2010 - 2011

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS LEGISLATION AMENDMENT BILL 2011

EXPLANATORY MEMORANDUM

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

EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS LEGISLATION AMENDMENT BILL 2011

GENERAL OUTLINE

This Bill will amend the *Crimes Act 1914*, the *Extradition Act 1988*, the *Mutual Assistance in Criminal Matters Act 1987*, the *Migration Act 1958*, the *Proceeds of Crime Act 2002*, the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*.

Extradition and mutual assistance are key international crime cooperation tools. Extradition is the process by which one country sends a person to another country to face criminal charges or serve a sentence. The *Extradition Act 1988* provides the legislative basis for extradition in Australia.

Mutual assistance is the formal Government to Government process countries use to assist one another in the investigation and prosecution of criminal offences. Mutual assistance can also be used to locate and recover the proceeds of crime. The *Mutual Assistance in Criminal Matters Act 1987* provides the legislative basis for mutual assistance in Australia.

Scope of the reforms

Extradition and mutual assistance, as formal Government to Government processes, are complemented by less formal relationships between Australian law enforcement agencies and their international counterparts. The reforms in this Bill are focused on Government to Government assistance and, with some minor exceptions, do not affect forms of agency to agency assistance.

PURPOSE

The Bill comprises four schedules.

Schedule 1 contains general amendments which relate to both extradition and mutual assistance. The purpose of the amendments in this Schedule is to:

- enable Federal Magistrates to perform functions under the Extradition Act and the Mutual Assistance Act, and
- clarify privacy and information disclosure provisions relating to extradition and mutual assistance processes.

Schedule 2 contains amendments relating to extradition. The purpose of the amendments in this Schedule is to:

- reduce delays in extradition processes by streamlining the early stages of the extradition process
- extend the availability of bail in extradition proceedings

- allow a person to waive the extradition process, subject to certain safeguards
- extend the circumstances in which persons may be prosecuted in Australia as an alternative to extradition
- allow a person to consent to being surrendered for a wider range of offences
- modify the definition of 'political offence' to clarify this ground of refusal does not extend to specified crimes such as terrorism, and
- require Australia to refuse to extradite a person if he or she may be prejudiced by reason of his or her sex or sexual orientation following surrender.

Schedule 3 contains amendments relating to mutual assistance. The purpose of the amendments in this Schedule is to:

- increase the range of law enforcement tools available to assist other countries with their investigations and prosecutions, subject to appropriate safeguards
- streamline existing processes for providing certain forms of assistance to other countries
- strengthen protections against providing assistance where there are death penalty or torture concerns in the requesting country
- amend other grounds on which Australia can refuse to provide mutual assistance to other countries, and
- streamline the process for authorising proceeds of crime action, and allow registration and enforcement of foreign non-conviction based proceeds of crime orders from any country.

Schedule 4 contains technical contingent amendments. This is because the Bill contains amendments which are contingent upon the commencement of amendments in other Bills currently before Parliament.

FINANCIAL IMPACT STATEMENT

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

ACRONYMS

AAT	Administrative Appeals Tribunal
AFP	Australian Federal Police
Crimes Act	*Crimes Act 1914*
Cybercrime Bill	*Cybercrime Legislation Amendment Bill 2011*
DPP	Director of Public Prosecutions
Extradition Act	*Extradition Act 1988*
MA Act	*Mutual Assistance in Criminal Matters Act 1987*
Migration Act	*Migration Act 1958*
POC Act	*Proceeds of Crime Act 2002*
SD Act	*Surveillance Devices Act 2004*
TIA Act	*Telecommunications (Interception and Access) Act 1979*
UNCAT	United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment

NOTES ON CLAUSES

Clause 1: Short Title

This clause provides that when the Bill is enacted, it is to be cited as the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2011*.

Clause 2: Commencement

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

Sections 1 to 3 of the Act will commence the day after this Act receives the Royal Assent.

Schedule 1, Schedule 2, items 1 to 34, Schedule 2, items 36 to 139, Schedule 3, items 1 to 49, Schedule 3, items 51 and 52 and Schedule 3, items 54 to 168 will all commence on a single day to be fixed by proclamation. However, if proclamation does not occur within the period of six months beginning on the day this Act receives Royal Assent, these provisions will commence on the day after the end of that period.

The commencement of the remainder of the provisions in the Bill is contingent on other Bills before Parliament. The commencement of these provisions is briefly set out below but is explained in further detail in the discussion of Schedule 4 of this Bill.

Schedule 2, item 35 and Schedule 4, item 1 are both contingent on the *Migration Amendment (Complementary Protection) Act 2011*. Schedule 2, item 35 will commence on a single day to be fixed by proclamation. However, if item 20 of Schedule 1 to the *Migration Amendment (Complementary Protection) Act 2011* commences before that time, this provision will not commence at all.

Schedule 4, item 1 will commence on the later of the two following dates:

(i) a single day to be fixed by proclamation, and

(ii) immediately after the commencement of item 20 of Schedule 1 to the *Migration Amendment (Complementary Protection) Act 2011*.

However, this provision will not commence at all if the event mentioned in (ii) does not occur.

The commencement of Schedule 3, items 50 and 53 and Schedule 4, items 2 to 4 depend on whether the *Cybercrime Legislation Amendment Act 2011* has commenced.

Schedule 3, items 50 and 53 will commence on a single day to be fixed by proclamation. However, if item 2 of Schedule 2 to the *Cybercrime Legislation Amendment Act 2011* has not commenced before that time, these provisions do not commence at all.

Schedule 4, items 2 and 4 will also commence on a single day to be fixed by proclamation. However, if item 2 of Schedule 2 to the *Cybercrime Legislation Amendment Act 2011* commences before that time, these provision do not commence at all.

Schedule 4, item 3 will commence immediately after the commencement of item 2 of Schedule 2 to the *Cybercrime Legislation Amendment Act 2011*. However, if item 2 of Schedule 2 to the *Cybercrime Legislation Amendment Act 2011* does not commence, this provision does not commence at all.

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 – GENERAL AMENDMENTS RELATING TO EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS

GENERAL OUTLINE

1.1 Schedule 1 contains general amendments which relate to both extradition and mutual assistance. Part 1 of Schedule 1 contains amendments to enable Federal Magistrates to perform functions under the Extradition Act and the MA Act, in addition to State and Territory magistrates. These amendments are designed to reduce delays in valuable court time by increasing the number of judicial officers available to conduct proceedings under the Acts.

1.2 Part 2 of Schedule 1 contains amendments to clarify privacy and information disclosure provisions relating to extradition and mutual assistance processes. It will insert new provisions in the Extradition Act and the MA Act to clarify that the collection, use or disclosure of personal information is authorised by law for the purposes of the *Privacy Act 1988* where it is reasonably necessary for the purposes of the extradition of a person to or from Australia, or providing or obtaining international assistance in criminal matters. Part 2 of Schedule 1 will also contain amendments to the Migration Act to ensure that the disclosure of identifying information for the purposes of extradition or mutual assistance is not an offence under that Act.

PART 1—AMENDMENTS RELATING TO FEDERAL MAGISTRATES

Extradition Act 1988

Item 1 – Section 5

1.3 This item will insert a definition of 'Federal Magistrate' in section 5 of the Extradition Act (which provides for the interpretation of terms). 'Federal Magistrate' will mean a Federal Magistrate acting *persona designata* pursuant to new sections 45A and 45B. This will clarify that any reference to 'Federal Magistrate' in the Act (other than in new section 45A which will be inserted by item 5) will be a reference to a Federal Magistrate acting in his or her personal capacity. This is because all functions assigned to magistrates under the Act are administrative as opposed to judicial in nature.

Item 2 – Section 5

1.4 This item will expand the definition of 'magistrate' in section 5 of the Extradition Act to include Federal Magistrates. This will enable Federal Magistrates to exercise all functions currently conferred on State and Territory magistrates under the Extradition Act. These functions include the power to hear consent matters under section 18 of the Act, the power to determine eligibility for surrender under section 19, the power to issue an arrest warrant under section 12 and the power to order the remand of a person under section 15. This amendment is designed to increase the availability of judicial officers to conduct extradition proceedings.

Items 3 and 4 – Subsection 21(1) and subsection 35(1)

1.5 Part 1 of Schedule 2 of the Bill will make a range of amendments to remove the jurisdiction of State and Territory Supreme Courts to hear appeals under the Extradition Act and limit this jurisdiction to federal courts. Currently, a review of a magistrate's determination of eligibility for surrender under section 19 or 34 of the Act can be sought in either the Federal Court of Australia, or the relevant State or Territory Supreme Court under sections 21 and 35 respectively. Items 1 and 7 of Schedule 2 will remove the ability to seek review of a decision under these sections in the Supreme Court of the State or Territory in which the order was originally made.

1.6 These items will remove 'of a State or Territory' after the word 'magistrate' from subsections 21(1) and 35(1). This will recognise that it will not matter which State or Territory the magistrate made the original order in as the only avenue for appeal is to the Federal Court.

Item 5 – After section 45

1.7 This item will insert new sections 45A and 45B. New section 45A will enable the Attorney-General to nominate a Federal Magistrate to be a magistrate for the purposes of the Extradition Act, and enable the Federal Magistrate to consent to the nomination. The nomination procedure will be required as a Federal Magistrate will exercise administrative functions under the Act, which must be performed in his or her personal capacity.

1.8 The nomination and consent must be made in writing, but the written document will not be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. A 'legislative instrument' is defined at section 5 of the Legislative Instruments Act. In general terms, a legislative instrument is a written document that is of a legislative character and that is made in the exercise of a power designated by Parliament. Requirements relating to registering, tabling, scrutinising and sun-setting all Commonwealth legislative instruments are imposed under the Legislative Instruments Act. Subsection 45A(3) will clarify that these requirements do not apply to nominations and consents to nomination pursuant to new section 45A.

1.9 New section 45B will clarify that magistrates exercising functions or powers under the Extradition Act perform these functions or exercise these powers in a personal capacity and not as a court or a member of the court. This reflects the doctrine of *persona designata*, which holds that Parliament may confer a non-judicial function on a justice of a court constituted under Chapter III of the Constitution if the function is conferred on the justice as an individual rather than a member of the court. Due to the separation of powers doctrine, functions or powers are conferred on a voluntary basis and need not be accepted by the magistrate.

1.10 New subsection 45B(2) differentiates between a magistrate and Federal Magistrate in this regard because a Federal Magistrate will be defined as a person who has already consented to being nominated by the Attorney-General to exercise the relevant functions or powers under the Act (which will be inserted by item 1 of this Schedule).

1.11 New subsection 45B(3) will also make clear that magistrates acting *persona designata* are still entitled to the judicial immunity afforded to them as if they were exercising functions or powers as a court or a member of a court.

Item 6 – Subparagraph 55(c)(vii)

1.12 This item will remove 'of magistrates' from subparagraph 55(c)(vii). This will remove the ability of the Governor-General to make regulations prescribing the protection and immunity of magistrates. This provision is not necessary as a consequence of the legislative provision for the immunity of magistrates in new subsection 45B(3) (see Item 5 of Schedule 1 to this Bill).

Mutual Assistance in Criminal Matters Act 1987

Item 7 – Subsection 3(1)

1.13 This item will insert a definition of 'Federal Magistrate' in section 3 of the MA Act (which provides for the interpretation of terms). 'Federal Magistrate' will mean a Federal Magistrate acting *persona designata* pursuant to new sections 38ZC and 38ZD. This will clarify that any reference to 'Federal Magistrate' in the MA Act (other than in new section 38ZC) will be a reference to a Federal Magistrate acting in his or her personal capacity. This is because all functions assigned to magistrates under the MA Act are administrative as opposed to judicial.

Item 8 – Subsection 3(1) (before paragraph (a) of the definition of *magistrate*)

1.14 This item will expand the definition of 'magistrate' in section 3 of the MA Act to include Federal Magistrates, except for references to 'magistrate' in Division 2 of Part VI. This will enable Federal Magistrates to exercise all functions currently conferred on State and Territory magistrates under the MA Act, except for the functions conferred in Division 2 of Part VI relating to proceeds of crime proceedings. Under the POC Act, these proceedings can only be heard before State and Territory magistrates. It is therefore appropriate that these functions continue to be limited to State and Territory magistrates in the mutual assistance context.

1.15 Federal Magistrates will be able to exercise a range of other functions under the MA Act, including the conduct of 'take evidence' and production of document proceedings under section 13, and the issue of search warrants under section 38C.

Item 9 – At the end of section 38C

1.16 This item will insert a new subsection 38C(8) to clarify that subsections 38C(6) and (7) do not apply if the magistrate is a Federal Magistrate. Subsection 38C(6) provides that a New South Wales or Australian Capital Territory magistrate may issue a warrant in relation to premises or a person in the Jervis Bay Territory. Subsection 38C(7) generally provides for State or Territory magistrates to issue warrants in relation to persons and premises in that State or Territory. These provisions do not apply to Federal Magistrates as they are Commonwealth, rather than State or Territory, judicial officers.

Item 10 – Before section 39

1.17 This item will insert new sections 38ZC and 38ZD. New section 38ZC will enable the Attorney-General to nominate a Federal Magistrate to be a magistrate for the purposes of the MA Act, and enable the Federal Magistrate to consent to the nomination. The nomination procedure will be required as a Federal Magistrate will exercise administrative functions under the MA Act, which must be performed in his or her personal capacity.

1.18 The nomination and consent must be made in writing, but the written document would not be a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. A 'legislative instrument' is defined at section 5 of the Legislative Instruments Act. In general terms, a legislative instrument is a written document that is of a legislative character and that is made in the exercise of a power designated by Parliament. Requirements relating to registering, tabling, scrutinising and sun-setting all Commonwealth legislative instruments are imposed under the Legislative Instruments Act. Subsection 38ZC(3) will clarify that these requirements do not apply to nominations pursuant to new section 38ZC.

1.19 New section 38ZD will clarify that magistrates exercising functions or powers under the MA Act perform these functions or exercise these powers in a personal capacity and not as a court or a member of the court. This reflects the doctrine of *persona designata*, which holds that Parliament may confer a non-judicial function on a justice of a court constituted under Chapter III of the Constitution if the function is conferred on the justice as an individual rather than a member of the court. Due to the separation of powers doctrine, functions or powers are conferred on a voluntary basis and need not be accepted by the magistrate.

1.20 New subsection 38ZD(2) differentiates between a magistrate and Federal Magistrate in this regard because a Federal Magistrate will be defined as a person who has already consented to being nominated by the Attorney-General to exercise the relevant functions or powers under the MA Act (which will be inserted by item 7 of this Schedule).

1.21 New subsection 38ZD(3) will also make clear that magistrates acting *persona designata* are still entitled to the judicial immunity afforded to them as if they were exercising functions or powers as a court or a member of a court.

Item 11 – Paragraph 44(c)

1.22 This item will remove 'of magistrates' from subsection 44(c). This will remove the ability of the Governor-General to make regulations prescribing the protection and immunity of magistrates. This provision is not necessary as a consequence of the legislative provision for the immunity of magistrates in new subsection 38ZD(3) (which will be inserted by item 10 of this Schedule).

PART 2—AMENDMENTS RELATING TO INFORMATION SHARING

Extradition Act 1988

Item 12 – After section 54

1.23 This item will insert a new section 54A in the Extradition Act. New section 54A will provide that the collection, use or disclosure of personal information is authorised by law for the purposes of the *Privacy Act 1988* where it is reasonably necessary for the purposes of the extradition of a person to or from Australia. This new section clarifies the application of the *Privacy Act 1988* to the extradition process.

Migration Act 1958

Item 13 – After paragraph 336E(2)(ga)

1.24 This item will insert new paragraphs 336E(2)(gb) and (gc) in the Migration Act. Subsection 336E(1) of the Act makes it an offence to disclose identifying information if the disclosure is not a 'permitted disclosure'. The new paragraphs will expand the definition of 'permitted disclosure' in subsection 336E(2) to include a disclosure that is for the purposes of the extradition of a person either to or from Australia, or the provision or obtaining of international assistance in criminal matters by the Attorney-General or an officer of his or her Department.

Mutual Assistance in Criminal Matters Act 1987

Item 14 – After section 43C

1.25 This item will insert a new section 43D. New section 43D will provide that the collection, use or disclosure of personal information that is reasonably necessary for the purposes of providing or obtaining international assistance in criminal matters by the Attorney-General or an officer of his or her Department is authorised by law for the purposes of the *Privacy Act 1988*.

1.26 This encompasses both international assistance which is authorised by the Attorney-General under the MA Act and assistance that can be provided outside the scope of the MA Act, such as voluntarily obtained witness statements, the provision of which may be facilitated by the Attorney-General's Department.

1.27 This new section does not impact on exchanges of information between other law enforcement agencies, such as police to police assistance provided or obtained by the AFP.

SCHEDULE 2 – AMENDMENTS RELATING TO EXTRADITION

GENERAL OUTLINE

2.1 Schedule 2 contains amendments to the Extradition Act. Part 1 of Schedule 2 will remove the jurisdiction of State and Territory Supreme Courts to hear appeals under the Extradition Act and limit this jurisdiction to federal courts. Proceedings in the extradition context, such as applications for judicial review of decisions made by the Attorney-General, are generally brought in the Federal Court of Australia. This amendment seeks to overcome the jurisdictional complexities that can arise where proceedings in the same matter are brought in both State and federal courts. This amendment will also build on the federal courts' existing expertise in extradition matters.

2.2 Part 2 of Schedule 2 will allow a person to waive the extradition process, subject to certain safeguards. Currently, a person may only consent to extradition once he or she is before a magistrate following the issue of the Minister's notice accepting the extradition request. This can take some time, particularly if the person was arrested under a provisional arrest warrant. The amendments in Part 2 of Schedule 2 will allow a person, once arrested following an extradition request or a provisional arrest request, to immediately elect to remove him or herself from the extradition process and be surrendered to the foreign country. Persons who elect to use the waiver of extradition process could reduce the time they spend in Australian custody pending surrender as not all stages of the extradition process would be required to be completed.

2.3 Part 3 of Schedule 2 contains other amendments to the Extradition Act. Division 1 of Part 3 of Schedule 2 will streamline the 'political offence' definition by ensuring that exceptions to the definition are generally contained in regulations, rather than in the Act. This will ensure the extradition regime can be kept up-to-date with Australia's international obligations without requiring frequent amendments to the Extradition Act. It is intended that the regulations would clarify that this ground of refusal does not extend to specified crimes such as terrorism.

2.4 Division 2 of Part 3 of Schedule 2 will require Australia to refuse to extradite a person if he or she may be punished, or discriminated against upon surrender, on the basis of his or her sex or sexual orientation. Division 3 of Part 3 of Schedule 2 will streamline the early stages of the extradition process by removing the current duplication in the factors required to be considered. Dual criminality and extradition objections would continue to be considered by a magistrate when conducting extradition proceedings. However, the Attorney-General will not be required to consider these factors before issuing a notice under section 16 of the Extradition Act conferring jurisdiction on a magistrate to conduct extradition proceedings.

2.5 Division 4 of Part 3 of Schedule 2 will allow a person to consent to being surrendered for a wider range of offences. Currently, a person can consent to being surrendered for 'extradition offences' (i.e. offences that are punishable by imprisonment for over 12 months), which are listed in the Attorney-General's notice under section 16 of the Extradition Act conferring jurisdiction on a magistrate to conduct extradition proceedings. A person can also consent to being surrendered for offences which are not 'extradition offences' and therefore not offences which are listed in the Attorney-General's notice under section 16. Division 4 will allow a person to consent to being surrendered for offences which are 'extradition offences' but are not listed in the Attorney-General's notice under section 16.

2.6 Division 5 of Part 3 of Schedule 2 will enable the Attorney-General to give a legally enforceable undertaking to a country as to the maximum sentence that could be imposed on a person, before the person is extradited to Australia. This will facilitate the return to Australia, for prosecution, of persons from countries which are prohibited under their own laws from surrendering a person to Australia unless an undertaking is provided about the maximum sentence that may be imposed on the person.

2.7 Division 6 of Part 3 of Schedule 2 will extend the circumstances in which persons may be prosecuted in Australia as an alternative to extradition. Currently, a person can only be prosecuted in Australia in lieu of extradition where the extradition has been refused on the basis that the person is an Australian citizen. The amendments in this division will enable a person to be prosecuted in any circumstances where Australia has refused extradition.

2.8 Division 7 of Part 3 of Schedule 2 will make various minor and technical amendments to the provisions in the Extradition Act which provide for the Attorney-General to give notices. For example, it will allow the Attorney-General to amend notices that he or she has issued under section 16 of the Extradition Act.

2.9 Division 8 of Part 3 of Schedule 2 will extend the availability of bail in extradition proceedings. Currently, a person may be remanded on bail during the early stages of the extradition process if special circumstances exist. However, once a person is determined by a magistrate to be eligible for surrender, he or she must be committed to prison. Division 8 of Part 3 of Schedule 2 will extend the availability of bail to persons who have consented to extradition or been determined eligible for surrender by a magistrate. Division 9 of Part 3 of Schedule 2 will make a series of minor and technical amendments to the Extradition Act. A number of these amendments will simplify the language of the Extradition Act and rectify technical drafting issues.

PART 1—STATUTORY APPEAL OF EXTRADITION DECISIONS

Division 1—Amendments

Overview

2.10 Part 1 of Schedule 2 of the Bill will limit the jurisdiction to review extradition decisions to the Federal Court of Australia. This will assist in removing judicial complexities where proceedings are brought in both State and Federal courts. This will also build on the federal courts' existing expertise in extradition matters.

Extradition Act 1988

Item 1 – Subsection 21(1)

2.11 This item will remove the phrase ', or to the Supreme Court of the State or Territory' from subsection 21(1) of the Extradition Act. Currently, a magistrate of a State or Territory conducts proceedings under section 19 of the Act to determine whether a person is eligible for surrender to an extradition country. Under section 21 of the Act, the person whose extradition is sought or the extradition country can seek a review of the magistrate's order that a person is eligible for surrender either in the Federal Court or in the Supreme Court of the State or Territory. This amendment will limit jurisdiction for reviews carried out under

section 21 to the Federal Court. Further, item 3 of Schedule 1 will remove 'of a State or Territory' after the word 'magistrate' from subsection 21(1). This will recognise that it will not matter which State or Territory the magistrate made the original order in as the only avenue for appeal will be to the Federal Court.

Item 2 – Subsection 21(2)

2.12 This item is consequential to the changes that will be made by item 1 of this Schedule, and will insert 'Federal' before 'Court' in subsection 21(2) of the Extradition Act. This item will provide that the Federal Court will be the only court which may make orders under subsection 21(2), on review of a magistrate's determination of a person's eligibility for surrender.

Item 3 – Subsections 21(3) and (4)

2.13 This item will remove the phrase 'or the Supreme Court' from subsections 21(3) and 21(4) of the Extradition Act as a consequence of the removal of the jurisdiction of the Supreme Courts to carry out reviews under section 21 (which will be made by item 1 of this Schedule). Existing subsection 21(3) allows for appeals from the Federal Court or a State or Territory Supreme Court to the Full Court of the Federal Court. Existing subsection 21(4) provides for this appeal to be filed or lodged within 15 days of the order being made by the Federal Court or the State or Territory Supreme Court.

Item 4 – At the end of paragraph 21(6)(a)

2.14 This item will add 'or' to the end of paragraph 21(6)(a) to correct a previous stylistic oversight.

Item 5 – Paragraph 26(5)(c)

2.15 This item will omit 'or the Supreme Court of the State or Territory in which the person is in custody' from paragraph 26(5)(c) of the Extradition Act. Existing subsection 26(5) provides that where a surrender warrant or temporary surrender warrant has been issued in relation to a person and the person is in custody under the warrant for more than two months, the person may apply to the Federal Court or the Supreme Court of the State or Territory in which the person is in custody for release from custody.

2.16 This item will limit this jurisdiction to the Federal Court. This will mean that a person can only apply to the Federal Court for release from custody, and not the Supreme Court of the State or Territory in which he or she is in custody.

Item 6 – Subsections 26(5) and (6)

2.17 This item will omit 'the Court' and substitute 'the Federal Court' in subsections 26(5) and 26(6) of the Extradition Act. This is consequential to the changes that will be made by item 5, which limit the jurisdiction for applications made under subsection 26(5) of the Extradition Act to the Federal Court.

Item 7 – Subsection 35(1)

2.18 This item will omit ‘, or to the Supreme Court of the State or Territory’ from subsection 35(1) of the Extradition Act. Currently, a magistrate of a State or Territory conducts proceedings under section 34 of the Act to determine whether the person is eligible for surrender to New Zealand. Where a person is found eligible for surrender, the magistrate makes an order under section 34 of the Extradition Act. Section 35 provides for judicial review of the magistrate’s order in either the Federal Court or the Supreme Court of the State or Territory. This item will limit the jurisdiction for reviews carried out under section 35 of the Extradition Act to the Federal Court. Further, item 4 of Schedule 1 will remove ‘of a State or Territory’ after the word ‘magistrate’ from subsection 35(1). This will recognise that it will not matter which State or Territory the magistrate made the original order in as the only avenue for appeal will be to the Federal Court.

Item 8 – Subsection 35(2)

2.19 This item will insert ‘Federal’ before ‘Court’ in subsection 35(2) of the Extradition Act. This amendment is consequential to the changes that will be made by item 7 and will make it clear that the Federal Court will be the only court which may make orders under subsection 35(2).

Item 9 – Subsections 35(3) and (4)

2.20 This item will omit ‘or the Supreme Court’ from subsections 35(3) and 35(4) of the Extradition Act. This item is consequential to the changes that will be made by item 7. Existing subsection 35(3) provides for an appeal to the Full Federal Court from an order of the Federal Court or an order of a Supreme Court of a State or Territory. Subsection 35(4) provides for this appeal to be lodged within 15 days of the order being made.

Item 10 – Paragraph 38(7)(c)

2.21 This item will omit ‘or the Supreme Court of the State or Territory in which the person is in custody’ from paragraph 38(7)(c) of the Extradition Act. Currently, where a surrender warrant or temporary surrender warrant has been issued in relation to a person and the person is in custody under the warrant for more than one month, the person may apply to the Federal Court, or to the Supreme Court of the State or Territory in which the person is in custody for release from custody.

2.22 This item will limit the jurisdiction for applications made under subsection 38(7) to the Federal Court. This will mean that a person can only apply to the Federal Court for release from custody, and not the Supreme Court of the State or Territory in which he or she is in custody.

Item 11 – Subsection 38(7) and (8)

2.23 Currently, where a surrender warrant or temporary surrender warrant has been issued in relation to a person and the person is in custody under the warrant for more than one month, the person may apply to the Federal Court, or to the Supreme Court of the State or Territory in which the person is in custody, for release from custody. Item 10 will limit the

jurisdiction for applications made under subsection 38(7) of the Extradition Act to the Federal Court. This will mean that a person can only apply to the Federal Court for release from custody, and not the Supreme Court of the State or Territory in which he or she is in custody.

2.24 This item will remove the references to 'the Court' wherever occurring in subsections 38(7) and 38(8) and substitute them with 'the Federal Court' as a consequence of the changes that will be made by item 10.

Item 12 – Subsection 51(1)

2.25 This item will repeal subsection 51(1) and replace the heading to section 51 with 'Application of section 38 of the *Judiciary Act 1903*'. Existing subsection 51(1) provides that the jurisdiction of the Supreme Court of a State or Territory in matters arising under section 21 or 35 of the Extradition Act may be exercised by a single Judge of the Court. As a consequence of the amendments that will be made by Part 1 of this Schedule, jurisdiction in matters arising under sections 21 or 35 may only be exercised by the Federal Court and will no longer be exercised by the Supreme Court of a State or Territory. Consequently, this subsection is no longer required.

Item 13 – Subsection 51(2)

2.26 This item will remove the numbering of subsection 51(2), and is consequential to the changes that will be made by item 12, which will repeal subsection 51(1). As subsection 51(1) will be repealed, '(2)' will no longer be required as section 51 will no longer be subdivided.

Division 2 – Application and transitional provisions

Item 14 – Application of amendments made by items 1, 3 and 12

2.27 This item will stipulate the application of the amendments which will be made by items 1, 3 and 12. The amendments will apply such that any order made under subsections 19(9) or (10) of the Extradition Act after the date of commencement of this item cannot be considered by a State or Territory Supreme Court pursuant to section 21 of the Extradition Act. Any order made under subsections 19(9) or (10) before the date of commencement of this item may still be considered by a State or Territory Supreme Court. This item will commence on Proclamation.

Item 15 – Application of amendment made by item 5

2.28 This item will stipulate the application of amendments which will be made by item 5. The amendments will apply such that applications for release from custody made under paragraph 26(5)(c) of the Extradition Act in respect of surrender warrants or temporary surrender warrants issued after the commencement of this item may only be made to the Federal Court. Applications which relate to surrender warrants or temporary surrender warrants issued prior to the commencement of this item may still be considered by a State or Territory Supreme Court. This item will commence on Proclamation.

Item 16 – Application of amendments made by items 7, 9 and 12

2.29 This item will stipulate the application of amendments which will be made by items 7, 9 and 12. The amendments will apply such that any order made under section 34 of the Extradition Act after the date of commencement of this item cannot be considered by a State or Territory Supreme Court pursuant to section 35 of the Act. Any order made under section 34 before the date of commencement of this item may still be considered by a State or Territory Supreme Court. This item will commence on Proclamation.

Item 17 – Application of amendment made by item 10

2.30 This item will stipulate the application of the amendment which will be made by item 10. The amendment will apply such that applications for release from custody made under section 38 of the Extradition Act which relate to surrender warrants or temporary surrender warrants issued after the commencement of this item may only be made to the Federal Court. Applications which relate to surrender warrants or temporary surrender warrants issued prior to the commencement of this item may still be considered by a State or Territory Supreme Court. This item will commence on Proclamation.

PART 2—WAIVER OF EXTRADITION

Extradition Act 1988

Items 18 and 19 – Section 5 (definition of *surrender offence* and paragraph (b) of the definition of *surrender offence*)

2.31 These items will amend the definition of 'surrender offence' in section 5 of the Extradition Act. Currently, 'surrender offence' is defined as an extradition offence in relation to which the Attorney-General has determined that a person should be surrendered in accordance with subsection 22(2) of the Extradition Act, or any offences in respect of which a person has consented to being surrendered in accordance with subsection 20(2) of the Extradition Act.

2.32 These items will amend the definition of 'surrender offence' to include extradition offences in relation to which the Attorney-General has determined that a person should be surrendered in accordance with new subsection 15B(2) of the Extradition Act. These amendments are consequential to item 24, which will insert new section 15B. New section 15B will enable the Attorney-General to make a separate determination in relation to surrender where a person elects to waive extradition.

Item 20 – Section 5 (at the end of subparagraph (b)(i) of the definition of *surrender warrant*)

2.33 This item will insert 'or' at the end of subparagraph (b)(i) of the definition of 'surrender warrant'. Each subparagraph in the definition of 'surrender warrant' has an 'or' at the end of the subparagraph. The omission at the end of subparagraph (b)(i) is a previous stylistic oversight.

Items 21, 22 and 23 – Subsections 15(2), 15(4) and 15(5)

2.34 These items will insert references to new section 15A in section 15 of the Extradition Act. This is consequential to item 24, which will insert new section 15A.

2.35 Section 15 enables a person who is arrested under an extradition arrest warrant to be held on remand. New section 15A will enable a person who is on remand to waive extradition prior to the Attorney-General issuing a notice under section 16 of the Act. Subsections 15(2) and 15(4) will be amended to insert references to section 15A, to reflect that persons held on remand under section 15 will be able to elect to waive extradition.

2.36 Subsection 15(5) will be amended to insert a reference to section 15A, to reflect that a person on remand who is transferred, either in custody or on bail, to a specified State or Territory will be able to elect to waive extradition.

Item 24 – After section 15

2.37 This item will insert new sections 15A and 15B after section 15 of the Extradition Act. Currently, a person who consents to being extradited by Australia to a foreign country can spend up to six months in custody in Australia. This delay is largely due to the multiple stages in the current consent process. Sections 15A and 15B will enable a

New section 15A

2.38 New section 15A will set out the process for a person to elect to waive extradition. New subsections 15A(1) and (2) will establish the categories of persons who may elect to waive extradition. New subsection 15A(1) will apply to a person who is on remand but the Attorney-General has not made a decision whether or not to give a notice in relation to him or her under subsection 16(1). This will cover the situation where a person has been provisionally arrested before the extradition country has made a full formal extradition request to Australia.

2.39 New subsection 15A(2) will apply to a person who is on remand under section 15 if the Attorney-General has given a notice under section 16 but the magistrate has not yet advised the Attorney-General that the person has consented to being surrendered under subparagraph 18(2)(b)(ii), or determined that the person is eligible for surrender under subsection 19(1). This will cover the situation where the extradition country has made an extradition request and the Attorney-General has issued a notice stating that the request has been received.

2.40 New subsection 15A(3) will provide that a person may inform a magistrate that he or she wishes to waive extradition in relation to:

- the extradition offence or all of the offences specified in the extradition arrest warrant (if an extradition request has not been made) or

- the extradition offence or all of the offences for which surrender is sought (if an extradition request has been made).

2.41 It will not be possible to waive extradition with regard to only some of the extradition offences listed on the extradition warrant.

2.42 New subsection 15A(4) will require a magistrate, if satisfied of the matters listed in new paragraphs 15A(5)(a), (c) and (d), and if the person has been informed as mentioned in new paragraph 15A(5)(b), to order that the person be committed to prison pending a determination by the Attorney-General about surrender under new subsection 15B(2), and to advise the Attorney-General in writing that the person wishes to waive extradition for the relevant offences.

2.43 New paragraph 15A(5)(a) will require the magistrate to be satisfied, before ordering a person to be committed to prison pursuant to subsection 15A(4), that the person's election to waive extradition was voluntary. New paragraph 15A(5)(b) will also require the magistrate to inform the person that:

- once the order that they be committed to prison is made, they cannot apply to have the order revoked

- the country to which they will be extradited may not have given, and will not be required to give, a speciality assurance to the effect that that they will not be tried or punished for an offence committed before their surrender other than an offence for which extradition was sought

- certain requirements in the Extradition Act that would otherwise apply to him or her (such as requirements relating to extradition objections) will not apply, and

- if the Attorney-General determines that he or she should be surrendered in accordance with new section 15B, they will be so surrendered.

2.44 While this new provision will have result in the foreign country not being required to give a speciality assurance, this will not impact on a person's rights. This is because although in most circumstances a speciality assurance would not have been given, new subsection 15B(2) (which requires the Attorney-General to have regard to all the circumstances when deciding whether to surrender a person who has waived extradition), in conjunction with the requirements of new subsection 15B(3) (refuse to surrender where there are torture or death penalty concerns) would still require the Attorney-General to consider the risk of the person being tried for offences other than those included in the extradition request and the possibility of a person being subject to the death penalty or torture as a result. Further, the rule of speciality is a standard provision incorporated into the majority of Australia's bilateral extradition treaties.

2.45 Therefore, if the Attorney-General has substantial concerns that the person would be in danger of being subjected to torture, or if the Attorney-General is satisfied that there is a real risk that the death penalty will be carried out, the Attorney-General will not be able to surrender the person.

2.46 Having informed the person as mentioned in paragraph 15A(5)(b), the magistrate will be required to be satisfied that the person has confirmed that he or she wishes to waive extradition, and that the person is legally represented or was given adequate opportunity to be legally represented. This will ensure that the person is fully informed of all the consequences of waiving extradition.

2.47 New subsection 15A(6) will provide that if a person informs a magistrate that he or she wishes to waive extradition, no further steps in the extradition process are to be taken during the time at which the magistrate is determining whether to make an order under subsection 15A(4). This means that if a person, who has been provisionally arrested, elects to waive extradition, the Attorney-General may not give a notice under subsection 16(1). It also means that if a person, in relation to whom a notice under subsection 16(1) has already been given, elects to waive extradition, sections 18 and 19 (which relate to consent to surrender and determination of eligibility for surrender) do not apply, and any related proceedings are stayed.

2.48 New subsection 15A(7) will provide that if the magistrate is not satisfied of the matters listed in paragraphs 15A(5)(a), (c) and (d), the magistrate must advise the Attorney-General in writing that he or she has decided not to make an order under paragraph 15A(4)(a) committing the person to prison pending a surrender determination by the Attorney-General. This will mean the person is then subject to the ordinary extradition process.

New section 15B

2.49 New section 15B will set out the process for the Attorney-General to determine if a person should be surrendered, having been notified by a magistrate that the person has elected to waive extradition.

2.50 New subsection 15B(2) will provide that the Attorney-General must, as soon as reasonably practicable, having regard to all the circumstances, determine whether or not the person should be surrendered. New subsection 15B(3) will provide that the Attorney-General may only determine the person be surrendered if he or she:

- does not have substantial grounds for believing that, if the person were surrendered, the person would be in danger of being subjected to torture, and

- is satisfied that on surrender, there is no risk the death penalty will be carried out upon the person in relation to any offence.

2.51 This provides safeguards to ensure a person who waives his or her extradition is not at risk of being subject to the death penalty or torture on return to the requesting country.

2.52 New subsection 15B(4) will provide that if the Attorney-General determines that the person is not to be surrendered, the Attorney-General must, by notice in writing in the statutory form, direct a magistrate to order the release of the person from custody.

Item 25 – At the end of section 17

2.53 This item will add new subsections 17(4) and (5) at the end of section 17 of the Extradition Act. Section 17 sets out the circumstances in which a person may be released from remand. Subsection 17(2) enables a magistrate to order a person's release from custody where he or she has been held on remand for over 45 days (or another length of time stipulated in the relevant Regulations) and a section 16 notice has not been given.

2.54 New subsections 17(4) and 17(5) will provide that subsection 17(2) will not apply to a person who has elected to waive extradition, unless and until the magistrate decides not to accept the person's election to waive. This is appropriate as new paragraph 15A(6)(a) will prevent the Attorney-General from issuing a section 16 notice while the issue of waiver is under consideration. The 45 day time period would resume on the day after the Attorney-General receives the magistrate's advice that the person's election to waive extradition has not been accepted.

Item 26 – Section 23

2.55 This item will insert the words '15B(2) or' after 'subsection' in section 23 of the Extradition Act. This amendment is consequential to new section 15B which will be inserted by item 24.

2.56 Existing section 23 provides that where the Attorney-General has determined under subsection 22(2) that a person is to be surrendered to an extradition country, the Attorney-General must issue a warrant for the surrender of the person, unless the Attorney-General issues a temporary surrender warrant. This item will amend this provision

to ensure it applies to circumstances in which the Attorney-General has made a determination that a person is to be surrendered under the new subsection 15B(2) (i.e. surrender following waiver of extradition).

Item 27 – Paragraph 24(1)(a)

2.57 This item will insert the words '15B(2) or' after 'subsection' in paragraph 24(1)(a) of the Extradition Act. This amendment is consequential to the inclusion of new section 15B by item 24.

2.58 Section 24 currently provides that where the Attorney-General has determined under subsection 22(2) that a person is to be surrendered to an extradition country, the Attorney-General may issue a temporary surrender warrant. This item will amend this provision to ensure it applies to circumstances in which the Attorney-General has made a determination that a person is to be surrendered under new subsection 15B(2) (i.e. surrender following waiver of extradition).

Item 28 – Subsection 25(2)

2.59 This item will amend subsection 25(2) of the Extradition Act so that the conditions for the issue of a section 25 surrender warrant under that subsection only apply to surrender warrants issued after a temporary surrender warrant was previously issued following a subsection 22(2) determination. A subsection 22(2) determination is one which results from the usual extradition process being carried out (as distinct from surrender which results from a person electing to waive the extradition process).

2.60 This amendment has the effect that the conditions for issuing a section 25 surrender warrant under subsection 25(2) do not apply to surrender warrants issued after a temporary surrender warrant was previously issued following a subsection 15B(2) determination (waiver of extradition). In this situation, the more limited conditions provided by new subsection 25(3) apply (which will be inserted by Item 30).

Item 29 – After paragraph 25(2)(a)

2.61 This item will insert a new paragraph 25(2)(ba) after existing paragraph 25(2)(a). New paragraph 25(2)(ba) will set out an additional condition for the issue of a section 25 surrender warrant after a temporary surrender warrant was previously issued following a subsection 22(2) determination of surrender. This additional condition is that the Attorney-General does not have substantial grounds for believing that, if the person were surrendered, the person would be in danger of being subjected to torture. This will ensure that the issue of potential torture of a person following surrender is considered in every determination of surrender, including in the determination of section 25 surrenders.

Item 30 – At the end of section 25

2.62 This item will insert a new subsection 25(3) at the end of existing section 25. New subsection 25(3) will set out the relevant grounds of refusal for surrender if the Attorney-General determines that a person is to be surrendered under section 25, after a temporary surrender warrant has previously been issued following a determination that a person is to be surrendered under new subsection 15B(2).

2.63 The Attorney-General may only issue a surrender warrant under subsection 25(1) if the Attorney-General:

- does not have substantial grounds for believing that, if the person were surrendered, the person would be in danger of being subjected to torture, and

- is satisfied that on surrender, there is no risk the death penalty will be carried out upon the person in relation to any offence.

2.64 These grounds of refusal are consistent with the grounds of refusal that would have applied when the person waived the extradition process (see new section 15B which will be inserted by item 24).

Item 31 – Paragraph 45(4)(b)

2.65 This item will amend paragraph 45(4)(b) of the Extradition Act to insert the words '15B or' after 'section'. This amendment is consequential to new section 15B which will be inserted by item 24. This amendment has the effect that the Attorney-General may give consent for the prosecution, instead of extradition, of certain Australian citizens, but only if a determination not to surrender under sections 22 or 15B has been made.

Item 32 – Application of amendments made by this Part

2.66 This item will provide that the amendments in Part 2 of Schedule 2 which relate to waiver of extradition apply to a person who, on or after the commencement of this item, is on remand under section 15 of the Extradition Act.

PART 3—OTHER AMENDMENTS

Division 1—Amendments relating to political offences

Extradition Act 1988

Item 33 – Section 5 (paragraphs (a) to (d) of the definition of *political offence*)

2.67 By virtue of section 7 of the Extradition Act, a person cannot be extradited from Australia for a political offence. A political offence is defined in section 5 of the Extradition Act as an offence against the law of the foreign country that is of a political character. The definition in section 5 of the Act provides that certain offences are not 'political offences'. The Bill will amend section 5 to expressly exclude the following from the political offence definition:

- an offence that involves an act of violence against a person's life or liberty
- an offence prescribed by regulations for the purposes of paragraph 5(b) to be an extraditable offence in relation to the country or all countries, and
- an offence prescribed by regulations for the purposes of paragraph 5(c) not to be a political offence in relation to the country or all countries.

2.68 These amendments will streamline the 'political offence' definition by ensuring that exceptions to the definition are generally contained in regulations, rather than in the Act. The amendments are consistent with the United Nations Model Extradition Treaty, which states that countries may wish to exclude from the definition of 'political offence' certain conduct, for example, serious offences involving an act of violence against the life, physical integrity or liberty of a person.

2.69 Australia is party to a large number of bilateral and multilateral treaties, many of which require parties to ensure that certain offences are extraditable offences, or are not to be considered political offences for the purposes of extradition. Australia implements its obligations under these treaties by providing that such offences are excluded from the definition of political offence in the Extradition Act. Exemptions are currently set out in both the Extradition Act and the Regulations. Providing for exceptions to the political offence definition to be set out in Regulations, rather than the Extradition Act, will ensure the extradition regime can be kept up-to-date with Australia's international obligations without requiring frequent amendments to the Extradition Act.

2.70 It is intended that the Regulations will also expressly exclude from the definition of political offence other conduct which, if the conduct occurred in Australia, would constitute a terrorism, genocide or war crimes offence or a crime against humanity. The Regulations will also make clear that an offence constituted by the murder, kidnapping or other attack on a head of state or head of government, or his or her family, is not considered a political offence for the purposes of Australia's extradition law.

Item 34 – At the end of paragraphs 7(a), (b) and (c)

2.71 This item will make a technical correction by adding 'or' to the end of paragraphs 7(a), (b) and (c). This will correct a previous stylistic oversight.

Migration Act 1958

Item 35 – Subsection 91T(3)

2.72 This item will amend subsection 91T(3) of the Migration Act, which refers to the definition of 'political offence' in the Extradition Act. This amendment is consequential to the amendment that will be made by item 33 of this Schedule.

Item 36 – Application

2.73 This item sets out the application of the amendments made by Division 1 of Part 3 of Schedule 2 of the Bill. The amendments in this Division will apply in respect of extradition requests made by a foreign country on or after the commencement of this item. This item will commence on Proclamation.

Division 2—Extradition objection on the grounds of sex and sexual orientation

Extradition Act 1988

Item 37 – Paragraphs 7(b) and (c)

2.74 Currently, a person cannot be extradited where there is an 'extradition objection' as defined in section 7 of the Extradition Act. This includes where surrender is sought for the purpose of punishing the person on account of his or her race, religion, nationality, political opinions or for a political offence (paragraph 7(b)), or where the person may be prejudiced on surrender on the basis of any of these factors (paragraph 7(c)).

2.75 This item will insert the words 'sex, sexual orientation,' after the reference to 'race' in paragraphs 7(b) and (c). This will ensure that extradition must be refused if the surrender of the person is sought for the purpose of prosecuting or punishing the person on account of his or her sex or sexual orientation, or where the person may be discriminated against upon surrender on the basis of his or her sex or sexual orientation.

2.76 Although Australia does not have an obligation under international law to refuse extradition where a person may be subject to discrimination on the basis of their sex or sexual orientation, these amendments will demonstrate Australia's firm position against this type of discrimination. It will also bring Australia's legislation in line with that of comparable jurisdictions, such as New Zealand, the United Kingdom and Canada. A similar amendment to the MA Act will be made by Part 1 of Schedule 3.

Item 38 – Application of amendment made by item 37

2.77 This item will set out the application of the amendments made by item 37. The amendments will apply in relation to an extradition request from an extradition country that is made on or after the commencement of item 37. Item 37 will commence on a date to be set by Proclamation.

Division 3—Notice of receipt of extradition request

Overview

2.78 Division 3 of Part 3 of Schedule 2 of the Bill will limit the factors the Attorney-General is statutorily required to consider before giving a notice under section 16 of the Extradition Act accepting an extradition request. The issue of a notice accepting an extradition request is a precondition to the conduct of extradition proceedings by a magistrate.

2.79 Limiting the factors the Attorney-General is statutorily required to consider before giving a notice will streamline the early stages of the extradition process and facilitate consideration of eligibility for surrender by a magistrate more quickly. This may reduce the overall time spent in custody.

Extradition Act 1988

Item 39 – Subsection 10(3)

2.80 This item will omit 'subparagraph 16(2)(a)(ii) or paragraph' and substitute 'or' in subsection 10(3). This amendment is consequential to the removal of subparagraph 16(2)(a)(ii) which will be done by item 41.

Item 40 – Subparagraph 12(3)(c)(i)

2.81 This item will omit 'issue' and substitute 'give' in subparagraph 12(3)(c)(i). This amendment will make the current reference to the Attorney-General's 'issue' of a notice under subparagraph 12(3)(c)(i) consistent with the wording of subsection 16(1), which is that the Attorney-General decides to 'give' a notice.

Item 41 – Subsection 16(2)

2.82 Under existing section 16 of the Extradition Act, the Attorney-General must not give a notice accepting an extradition request:

- unless he or she is satisfied that:
    - the person is an extraditable person in relation to the extradition country (subparagraph 16(2)(a)(i)), and
    - the criminal conduct alleged against the person sought for extradition would be an offence in Australia (subparagraph 16(2)(a)(ii)); or
- if the Attorney-General is of the opinion that there is an extradition objection in relation to the extradition offence (paragraph 16(2)(b)).

2.83 This item will repeal existing subsection 16(2) and insert new subsection 16(2), which will provide that the Attorney-General is only required to consider whether a person is an 'extraditable person' in relation to the extradition country, in determining whether to exercise his or her discretion to give a notice accepting the extradition request. An 'extraditable person' is defined in section 6 of the Extradition Act.

2.84 The factors in current subparagraph 16(2)(a)(ii) and paragraph 16(2)(b) will continue to be assessed by a magistrate in determining whether a person is eligible for surrender to the extradition country (under paragraphs 19(2)(c) and 19(2)(d)) while the factor in paragraph 16(2)(b) will also be assessed by the Attorney-General in making a final surrender determination under section 22 of the Extradition Act.

2.85 This amendment is intended to remove the existing overlap in consideration of the same factors by both the Attorney-General at the section 16 stage and a magistrate, and thereby streamline the extradition process.

Item 42 – Subsection 16(3)

2.86 This item will omit 'issued' and substitute 'given' in subsection 16(3) of the Extradition Act. This amendment will make the current reference to the Attorney-General's 'issue' of a notice under subsection 16(3) consistent with the wording of subsection 16(1), which is that the Attorney-General decides to 'give' a notice.

Item 43 – Application of amendments made by this Division

2.87 This item will set out the application of the amendments made by Division 3 of Part 3 of Schedule 2 of the Bill. The amendments apply in relation to an extradition request from an extradition country that is made on or after the commencement of this item. This item will commence upon Proclamation.

Division 4—Consent to accessory extradition

Overview

2.88 The amendments in Division 4 of Part 3 of Schedule 2 of the Bill will provide persons with an opportunity to consent to being extradited for a wider range of offences. Currently, section 18 of the Extradition Act allows a person to consent to surrender for 'extradition offences' in respect of which the Attorney-General has given a notice under subsection 16(1). 'Extradition offence' is defined in section 5 of the Extradition Act, and means an offence punishable by at least 12 months imprisonment. Section 20 of the Extradition Act allows a person who has either consented to his or her surrender (under section 18) or been found eligible for surrender by a magistrate in respect of 'extradition offences' to consent to also being surrendered for offences that are not 'extradition offences' (known as 'consent to accessory extradition'). This enables a person to have all outstanding charges dealt with upon their return to the foreign country.

2.89 A person may wish to consent to surrender for an offence, even though Australia could not extradite the person for that offence under the Extradition Act (for example because the foreign country has not yet issued a warrant in respect of that offence). This may be because a person may wish to have all outstanding charges dealt with in one process on return to the country so as to serve any resulting sentences concurrently.

2.90 The amendments in Division 4 of Part 3 of Schedule 2 of the Bill will clarify that a person can consent to accessory extradition for offences punishable by more than 12 months imprisonment that are listed in the extradition request but which are not listed in the notice

accepting the extradition request. This will ensure that persons facing extradition have the option to face all charges in the foreign country simultaneously.

2.91 The amendments will require a magistrate to be satisfied that there is no extradition objection in relation to any of the additional extradition offences before asking the person whether he or she consents to being surrendered in respect of those offences.

Extradition Act 1988

Item 44 – After section 19

2.92 This item will insert new section 19A after section 19 of the Extradition Act. New subsection 19A(1) will set out when section 19A applies. It will provide that section 19A applies if:

- a notice under subsection 16(1) has been given in relation to a person who is the subject of an extradition request from an extradition country, and

- in proceedings under section 18, the person consents to being surrendered to the extradition country in relation to the extradition offence or all the extradition offences to which the notice relates, or

- in proceedings under subsection 19(1), a magistrate determines the person is eligible for surrender to the extradition country in relation to one or more of the extradition offences to which the notice relates, and

- the extradition country had requested in the extradition request that the person be surrendered for one or more extradition offences (additional extradition offences) that are not specified in the notice.

2.93 New subsection 19A(2) will require the magistrate, in proceedings under section 18 or subsection 19(1), to ask the person whether he or she consents to accessory extradition if the magistrate is satisfied that there is no 'extradition objection' in relation to any of the additional extradition offences. 'Extradition objections' are set out in section 7 of the Extradition Act. Subsection 19A(2) will ensure that human rights safeguards which currently apply where a person consents to extradition, also apply where a person consents to accessory extradition.

2.94 New subsection 19A(3) will contain safeguards designed to ensure the person is fully informed, and protect the person from consenting to accessory extradition without being aware of the implications of that consent. New subsection 19A(3) will require that before asking the person if he or she consents to surrender in respect of the additional extradition offences, the magistrate must first:

- be satisfied that the person is legally represented or give the person an adequate opportunity to be legally represented

- inform the person that if the person consents to surrender for any additional extradition offences he or she may be tried and sentenced in the extradition country for any of those additional extradition offences, and

- inform the person that he or she may be tried and sentenced in the extradition country even though, had the conduct of the person constituting the additional extradition offences, or equivalent conduct, taken place in Australia at the time the extradition request was received, that conduct may not have constituted an extradition offence in relation to Australia.

2.95 New subsection 19A(4) will provide that where a person has given his or her consent to being surrendered in accordance with section 19A, the magistrate must, unless he or she considers the consent was not given voluntarily, advise the Attorney-General in writing of the additional extradition offences in respect of which the person has consented. This will ensure that the Attorney-General is informed of all offences relevant to his or her surrender determination under section 22 of the Extradition Act. Under section 22, if a magistrate has determined a person is 'eligible for surrender', or if a person has consented to extradition (including accessory extradition), the Attorney-General must decide whether or not to surrender the person.

Item 45 – Subsection 22(1) (definition of *qualifying extradition offence*)

2.96 This item will repeal the definition of *qualifying extradition offence* in subsection 22(1) of the Extradition Act. This definition enables the Attorney-General to make a surrender determination under section 22 for extradition offences in relation to which the person consented to surrender (under section 18) or a magistrate has determined eligibility for surrender (under section 19), or a court, on appeal, has confirmed the magistrate's determination of eligibility for surrender (under section 21). The Attorney-General cannot make a surrender determination under section 22 for offences that are not 'extradition offences' in relation to which a person consents to surrender (under section 20).

2.97 The amendment will include a new definition of *qualifying extradition offence* which will include:

- any extradition offence in relation to which the person consented in accordance with section 18

- any extradition offence in relation to which a magistrate, or a court conducting final review proceedings under section 21, determines that the person is eligible for surrender within the meaning of subsection 19(2), or

- in any case, any extradition offence in relation to which the person has consented in accordance with section 19A.

2.98 The new definition will ensure that any additional extradition offences for which the person consents to being surrendered will be included in the definition of *qualifying extradition offence*, enabling the Attorney-General to make a surrender determination under section 22 for the additional extradition offences.

Division 5—Extradition to Australia from other countries

Overview

2.99 Division 5 of Part 3 of Schedule 2 of the Bill will enable the Attorney-General to give a legally enforceable undertaking to the requested country as to the maximum sentence that could be imposed on a person, before the person is extradited to Australia. This undertaking could either state that life imprisonment will not be imposed on the person or specify the maximum period of imprisonment that may be imposed on the person.

2.100 Some countries are prohibited under their laws from surrendering a person to other countries unless an undertaking is provided about the maximum sentence that may be imposed on the person. For example, a country's Constitution may prohibit extradition if the person may be subject to life imprisonment on surrender. This can cause considerable difficulty in cases where the offender may technically be liable to a life sentence, but there is no likelihood of such a sentence being imposed given the circumstances of the offence. In such cases, unless Australia is able to provide a sufficient undertaking, extradition will be refused and the person could be released.

2.101 This amendment will enable Australia to provide legally enforceable undertakings, in appropriate circumstances, which will allow the person to be surrendered to Australia to face charges. For an offence that is to be prosecuted in a State or Territory, the Commonwealth Attorney-General will be required to consult with the Attorney-General of the State or Territory before giving an undertaking.

Item 46 – At the end of Part IV

2.102 This item will insert new section 44A into the Extradition Act. New subsection 44A(1) will set out when the new section will apply and the circumstances in which the Attorney-General may give an undertaking. Subsection 44(1) will enable the Attorney-General, before a person is surrendered to Australia, to give an undertaking:

- that life imprisonment will not be imposed on the person if he or she is found guilty in Australia, or

- specifying the maximum period of imprisonment that may be imposed on the person if he or she is found guilty in Australia.

2.103 New subsection 44A(2) will ensure that Australian courts give effect to the Attorney-General's undertaking by providing that a person must not, under a law of the Commonwealth, a State or Territory, be sentenced to life imprisonment (where subparagraph 44A(1)(b)(i) applies) or a period of imprisonment that is more than the period specified in the Attorney-General's undertaking (where subparagraph 44A(1)(b)(ii) applies).

2.104 New subsection 44A(3) requires the Attorney-General to consult with the Attorney-General of the State or Territory where the offence is to be prosecuted before giving an undertaking under section 44A. This is because there may be circumstances where the undertaking could not be upheld, for example because the offence is subject to a mandatory

sentence in that State or Territory. An undertaking would not be entered into where it would be in breach of domestic laws.

2.105 New subsection 44A(4) will provide that where an undertaking in subsection 44A(1) is given in writing, the undertaking is not a legislative instrument within the meaning of section 5 of the *Acts Interpretation Act 1901*.

2.106 New subsection 44A(5) is intended to make clear that the Attorney-General cannot give an undertaking under subsection 44A(1) as to the maximum sentence that may be imposed on a person which is greater than (a) the maximum sentence that applies to the offence, or (b) in the case of multiple offences, the total of each maximum period of imprisonment that applies to each offence.

Division 6—Prosecution in lieu of extradition

Overview

2.107 Currently, a person can only be prosecuted in Australia in lieu of extradition under section 45 of the Extradition Act in limited circumstances where the extradition has been refused on the basis that the person is an Australian citizen. Division 6 will amend section 45 of the Extradition Act to enable a person to be prosecuted in any circumstances where Australia has refused extradition.

2.108 This amendment will assist in preventing Australia from becoming an attractive safe haven for fugitives from countries whose criminal justice systems might give rise to grounds for refusal under the Extradition Act.

Item 47 – Subsections 45(1), (2) and (3)

2.109 Section 45 currently enables the Attorney-General to consent to Australian citizens being prosecuted for an extradition offence (or extradition offences) in Australia instead of being surrendered to an extradition country. This item will repeal existing subsections 45(1), 45(2) and 45(3) of the Act, and replace them with new subsections 45(1), 45(2), 45(3), 45(3A), 45(3B), 45(3C) and 45(3D). The amendments will enable the Attorney-General to consent to prosecution of persons in lieu of their extradition in all circumstances and regardless of their nationality.

2.110 This item can be explained with the following example: Person X kills person Y in country Z, then flees to Australia. Country Z requests the extradition of person X, but the Attorney-General refuses the request on the basis of concerns that person X will be subjected to torture in country Z. Item 47 will facilitate the prosecution of person X in Australia in lieu of his or her extradition to country Z.

2.111 New subsection 45(1) will create an offence against person X to facilitate his or her prosecution in Australia. In order to establish this offence, first, the prosecution must prove that person X has been remanded in a State or Territory by order of a magistrate under section 15 of the Extradition Act. This will establish a nexus to the extradition process, as remand can only occur pursuant to section 15 if a person is arrested under an extradition arrest warrant issued in response to a request made by a foreign country.

2.112 Second, the prosecution must prove that person X has engaged in conduct outside Australia at an earlier time, which would have constituted an offence had the conduct or equivalent conduct occurred in Australia. This will be referred to as the 'notional Australian offence'.

2.113 The phrase 'at an earlier time' in new paragraph 45(1)(b) will refer to a time prior to person X's remand under section 15 of the Act. This is because, under subsection 45(4), the Attorney-General shall only consent to a prosecution under section 45 in relation to an extradition offence (or extradition offences) for which surrender has been refused under section 22 of the Act. Accordingly, the conduct which will be captured by this offence will be limited to the conduct for which the Attorney-General refused surrender, and could not include, for example, illegal conduct which person X may have engaged in, in his or her past which is not the subject of the particular extradition request or conduct which the person may engage in after their remand under section 15. This means person X will not be vulnerable to prosecution for offences which he or she may have committed, or may commit, over a potentially indefinite period of time.

2.114 The phrase 'equivalent conduct' in new paragraph 45(1)(c) is intended to cover circumstances where an element of the relevant foreign offence is analogous but not identical to a corresponding element of the relevant Australian offence (for example, in Australia, conduct equivalent to defrauding the United States Internal Revenue Service will be defrauding the Australian Taxation Office).

2.115 Subsection 45(2) will outline that absolute liability will attach to new paragraphs 45(1)(a) and 45(1)(b) and to the circumstances in paragraph 45(1)(c). This will mean that the prosecution need not prove person X was reckless as to the elements required to establish the offence under subsection 45(1). This will clarify that new paragraphs 45(1)(a), 45(1)(b) and 45(1)(c) will effectively be factual pre-conditions for the existence of the offence. This will ensure that the prosecution is not required to prove that the person intended to engage in conduct outside Australia at an earlier time or that the person was reckless as to whether that conduct would have constituted an offence in Australia had the conduct or equivalent conduct occurred in Australia. Further, new subsection 45(3) will set out the physical and fault elements that need to be established by the prosecution.

2.116 New subsection 45(3) will explain how the prosecution is to prove the 'notional Australian offence'. New paragraph 45(3)(a) will require the prosecution to prove the physical and fault elements applicable to the 'notional Australian offence'. In the example above, person X's conduct constitutes the Australian offence of murder. Accordingly, the prosecution will be required to prove the physical and fault elements for the offence of murder in the State or Territory in which person X is on remand. Assuming person X was held on remand in Queensland, the prosecution will be required to prove the physical and fault elements for the offence of murder under Queensland law.

2.117 The phrase 'however described' in new paragraph 45(3)(a) will encompass concepts such as *mens rea* and *actus reus* (that is, elements of an offence which have not been codified in legislation and are therefore not described as 'physical' and 'fault' elements).

2.118 New paragraph 45(3)(b) will provide that any defences or special liability provisions that apply in relation to the notional Australian offence will have effect. Using the example above, if person X was held on remand in Queensland, then any defences (for example, self-

defence) or special liability provisions applicable to the offence of murder in Queensland will apply. 'Special liability provision' is defined in the Dictionary to the *Criminal Code* (Cth) to mean:

- a provision that provides that absolute liability applies to one or more (but not all) of the physical elements of an offence
- a provision that provides that, in a prosecution of an offence, it is not necessary to prove that the defendant knew a particular thing, or
- a provision that provides that, in a prosecution for an offence, it is not necessary to prove that the defendant knew or believed a particular thing.

2.119 The phrase 'however described' in new paragraph 45(3)(b) will include defences or special liability provisions that are not described as such in State or Territory legislation.

2.120 New paragraph 45(3)(c) will provide that any procedures or limitations that apply in relation to the notional Australian offence will have effect. This will ensure that any applicable limitation period for the notional Australian offence would apply, as would any relevant procedure in relation to the offence, such as offering suitable protections for vulnerable witnesses.

2.121 The phrase 'however described' in new paragraph 45(3)(c) will include procedures or limitations that are not described as such in State or Territory legislation.

2.122 Division 1 of Part X and subsection 79(1) of the *Judiciary Act 1903* apply State and Territory procedural laws in relation to persons charged with Commonwealth offences. New subsection 45(3A) will clarify that new subsection 45(3) is not intended to override or replace the Judiciary Act provisions.

2.123 New subsection 45(3B) will apply the maximum penalty applicable to the notional Australian offence at the time the conduct occurred. Using the example above, that will be the maximum penalty for the offence of murder under Queensland law at the time person X killed person Y in country Z. This will ensure person X will not be liable for a harsher maximum penalty than was applicable when the offence was committed. This is consistent with Australia's international obligations under Article 15 of the International Covenant on Civil and Political Rights.

2.124 New subsection 45(3C) will clarify that the offence is an indictable offence. This will ensure that prosecutions for such offences are held before a jury, as section 80 of the Constitution requires jury trials for indictable Commonwealth offences. In practice, the conduct constituting the 'notional Australian offence' in this offence would generally constitute an indictable offence, as all extradition treaties to which Australia is party do not permit extradition for offences punishable by a maximum penalty of less than 12 months imprisonment.

2.125 New subsection 45(3D) will provide that the Attorney-General's written consent is required for offence proceedings to be instituted. This is consistent with the current provision governing prosecution in lieu of extradition. The Attorney-General would have discretion to refer the matter to the relevant law enforcement agency for investigation and the DPP for

prosecution. The DPP would need to independently assess whether a prosecution should be undertaken in accordance with its Prosecution Policy. The Prosecution Policy requires the DPP to be satisfied that there is sufficient evidence to prosecute the case, and that it is evident from the facts of the case and all the surrounding circumstances that the prosecution would be in the public interest.

2.126 Existing subsection 45(4) (which will be amended by items 49 to 52) will continue to provide for when the Attorney-General can give his or her consent to a prosecution in lieu of extradition.

Item 48 – Application of item 47

2.127 This item will clarify that the amendments to the offence provision in section 45 of the Extradition Act will not apply retrospectively.

Item 49 – Subsection 45(4)

2.128 This item will remove the reference to 'subsection (3)' in subsection 45(4) and replace it with 'subsection (3D)'. This change is a consequence of item 47, which will repeal existing subsections 45(1), (2) and (3) and replace them with new subsections. As new subsection 45(3D) will require the Attorney-General's consent for proceedings to take place, this item will replace the reference to subsection 45(3) with subsection 45(3D).

Item 50 – Paragraph 45(4)(a)

2.129 This item will remove the reference to 'paragraph (1)(a)' and replace it with 'paragraph (1)(b); and'. This change is a consequence of item 47, which will repeal existing subsection 45(1) and replace it with a new subsection. As new paragraph 45(1)(b) will refer to conduct for which an extradition country has sought the surrender of a person, this item will replace the reference to paragraph (1)(a) with a reference to paragraph (1)(b).

Item 51 – Paragraph 45(4)(b)

2.130 This item will omit the reference to 'country; and' in paragraph 45(4)(b) and replace it with 'country.' This is a consequence of item 52, which will repeal existing paragraph 45(4)(c).

Item 52 – Paragraph 45(4)(c)

2.131 Existing paragraph 45(4)(c) provides that the Attorney-General can only give his or her consent for prosecution in lieu of extradition if:

- the Attorney-General made a determination not to surrender a person because the person was an Australian citizen at the time of committing the offence
- the extradition country would not have surrendered the person to Australia if the situation was reversed, and
- the Attorney-General intended to give his or her consent for prosecution in lieu of extradition.

2.132 This item will repeal the limitations to prosecution in lieu of extradition in paragraph 45(4)(c). This will enable Australia to prosecute a person regardless of their nationality, and regardless of whether the extradition country would not have surrendered the person to Australia if the situation had been reversed.

2.133 This will assist in preventing Australia from becoming an attractive safe haven for fugitives from countries whose criminal justice systems might give rise to grounds for refusal under the Extradition Act. For example, where there are concerns about torture or the death penalty.

Item 53 – Application of the amendment made by item 52

2.134 This item will provide that the amendment made by item 52 will apply in respect of an extradition request made by an extradition country if the request is made on or after the commencement of this item. This item is to commence on a date to be fixed by Proclamation.

Item 54 – Subsection 45(5)

2.135 This item will remove the reference to 'subsection (3)' in subsection 45(5) and replaces it with 'subsection (3D)'. This change is a consequence of item 47, which will repeal existing subsections 45(1), (2) and (3) and replace them with new subsections. As new subsection 45(3D) will require the Attorney-General's consent for proceedings to take place, this item will replace the reference to subsection 45(3) with subsection 45(3D).

Division 7—Technical amendments relating to notices

Overview

2.136 Division 7 of Part 3 of Schedule 2 of the Bill will make various minor and technical amendments to the provisions in the Extradition Act which provide for the Attorney-General to give notices. The Extradition Act makes provision for the Attorney-General to give notices at various stages of the extradition process, for example, notices stating that an extradition request has been received (section 16) and notices directing a magistrate to release a person from remand (section 17).

Item 55 – After section 16

2.137 Section 16 provides for the Attorney-General to issue a notice to a magistrate stating that a formal extradition request has been received. In some cases it may be desirable for the Attorney-General to amend a section 16 notice after the notice is given, for example, to rectify a minor deficiency or to add additional extradition offences that satisfy the requirements under the Extradition Act. Currently subsection 10(4) of the Extradition Act refers to a section 16 notice as including the notice as amended. This implies that a section 16 notice can be amended, however, there is no express power under the Extradition Act for the Attorney-General to amend the section 16 notice and the Extradition Act does not specify the processes for making such an amendment.

2.138 This item will insert a new section 16A, after existing section 16, to make specific provision for the Attorney-General to amend a notice of receipt of an extradition request

given under section 16 of the Extradition Act. Section 16A will enable the Attorney-General to amend the notice at any time up until the magistrate determines the person eligible for surrender, or the person consents to surrender under section 18.

2.139 New subsection 16A(1) will set out when section 16A applies. This will provide that section 16A applies if the Attorney-General has given a notice (the original notice) under subsection 16(1) of the Extradition Act in relation to a person.

2.140 New subsection 16A(2) will provide that the Attorney-General may, in his or her discretion, give an amended notice at any time before:

- the person consents to surrender under section 18 in relation to the extradition offence or extradition offences specified in the original notice, or

- a magistrate determines the person eligible for surrender in relation to the extradition offence or extradition offences specified in the original notice.

2.141 New subsection 16A(3) will provide that the amended notice must be in writing in the statutory form expressed to be directed to any magistrate. This will ensure that the magistrate is informed of any amendments to the notice.

2.142 New subsection 16A(4) will provide that if the amended notice lists new extradition offences, the Attorney-General may only give the notice if the requirements of section 16 of the Extradition Act are satisfied with respect to the new offences. This will mean that the Attorney-General may only give the amended notice containing the new offences if he or she could have given a notice in relation to those offences under section 16. This will ensure all new offences in the amended notice comply with the requirements set out in section 16.

2.143 New subsection 16A(5) will provide that a reference to a notice given under subsection 16(1) in the Extradition Act includes a reference to an amended notice given under subsection 16A(2). This will ensure that provisions in the Extradition Act which apply to notices given under subsection 16(1) will also apply to amended notices given under new subsection 16A(2).

2.144 New subsection 16A(6) will provide that an amended notice given under subsection 16A(2) is not a legislative instrument. This will clarify that a notice given under subsection 16A(2) is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

2.145 New subsection 16A(7) will provide that as soon as practicable after the person is remanded under section 15, or an amended notice is given under subsection 16A(2), whichever is later, a copy of the amended notice and, if the amended notice specifies one or more extradition offences that were not in the original notice, copies of relevant documents relating to the offence(s), must be given to the person. This will ensure the person is kept informed of the case against him or her, including information relating to the offences for which he or she is being sought for extradition.

2.146 New subsection 16A(8) will provide that section 16A does not limit the power of the Attorney-General to revoke the original notice in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*. Subsection 33(3) of the *Acts Interpretation Act 1901* provides

that where an Act confers a power to make, grant or issue any instrument, the power shall, unless the contrary intention appears, be construed as including a power to repeal, rescind, revoke, amend, or vary any such instrument.

Item 56 – Paragraph 17(1)(a)

2.147 This item will replace the reference to 'issue' in paragraph 17(1)(a) with 'give' to make the language of paragraph 17(1)(a) consistent with references to the Attorney-General 'giving' notice under section 16 and other provisions in the Extradition Act.

Item 57 – After subsection 18(1)

2.148 This item will insert a new subsection 18(1A), after existing subsection 18(1), into the Extradition Act. New subsection 18(1A) will provide that where the Attorney-General gives an amended notice under new section 16A (which will be inserted by item 55) containing new offences while consent to surrender proceedings are being conducted under section 18, the magistrate may adjourn proceedings to give the person additional time to inform the magistrate about whether the person consents to be surrendered in relation to any of those new offences. This will ensure a person has an appropriate amount of time to consider whether to consent to the new offences.

Item 58 – After subsection 19(4)

2.149 This item will insert a new subsection 19(4A), after existing subsection 19(4), into the Extradition Act. New subsection 19(4A) will provide that where the Attorney-General gives an amended notice under new section 16A (which will be inserted by item 55) containing new offences while determination of eligibility for surrender proceedings are being conducted under section 19, the magistrate may, if he or she considers it necessary, adjourn proceedings to give the person and the extradition country additional time to prepare for the conduct of proceedings. This will ensure a person and the extradition country have an appropriate amount of time to prepare for the conduct of proceedings involving the new offences.

Item 59 – Subsection 43(1)

2.150 Section 43 allows the Attorney-General to authorise the taking of evidence for use in any proceedings for the surrender of that person to Australia where the Attorney-General suspects that the person is an extraditable person in relation to Australia. This item will insert 'expressed to be directed to any magistrate' after the reference to 'statutory form' in subsection 43(1). This amendment is to clarify that where the Attorney-General authorises, by notice in writing in the statutory form, the taking of evidence under section 43, it is to be directed to a magistrate.

Item 60 – After section 46

2.151 The Extradition Act makes provision for the Attorney-General to give notices at various stages of the extradition process including, for example, notices stating that an extradition request has been received (section 16) and notices directing a magistrate to release a person from remand (section 17). This item will insert new section 46A, after existing section 46, into the Act. New section 46A will set out the process by which a notice may be

'given' and the time at which such notices are taken to be given. The time at which a notice is taken to be 'given' by the Attorney-General can be particularly relevant in determining if the Attorney-General has given a section 16 notice within the 45 day period specified in section 17 of the Act.

2.152 Subsection 46A(1) will provide that new section 46A will apply to notices (under subsection 16(1)), amended notices (under new subsection 16A(2)), as well as other types of notices given by the Attorney-General to a magistrate (under subsections 43(1), 12(3), 15B(4) or 17(1)).

2.153 Subsection 46A(2) will provide that when a notice, or copy of the notice, is to be given to a magistrate, it may be handed to a magistrate in person or sent to a magistrate by post, fax, email or other electronic means. Subsection 46A(3) will provide that the notice is taken to be given at the time at which the notice, or a copy of the notice, is handed to the magistrate, or delivered in the ordinary course of post, or at the time at which the fax, email or other electronic communication is sent to the magistrate (whichever is relevant). For example, if an email is sent to the magistrate on 1 July 2011, then that is when the notice is taken to be given, regardless of when the magistrate actually views the email.

Item 61 – Application—section 16A of the *Extradition Act 1988*

2.154 This item will provide that new section 16A, which will be inserted by item 55, will apply in relation to a notice given under subsection 16(1) of the Act, after the commencement of this item. This item will commence on a date to be fixed by Proclamation.

Item 62 – Application—section 46A of the *Extradition Act 1988*

2.155 This item provides that new section 46A, which will be inserted by item 60, will apply in relation to a notice given under subsections 16(1), 16A(2) or 43(1) of the Extradition Act, if the Attorney-General gives notice on or after the commencement of this item. This item will commence on a date to be fixed by Proclamation.

2.156 This item will also provide that new section 46A, which will be inserted by item 60, will apply to a notice under subsection 12(3) or 17(1) of the Extradition Act if the Attorney General is required to give notice on or after the commencement of this item. This item will commence on a date to be fixed by Proclamation.

Division 8—Amendments relating to remand and bail

Overview

2.157 This Division will make amendments to extend the availability of bail in the extradition process. This Division will also make amendments to provide the Attorney-General with an additional five days in which to consider whether to issue a section 16 notice stating that an extradition request has been received.

Extradition Act 1988

Item 63 – Paragraph 17(2)(b)

2.158 The effect of existing paragraph 17(2)(b) is that, where a person is arrested on a provisional arrest warrant in urgent circumstances, the person shall be brought before a magistrate who shall determine if the person is to be released from custody if the Attorney-General has not issued a notice stating that a formal extradition request has been received (a 'section 16 notice') within 45 days. The period of 45 days may be varied through Regulations. This item will repeal existing paragraph 17(2)(b) and replace it with a new paragraph 17(2)(b).

2.159 New paragraph 17(2)(b) will provide that where a person is arrested on a provisional arrest warrant in urgent circumstances, and the Attorney-General has not received an extradition request or has received such a request but has not issued a section 16 notice within five days after the period of days referred to in paragraph 17(2)(a) (i.e. 45 days), then the person is to be brought before a magistrate.

2.160 The effect of new paragraph 17(2)(b) will be that the Attorney-General is given an additional five days following the receipt of an extradition request to consider the request and determine whether to issue a section 16 notice. Many of Australia's treaties with other countries require an extradition request to be made within a certain period of a person being arrested on a provisional arrest warrant. However, the Extradition Act requires the Attorney-General to issue a section 16 notice within that same period.

2.161 In circumstances where a person has been provisionally arrested and the Attorney-General receives the extradition request on the last day of the specified time period, he or she may not have sufficient time to consider the request and determine whether to issue the section 16 notice. This amendment would allow the Attorney-General an additional five days following the receipt of an extradition request for the Attorney-General to consider the request and determine whether to issue a section 16 notice.

2.162 The other requirement in existing paragraph 17(2)(b) for what the magistrate must do once a person has been brought before him or her will be removed by item 64, and provided in new subsection 17(2A), which will be inserted by item 65.

Item 64 – Subsection 17(2)

2.163 Subsection 17(2) of the Extradition Act provides that where a person is arrested on a provisional arrest warrant in urgent circumstances, they must be brought before a magistrate if a formal extradition request is not received or the Attorney-General decides not to issue a section 16 notice within a specified period of the person being held on remand. This item will remove all the words after the third occurring reference to 'the person' in subsection 17(2) and replace them with 'must be brought before a magistrate'. This amendment removes the provision for what a magistrate must do once a person has been brought before him or her under existing subsection 17. This is because this requirement will be outlined in amended form in a new subsection 17(2A), which will be inserted by item 65.

Item 65 – after subsection 17(2)

2.164 This item will insert a new subsection 17(2A), after existing subsection 17(2), into the Extradition Act. Subsection 17(2) provides that a person who has been arrested on a provisional arrest warrant and placed on remand must be brought before a magistrate if the Attorney-General has not given a section 16 notice within a specified period of the person being held on remand.

2.165 New subsection 17(2A) will provide that once the person is brought before a magistrate, the magistrate would be required to release the person or discharge the recognisances on which bail was granted to the person except:

- where the Attorney-General has not received a formal extradition request from the extradition country in relation to the person, if:
    - exceptional circumstances have prevented the extradition country from providing an extradition request (subparagraph 17(2A)(a)(i))
    - the Attorney-General is likely to receive an extradition request within a particular time that is reasonable in the circumstances (subparagraph 17(2A)(a)(ii)), and
    - after receiving the extradition request, the Attorney-General is likely to make a decision to give or not to give a section 16 notice within a particular period that is reasonable in the circumstances (subparagraph 17(2A)(a)(iii)).
- where the Attorney-General has received a formal extradition request but a section 16 notice has not been given, if:
    - the Attorney-General is likely to make a decision to give, or not to give, a section 16 notice within a particular period that is reasonable in the circumstances (paragraph 17(2A)(b)).

2.166 This amendment will better align the operation of the Extradition Act with Australia's obligations under bilateral extradition treaties and would ensure the Attorney-General has sufficient opportunity to give due consideration to extradition requests before issuing a section 16 notice. This provision will also clearly delineate the circumstances in which a person can continue to be held on remand, and thereby provide greater certainty for persons subject to an extradition request or potentially subject to an extradition request.

Item 66 – Paragraphs 17(3)(a) and (b)

2.167 This item will repeal existing paragraphs 17(3)(a) and (b) and replace them with new paragraphs 17(3)(a) and (b). The new paragraphs will provide that a magistrate must order the release of a person from custody, or discharge any recognisances on which bail was granted, as the case requires, if:

- the formal extradition request is not received within the particular period (as anticipated under new subparagraph 17(2A)(a)(ii)), or

- the decision to give or not to give a section 16 notice is not made within the particular period (as anticipated under new subparagraph 17(2A)(a)(iii) or new paragraph 17(2A)(b)).

2.168 This amendment of existing paragraphs 17(3)(a) and (b) is necessary as a consequence of the changes that will be made by item 65.

Item 67 – Subparagraph 18(2)(a)(i)

2.169 This item will insert ', or subject to subsection (3), released on bail' after the reference to 'prison' in subparagraph 18(2)(a)(i). This amendment is a consequence of the extension of the availability of bail, which will be inserted by item 68.

Item 68 – Paragraph 18(2)(b)

2.170 Currently under the Extradition Act, a person may be remanded on bail during the early stages of the extradition process if special circumstances exist. However, once a person is determined by a magistrate to be eligible for surrender, he or she must be committed to prison. Under paragraph 18(2)(b), the person must also be committed to prison, once he or she consents to extradition. This item will repeal existing paragraph 18(2)(b) and replace it with a new paragraph 18(2)(b), which will extend the availability of bail to persons who have consented to extradition.

2.171 New paragraph 18(2)(b) will provide that if the person consents to being surrendered, the magistrate shall order that the person be committed to prison or, subject to new subsection 18(3) (which will be inserted by item 69), released on bail to await:

- the issue of a surrender warrant or temporary surrender warrant, or

- release, or the discharge of the recognisances on which bail was granted, under an order under subsection 22(5).

2.172 Extending the availability of bail to situations where a person consents to extradition will ensure the Extradition Act is sufficiently flexible to accommodate extenuating circumstances that may justify granting a person bail. New section 49B, which will be inserted by item 84, will provide that a decision by a court to release a person on bail may be made on such terms and conditions as the court or magistrate thinks fit.

Item 69 – At the end of section 18

2.173 This item will insert new subsections 18(3), 18(4) and 18(5) at the end of section 18 of the Extradition Act. New paragraph 18(2)(b), which will be inserted by item 68, will allow a person to be released on bail if the person consents to being surrendered. Subsection 18(3) will provide that a magistrate must not release a person on bail where the person consents to surrender under section 18, unless there are special circumstances justifying such release. This aligns with the circumstances in which bail can be granted under section 15, which provides for a person who is arrested under the Extradition Act to be placed on remand for the purposes of consent to surrender proceedings under section 18 or determination of eligibility for surrender proceedings under section 19.

2.174 This reflects the current presumption against bail under subsection 15(6) for persons who seek to be released on bail upon consent to being surrendered under new paragraph 18(2)(b). Creating a presumption against bail for persons sought for extradition is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country. The High Court in *United Mexican States v Cabal*[1] has previously observed that to grant bail where a risk of flight exists would jeopardise Australia's relationship with the country seeking extradition and jeopardise our standing in the international community. New section 49B, which will be inserted by item 84, will provide that any decision under the Extradition Act of a court or a magistrate to remand or release a person on bail may be made on such terms and conditions as the court or magistrate thinks fit. The presumption against bail unless there are special circumstances and new section 49B will assist Australia to meet its international obligations to secure the return of alleged offenders to face justice in the requesting country.

2.175 New subsection 18(4) will provide that if a magistrate makes an order committing the person to prison or releasing the person on bail under paragraph 18(2)(b), the magistrate must advise the Attorney-General in writing of the offence or offences in respect of which the person has consented to surrender. This replicates the requirement under existing subparagraph 18(2)(b)(ii), which will be repealed by item 68, and will ensure that the Attorney-General is notified of extradition offences which the person has consented to and which he or she must ultimately decide whether to extradite the person in relation to.

2.176 New subsection 18(5) will provide that an order committing a person to prison under paragraph 18(2)(b) must be made by warrant in the statutory form. This replicates the requirement under existing subparagraph 18(2)(b)(i), which will be repealed by item 68.

Item 70 – Paragraph 19(9)(a)

2.177 Existing paragraph 19(9)(a) of the Extradition Act provides that where a magistrate determines that a person is eligible for surrender, the magistrate shall order the person be committed to prison to await surrender. This item will repeal existing paragraph 19(9)(a) and insert a new paragraph 19(9)(a). This item will extend the availability of bail to persons who have been determined eligible for surrender by a magistrate.

2.178 New paragraph 19(9)(a) will provide that if the magistrate determines the person is eligible for surrender, the magistrate shall order that the person be committed to prison or (subject to new subsection 19(9A), which will be inserted by item 72), released on bail, to await surrender under a surrender warrant or temporary surrender warrant. However, if the Attorney-General decides not to surrender the person, new paragraph 19(9)(a) will require the magistrate to order the release of the person, or the discharge of the recognisances on which bail was granted, under an order under subsection 22(5).

2.179 Extending the availability of bail to a person following a magistrate's determination that the person is eligible for surrender will ensure the Extradition Act is sufficiently flexible to accommodate extenuating circumstances that may justify granting a person bail.

[1] (2001) 209 CLR 165; 183 ALR 645

Item 71 – Paragraph 19(9)(b)

2.180 This item will remove the reference to 'in the warrant is made, seek a review of the order' in paragraph 19(9)(b) and substitute it with 'under paragraph (a) is made, seek a review of the order'. This amendment is a consequence of the changes that will be made by item 70.

2.181 Amended paragraph 19(9)(b) will require the magistrate to inform the person that they can seek a review of the order under subsection 21(1) within 15 days after the day on which the order under paragraph 19(9)(a) is made. An order under amended paragraph 19(9)(a) could be made by warrant if the person is committed to prison, but it could also be an order that the person be released on bail (which would not be required to be made by warrant).

Item 72 – After subsection 19(9)

2.182 This item will insert new subsections 19(9A) and 19(9B) after subsection 19(9). Subsection 19(9A) will provide that a magistrate must not release a person on bail where the magistrate determines that the person is eligible for surrender under paragraph 19(9)(a), unless there are special circumstances justifying such release. This reflects the current presumption against bail under subsection 15(6) of the Extradition Act.

2.183 Creating a presumption against bail for persons sought for extradition is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country. The High Court in *United Mexican States v Cabal*[2] has previously observed that to grant bail where a risk of flight exists would jeopardise Australia's relationship with the country seeking extradition and jeopardise our standing in the international community.

2.184 New section 49B, which will be inserted by item 84, will provide that any decision under the Extradition Act of a court or a magistrate to remand or release a person on bail may be made on such terms and conditions as the court or magistrate thinks fit. The presumption against bail unless there are special circumstances justifying such a release and new section 49B will assist Australia to meet its international obligations to secure the return of alleged offenders to face justice in the requesting country.

2.185 Subsection 19(9B) will provide that an order committing a person to prison under paragraph 19(9)(a) must be made by warrant in the statutory form. This replicates the requirement under existing paragraph 19(9)(a), which will be removed by item 70.

Item 73 – Paragraph 21(2)(b)

2.186 Existing paragraph 21(2)(b) provides that upon review of a magistrate's determination of eligibility for surrender, the Court may quash the original order of the magistrate and direct the magistrate to release the person or commit the person to prison to await surrender. This item will repeal existing paragraph 21(2)(b) and substitute it with a new paragraph 21(2)(b), which will simply provide that the Court may quash the order made by the magistrate. New subsection 21(2A) (which will be inserted by item 74) will provide for the orders the Court must make if a Court quashes its order.

[2] (2001) 209 CLR 165; 183 ALR 645

Item 74 – After subsection 21(2)

2.187 This item will insert new subsections 21(2A), 21(2B) and 21(2C) after subsection 21(2) (which will be amended by item 73). New subsection 21(2A) will set out the orders the Federal Court must make if it quashes an order of a magistrate under subsection 19(9) or (10).

- If the magistrate made an order under subsection 19(9) (that the person is eligible for surrender) and the Federal Court quashes that order—the Federal Court must also order the release of the person or the discharge of the recognisances on which bail was granted. This ensures a person is released and no longer subject to extradition processes.

- If the magistrate made an order under subsection 19(10) (that the person is not eligible for surrender) and the Federal Court quashes that order—the Federal Court must also order that the person be committed to prison or (subject to new subsection (2B)) released on bail, to await the issue of a surrender warrant or a temporary surrender warrant or to await release, or the discharge of the recognisances on which bail was granted, under an order under subsection 22(5).

2.188 The orders for the discharge of the recognisances on which bail was granted, or for the person to be released on bail under new subsection 21(2A) are additional to what is currently provided under existing subsection 21(2). This is a consequence of the extension of bail to the later stages of the extradition process that will be made by item 70.

2.189 New subsection 21(2B) will provide that the Federal Court must not release a person on bail under new paragraph 21(2A)(b) unless there are special circumstances justifying such release. Maintaining this presumption against bail for orders made by the Federal Court on appeal is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice. The High Court in *United Mexican States v Cabal*[3] has previously observed that to grant bail where a risk of flight exists would jeopardise Australia's relationship with the country seeking extradition and jeopardise our standing in the international community.

2.190 New section 49B, which will be inserted by item 84, will provide that any decision under the Extradition Act of a court or a magistrate to remand or release a person on bail may be made on such terms and conditions as the court or magistrate thinks fit. The presumption against bail unless there are special circumstances justifying such a release and new section 49B will assist Australia to meet its international obligations to secure the return of alleged offenders to face justice in the requesting country.

2.191 New subsection 21(2C) will provide that an order by the Federal Court, on appeal, committing a person to prison under paragraph 21(2A)(b) must be made by a warrant in the statutory form.

[3] (2001) 209 CLR 165; 183 ALR 645

Item 75 – Paragraph 21(6)(e)

2.192 Existing paragraph 21(6)(e) provides that where an extradition country applies for review of a magistrate's order or institutes any subsequent appeal under section 21 of the Extradition Act in circumstances where a person has been released because of an order by a magistrate or a court on appeal, the court to which the application or appeal is made may order the arrest of the person. This item will repeal existing paragraph 21(6)(e) and substitute it with a new paragraph 21(6)(e).

2.193 New paragraph 21(6)(e) will provide that the court may, if the person was released on bail, order both the discharge of the recognisances on which bail was granted and the arrest of the person. This additional order will be necessary as a consequence of the extension of bail to the later stages of the extradition process that will be made by item 70.

Item 76 – Subparagraph 21(6)(f)(i)

2.194 Existing subparagraph 21(6)(f)(i) provides that if, because of an order by a magistrate at first instance, or by a court on appeal, the person has been remanded in custody, the court to which an application for review or appeal has been made may order the person's release on bail until the review has been conducted or appeal heard. This item will repeal existing subparagraph 21(6)(f)(i) and substitute it with a new subparagraph 21(6)(f)(i), which will more generally provide that if an order for the release of the person has not been made, the court to which an application for review or appeal has been made may order the person's release on bail until the review has been conducted or appeal heard. It will simplify the existing subparagraph 21(6)(f)(i) by not specifying the source of the order not to release the person.

Item 77 – Subparagraph 21(6)(f)(iv)

2.195 Subparagraph 21(6)(f)(iv) provides that if a person has been remanded in custody, the court hearing an application for review or an appeal may, if there are special circumstances justifying such a course, order the release on bail of the person on such terms and conditions as the court thinks fits.

2.196 This item will remove the reference to 'on such terms and conditions as the court thinks fit' in subparagraph 21(6)(f)(iv). These words will not be necessary as a consequence of new section 49B, which will be inserted by item 84. New section 49B will provide that any decision under the Extradition Act of a court or a magistrate to remand or release a person on bail may be made on such terms and conditions as the court or magistrate thinks fit.

Item 78 – Subsection 22(1) (definition of *eligible person*)

2.197 This item will amend the definition of *eligible person* in subsection 22(1) by inserting the words 'or released on bail' after 'prison'. This is to reflect the changes which will be made by items 68 and 70, which will extend the availability of bail to a person following a determination by a magistrate that he or she is eligible for surrender or his or her consent to extradition.

Item 79 – Subsection 22(1) (paragraph (b) of definition of *eligible person*)

2.198 This item will repeal existing paragraph (b) of the definition of *eligible person* and replace it with a new paragraph (b). New paragraph (b) will update cross-references to relevant provisions under which a person may be committed to prison or released on bail by order of a magistrate. These updates are necessary as a consequence of new subsection 21(2A) (which will be inserted by item 74), which will replace the content of subparagraph 21(2)(b)(ii), and the changes to section 19 (which will be made by item 71).

2.199 As a result, a person will be an *eligible person* for the purposes of a surrender determination by the Attorney-General if they have been committed to prison or released on bail following a determination of eligibility for surrender by a magistrate under subsection 19(9) or a decision by the Federal Court to quash a magistrate's determination that the person is not eligible for surrender on appeal under subsection 21(2A) and no further appeal proceedings are being conducted or are available.

Item 80 – Subsection 22(5)

2.200 Subsection 22(5) of the Extradition Act requires the Attorney-General to order, in writing, the release of a person where the Attorney-General determines that the person is not to be surrendered to the extradition country.

2.201 This item will remove the reference to 'the Attorney-General shall order, in writing, the release of the person' in subsection 22(5) and replace it with 'the Attorney-General must, by notice in writing, direct a magistrate to order:

- if the person has been committed to prison—the release of the person; or
- if the person has been released on bail—the discharge of the recognisances on which bail was granted.'.

2.202 This amendment is a consequence of the extension of the availability of bail to a person following his or her determination of eligibility for surrender by a magistrate or his or her consent to extradition.

Item 81 – Paragraph 26(1)(c)

2.203 Section 26 provides for the form and execution of surrender warrants and temporary surrender warrants. Paragraph 26(1)(c) provides that a surrender warrant or a temporary surrender warrant shall require the person who is being held in custody to be released into the custody of a police officer. This allows the police officer to execute the surrender warrant. This item will insert 'if the person has been committed to prison—' before the reference to 'require' in paragraph 26(1)(c). This amendment is a consequence of the extension of the availability of bail to a person following a determination by a magistrate that he or she is eligible for surrender or his or her consent to extradition, which means that a person the subject of a surrender warrant may not always be held in custody. New paragraph 26(1)(ca), which will be inserted by item 82, will provide for the situation where a surrender warrant is executed against a person who is released on bail.

Item 82 – After paragraph 26(1)(c)

2.204 This item will insert new paragraph 26(1)(ca) after existing paragraph 26(1)(c) of the Extradition Act. New paragraph 26(1)(ca) will provide that if the person is released on bail, a surrender warrant or a temporary surrender warrant in relation to a person shall authorise any police officer to take the person into custody and to take the person before a magistrate for the purposes of the discharge of the recognisances on which bail was granted (if necessary). This item is a consequence of the extension of the availability of bail to a person following a determination by a magistrate that he or she is eligible for surrender or after his or her consent to extradition (items 68 and 70).

Item 83 – Subparagraph 35(6)(g)(iv)

2.205 Subparagraph 35(6)(g)(iv) of the Extradition Act provides that if a person has been remanded in custody in the execution of an extradition request from New Zealand, the court hearing the application for review or on appeal may, if there are special circumstances justifying such a course, order the release on bail of the person on such terms and conditions as the court thinks fits. This item will remove the words 'on such terms and conditions as the court thinks fit' from subparagraph 35(6)(g)(iv). These words will not be necessary as a consequence of new section 49B, which will be inserted by item 84. New section 49B will provide that any decision under the Extradition Act of a court or a magistrate to remand or release a person on bail may be made on such terms and conditions as the court or magistrate thinks fit.

Item 84 – After section 49A

2.206 This item will insert new sections 49B and 49C after existing section 49A. New section 49B will provide that a decision under the Extradition Act of a court or a magistrate to remand or release a person on bail may be made on such terms and conditions as the court or magistrate thinks fit. There will be various stages of the extradition process where a court or magistrate is able to release a person on bail including where a person has consented to extradition, where a magistrate determines that a person is eligible for surrender, and where the Federal Court quashes a determination of the magistrate that a person is not eligible for surrender, on appeal. New section 49B will cover all instances where a court or magistrate decides to remand or release a person on bail.

2.207 New section 49C extends the availability of bail to where a person seeks review of the Attorney-General's decision to surrender a person under subsection 22(2) or 15B (which will be inserted by item 24). Subsections 49C(1) and 49C(2) will provide that if the Attorney-General determines that a person is to be surrendered, and the person applies to a court for judicial review of the determination, the court to which the application is made, or any court hearing a subsequent appeal, may order the release of the person on bail until the application has been determined or the appeal has been heard. Subsection 49C(3) provides that a court must not release a person on bail unless there are special circumstances justifying such release. Maintaining this presumption against bail where a person seeks review of the Attorney-General's decision to surrender a person is appropriate given the serious flight risk posed in extradition matters and Australia's international obligations to secure the return of alleged offenders to face justice in the requesting country. The High Court in *United*

Mexican States v Cabal[4] has previously observed that to grant bail where a risk of flight exists would jeopardise Australia's relationship with the country seeking extradition and jeopardise our standing in the international community.

2.208 New section 49B will provide that any decision under the Extradition Act of a court or a magistrate to remand or release a person on bail may be made on such terms and conditions as the court or magistrate thinks fit. The presumption against bail unless there are special circumstances justifying such a release and new section 49B will assist Australia to meet its international obligations to secure the return of alleged offenders to face justice in the requesting country.

Item 85 – Application

2.209 This item will provide that the amendments of subsections 17(2) and (3) of the Extradition Act, which will be made by items 63, 64, 65 and 66 will only apply to a person who is remanded under section 15 of the Extradition Act on or after the commencement of this item. This item will commence on a date to be fixed by Proclamation.

Division 9—Other minor technical amendments

Overview

2.210 Division 9 will make a series of minor and technical amendments to the Extradition Act. A number of these amendments will simplify the language of the Extradition Act and rectify technical drafting issues.

Extradition Act 1988

Item 86 – Section 5

2.211 This item will insert a definition of *extraditable person* in section 5 to have the meaning given by section 6. This will correct a previous omission to define this term.

Item 87 – Section 5

2.212 This item will insert a definition of *extradition arrest warrant* in section 5 to mean a warrant issued under section 12. The inclusion of this new definition is a consequence of items 94, 96, and 98, which will change references to 'a provisional arrest warrant' in Part II of the Extradition Act to refer to 'an extradition arrest warrant'.

Item 88 – Section 5 (at the end of paragraph (a) of the definition of *extradition country*)

2.213 This item will add 'or' at the end of paragraph (a) of the definition of *extradition country* to correct a previous typographical oversight.

[4] (2001) 209 CLR 165; 183 ALR 645

Item 89 – Section 5 (subparagraph (b)(ii) of the definition of *extradition country*)

2.214 This item will remove the reference to 'responsible; and', and substitute it with 'responsible; or' in subparagraph (b)(ii) of the definition of *extradition country*. This will correct a previous typographical oversight.

Item 90 – Section 5

2.215 This item will insert a definition of *extradition objection* to have the meaning given by section 7. This will correct a previous omission to define this term.

Item 91 – Section 5 (definition of *provisional arrest warrant*)

2.216 This item will repeal the existing definition of *provisional arrest warrant* in section 5 of the Extradition Act, and substitute it with a new definition to mean a warrant issued under section 29. The new definition will exclude warrants issued under section 12, for the purposes of Part II of the Extradition Act (which covers extradition from Australia to extradition countries other than New Zealand). The amendment in this item is a consequence of items 94, 96, and 98, which will change all references to 'a provisional arrest warrant' in Part II to refer to 'an extradition arrest warrant'.

Item 92 – Section 5 (before subparagraph (b)(i) of the definition of *surrender warrant*)

2.217 Existing subparagraph (b)(i) of the definition of *surrender warrant* in section 5 provides that, where the expression is used in Part III of the Extradition Act, a *surrender warrant* means a warrant issued or required to be issued under paragraph 34(1)(c).

2.218 This item will insert a new subparagraph (b)(ia) before subparagraph (b)(i) of the definition of *surrender warrant*. New subparagraph (b)(ia) will provide that a surrender warrant when referred to in Part III will also mean 'a warrant issued, or required to be issued, under subparagraph 33A(2)(b)(i)'. This is a warrant issued following a person consenting to surrender to New Zealand.

Item 93 – At the end of section 12

2.219 Subsection 12(3) provides that where a magistrate has issued a provisional arrest warrant, but the person has not yet been arrested under the warrant and the Attorney-General decides not to proceed with the extradition process or considers for any other reason that the warrant should be cancelled, the Attorney-General must by notice in writing in the statutory form, direct a magistrate to cancel the warrant. This item will insert a new subsection 12(4) at the end of existing section 12. New subsection 12(4) will provide that a notice given under subsection 12(3) is not a legislative instrument. This provision is intended to clarify any existing uncertainty about whether a notice given under subsection 12(3) is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

2.220 This item will also replace the existing heading for section 12, 'Provisional arrest warrants', with 'Extradition arrest warrants'. Section 12 enables a magistrate to issue a warrant for a person's arrest either *before or after* a full formal extradition request has been received by Australia. Generally, in an international context, 'provisional arrest' refers to circumstances in which a person is arrested in urgent circumstances *before* receipt of a full

extradition request. Therefore, the heading for section 12, 'provisional arrest warrants', will be changed to 'extradition arrest warrants' to avoid any implication that warrants issued under section 12 are limited to those issued in urgent circumstances prior to the Attorney-General issuing a section 16 notice.

Item 94 – Paragraphs 13(1)(a) and (2)(a)

2.221 This item will remove the references to 'a provisional arrest warrant' in paragraphs 13(1)(a) and 13(2)(a) and replace them with 'an extradition arrest warrant'. The references to 'provisional arrest warrant' in these paragraphs refer to a warrant issued under section 12. Section 12 enables a magistrate to issue a warrant for a person's arrest either *before or after* a full formal extradition request has been received by Australia. Generally, in an international context, 'provisional arrest' refers to circumstances in which a person is arrested in urgent circumstances *before* receipt of a full extradition request.

2.222 Item 93 will change the heading of section 12 to refer to extradition arrest warrants to avoid any implication that warrants issued under section 12 are limited to those issued in urgent circumstances prior to the Attorney-General issuing a section 16 notice. As a consequence of the change that will be made by item 93, this item will change references to 'provisional arrest warrants' in paragraphs 13(1)(a) and 13(2)(a) to 'extradition arrest warrants'.

Item 95 – At the end of section 13

2.223 Subsection 13(5) provides that a police officer may retain any property or thing seized upon or following the arrest of a person under a provisional arrest warrant pending any direction from the Attorney-General as to the manner in which the thing is to be dealt with. This item will add a new subsection 13(8) at the end of existing section 13. New subsection 13(8) provides that if a direction under subsection 13(5) is given in writing, the direction is not a legislative instrument. This provision is intended to clarify any existing uncertainty about whether a direction given under subsection 13(5) is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 96 – Paragraph 14(1)(a)

2.224 This item will remove the reference to 'a provisional arrest warrant' in paragraph 14(1)(a) and substitute it with 'an extradition arrest warrant'. The reference to 'provisional arrest warrant' in paragraph 14(1)(a) refers to a warrant issued under section 12. Section 12 enables a magistrate to issue a warrant for a person's arrest either *before or after* a full formal extradition request has been received by Australia. Generally, in an international context, 'provisional arrest' refers to circumstances in which a person is arrested in urgent circumstances *before* receipt of a full extradition request.

2.225 Item 93 will change the heading of section 12 to refer to extradition arrest warrants to avoid any implication that warrants issued under section 12 are limited to those issued in urgent circumstances prior to the Attorney-General issuing a section 16 notice. As a consequence of the change that will be made by item 93, this item will change the reference to 'provisional arrest warrant' in paragraph 14(1)(a) to 'extradition arrest warrant'.

Item 97 – After subsection 14(5)

2.226 Subsection 14(5) provides that where a police officer seizes a thing in the execution of a search and seizure warrant under section 14, the police officer may retain the thing pending any direction from the Attorney-General as to the manner in which it is to be dealt with. This item will insert a new subsection 14(5A) after existing subsection 14(5). New subsection 14(5A) provides that if a direction under subsection 14(5) is given in writing, the direction is not a legislative instrument. This provision is intended to clarify any existing uncertainty about whether a direction given under subsection 14(5) is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 98 – Subsection 15(1)

2.227 This item will remove the reference to 'a provisional arrest warrant' in subsection 15(1) and replace it with 'an extradition arrest warrant'. The reference to 'provisional arrest warrant' in subsection 15(1) refers to a warrant issued under section 12. Section 12 enables a magistrate to issue a warrant for a person's arrest either *before or after* a full formal extradition request has been received by Australia. Generally, in an international context, 'provisional arrest' refers to circumstances in which a person is arrested in urgent circumstances *before* receipt of a full extradition request.

2.228 Item 93 will change the heading of section 12 to refer to an extradition arrest warrant to avoid any implication that warrants issued under section 12 are limited to those issued in urgent circumstances prior to the Attorney-General issuing a section 16 notice. As a consequence of the change that will be made by item 93, this item will change the reference to 'a provisional arrest warrant' in subsection 15(1) to 'an extradition arrest warrant'.

Item 99 – At the end of section 16

2.229 Subsection 16(1) provides that where the Attorney-General receives an extradition request, he or she may give a notice to a magistrate stating that the request has been received. This item will add a new subsection 16(4) at the end of existing section 16. New subsection 16(4) will provide that a notice given under subsection 16(1) is not a legislative instrument. This provision is intended to clarify any existing uncertainty about whether a notice given under subsection 16(1) is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 100 – At the end of section 17

2.230 Subsection 17(1) provides that where a person is on remand pending the Attorney-General's decision whether to issue a notice of receipt of the formal extradition request, and the Attorney-General decides not to issue a notice, or considers for any other reason that the remand should cease, the Attorney-General must by notice in writing direct a magistrate to release the person from custody or discharge any conditions on which bail was granted (whichever is applicable). This item will add a new subsection 17(6) at the end of existing section 17. New subsection 17(6) will provide that a notice given under subsection 17(1) is not a legislative instrument. This provision is intended to clarify any existing uncertainty about whether a notice given under subsection 17(1) is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 101 – Paragraph 21(6)(d)

2.231 Existing paragraph 21(6)(d) provides that where a person or the extradition country applies for a review of the magistrate's order determining whether a person is eligible for surrender, or institutes a subsequent appeal, the court to which the application or appeal is made must only have regard to the material that was before the magistrate. This item will insert 'subject to section 21A' before the reference to 'the court' in paragraph 21(6)(d). This amendment is a consequence of new section 21A (which will be inserted by item 102). New section 21A will make it clear that if a review court considers evidence was wrongly excluded in the extradition proceedings, the review court may consider the wrongly excluded evidence as well as further evidence or submissions directly relating to the excluded evidence.

2.232 The effect of this amendment is that the requirement for a review court to 'have regard only to the material that was before the magistrate' during section 19 proceedings is subject to new section 21A.

Item 102 – After section 21

2.233 Paragraph 21(6)(d) provides that where a person or the extradition country applies for review of a magistrate's decision about eligibility for surrender, the review court may 'have regard only to the material that was before the magistrate' during the section 19 proceedings. While it is likely that the review court would interpret paragraph 21(6)(d) as enabling the court to consider material that was 'before' the magistrate but wrongly excluded, it is not clear whether the review court could then hear further submissions on the wrongly excluded material. For example, if the review court were able to consider material tendered by the person but wrongly excluded by the magistrate, it is not clear under paragraph 21(6)(d) whether the requesting country could adduce any further evidence, or make any submissions relating to the wrongly excluded material.

2.234 This item will insert a new section 21A after existing section 21, which will make it clear that if a review court considers evidence was wrongly excluded in the extradition proceedings, the review court may receive the wrongly excluded evidence as well as further evidence or submissions directly relating to the excluded evidence.

2.235 Subsection 21A(1) will provide that section 21A applies if a person or extradition country applies under subsection 21(1) for a review of an order of a magistrate, appeals under subsection 21(3) against an order made on that review, or appeals to the High Court against an order made on that appeal. This will cover all possible stages of the appeal process.

2.236 Subsection 21A(2) will provide that if a party to the relevant proceedings under section 19 was prevented from adducing evidence (the excluded evidence) in the proceedings, and the review court considers that the party should have been permitted to adduce the excluded evidence, the court may receive the excluded evidence and further evidence, or submissions, that directly relate to the excluded evidence.

2.237 Subsection 21A(3) will provide that if a document before a review court contains a deficiency of relevance to the review or appeal, and the court considers the deficiency to be of a minor nature, the court must adjourn the proceedings for such period as is necessary to

2.238 Subsection 21A(4) will provide that section 21A does not entitle the person to whom the proceedings relate to adduce, or the court to receive, evidence to contradict an allegation that the person has engaged in conduct constituting an extradition offence for which the surrender of the person is sought. This is intended to maintain the 'no evidence' standard in extradition proceedings as currently applies in proceedings under section 19. The application of the 'no evidence' standard means that an extradition request does not need to include actual evidence of the alleged offence (for example, sworn affidavits). The Extradition Act only requires that a requesting country provide the warrant for arrest, a statement setting out a description of the offence and the applicable penalty and a statement setting out the alleged conduct constituting the offence in an extradition request.

2.239 This standard of information required for extradition requests to Australia is in line with the United Nations Model Treaty on Extradition. It has allowed Australia to enter into extradition relations with many countries that would otherwise have been unable to conduct extradition with Australia, particularly civil code jurisdictions

2.240 Subsection 21A(5) will provide that in section 21A, ***review court*** means the court to which the application or appeal was made.

Item 103 – At the end of paragraph 22(3)(a)

2.241 This item will add 'and' at the end of paragraph 22(3)(a) to correct a previous stylistic error.

Item 104 – Paragraph 22(3)(b)

2.242 Paragraph 22(3)(b) currently requires the Attorney-General to be satisfied that a person will not be subjected to torture on surrender to an extradition country before making a surrender determination. The Explanatory Memorandum to the Extradition Act makes clear that this is intended to implement Australia's obligations under the UNCAT.

2.243 This item will repeal existing paragraph 22(3)(b) and substitute it with a new paragraph 22(3)(b). The wording in this new paragraph 22(3)(b) will align with Australia's non-refoulement obligations under Article 3 of the UNCAT. The revised wording will provide that the Attorney-General may only make a surrender determination if he or she does not have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture. In determining whether there are substantial grounds for believing a person would be in danger of being subjected to torture, the Attorney-General will take into account relevant considerations, including any consistent patterns of gross, flagrant or mass violations of humans rights consistent with Article 3(2) of the UNCAT.

Item 105 – At the end of paragraphs 22(3)(c) and (d)

2.244 This item will add 'and' at the end of paragraphs 22(3)(c) and 22(3)(d) to correct a previous stylistic error.

Item 106 – At the end of paragraph 22(4)(a)

2.245 This item will add 'or' at the end of paragraph 22(4)(a) to correct a previous stylistic error.

Item 107 – At the end of subparagraphs 22(4)(d)(i) and (ii)

2.246 This item will add 'or' at the end of subparagraphs 22(4)(d)(i) and 22(4)(d)(ii) to correct a previous stylistic error.

Item 108 – At the end of section 22

2.247 Subsection 22(2) provides that the Attorney-General shall, as soon as reasonably practicable after a person becomes eligible for surrender, determine whether the person is to be surrendered. Subsection 22(5) provides that where the Attorney-General determines that the eligible person is not be surrendered to the extradition country, the Attorney-General shall order, in writing, the release of that person. This item will add new subsections 22(6) and 22(7) at the end of section 22. Subsection 22(6) will provide that if a determination under subsection 22(2) is made in writing, the determination is not a legislative instrument. Subsection 22(7) will provide that an order made under subsection 22(5) is not a legislative instrument. These new provisions are intended to clarify any existing uncertainty about whether determinations given under subsections 22(2) or 22(5) are legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 109 – At the end of paragraphs 24(1)(a) and (b)

2.248 This item will add 'and' at the end of paragraphs 24(1)(a) and 24(1)(b) to correct a previous stylistic error.

Item 110 – At the end of subparagraph 24(3)(b)(i)

2.249 This item will add 'or' at the end of paragraph 24(3)(b)(i) to correct a previous stylistic error.

Item 111 – At the end of section 24

2.250 This item will add new subsection 24(6) at the end of existing section 24. New subsection 24(6) will provide that if the Attorney-General informs an extradition country, in writing, in accordance with subsection 24(4) that an undertaking referred to in subparagraph 24(1)(d)(ii) is no longer required to be complied with, the written instrument is not a legislative instrument. This provision is intended to clarify any existing uncertainty about whether the written instrument under subsection 24(4) is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 112 – At the end of subparagraph 25(2)(a)(i)

2.251 This item will add 'or' at the end of subparagraph 25(2)(a)(i) to correct a previous stylistic error.

Item 113 – Paragraph 26(1)(c)

2.252 Existing paragraph 26(1)(c) provides that a surrender warrant or temporary surrender warrant (for extradition from Australia to an extradition country) must require that a person held in custody be released into the custody of 'a police officer' for the purpose of surrendering the person to the foreign country. Paragraph 26(1)(d) provides that a surrender warrant or temporary surrender warrant must authorise 'the police officer' to transport the person in custody for the purposes of enabling the person to be placed into the custody of the foreign escort officer and transported out of Australia.

2.253 This item will remove the reference to 'a police officer' in paragraph 26(1)(c) and replace it with 'any police officer'. This is because it is not always practicable for the same police officer to transport a person in custody through to the point of surrender to the foreign escort. This amendment, together with the amendment in item 114, will ensure that the police officer who takes custody of the person when released from prison is able to transfer the person into the custody of another police officer if necessary for the purposes of executing a surrender warrant.

Item 114 – Paragraph 26(1)(d)

2.254 Paragraph 26(1)(d) provides that a surrender warrant or temporary surrender warrant must authorise 'the police officer' (who took custody of the person when released from prison) to transport the person in custody for the purpose of enabling the person to be placed in the custody of the foreign escort and transported out of Australia. However, it is not always practicable for the same police officer to transport a person in custody through to the point of surrender to the foreign escort.

2.255 This item will remove the reference to 'the police officer to transport the eligible person in custody, and, if necessary or convenient, to detain the eligible person in custody' and replace it with 'the eligible person to be transported in custody, and if necessary or convenient, detained in custody, by any police officer'. This amendment, together with the amendment in item 113, will ensure that the police officer who takes custody of the person when released from prison is able to transfer the person into the custody of another police officer if necessary for the purposes of executing a surrender warrant.

Item 115 – Paragraph 26(1)(d)

2.256 Paragraph 26(1)(d) provides that a surrender warrant or temporary surrender warrant must authorise a police officer to transport the person in custody for the purposes of enabling the person to be placed in the custody of a specified person to transport the person out of Australia. This specified person is currently referred to as a 'foreign escort officer'.

2.257 This item will remove the reference to '(in this subsection called the *foreign escort officer*)' in paragraph 26(1)(d) and replace it with 'or a person included in a specified class (in this subsection called the escort officer)'. The phrase 'foreign escort officer' suggests the person will always be an officer of the foreign country. However, in some cases, Australian authorities may escort the person to the foreign country. In some situations the police officer may also be the escort officer for the purpose of the warrant. This amendment will recognise that Australian officers may escort the person to the requesting country.

Item 116 – Paragraph 26(1)(e)

2.258 Paragraph 26(1)(e) provides that a surrender warrant or temporary surrender warrant shall authorise the foreign escort officer to transport the person in custody out of Australia to a place in the extradition country for the purpose of surrendering the person. This item will remove the reference to 'foreign' in paragraph 26(1)(e). The existing phrase 'foreign escort officer' in this paragraph suggests the person will always be an officer of the foreign country. However, in some cases, Australian authorities may escort the person to the foreign country. In some situations the police officer may also be the escort officer for the purpose of the warrant.

Item 117 – After subsection 26(1)

2.259 This item inserts new subsection 26(1A) after existing subsection 26(1). While subsection 26(1) sets out what the warrant authorises, it does not specify when it ceases to be in force. New subsection 26(1A) will provide that a surrender warrant or a temporary surrender warrant remains in force until the eligible person is surrendered, at a place in the extradition country, to a person appointed by the extradition country to receive the eligible person.

Item 118 – Section 27

2.260 This item will insert '(1)' before the reference to 'where' in section 27. This is a consequence of new subsection 27(2), which will be inserted by item 119.

Item 119 – At the end of section 27

2.261 Subsection 27(1) provides that where property or a thing is seized upon arrest or in the execution of a search and seizure warrant, the Attorney-General may direct, by notice in writing, that the property or thing be sent to the extradition country. This item will insert a new subsection 27(2) at the end of existing section 27. New subsection 27(2) will provide that a notice given under subsection 27(1) is not a legislative instrument. This provision is intended to clarify any existing uncertainty about whether a notice given under subsection 27(1) is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 120 – At the end of section 30

2.262 Subsection 30(5) provides that a police officer may retain any property or thing seized upon arrest under an indorsed New Zealand warrant or a provisional arrest warrant pending any direction from the Attorney-General as to the manner in which the thing is to be dealt with. This item will insert a new subsection 30(8) at the end of existing section 30. New subsection 30(8) will provide that if a direction under subsection 30(5) is given in writing, the direction is not a legislative instrument. This provision is intended to clarify any existing uncertainty about whether a direction given under subsection 30(5) is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 121 – After subsection 31(5)

2.263 This item will insert a new subsection 31(5A) after existing subsection 31(5). New subsection 31(5A) provides that if a direction under subsection 31(5) is given in writing, the direction is not a legislative instrument. This provision is intended to clarify any existing uncertainty about whether a direction given under subsection 31(5A) is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 122 – Subsection 32(2)

2.264 This item will remove the reference to '34' in subsection 32(2) and replace it with '33A or 34, or both'. This will recognise that proceedings may take place under section 33A if a person consents to surrender.

Item 123 – Paragraph 33A(1)(b)

2.265 This item will remove the reference to 'and' in paragraph 33A(1)(b) as a consequence of the repeal of ensuing paragraph 33A(1)(c), which will be done by item 124.

Item 124 – Paragraph 33A(1)(c)

2.266 This item will repeal paragraph 33A(1)(c). Existing paragraph 33A(1)(c) allows a person to consent to be surrendered to New Zealand where a request has been made to a magistrate for proceedings to be conducted under section 34, determining whether the person should be surrendered. This will enable a person to consent to extradition to New Zealand earlier in the process, and not have to wait until surrender proceedings have been requested to be conducted. However, while enabling a person to consent at any earlier stage, this amendment will not remove any safeguards that currently apply where a person consents to being surrendered to New Zealand.

Item 125 – Paragraph 38(1)(a)

2.267 Paragraph 38(1)(a) provides that a surrender warrant or temporary surrender warrant (for extradition from Australia to New Zealand) must authorise 'a police officer' to take the person into custody, to transport the eligible person in custody and, if necessary or convenient, to detain the eligible person in custody for the purpose of enabling the person to be placed in the custody of a specified person (called the New Zealand escort officer) and transported out of Australia. However, it is not always practicable for the same police officer to transport a person in custody through to the point of surrender to the escort.

2.268 This item will remove the phrase 'a police officer to take the eligible person into custody, to transport the eligible person in custody and, if necessary or convenient, to detain the eligible person in custody' and replace it with 'the eligible person to be taken into custody, transported in custody and, if necessary or convenient, detained in custody, by any police officer'. This amendment, together with the amendment in item 126, will ensure that the police officer who takes custody of the person when released from prison is able to transfer the person into the custody of another police officer if necessary for the purposes of executing a surrender warrant.

Item 126 – Paragraph 38(1)(a)

2.269 Paragraph 38(1)(a) provides that a surrender warrant or temporary surrender warrant shall authorise a police officer to take the eligible person into custody, and transfer the person into the custody of a specified person (in this subsection called the New Zealand escort officer).

2.270 This item will remove '(in this subsection called the New Zealand escort officer)' and replace it with 'or a person included in a specified class (in this subsection called the escort officer)'. The phrase 'New Zealand escort officer' suggests the person will always be an officer from New Zealand. However, in some cases, Australian authorities may escort the person to New Zealand. In some situations the police officer may also be the escort officer for the purpose of the warrant. This amendment will recognise that Australian officers may escort the person.

Item 127 – Paragraph 38(1)(b)

2.271 Paragraph 38(1)(b) provides that a surrender warrant or temporary surrender warrant must authorise 'the New Zealand escort officer' to transport the person in custody out of Australia to a place in New Zealand for the purpose of surrendering the person to New Zealand.

2.272 This item will remove the first occurring reference to 'New Zealand' in paragraph 38(1)(b). The phrase 'New Zealand escort officer' in existing paragraph 38(1)(b) suggests the person will always be an officer from New Zealand. However, in some cases, Australian authorities may escort the person to New Zealand. In some situations the police officer may also be the escort officer for the purpose of the warrant. This amendment will recognise that Australian officers may escort the person.

Item 128 – After subsection 38(1)

2.273 This item will insert new subsection 38(1A) after existing subsection 38(1). New subsection 38(1A) provides that, subject to section 38 and subsection 33(3) of the *Acts Interpretation Act 1901*, a surrender warrant or a temporary surrender warrant remains in force until the eligible person is surrendered, at a place in New Zealand, to a person appointed by New Zealand to receive the eligible person. Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument, the power shall, unless the contrary intention appears, be construed as including a power to repeal, rescind, revoke, amend, or vary any such instrument.

Item 129 – Section 39

2.274 This item inserts '(1)' before the reference to 'where' in section 39 as a consequence of new subsection 39(2), which will be inserted by item 130.

Item 130 – At the end of section 39

2.275 Subsection 39(1) provides that where property or a thing is seized upon arrest under an indorsed New Zealand warrant or a provisional arrest warrant or in the execution of a search and seizure warrant, the Attorney-General may direct, by notice in writing, that the

property or thing be sent to New Zealand. This item inserts a new subsection 39(2) at the end of section 39. New subsection 39(2) will provide that a notice given under subsection 39(1) is not a legislative instrument. This provision is intended to clarify any existing uncertainty about whether a notice given under subsection 39(1) is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 131 – At the end of section 43

2.276 Subsection 43(1) provides that where the Attorney-General suspects that a person is an extraditable person in relation to Australia, the Attorney-General may, by notice in writing in the statutory form, authorise the taking of evidence for use in any proceedings for the surrender of the person to Australia. This item inserts a new subsection 43(4) at the end of section 43. New subsection 43(4) will provide that a notice given under subsection 43(1) is not a legislative instrument. This provision is intended to clarify any existing uncertainty about whether a notice given under section 43 is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 132 – At the end of section 44

2.277 Section 44 provides for the situation where a person is surrendered to Australia pursuant to an undertaking that Australia will return the person back to the country, following the trial of the person in Australia for particular offences. Under section 44, a person who has been temporarily surrendered to Australia must be kept in custody unless the country that surrendered the person requests the release of the person, in which case the Attorney-General must order the release of the person. This item inserts new subsections 44(3), 44(4) and 44(5) at the end of existing section 44. Subsection 44(3) will provide that if the undertaking mentioned in subsection 44(1) is given in writing, the undertaking is not a legislative instrument. Subsection 44(4) will provide that an order made under paragraph 44(1)(d) is not a legislative instrument. Subsection 44(5) will provide that if an order under subsection 44(2) is made in writing, the order is not a legislative instrument. These new provisions are intended to clarify any existing uncertainty about whether orders under subsections 44(1) and 44(2) are legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 133 – At the end of section 45

2.278 Subsection 45(3D) (which will be inserted by item 47) will require the Attorney-General's consent for a person to be prosecuted in Australia in respect of conduct constituting an extradition offence (or extradition offences) instead of being surrendered to an extradition country. This item inserts a new subsection 45(6) at the end of section 45. New subsection 45(6) will provide that a consent given under subsection 45(3D) is not a legislative instrument. This provision is intended to ensure there is no uncertainty about whether a consent given under subsection 45(3D) is a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 134 – Section 47

2.279 This item removes the reference to 'A provisional arrest warrant, within the meaning of Part II or III' and replaces it with 'An extradition arrest warrant, a provisional arrest

warrant'. This is a consequence of amendments which will change references to 'a provisional arrest warrant' in Part II to 'an extradition arrest warrant' (items 94, 96 and 98).

Item 135 – At the end of section 48

2.280 Section 48 allows Australia to facilitate the transport of a person through Australia for the purposes of the person's extradition from another country to a third country. This includes providing for the Attorney-General to authorise, in writing, a magistrate to issue a warrant to hold the transferee in custody under subparagraph 48(1)(b)(iv) or direct any person having custody of the transferee to release the transferee from custody under subparagraph 48(1)(b)(v). This item inserts new subsections 48(3) and 48(4) at the end of section 48. New subsection 48(3) provides that an authorisation given under subparagraph 48(1)(b)(iv) is not a legislative instrument. Subsection 48(4) provides that if a direction under subparagraph 48(1)(b)(v) is given in writing, the direction is not a legislative instrument. These provisions are intended to clarify any existing uncertainty about whether an authorisation given under subparagraph 48(1)(b)(iv) or a direction given in writing under subparagraph 48(1)(b)(v) are legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 136 – Paragraph 55(d)

2.281 This item will remove the reference to 'prescribing penalties not exceeding a fine of $2,000' in paragraph 55(d) and replace it with 'penalties not exceeding a fine of 20 penalty units'. This item will remove the reference to 'prescribing' at the beginning of the paragraph as it is already referred to leading in to paragraph 55(d). This item will also ensure the regulations can prescribe penalties for offences against the regulations by reference to a maximum number of penalty units rather than a maximum monetary amount. This reflects modern drafting practice for penalties. A penalty unit is defined in section 4AA of the Crimes Act and is $110.

Item 137 – Application—section 21A of the Extradition Act 1988 etc.

2.282 This item will provide that section 21A of the Extradition Act, which will be inserted by item 102, will apply in relation to an application for review or appeal referred to in subsection 21A(1) that is made on or after the commencement of this item, whether or not the relevant proceedings under section 19 were instituted before or after that commencement.

Item 138 – Application of amendments made by items 122, 123 and 124

2.283 This item will provide that the amendments that will be made by items 122, 123, and 124 of this Schedule will apply in relation to persons in respect of whom an indorsed New Zealand warrant has been obtained on or after the commencement of this item.

Item 139 – Application of amendment made by item 136

2.284 This item will provide that the amendment that will be made by item 136 of this Schedule will apply to a penalty imposed on or after the commencement of this item, whether or not the relevant proceedings were instituted before, on or after that commencement.

SCHEDULE 3 – AMENDMENTS RELATING TO PROVIDING MUTUAL ASSISTANCE IN CRIMINAL MATTERS

GENERAL OUTLINE

3.1 Schedule 3 contains a range of amendments to improve the operation of the MA Act.

3.2 Part 1 of Schedule 3 will amend section 8 of the MA Act, which sets out the grounds on which the Attorney-General may or must refuse a mutual assistance request from a foreign country. These amendments will expand the operation of the grounds of refusal to ensure they apply at the investigation stage and to proceeds of crime related requests. The amendments will also expand the discrimination ground of refusal to include discrimination on the basis of sexual orientation, strengthen the death penalty ground of refusal and insert an express mandatory ground for refusal where there are substantial grounds to believe the provision of the assistance would result in a person being subjected to torture.

3.3 Part 2 of Schedule 3 will improve the operation of the 'take evidence' provisions in the MA Act. In particular, this Part will amend the MA Act to clarify the application of sections 12 and 13 of the MA Act to requests for witnesses to give evidence directly to a courtroom in the requesting country by live video link. The amendments will also more clearly set out the role of the Australian magistrate in conducting the proceedings in cooperation with the foreign court, and clarify the powers that may be exercised by a magistrate in such proceedings.

3.4 Parts 3 and 4 of Schedule 3 will expand the range of law enforcement tools that are available for foreign law enforcement purposes. Division 1 of Part 3 will amend the MA Act and the TIA Act so that section 13A of the MA Act is available for the provision of TI product and covertly accessed stored communications material that was originally obtained for domestic purposes. This material can currently only be provided under take evidence proceedings under section 13 which can be resource and time intensive. Division 2 of Part 3 will amend the MA Act and the SD Act to enable Australia to make and receive requests relating to the use of surveillance devices. While Australia is able to make requests for a country to provide this type of assistance under the executive power, the amendment would ensure express provision is made in the legislation, consistent with other types of assistance. The power to use a surveillance device for foreign purposes will be limited to circumstances where a surveillance device could be used for domestic investigations (generally offences that carry at least three years imprisonment).

3.5 Currently, Australia cannot conduct a compulsory forensic procedure on a suspect in relation to a foreign serious offence in response to a request from a foreign country. Part 4 of Schedule 3 will amend the MA Act and the Crimes Act to enable the AFP, or a State or Territory police force, to carry out a forensic procedure on a suspect in relation to a foreign serious offence, either with informed consent or compulsorily, at the request of a foreign country. Part 4 would also clarify the procedures for obtaining forensic material from a volunteer on behalf of a foreign law enforcement agency.

3.6 Part 5 of Schedule 3 will make a range of amendments to Part VI of the MA Act to improve the operation of the proceeds of crime provisions. These amendments will enable Australia to register non-conviction based proceeds of crime orders from any country and

streamline existing processes for providing certain forms of investigative assistance relating to proceeds of crime to other countries.

3.7 Part 6 of Schedule 3 will make a range of miscellaneous amendments to the MA Act to improve the operation of the MA Act.

PART 1 – GROUNDS OF REFUSAL

3.8 Part 1 of Schedule 3 will make a range of amendments to section 8 of the MA Act, which sets out the grounds on which the Attorney-General may or must refuse a mutual assistance request from a foreign country.

Mutual Assistance in Criminal Matters Act 1987

Items 1 and 2 – Paragraphs 8(1)(a) and 8(1)(b)

3.9 Currently, paragraphs 8(1)(a) and (b) of the MA Act provide that the Attorney-General must refuse a request for assistance if it relates to the prosecution or punishment of a person for a political offence, or if there are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for a political offence. The term 'political offence' is defined by reference to the Extradition Act.

3.10 In practice, a large portion of mutual assistance requests seek assistance during the investigation stage (that is, prior to prosecution or punishment). This means that when mutual assistance requests are received for assistance at the investigation stage, paragraphs 8(1)(a) and 8(1)(b) are not strictly applicable in considering whether to provide that assistance.

3.11 Item 1 will insert the word 'investigation' in paragraph 8(1)(a) and item 2 will insert the word 'investigating' in paragraph 8(1)(b). These amendments will expand the operation of paragraphs 8(1)(a) and 8(1)(b) to provide that the Attorney-General must refuse a request for assistance if it relates to the *investigation*, prosecution or punishment of a person for a political offence, or if there are substantial grounds for believing that the request has been made with a view to *investigating*, prosecuting or punishing a person for a political offence.

3.12 These amendments will ensure that the grounds of refusal in paragraphs 8(1)(a) and 8(1)(b) apply to requests for assistance made during the investigation of an offence, affording greater protections to persons who may be the subject of a request.

Item 3 – After paragraph 8(1)(b)

3.13 Subsection 8(1) of the MA Act sets out the circumstances in which the Attorney-General must refuse a foreign country's request for assistance. Currently, most of these grounds for refusal refer to the prosecution or punishment for *an offence*. However, proceeds of crime action may be non-conviction based, meaning that a prosecution has not, and may not, commence. Further, proceeds action may be taken or pursued after a trial concludes or independently of a trial process. Therefore, the request may not relate to the prosecution or punishment of an offence.

3.14 This item will insert proposed paragraph (ba) in subsection 8(1) to clarify the application of the political offence grounds for refusal in subsection 8(1) of the MA Act to requests for assistance relating to proceeds of crime.

3.15 The insertion of proposed paragraph 8(1)(ba) will extend the circumstances in which the Attorney-General must refuse a request by requiring the Attorney-General to refuse a request relating to a foreign order in relation to an offence, that is, or is by reason of the circumstances in which it is alleged to have been committed, or was committed, a political offence. A foreign order is defined in subsection 3(1) of the MA Act as a foreign forfeiture order (an order relating to the forfeiture of property in respect of an offence against the foreign country's law), a foreign pecuniary penalty order (an order imposing a pecuniary penalty in respect of an offence against a foreign law) or a foreign restraining order (an order made for the purposes of preserving property including preventing dealings with the property or freezing the property). A request will 'relate' to a foreign order even if the foreign order has not yet been sought – for example, assistance is required to determine whether a foreign order should be sought, or a foreign country requests that an Australian restraining order is sought to ensure assets are not dissipated before a foreign country can seek an order.

3.16 This will ensure that the grounds of refusal for a political offence clearly apply to requests for assistance in relation to the recovery of the proceeds or an instrument of a political offence.

Items 4 and 5 – Paragraph 8(1)(c)

3.17 Currently, paragraph 8(1)(c) of the MA Act provides that the Attorney-General must refuse a foreign country's request for assistance if there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise prejudicing a person on account of his or her race, sex, religion, nationality or political opinions.

Item 4

3.18 In practice, a large portion of mutual assistance requests seek assistance during the investigation stage of the offence. This means that when mutual assistance requests are received for assistance at the investigation stage, paragraph 8(1)(c) is not strictly applicable in considering whether to provide assistance.

3.19 This item will insert the word 'investigating' in paragraph 8(1)(c). The insertion of the word 'investigating' will expand paragraph 8(1)(c) to provide that the Attorney-General must refuse a country's request for assistance if there are substantial grounds for believing that the request was made for the purpose of *investigating*, prosecuting, punishing or otherwise prejudicing a person on account of his or her race, sex, religion, nationality or political opinions.

3.20 This amendment will ensure that the grounds for refusal in paragraph 8(1)(c) apply to requests for assistance made during the investigation of an offence, affording greater protections to persons who may be the subject of a request.

Item 5

3.21 Under paragraph 8(1)(c) of the MA Act, the Attorney-General must refuse a request for assistance if there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise prejudicing a person on account of his or her race, sex, religion, nationality or political opinions.

3.22 This item will insert the words 'sexual orientation' in paragraph 8(1)(c). The insertion of the words 'sexual orientation' will expand this provision to provide that the Attorney-General must refuse a country's request for assistance if there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise prejudicing a person on account of his or her sexual orientation, in addition to the other grounds of discrimination currently set out in the paragraph.

3.23 The proposed amendment will ensure that a request made solely for the purpose of persecuting someone on the basis of their sexual orientation must be refused. This demonstrates Australia's firm position against this type of discrimination.

3.24 This amendment is consistent with the proposed amendment to the extradition objections in section 7 of the Extradition Act (see Division 2 of Part 3 of Schedule 2).

Item 6 – After paragraph 8(1)(c)

3.25 Currently, the Attorney-General has a discretion to refuse to provide assistance where the provision of the assistance would, or would be likely to, prejudice the safety of any person. Requests raising concerns about torture can and would be refused on the basis of this ground for refusal. However, there is no explicit legal protection against the provision of assistance in such cases.

3.26 This item will insert proposed paragraph (ca) in subsection 8(1) of the MA Act. Proposed paragraph 8(1)(ca) will provide that the Attorney-General must refuse a request where there are substantial grounds for believing that, if the request was granted, the person would be in danger of being subjected to torture. The wording is consistent with the proposed change to the Extradition Act (see Division 9 of Part 3 of Schedule 2).

3.27 This amendment will enhance protections in cases where there are torture concerns and affirm Australia's strong position against torture. It will also be consistent with the recommendations made by the UNCAT that mutual assistance be refused where there are substantial grounds to believe that if the request was approved, the person would be in danger of being subjected to torture. What would be considered to be torture would be determined in the particular circumstances of each case and with reference to the UNCAT. This amendment will operate in addition to paragraph 8(2)(e) of the MA Act, which contains a discretionary ground for refusing assistance if the provision of the assistance would, or would be likely to, prejudice the safety of any person.

Item 7 – Paragraph 8(1)(d)

3.28 Currently, paragraph 8(1)(d) of the MA Act provides that a request must be refused if it relates to the prosecution or punishment of a person in respect of an act or omission that

would have constituted an offence under the military law of Australia, but not under the ordinary criminal law of Australia, had it occurred in Australia.

3.29 In practice, a large portion of mutual assistance requests seek assistance during the investigation stage. This means that paragraph 8(1)(d) is not strictly applicable to such requests, as that paragraph only relates to the prosecution or punishment of a person, and not to the investigation of a person in respect of an act or omission that would have constituted a military offence in Australia.

3.30 This item will insert the word 'investigation' in paragraph 8(1)(d). The insertion of the word 'investigation' will expand this provision to provide that the Attorney-General must refuse a country's request for assistance if the request relates to the *investigation*, prosecution or punishment of a person in respect of an act or omission that would have constituted an offence under the military law of Australia, but not under the ordinary criminal law of Australia, had it occurred in Australia.

3.31 This amendment will ensure that the grounds of refusal in paragraph 8(1)(d) apply to requests for assistance made during the investigation of an offence, affording greater protections to persons who may be the subject of a request.

Item 8 – After paragraph 8(1)(d)

3.32 Subsection 8(1) of the MA Act sets out the circumstances in which the Attorney-General must refuse a foreign country's request for assistance. Currently, most of these grounds for refusal refer to the prosecution or punishment for an offence. However, proceeds action may be non-conviction based, meaning that a prosecution has not, and may not, commence. Further, proceeds action may be taken or pursued after a trial concludes or independently of a trial process. Therefore, the request may not relate to the prosecution or punishment of an offence.

3.33 This item will insert proposed paragraph (da) in subsection 8(1) to clarify the application of the ground for of refusal in paragraph 8(1)(d) of the MA Act to requests for assistance relating to proceeds of crime.

3.34 The insertion of proposed paragraph (da) will extend the circumstances in which the Attorney-General must refuse a request for assistance. Under new paragraph 8(1)(da), a request must be refused if the request relates to a foreign order relating to an offence and an act or omission constituting the offence, if the act or omission had occurred in Australia, would have constituted an offence under the military law of Australia, but not under the ordinary criminal law of Australia.

3.35 A foreign order is defined in subsection 3(1) of the MA Act as a foreign forfeiture order (an order relating to the forfeiture of property in respect of an offence against the foreign country's law), a foreign pecuniary penalty order (an order imposing a pecuniary penalty in respect of an offence against a foreign law) or a foreign restraining order (an order made for the purposes of preserving property including preventing dealings with the property or freezing the property). A request will 'relate' to a foreign order even if the foreign order has not yet been sought – for example, assistance is required to determine whether a foreign order should be sought, or a foreign country requests that an Australian restraining order is sought to ensure assets are not dissipated before a foreign country can seek an order.

3.36 This amendment will ensure that the ground for refusal for a military offence also applies to requests for assistance in relation to the restraint or confiscation of the proceeds or an instrument of an offence.

Item 9 – Paragraph 8(1)(e)

3.37 This item will remove the phrase '; or' which currently follows the word 'Territory' in paragraph 8(1)(e). This item will be consequential upon the repeal of paragraph 8(1)(f) (item 10). The repeal of paragraph 8(1)(f) will make the phrase '; or' unnecessary.

Item 10 – Paragraph 8(1)(f)

3.38 Paragraph 8(1)(f) of the MA Act provides that the Attorney-General must refuse a request where it relates to the prosecution of a person for an offence in a case where the person has previously been acquitted, pardoned or punished in the requesting country in respect of that offence, or another offence constituted by the same conduct. This reflects the principle known as 'double jeopardy'.

3.39 This item will repeal paragraph 8(1)(f). This item will be consequential upon item 14, which will insert paragraph 8(2)(c) to provide for double jeopardy to be a discretionary, rather than a mandatory, ground for refusal. Cases in which it might be appropriate to provide mutual assistance despite a double jeopardy issue include where there is fresh evidence that was not available at the original trial, or where there are other circumstances accepted in Australia as being exceptions to the double jeopardy principle.

Item 11 – Subsection 8(1A)

3.40 Subsection 8(1A) of the MA Act currently requires the Attorney-General to refuse a request for assistance if the request relates to the prosecution or punishment of a person *charged with*, or *convicted of*, an offence for which the death penalty may be imposed in the foreign country, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

3.41 This item will repeal existing subsection 8(1A) and replace it with a new provision. The new subsection 8(1A) will ensure the mandatory ground of refusal for death penalty offences also applies in circumstances in which a person has been *arrested or detained* on suspicion of committing an offence for which the death penalty may apply, regardless of whether formal charges have been laid.

3.42 This recognises that under some legal systems, a suspect may be formally charged with an offence later in the criminal justice process than in Australia. As a consequence, the suspect may be arrested or detained for a longer period of time before being formally charged.

3.43 As is the case in respect of existing subsection 8(1A), the 'special circumstances of the case' warranting assistance may include, but are not limited to, circumstances where the assistance is exculpatory in nature or where the requesting country has provided an undertaking that the death penalty will not be imposed, or if it is imposed, will not be carried out.

3.44 In addition, subsection 8(1B) of the MA Act will continue to enable the Attorney-General to refuse a request for assistance in circumstances where he or she believes that the provision of assistance may result in the death penalty being imposed on a person, and, after taking into consideration the interests of international criminal co-operation, he or she is of the opinion that in the circumstances of the case, the request should not be granted.

Item 12 – Paragraph 8(2)(a)

3.45 Currently, paragraph 8(2)(a) of the MA Act provides that the Attorney-General may refuse a request for assistance if he or she is of the opinion that the request relates to the prosecution or punishment of a person in respect of an act or omission that would not have constituted an offence against Australian law had it occurred in Australia. This is known as the principle of dual criminality.

3.46 In practice, a large portion of mutual assistance requests seek assistance during the investigation stage. This means that when mutual assistance requests are received for assistance at the investigation stage, paragraph 8(2)(a) is not strictly applicable in considering whether to provide that assistance.

3.47 This item will insert 'investigation' in paragraph 8(2)(a). The insertion of 'investigation' will expand the operation of paragraph 8(2)(a) to provide that the Attorney-General may refuse a request for assistance if he or she is of the opinion that it relates to the investigation, prosecution or punishment of a person in respect of an act or omission that would not have constituted an offence against Australian law had it occurred in Australia.

3.48 This amendment will ensure that the discretionary ground for refusal in paragraph 8(2)(a) applies to requests for assistance made during the investigation of an offence, affording greater protections to persons who may be the subject of a request.

Item 13 – Paragraph 8(2)(a)

3.49 Currently, the Attorney-General has a discretion to refuse a request for assistance where the request relates to conduct that would not have constituted an offence against Australian law, had it occurred in Australia. This is known as the principle of dual criminality. Unlike the dual criminality provision in the Extradition Act, the MA Act does not specify the time at which dual criminality is to be assessed.

3.50 To ensure consistency with the Extradition Act, this item will insert 'at the time at which the request was received' in paragraph 8(2)(a) of the MA Act to clarify that dual criminality exists if the relevant conduct is an offence against Australian law *at the time at which the request was received*.

Item 14 – Paragraphs 8(2)(b) and (c)

Repeal of paragraph 8(2)(b)

3.51 Paragraph 8(2)(b) of the MA Act currently provides that the Attorney-General may refuse a request if he or she is of the opinion that the request relates to conduct that occurred

outside the foreign country (that is, where the foreign country has criminalised the conduct extraterritorially) and Australia has not criminalised the same conduct extraterritorially.

3.52 Many countries exercise extraterritorial jurisdiction for criminal offences and Australia now asserts extraterritorial jurisdictions for a number of offences, such as terrorism, war crimes, crimes against humanity, genocide and child sex tourism. As a result, the extraterritoriality ground of refusal in paragraph 8(2)(b) is rarely used and will be repealed from the MA Act by this item. The repeal would not affect a person's protections under the MA Act, as the Attorney-General would have a discretion to refuse a request if the relevant conduct would not be an offence under Australian law if it had occurred in Australia (paragraph 8(2)(a)). The Attorney-General will also retain a broad discretion to refuse assistance under paragraph 8(2)(g) of the MA Act.

Repeal of paragraph 8(2)(c)

3.53 Paragraph 8(2)(c) of the MA Act currently provides that the Attorney-General may refuse a request if he or she is of the opinion that it relates to the prosecution or punishment of a person in respect of conduct for which the person, had the offence occurred in Australia, could no longer be prosecuted by reason of lapse of time or any other reason.

3.54 The ground of refusal in paragraph 8(2)(c) was originally included in the MA Act to align mutual assistance legislation with Australian statutes of limitation. Statutes of limitation have now been removed for most criminal offences in Australia. As a result, the lapse of time ground for refusal is rarely used and will be repealed by this item. The repeal would not affect a person's protections under the MA Act, as the Attorney-General would retain a broad discretion to refuse assistance under paragraph 8(2)(g) of the MA Act.

New paragraph 8(2)(b)

3.55 Subsection 8(2) of the MA Act sets out the circumstances in which the Attorney-General may exercise his or her discretion to refuse a foreign country's request for assistance. Currently, most of these grounds for refusal refer to prosecution or punishment for an offence. However, proceeds action may be non-conviction based, meaning that a prosecution has not, and may not, commence. Further, proceeds action may be taken or pursued after a trial concludes or independently of a trial process.

3.56 Paragraph 8(2)(b) will be replaced with a new paragraph that will provide that the Attorney-General may exercise his or her discretion to refuse assistance if the request relates to a foreign order in relation to an offence, where an act or omission constituting the offence would not have constituted an offence against Australian law had it occurred in Australia at the time at which the request was received (that is, where dual criminality cannot be established).

3.57 A foreign order is defined in subsection 3(1) of the MA Act as a foreign forfeiture order (an order relating to the forfeiture of property in respect of an offence against the foreign country's law), a foreign pecuniary penalty order (an order imposing a pecuniary penalty in respect of an offence against a foreign law) or a foreign restraining order (an order made for the purposes of preserving property including preventing dealings with the property or freezing the property). A request will 'relate' to a foreign order even if the foreign order has not yet been sought – for example, assistance is required to determine whether a foreign

order should be sought, or a foreign country requests that an Australian restraining order is sought to ensure assets are not dissipated before a foreign country can seek an order.

3.58 The insertion of proposed paragraph 8(2)(b) will extend the circumstances in which the Attorney-General may exercise his or her discretion to refuse assistance in relation to proceeds of crime matters.

3.59 This amendment will ensure that the dual criminality ground of refusal applies to requests for assistance made in relation to the recovery of the proceeds or an instrument of an offence.

New paragraph 8(2)(c)

3.60 Currently, double jeopardy is a mandatory ground for refusal under paragraph 8(1)(f) of the MA Act. However, there may be exceptional circumstances where it is appropriate to provide assistance notwithstanding double jeopardy concerns, for example, if fresh and compelling evidence such as new DNA evidence or evidence obtained through technological developments, has emerged.

3.61 This item will insert a new paragraph 8(2)(c) that will provide the Attorney-General with the discretion to refuse a request for assistance if he or she is of the opinion that it relates to the investigation, prosecution or punishment of a person for an offence where the person has been acquitted or pardoned or has undergone punishment for that offence, or another offence constituted by the same conduct. This amendment will make double jeopardy a discretionary ground for refusal to enable the provision of assistance in appropriate exceptional cases such as where there is fresh evidence that was not available at the original trial, or where there are other circumstances accepted in Australia as being exceptions to the double jeopardy principle.

3.62 The current double jeopardy ground for refusal only refers to situations where the person has been acquitted, pardoned or punished in the *requesting* country. The new double jeopardy ground for refusal inserted by this item will extend the application of the ground for refusal so that a request for assistance may be refused where the person has previously been acquitted, pardoned or punished in *Australia* or a *third country*, as well as the requesting country in respect of the offence.

3.63 Further, in line with other amendments made by this Part to extend the operation of the grounds for refusal to the investigation stage, the double jeopardy ground for refusal will also be extended to apply at the investigation stage.

3.64 However, unlike the other grounds for refusal in the MA Act, the double jeopardy ground is currently limited to the *prosecution* of a person and does not apply at the *punishment* stage. The new double jeopardy ground for refusal inserted by this item will also apply at the punishment stage. This would ensure that Australia is able to refuse to provide assistance at the investigation, prosecution or punishment stage in circumstances where the person has previously been acquitted, pardoned or punished in Australia, the requesting country or a third country in respect of the offence.

Item 15 – Application of amendments made by this Part

3.65 This item will provide that the amendments made by Part 1 of Schedule 3 will apply in relation to a request by a foreign country that is being considered on or after the day on which this item commences. The commencement for this item will be a day to be fixed by proclamation.

3.66 This application provision also specifies that the amendments made by this Part will apply from the day of commencement regardless of whether the request was made before or after that day. The provision is necessary to enable there to be certainty with regards to the applicable law when processing requests made by foreign countries for assistance.

PART 2 – VIDEO LINK EVIDENCE

3.67 Section 12 of the MA Act deals with requests by Australia for evidence to be taken in a foreign country. Section 13 of the MA Act deals with requests by a foreign country for evidence to be taken from a witness before an Australian magistrate.

3.68 Increasingly, Australia is making and receiving requests for witnesses to give evidence directly to a courtroom using live video link technology. Such requests are currently able to be made and received by Australia under the existing take evidence provisions in sections 12 and 13 of the MA Act. However, section 13 in particular is not very clear in its application to such requests. Part 2 of Schedule 3 will amend the MA Act to clarify the application of sections 12 and 13 to requests for witnesses to give evidence directly to a courtroom in the requesting country by live video link.

3.69 In particular, Part 2 would amend section 13 to make clear that the Attorney-General may authorise evidence to be taken before an Australian magistrate for live transmission by video link back to a court in the foreign country. The amendments will also set out the role of the Australian magistrate in conducting the proceedings in cooperation with the foreign court, and clarify the powers that may be exercised by a magistrate in such proceedings.

3.70 Part 2 also contains amendments to sections 12 and 13 of the Mutual Assistance Act which will make clear that Australia can make and receive requests for take evidence proceedings to be audio or video recorded, or recorded by other electronic means. In some circumstances, this type of recording of the proceeding is likely to be more useful to the requesting country than a written transcript of the proceeding as would ordinarily be provided.

Mutual Assistance in Criminal Matters Act 1987

Item 16 – Subsection 3(1)

3.71 Subsection 3(1) of the MA Act sets out definitions that are relevant to the operation of the MA Act.

3.72 This Part will amend the MA Act to enable Australia to request, where evidence is taken in a foreign country, that the foreign country arranges for a tape recording to be made of the evidence. Further, the amendments will also provide that foreign countries are able to request, where evidence is taken in Australia, that a tape recording be made of the evidence taken.

3.73 This item will insert a definition of ‘tape recording’ in subsection 3(1) of the MA Act. ‘Tape recording’ will be defined to include an audio recording, video recording or recording by other electronic means. As this definition will encompass a wide range of means of recording evidence, it will ensure that the legislation will not require amendment every time there are technological advancements in methods of electronically recording evidence.

Item 17 – Before section 12

3.74 This item will insert a heading before section 12. The heading, 'Division 1 – Requests by Australia' will create a new division in Part II of the MA Act. This new Division will contain section 12 of the MA Act which deals with requests by Australia for assistance from foreign countries in relation to the taking of evidence.

Item 18 – Subparagraphs 12(1)(a)(i) and (ii)

3.75 Subparagraphs 12(1)(a)(i) and (ii) of the MA Act currently provide that Australia may request that a foreign country arrange for evidence to be taken in the foreign country, *in accordance with the law of that country*, or a document or other article to be produce *in accordance with the law of that country*, for the purposes of a proceeding or investigation relating to a criminal matter in Australia.

3.76 This item will omit the phrase 'in accordance with the law of that country' from subparagraphs 12(1)(a)(i) and (ii).

3.77 As the 'take evidence' proceeding will be occurring in the foreign country, the proceedings will necessarily have to be conducted under that country's law. Accordingly, these words will be removed to avoid confusion.

Items 19 and 20 – After paragraph 12(1)(a) and paragraph 12(1)(b)

3.78 Subsection 12(1) of the MA Act provides that Australia may request a foreign country to arrange for evidence to be taken or a document to be produced in the foreign country for the purposes of a proceeding or investigation relating to a criminal matter in Australia. It also provides that Australia may request a foreign country to arrange for the evidence, document or other article to be sent to Australia.

3.79 Item 19 will insert paragraph 12(1)(aa) and item 20 will insert additional words in paragraph 12(1)(b).

3.80 Proposed paragraph 12(1)(aa) will provide that, if a request is made for evidence to be taken, Australia may request the appropriate authority of a foreign country to arrange for a tape recording to be made of the evidence taken. Proposed paragraph 12(1)(b) will be amended to provide that Australia may request the appropriate authority of the foreign country to arrange for the evidence, (and if paragraph (aa) applies, the tape recording or a copy of it) document or other article to be sent to Australia.

3.81 These amendments will clarify that Australia can make requests for take evidence proceedings to be recorded by a foreign country, and for that recording to be sent to Australia. This will ensure that section 12 covers evidence taken by tape, audio, video or another electronic means of recording as well as a transcript of the evidence.

Item 21 – Subsection 12(3)

3.82 Subsection 12(3) of the MA Act currently provides that when Australia makes a request for evidence to be taken or a document to be produced in a foreign country for the purposes of an Australian investigation or proceeding, Australia may also request an

opportunity for the person giving evidence or producing the document to be examined or cross examined by video link from Australia.

3.83 This item will insert additional words in subsection 12(3).

3.84 The application of this provision is currently limited to examination or cross examination *by video link*. This item will amended subsection 12(3) to provide that Australia may request an opportunity for the person to be examined or cross examined *in person or* by video link from Australia.

Item 22 – After section 12

3.85 This item will insert a heading after section 12 of the MA Act. The heading, 'Division 2 – Requests by foreign countries' will create a new division in Part II of the MA Act. This new Division will contain section 13 of the MA Act which deals with requests by foreign countries for assistance in relation to the taking of evidence, or the production of documents.

Item 23 – Subsection 13(1)

3.86 Subsection 13(1) of the MA Act currently provides that if a foreign country requests that evidence be taken, or documents be produced, in Australia in relation to a foreign criminal matter, the Attorney-General may provide written authorisation for the taking of evidence, production of documents and transmission of that evidence or those documents to the foreign country.

3.87 Increasingly, Australia is receiving requests for witnesses to give evidence directly to a foreign courtroom using live video link technology; however subsection 13(1) does not make clear whether Australia is able to arrange for the evidence to be given through video link.

3.88 This item will repeal existing subsection 13(1) and replace it with two subsections: subsections 13(1) and 13(1A), which will govern requests from foreign countries for evidence to be taken or documents produced.

3.89 New subsection 13(1) will provide that section 13 applies if a foreign country requests, for the purposes of a foreign proceeding, that:

- evidence be taken in Australia
- a tape recording be made of evidence taken in Australia
- evidence be taken in Australia for live transmission by means of video link to a foreign country, or
- documents or articles be produced in Australia.

3.90 New subsection 13(1A) will provide that the Attorney-General may authorise the taking of evidence or the production of documents and also approve their transmission to the foreign country. New subsections 13(1) and (1A) will enable the evidence to be taken and

3.91 This will clarify the means by which evidence may be taken or documents produced in Australia.

Item 24 – Saving of existing authorisations

3.92 Item 23 will repeal existing subsection 13(1) of the MA Act and substitute it with two subsections: subsections 13(1) and 13(1A), which will govern requests from foreign countries for evidence to be taken or documents produced.

3.93 This item will provide that any authorisation made by the Attorney-General under subsection 13(1) prior to the commencement of this item, will continue to have force as if the authorisation had been given under new subsection 13(1A) (which will be inserted by item 23).

3.94 This will ensure that old authorisations can continue to be relied upon to obtain evidence or require the production of documents or other articles without the Attorney-General having to make a new authorisation. This will also clarify that any take evidence proceedings which are on foot can continue without a new authorisation being necessary.

Item 25 – Subsection 13(2)

3.95 Currently, paragraph 13(2)(a) of the MA Act provides that where the Attorney-General authorises the taking of evidence under subsection 13(1), this must be done before a magistrate. Where evidence is taken, the magistrate must cause the evidence to be put in writing, certify that the evidence was taken by the magistrate, and cause the certified writing to be sent to the Attorney-General. Where documents or other articles are produced, paragraph 13(2)(b) requires the Magistrate to send those documents, or certified copies of those documents or other articles, to the Attorney-General.

3.96 While paragraph 13(2)(a) provides some guidance as to the role a magistrate plays in 'take evidence' proceedings, the extent of the powers which may be exercised by a magistrate is unclear.

3.97 This item will omit all the words before paragraph 13(2)(b) and substitute them with replacement provisions.

3.98 New paragraph 13(2)(a) will set out the powers which may be exercised by a magistrate when taking evidence, other than by video link (this will be governed by new subsection 13(2B) which will be inserted by item 28), in accordance with an authorisation given by the Attorney-General. These will be:

- taking the witness' evidence on oath or affirmation (subparagraph (i))
- directing that all or part of the proceeding be conducted in private (subparagraph (ii))

- requiring a person to leave the place in Australia where the giving of evidence is taking place or going to take place (subparagraph (iii)) (an example of this may be where a person present during the take evidence proceedings is being uncooperative and disruptive and it is necessary for the magistrate to order them to leave the place where evidence is being given)

- prohibiting or restricting the publication of evidence given in the proceeding or the name of a party to, or a witness in, the foreign proceeding (subparagraph (iv)) (for example, this may be necessary to protect the identities of vulnerable witnesses or a witness who may be prejudiced by giving evidence because they are subject to ongoing criminal proceedings)

- requiring the production of documents or other articles (subparagraph (v)) (this power will be subject to proposed subsections 13AB(1), which will be introduced by item 32)

- taking such action as the magistrate considers appropriate to facilitate the foreign proceeding (subparagraph (vi)), or

- performing any other function required by the regulations (subparagraph (vii)).

3.99 This list is based on powers which are generally available to a magistrate when taking evidence in Australian criminal proceedings for Australian purposes. As such, the list of powers set out in new paragraph 13(2)(a) is not intended to be exhaustive, but is designed to give greater clarity and guidance to magistrates in performing their function under section 13 of the MA Act.

Item 26 – Paragraph 13(2)(b)

3.100 This item will omit the words 'subsection (6)' and substitute the words 'subsection 13AB(1)' in paragraph 13(2)(b) of the MA Act.

3.101 The proposed amendment is consequential upon items 31 and 32, which will repeal subsection (6) and insert section 13AB.

Item 27 – At the end of subsection 13(2)

3.102 This item will insert two notes after subsection 13(2) of the MA Act. These notes contain cross references to proposed subsections 13(2C) and 13(2B) respectively, which will be inserted by item 26, and will clarify the powers that a magistrate may exercise when evidence is taken during live video link proceedings.

Item 28 – After subsection 13(2)

3.103 Currently, while subsection 13(2) of the MA Act provides some guidance as to the role a magistrate plays in 'take evidence' proceedings, the extent of the powers which may be exercised by a magistrate are unclear, particularly in relation to live video link proceedings. Item 25 will insert a new paragraph which will set out the powers which may be exercised by a magistrate when taking evidence, other than by video link.

3.104 This item will insert subsections 13(2A), 13(2B), 13(2C) and 13(2D) in the MA Act, which will further clarify the powers and functions a magistrate may exercise while evidence is taken, particularly during live video link proceedings and will also set out the magistrate's responsibilities with regard to providing the evidence to the Attorney-General for provision to the foreign country.

3.105 Proposed subsection 13(2A) will provide that a magistrate may not make a ruling about the admissibility of evidence in a foreign proceeding.

3.106 This amendment is intended to reflect the High Court's decision in *The Queen v Wilson, ex parte Witness T* (1976) 135 CLR 179, in which the High Court considered the role of magistrates in take evidence proceedings. Barwick CJ held:

> The Magistrate who takes such evidence exercises no more than a recording function. He decides no matter of right and makes no rulings as to admissibility of evidence. All that will be for the foreign court, whose laws may be unknown to the Magistrate as may be its detailed rules as to admissibility of evidence.

3.107 This amendment will clarify that magistrates exercising powers under section 13 of the MA Act, whether during, or in the absence of, a live video link proceeding, perform a recording function and may not rule on matters of admissibility. This is a matter governed by the laws of the foreign country in which the evidence is to be admitted.

3.108 Proposed subsection 13(2B) will provide that a magistrate taking evidence by live video link may only exercise the following powers at the request of the foreign court:

- direct that all or part of the proceeding be conducted in private
- require a person to leave the place in Australia where the giving of evidence is taking place or going to take place (for example, if a witness is being uncooperative and disruptive and it may be necessary for a magistrate to order them to leave the place where evidence is being given)
- prohibit or restrict the publication of evidence given in the proceeding or the name of a party to, or a witness in, the foreign proceeding (for example, this power may be necessary to, for example, protect the identity of a witness)
- assist with the administering by the foreign court of, or administer himself or herself, an oath or affirmation.

3.109 This is appropriate because a judicial authority of the foreign country will be presiding over the proceedings and the taking of evidence is an extension of the foreign proceedings. As such, the powers exercisable by the Australian magistrate should be more limited.

3.110 New subsection 13(2C) will provide that where a magistrate takes a witness's evidence on oath or affirmation, but not for live video link transmission (as provided for in

new subparagraph 13(2)(a)(i) which will be inserted by item 25), the magistrate must also:

- cause a tape recording to be made of the evidence if requested by the foreign country, certify that the evidence on the tape recording was taken by the magistrate and cause the tape recording, or a copy of it, to be sent to the Attorney-General

- cause the evidence to be put in writing, certify that the evidence was taken by the magistrate and cause the certified writing to the sent to the Attorney-General.

3.111 This is consistent with the current general requirement in subsection 13(2), yet encompasses the recording of evidence which is not currently covered by subsection 13(2) and ensures the evidence is able to be provided to the foreign country in a form that will be admissible as evidence.

3.112 New section 13(2D) will outline the magistrate's responsibilities if, during take evidence proceedings, he or she requires the production of documents or other articles. If documents or other articles are produced, the magistrate must send those documents, or certified copies of those documents, or other articles, to the Attorney-General. This mirrors the requirements imposed on a magistrate by current paragraph 13(2)(b) where the magistrate has required the production of documents or other articles.

Item 29 – Subsection 13(4A)

3.113 Currently, subsection 13(4A) of the MA Act provides that where the Attorney-General authorises the taking of evidence or the production of documents at the request of a foreign country, a magistrate conducting 'take evidence' proceedings may permit any or all of the following persons to examine or cross examine, *through a video link*, from the requesting country, any person giving evidence or producing documents:

- any person to whom the proceeding in the requesting country relates

- the legal representative of the relevant authority of the requesting country.

3.114 This item will omit ', through a video link, from the requesting country' and substitute 'in person, or through a video link from the requesting country' in subsection 13(4A) of the MA Act. This amendment will ensure subsection 13(4A) applies to proceedings conducted in person *or* through a video link from the requesting country. This will ensure that the legislation reflects that examination or cross examination is permitted in take evidence proceedings conducted by live video link, and in take evidence proceedings other than by live video link. This mirrors the amendment that will be made by item 21 in relation to requests by Australia for the taking of evidence or production of documents in a foreign country.

Item 30 – After subsection 13(4A)

3.115 Part III of the Crimes Act contains offences relating to the administration of justice, including giving false testimony, fabricating evidence and intimidating witnesses.

3.116 This item will insert subsection 13(4B) in the MA Act, which will clarify that, for the purposes of Part III of the Crimes Act:

- a 'take evidence' proceeding before a magistrate is a federal judicial proceeding, and
- evidence taken from a witness on oath or affirmation is testimony given in a federal judicial proceeding.

3.117 This provision will ensure that any relevant offences contained in Part III of the Crimes Act will apply to evidence taken at the request of a foreign country in accordance with section 13 of the MA Act.

Item 31 – Subsections 13(6) to (10)

3.118 Subsections 13(6) to (10) of the MA Act relate to the application of Commonwealth, State and Territory laws to evidence taken and documents produced in accordance with section 13 of the MA Act.

3.119 This item will repeal subsections 13(6) to 13(10). This amendment will be consequential upon item 32, which will insert two new sections relating to enforcing orders and applying Commonwealth, State and Territory laws when taking evidence and producing documents for foreign purposes.

Item 32 – After section 13

3.120 This item will insert new sections 13AA (relating to the enforcement of orders) and 13AB (relating to the application of Commonwealth, State and Territory laws in the taking of evidence and production of documents in accordance with section 13 of the MA Act) in the MA Act.

3.121 New section 13AA will confirm that orders made by a magistrate during 'take evidence' proceedings are enforceable if they relate to the conduct of the proceedings, even if they are made at the request of a foreign court. This will clarify that any orders made may be enforced as if they were an order of that court, subject to the rules of the relevant court.

3.122 Currently, subsections 13(6), 13(7) and 13(8) provide for the application of State and Territory laws to 'take evidence' proceedings before magistrates. However, item 8 of Schedule 1 will enable Federal Magistrates, in addition to magistrates, to conduct 'take evidence' and production of document proceedings under section 13. As a consequence of this change, item 31 will repeal subsections 13(6) to 13(10) and new section 13AB will provide for the application of Commonwealth, State and Territory laws to 'take evidence' proceedings before Federal Magistrates and magistrates.

3.123 New subsection 13AB(1) will apply the following laws, subject to subsection 13AB(2):

- laws of Commonwealth with respect to the compelling of persons to attend before a Federal Magistrate

- laws of the Commonwealth with respect to giving evidence, answering questions and producing documents or other articles before a Federal Magistrate

- laws of a State or Territory with respect to compelling of persons to attend before a magistrate (other than a Federal Magistrate), and

- laws of a State or Territory with respect to giving evidence, answering questions and producing documents or other articles before a magistrate (other than a Federal Magistrate).

3.124 This will ensure that the rules of court apply when compelling persons to attend before a Federal Magistrate, and the Commonwealth *Evidence Act 1995* applies when a person gives evidence, answers questions and produces documents or other articles before a Federal Magistrate. This will be consistent with the usual rules and laws applicable to proceedings before a Federal Magistrate.

3.125 The laws of the State or Territory in which the magistrate is sitting will apply when compelling persons to attend before a magistrate, or when a person gives evidence, answers questions and produces documents or other articles before a magistrate. This will replicate the current application of State or Territory laws to magistrates under subsections 13(6), 13(7) and 13(8) (which will be repealed by item 31). New subsections 13AB(2) and (3) will provide that:

- the person to whom the proceeding in the requesting country relates is competent but not compellable to give evidence, and

- a person who is required to give evidence, or produce documents or other articles is not compellable to answer a question or produce a document if they could not be compelled to do so in the foreign country (except if this would be inconsistent with a provision of a mutual assistance treaty between Australia and the country requesting the take evidence proceedings).

3.126 A person to whom the foreign proceedings relate should not be compelled to give evidence for the purposes of a proceeding in the requesting country in relation to that person. However, the person should be able to give evidence if he or she wishes to do so.

3.127 A person who is required to give evidence, or produce documents or other articles should not be compellable to answer a question or produce a document if they could not be compelled to do so in the foreign country or under a relevant treaty. This will ensure that any evidence used for the purposes of a proceeding in the foreign country is obtained consistently with the laws of that foreign country.

3.128 These new subsections mirror subsections 13(7) to (9) which will be repealed by item 31.

3.129 New subsection 13AB(4) will provide that a duly authenticated foreign law immunity certificate is admissible in proceedings under section 13 as *prima facie* evidence of the matters stated in the certificate. This mirrors existing subsection 13(10) which will be repealed by item 31.

Item 33 – Application of amendments made by this Part

3.130 This item will provide that the amendments apply to requests made by foreign countries before the commencement of this item only if the Attorney-General has not made an authorisation under subsection 13(1).

3.131 The item will also provide that the amendments apply in relation to any request received on or after the commencement of this item.

PART 3 – TELECOMMUNICATIONS AND SURVIELLANCE DEVICES

Division 1 – Provision of certain lawfully obtained material

3.132 Section 13A of the MA Act provides a streamlined procedure for providing directly to a foreign country material that was lawfully obtained by, and is lawfully in the possession of, a domestic enforcement agency following an authorisation from the Attorney-General. Under section 13A, the material is not required to be produced before a magistrate before it can be provided to a foreign country.

3.133 Currently, information that is obtained by lawful telecommunications interception (lawfully intercepted information) and covertly accessed stored communications (such as email records) (lawfully accessed information) obtained in an Australian investigation can only be provided to a foreign country through take evidence or production order proceedings before a magistrate pursuant to section 13 of the MA Act. Lawfully intercepted and obtained currently cannot be provided to a foreign country under section 13A.

3.134 Division 1 of Part 3 will amend the MA Act and the TIA Act so that section 13A of the MA Act is available for the provision of lawfully intercepted and accessed information. Information in relation to the warrant used by the domestic enforcement agency to obtain the lawfully intercepted or accessed information will also be able to be provided under section 13A. This could include information in the application for the warrant, the person or telecommunications service to which the warrant relates and persons specified in the warrant as using the telecommunications service.

Mutual Assistance in Criminal Matters Act 1987

Items 34 to 38 – Subsection 3(1)

3.135 Subsection 3(1) of the MA Act sets out definitions that are relevant to the operation of the MA Act. Items 34 to 38 will insert new definitions relevant to the changes that will be made by this Division.

Item 34 – Subsection 3(1)

3.136 Item 39 will amend section 13A of the MA Act to enable the Attorney-General to authorise the provision of certain specified material to a requesting country, provided the requisite offence threshold is met. Under the amendments, the Attorney-General will be able to authorise the provision of 'interception warrant information' to a foreign country provided it relates to a serious offence against the laws of the requesting country punishable by a maximum penalty of seven or more years imprisonment, life imprisonment or death, or for a cartel offence, by a maximum fine of an amount equivalent to at least $A10,000,000.

3.137 This item will insert a definition of 'interception warrant information' in subsection 3(1) of the MA Act. 'Interception warrant information' will have the same meaning as in the TIA Act.

3.138 Section 6EA of the TIA Act provides that a reference to 'interception warrant information' is a reference to information:

- about an application for an interception warrant
- about the issue of an interception warrant
- about the existence or non-existence of an interception warrant
- about the expiration of an interception warrant
- that is likely to enable the identification of the telecommunications service to which an interception warrant relates, or
- that is likely to enable the identification of a person specified in an interception warrant as a person using, or likely to use, the telecommunications service to which the warrant relates.

Item 35 – Subsection 3(1)

3.139 Item 39 will amend section 13A of the MA Act to enable the Attorney-General to authorise the provision of certain specified material to a requesting country, provided the requisite offence threshold is met. Under the amendments, the Attorney-General will be able to authorise the provision of 'lawfully accessed information' provided it related to a serious offence against the laws of the requesting country that was punishable by a maximum penalty of three or more years imprisonment, life imprisonment or death, or a maximum fine of an amount equivalent to at least 900 penalty units (under section 4AA of the *Crimes Act 1914*, one penalty unit equates to $A110).

3.140 This item will insert a definition of 'lawfully accessed information' in subsection 3(1) of the MA Act. 'Lawfully accessed information' will have the same meaning as in the TIA Act.

3.141 Subsection 5(1) of the TIA Act provides that 'lawfully accessed information' means information obtained by accessing a stored communication otherwise than in contravention of subsection 108(1) of the TIA Act. Subsection 108(1) makes it an offence to access a stored communication unless the access is otherwise permitted by that section of the TIA Act.

Item 36 – Subsection 3(1)

3.142 Item 39 will amend section 13A of the MA Act to enable the Attorney-General to authorise the provision of certain specified material to a requesting country, provided the requisite offence threshold is met. Under the amendments, the Attorney-General will be able to authorise the provision of 'lawfully intercepted information' provided it related to a serious offence against the laws of the requesting country that was punishable by a maximum penalty of seven or more years imprisonment, life imprisonment or death, or for a cartel offence, by a maximum fine of an amount equivalent to at least $A10,000,000.

3.143 This item will insert a definition of 'lawfully intercepted information' in subsection 3(1) of the MA Act. 'Lawfully intercepted information' will have the same meaning as in the TIA Act.

3.144 Section 6E of the TIA Act provides that a reference to lawfully intercepted information is a reference to information obtained by lawfully intercepting a communication passing over a telecommunications system.

Item 37 – Subsection 3(1)

3.145 Section 13A of the MA Act enables Australia to provide directly to a foreign country material obtained through the use of a surveillance device only where the investigation or proceedings to which the material relates, is in relation to an offence punishable by a maximum penalty of three or more years imprisonment, life imprisonment or death.

3.146 Item 39 will amend section 13A of the MA Act to enable the Attorney-General to authorise the provision of other certain specified material to a requesting country, provided the requisite offence threshold is met. Under the amendments, the Attorney-General will continue to be able to provide surveillance device material in the same circumstances as is currently possible (that is where the offence is punishable by a maximum penalty of three or more years imprisonment, life imprisonment or death). However, this material will be covered by the term 'protected information'.

3.147 This item will insert a definition of 'protected information' in subsection 3(1) of the MA Act. 'Protected information' will be defined by reference to paragraphs 44(1)(a), (b) and (c) of the SD Act.

3.148 Paragraphs 44(1)(a), (b) and (c) of the SD Act define 'protected information' as any information:

- obtained from using a surveillance device
- relating to an application for the issue, existence, or expiration of a warrant, an emergency authorisation or a tracking device authorisation,
- relating to an application for approval of powers exercised under an emergency authorisation, or
- that is likely to enable the identification of a person, object or premises specified in a warrant, an emergency authorisation or a tracking device authorisation.

Item 38 – Subsection 3(1)

3.149 Item 39 will amend section 13A of the MA Act to enable the Attorney-General to authorise the provision of certain specified material to a requesting country, provided the requisite offence threshold is met. Under the amendments, the Attorney-General will be able to authorise the provision of 'stored communications warrant information' provided it relates to a serious offence against the laws of the requesting country that was punishable by a maximum penalty of three or more years imprisonment, life imprisonment or death, or a

maximum fine of an amount equivalent to at least 900 penalty units (under section 4AA of the Crimes Act, one penalty unit equates to $A110).

3.150 This item will insert a definition of 'stored communications warrant information' in subsection 3(1) of the MA Act. 'Stored communications warrant information' will have the same meaning as in the TIA Act.

3.151 Section 6EB of the TIA Act defines 'stored communications warrant information' as information about:

- an application for a stored communications warrant
- the issue of a stored communications warrant
- the existence or non-existence of a stored communications warrant
- the expiry of a stored communications warrant
- any other information that is likely to enable the identification of the telecommunications service to which a stored communications warrant relates, or
- any other information that is likely to enable the identification of a person specified in a stored communications warrant as a person using, or likely to use, the telecommunications service to which the warrant relates.

Items 39 to 41

3.152 Section 13A currently enables the Attorney-General to authorise the provision of material to the requesting foreign country where that material has been lawfully obtained by, and is in the possession of, an enforcement agency in Australia.

3.153 However, subsection 13A(2) limits the provision of material obtained through the use of a surveillance device to where the investigation, or proceedings to which the material relates, is in relation to an offence punishable by a maximum penalty of three or more years imprisonment, life imprisonment or death.

3.154 Further, subsection 13A(6) excludes material obtained under the TIA Act from the definition of material lawfully obtained by an enforcement agency in Australia and as such that material cannot be provided in response to a request pursuant to section 13A. This means that lawfully intercepted information and lawfully accessed stored communications ('lawfully accessed information' such as email records) can currently only be provided to a foreign country through 'take evidence' or production order proceedings before a magistrate pursuant to section 13 of the Act. These proceedings can be costly and time consuming.

3.155 The amendments made by these items will allow lawfully intercepted information and lawfully accessed information acquired for domestic purposes to be provided to a foreign country under section 13A. Unlike the current process for providing telecommunications interception product and covertly accessed stored communications under section 13, the material will not be required to be produced before a magistrate before it could be provided to a foreign country. This will enable Australia to provide material lawfully obtained by, and

Item 39 – Subsection 13A(2)

3.156 Subsection 13A(2) of the MA Act and the definition of 'material lawfully obtained by an enforcement agency in Australia' in the MA Act currently limits the material that is able to be provided to a foreign country under section 13A.

3.157 This item will repeal subsection 13A(2) and replace it with a new provision which will clearly outline what material can be provided to a foreign country, and the circumstances in which that material can be provided. Subsection 13A(2) will enable the provision of:

- protected information
- lawfully accessed information or stored communications warrant information, and
- lawfully intercepted information or interception warrant information.

Protected information

3.158 Under new subsection 13A(2), protected information will be able to be provided to a foreign country following an authorisation by the Attorney-General where the offence is a serious offence punishable by a maximum penalty of at least three years imprisonment, life imprisonment or the death penalty. This will mirror the threshold level required to obtain a surveillance device for a domestic offence under the SD Act. This is because it would be inappropriate to provide information obtained for a domestic purpose to a foreign country for use in relation to an offence that, if it were investigated in Australia would not have been able to be obtained for such purposes.

3.159 Although this amendment will enable assistance to be provided in relation to an offence that carries the death penalty, section 8 of the MA Act provides that where a mutual assistance request relates to a death penalty offence, assistance must be refused unless 'special circumstances' exist. Special circumstances could include material that provides exculpatory evidence, or where the requesting country has provided an undertaking that the death penalty will not be sought, or if imposed, will not be carried out.

3.160 Item 37 will insert a definition of 'protected information'. Protected information will be defined as information:

- obtained from using a surveillance device
- relating to an application for the issue, existence, or expiration of a warrant, an emergency authorisation or a tracking device authorisation,
- relating to an application for approval of powers exercised under an emergency authorisation, or
- that is likely to enable the identification of a person, object or premises specified in a warrant, an emergency authorisation or a tracking device authorisation.

3.161 This will maintain the current position under section 13A of the MA Act in relation to the provision of already lawfully obtained protected information to foreign countries.

Lawfully accessed information and stored communications warrant information

3.162 Under new subsection 13A(2), lawfully accessed information or stored communications warrant information will be able to be provided to a foreign country following an authorisation by the Attorney-General where the relevant foreign offence carries a maximum penalty of at least three years imprisonment, life imprisonment or the death penalty, or a fine equivalent to, or greater than 900 penalty units. Under section 4AA of the Crimes Act, one penalty unit is currently $110. This will mirror the threshold level required for a stored communications warrant in relation to a domestic offence under the TIA Act. This is because it would be inappropriate to provide information obtained for a domestic purpose to a foreign country for use in relation to an offence that, if it were investigated in Australia would not have been able to be obtained for such purposes.

3.163 Although this amendment will allow assistance to be provided in relation to an offence that carries the death penalty, section 8 of the MA Act provides that where a mutual assistance request relates to a death penalty offence, assistance must be refused unless 'special circumstances' exist. Special circumstances could include material that provides exculpatory evidence, or where the requesting country has provided an undertaking that the death penalty will not be sought, or if imposed, will not be carried out.

3.164 Item 35 will insert a definition of 'lawfully accessed information' and item 38 will insert a definition of 'stored communications warrant information'. 'Lawfully accessed information' will be defined as information obtained by accessing a stored communication otherwise than in contravention of subsection 108(1) of the TIA Act. 'Stored communications warrant information' will be defined as information about:

- an application for a stored communications warrant
- the issue of a stored communications warrant
- the existence or non-existence of a stored communications warrant
- the expiry of a stored communications warrant
- any other information that is likely to enable the identification of the telecommunications service to which a stored communications warrant relates, or
- any other information that is likely to enable the identification of a person specified in a stored communications warrant as a person using, or likely to use, the telecommunications service to which the warrant relates.

Lawfully intercepted information or interception warrant information

3.165 Under the amended section 13A of the MA Act, lawfully intercepted information and interception warrant information will be able to be provided to a foreign country following an authorisation by the Attorney-General where the relevant foreign offence carries a maximum penalty of at least seven years imprisonment, life imprisonment, the death penalty or in the

case of a foreign cartel offence, a fine of at least the equivalent of $A10,000,000. This generally mirrors the threshold for obtaining this information for domestic purposes. This is because it would be inappropriate to provide information obtained for a domestic purpose to a foreign country for use in relation to an offence that, if it were investigated in Australia would not have been able to be obtained for such purposes.

3.166 Although this amendment will allow assistance to be provided in relation to an offence that carries the death penalty, section 8 of the MA Act provides that where a mutual assistance request relates to a death penalty offence, assistance must be refused unless 'special circumstances' exist. Special circumstances could include material that provides exculpatory evidence, or where the requesting country has provided an undertaking that the death penalty will not be sought, or if imposed, will not be carried out.

3.167 Item 36 will insert a definition of 'lawfully intercepted information' and item 34 will insert a definition of 'interception warrant information'. Lawfully intercepted information will be defined to mean information obtained by lawfully intercepting a communication passing over a telecommunications system. Interception warrant information will be defined to mean information:

- about an application for an interception warrant
- about the issue of an interception warrant
- about the existence or non-existence of an interception warrant
- about the expiration of an interception warrant
- that is likely to enable the identification of the telecommunications service to which an interception warrant relates, or
- that is likely to enable the identification of a person specified in an interception warrant as a person using, or likely to use, the telecommunications service to which the warrant relates.

3.168 Item 114 will insert a definition of 'cartel offence'. Cartel offence will be defined as an offence by a corporation involving cartel conduct. As the definition will be limited to offences committed by corporations, if lawfully intercepted information or interception warrant information was sought in relation to an *individual* suspected of engaging in cartel conduct, the relevant offence must be punishable by seven or more years imprisonment. Lawfully intercepted information or interception warrant information could not be provided in relation to an individual being investigated, prosecuted or punished in relation to an offence punishable by only a fine.

Item 40 – Subsection 13A(6) (paragraph (b) of the definition of *material lawfully obtained by an enforcement agency in Australia*)

3.169 This item will replace a semi colon with a full stop after the word 'prosecution' in paragraph (b) of the definition of 'material lawfully obtained by an enforcement agency in Australia'. It is consequential upon item 41, which removes all words in subsection 13A(6) appearing after paragraph 13A(6)(b).

Item 41 – Subsection 13A(6) (definition of *material lawfully obtained by an enforcement agency in Australia*)

3.170 Subsection 13A(6) of the MA Act currently excludes material obtained under the TIA Act from the definition of 'material lawfully obtained by an enforcement agency in Australia' and as such that material cannot be provided in response to a request pursuant to section 13A. This means that lawfully intercepted information or lawfully accessed stored communications ('lawfully accessed information' such as email records) can only be provided to a foreign country through 'take evidence' or production order proceedings before a magistrate pursuant to section 13 of the Act.

3.171 This item will remove 'but does not include material under the *Telecommunications (Interception and Access) Act 1979.*' This amendment will support the amendment made by item 39, which will enable the Attorney-General to authorise the provision of certain types of information obtained lawfully under the TIA Act to the requesting country.

Telecommunications (Interception and Access) Act 1979

Item 42 – At the end of section 68

3.172 Section 63 of the TIA Act places a general prohibition on the use or communication of any lawfully intercepted information, or information about warrants ('interception warrant information').

3.173 Section 68 of the TIA Act sets out an exception to this prohibition which enables the chief officer of an agency to communicate lawfully intercepted information that was originally obtained by that agency, or interception warrant information, to certain named entities or persons for certain purposes.

3.174 This item will insert new paragraph 68(l) in the TIA Act which will outline a further circumstance in which lawfully intercepted information or interception warrant information may be communicated.

3.175 Paragraph 68(l) will enable the chief officer of an agency to communicate lawfully intercepted information or interception warrant information to a foreign country that has requested that information or to the Secretary of the Department for the purpose of providing that information to that foreign country.

3.176 The information will only be able to be provided if the Attorney-General has authorised the provision of the information under subsection 13A(1) of the MA Act. Section 13A (which will be amended by items 39 to 41) will provide that the Attorney-General may only authorise the provision of the information following a request by a foreign country if:

- lawfully intercepted information or interception warrant information has already been lawfully obtained by, and is in the possession of, Australian law enforcement, and

- the request relates to a serious offence punishable by a maximum penalty of seven or more years imprisonment, life imprisonment or death, or for a cartel offence, a maximum fine equivalent to at least $A10,000,000.

3.177 Using the definitions of 'chief officer' and 'agency' in subsection 5(1) of the TIA Act, the following persons will be able to disclose lawfully intercepted information or interception warrant information under paragraph 68(l):

- the Commissioner of the AFP
- the Chief Executive Officer of the Australian Crime Commission
- the Integrity Commissioner of the Australian Commission for Law Enforcement Integrity
- the Commissioners of all State Police forces or services (including the Northern Territory)
- the Commissioner of the NSW Crime Commission
- the Commissioner of the NSW Independent Commission Against Corruption
- the Inspector of the NSW Independent Commission Against Corruption
- the Commissioner of the NSW Police Integrity Commission
- the Inspector of the NSW Police Integrity Commission
- the Director of the Victorian Office of Police Integrity
- the Chairperson of the Queensland Crime and Misconduct Commission
- the Commissioner of the Western Australian Corruption and Crime Commission, or
- the Parliamentary Inspector of the Western Australian Corruption and Crime Commission

Item 43 – After section 68

3.178 New paragraph 68(l) (which will be inserted by item 42) will enable the chief officer of an agency to communicate lawfully intercepted information or interception warrant information to the Secretary of the Department for the purpose of providing that information to a foreign country. The information will only be able to be provided if the Attorney-General has authorised the provision of the information under subsection 13A(1) of the MA Act. Section 13A (which will be amended by items 39 to 41) will provide that the Attorney-General may only authorise the provision of the information following a request by a foreign country if:

- lawfully intercepted information or interception warrant information has already been lawfully obtained by, and is in the possession of, Australian law enforcement, and
- the request relates to a serious offence punishable by a maximum penalty of seven or more years imprisonment, life imprisonment or death, or for a cartel offence, a maximum fine equivalent to at least $A10,000,000.

3.179 This item will insert new section 68A, which will describe the circumstances in which information communicated to the Secretary of the Department in accordance with paragraph 68(l) (which will be inserted by item 42) will be able to be communicated to another person, including a foreign country.

3.180 Proposed subsection 68A(1) will provide that where lawfully intercepted information or interception warrant information has been provided to the Secretary of the Department in accordance with paragraph 68(l), the Secretary may (either personally or by a person authorised by him or her) communicate that information to another person, including a foreign country. The information may only be communicated for purposes connected with providing the information to a foreign country.

3.181 If the Secretary authorises another person to communicate the information, proposed subsection 68A(2) will authorise that person to communicate that information to another person (including a foreign country) for purposes connected with providing the information to the foreign country.

3.182 This new section will ensure that information requested by a foreign country is able to be provided to that foreign country (following Attorney-General authorisation) in the most appropriate manner by the most appropriate person.

3.183 As the provision of this information to the foreign country is part of the formal mutual assistance process as opposed to police-to-police assistance, the information will generally be provided to the foreign country by the Central Authority in the Department as opposed to being provided by the law enforcement agency.

Items 44 and 45 – Paragraph 94(3)(a) and after section 102A

3.184 Subsection 94(3) of the TIA Act requires the chief officer of a Commonwealth agency to provide an annual written report to the Minister, as soon as practicable within three months after 30 June. The report must contain information about telecommunications interceptions. The information required for inclusion in the report is set out in Division 2 of Part 2-8 of the TIA Act.

3.185 These items will insert '(other than section 102B)' after 'Division 2' in paragraph 94(3)(a), and will insert new section 102B.

3.186 The insertion of '(other than section 102B)' after 'Division 2' in paragraph 94(3)(a) will mean that the chief officer of a Commonwealth agency will not be required to provide the Minister with the information required to be in the Minister's annual report under new section 102B. New section 102B (which will be inserted by item 45) will require the Minister's report to set out the number of occasions on which lawfully intercepted information or interception warrant information was provided to a foreign country under paragraph 68(l) or section 68A of the TIA Act in connection with an authorisation under subsection 13A(1) of the MA Act

3.187 The provision of lawfully intercepted information or interception warrant information to the foreign country is part of the formal mutual assistance process as opposed to police-to-police assistance. Therefore, the information will generally be provided to the foreign country by the Central Authority in the Department as opposed to being provided by a law

enforcement agency. As such, it is not appropriate that the agency be required to report on these matters.

3.188 Division 2 of Part 2-8 requires the report to the Minister include information about how many warrant applications were made and issued, the duration of warrants and the effectiveness of the warrants including information about the number of arrests, prosecutions and convictions that result from the use of telecommunications interception warrants. As it will not be feasible for Australian authorities to obtain this type of information from foreign counterparts, these reporting requirements will not be extended to circumstances where information has been provided to a foreign country.

3.189 However, item 45 will insert new section 102B. This section will instead require the Minister's report to set out the number of occasions on which information about telecommunications interceptions was provided to a foreign country under paragraph 68(l) or section 68A of the TIA Act in connection with an authorisation under subsection 13A(1) of the MA Act. Paragraph 68(l) and section 68A will be inserted by items 42 and 43 respectively.

3.190 As section 104 of the TIA Act requires the Minister to table the report in Parliament, the amendments by these items will ensure there is transparency and accountability as to how often information lawfully obtained for a domestic purpose, is provided to a foreign country for the purpose of foreign law enforcement.

Item 46 – At the end of subsection 139(2)

3.191 Section 133 of the TIA Act places a general prohibition on the use and communication of lawfully accessed stored communications and stored communications warrant information. Section 139 contains exceptions to these prohibitions.

3.192 This item will insert new paragraph 139(2)(e), which will provide an additional purpose for which lawfully accessed information (other than foreign intelligence information) and stored communication warrant information may be communicated, used or recorded by an officer or staff member of an enforcement agency or an eligible Commonwealth authority.

3.193 Paragraph 139(2)(e) will provide that an officer or staff member of an enforcement agency or an eligible Commonwealth authority may communicate, use or record information for purposes connected with an authorisation under subsection 13A(1) of the MA Act. This is appropriate as it will be those officers or staff members who will need to deal with the information for the purposes of responding to the request from the foreign country.

3.194 Section 13A of the MA Act enables the Attorney-General to authorise the provision of certain material that has been lawfully obtained by, and is lawfully in the possession of, an enforcement agency, to a requesting foreign country. Item 39 will enable information obtained under the TIA Act to be provided pursuant to section 13A. This item will ensure that disclosure requirements under the TIA Act are not offended when information is provided in accordance with the MA Act.

Items 47 and 48 – Paragraph 159(1)(a) and at the end of Division 2 of Part 3-6 of Chapter 3

3.195 Section 159 requires the provision of a written annual report to the Minister, as soon as practicable within three months of 30 June. The report must contain information about applications and warrants to access stored communications, as required by Division 2 of Part 3-6 of the TIA Act.

3.196 These items will insert '(other than section 163A)' after 'Division 2' in paragraph 159(1)(a) and insert new section 163A.

3.197 The insertion of (other than section 163A)' after 'Division 2' in paragraph 159(1)(a) by item 47 will mean that the chief officer of an enforcement agency will not be required to provide the Minister with the information required to be included in the Minister's annual report under new section 163A. New section 163A will instead specify that the Minister's annual report must set out the number of occasions on which lawfully accessed information or stored communications information was provided to a foreign country under paragraph 139(1) or section 142 of the TIA Act in connection with an authorisation under subsection 13A(1) of the MA Act.

3.198 The provision of lawfully accessed information or stored communications information to the foreign country is part of the formal mutual assistance process as opposed to police-to-police assistance. Therefore the information will generally be provided to the foreign country by the Central Authority in the Department as opposed to being provided by a law enforcement agency. As such, it is not appropriate that the agency be required to report on these matters.

3.199 Division 2 of Part 3-6 requires the report to the Minister to contain information about the number of arrests, prosecutions and convictions that result from lawfully accessing stored communications information. As it will not be feasible for Australian authorities to obtain this type of information from foreign counterparts, these reporting requirements will not be extended to circumstances where information has been provided to a foreign country.

3.200 However, item 48 will insert new section 163A. This section will instead specify that the Minister's annual report must set out the number of occasions on which lawfully accessed information or stored communications information was provided to a foreign country under paragraph 139(1) or section 142 of the TIA Act in connection with an authorisation under subsection 13A(1) of the MA Act.

3.201 As section 164 of the TIA Act requires the Minister to table the report in Parliament, the amendments by these items will ensure there is transparency and accountability as to how often information lawfully obtained for a domestic purpose, is provided to a foreign country for the purpose of foreign law enforcement.

Item 49 – Application of amendments made by this Division

3.202 This item will provide that the amendments made by Part 1 of Schedule 3 apply in relation to a request by a foreign country that is being considered on or after the day on which this item commences. The commencement for this item will be a day to be fixed by proclamation.

3.203 This application provision also specifies that the amendments made by this Part will apply from the day of commencement regardless of whether the request was made before or after that day. While this provision would apply to requests made before the date of Royal Assent, it would not create any retrospective criminal liability. The provision is necessary to enable there to be certainty with regards to the applicable law when processing requests made by foreign countries for assistance.

Division 2 – Requests for use of surveillance devices

3.204 Currently, prescribed Australian agencies may apply to an eligible judge or nominated Administrative Appeals Tribunal member for warrants to use surveillance devices to assist in the investigation of domestic offences. The prescribed agency's investigation must relate to a *domestic offence* that is punishable by imprisonment for at least three years. These law enforcement tools are not currently available for the investigation or prosecution of a foreign offence.

3.205 This Division will amend the MA Act and the SD Act to enable Australia to make and receive requests relating to the use of surveillance devices.

Mutual Assistance in Criminal Matters Act 1987

Item 50 – After Part IIIB

3.206 This item will insert Part IIIC into the MA Act. Part IIIC will govern assistance in relation to surveillance devices. Part IIIC will contain two sections; the first will detail requests made by Australia and the second will detail requests made by foreign countries.

Section 15E – Requests by Australia for surveillance devices

3.207 New section 15E will enable Australia to request an appropriate authority of a foreign country to authorise the use of a surveillance device in that country and arrange for information obtained pursuant to use of that device to be sent to Australia.

3.208 The threshold test for requesting the use of a surveillance device will be:

- if the use of a surveillance device is reasonably necessary to obtain information relevant to the commission of an Australian offence punishable by three or more years imprisonment, or

- if the use of a surveillance device is reasonably necessary to obtain information relevant to the identity or location of the offenders.

3.209 If the foreign country obtained the requested information lawfully, but by a means other than using a surveillance device, that information would not be inadmissible as evidence in Australia, or precluded from use in an Australian investigation, because it was obtained otherwise than in accordance with the request.

3.210 This is appropriate because so long as the foreign country obtained the evidence in accordance with their domestic requirements, and it is still related to the request, it should not matter that the evidence was not obtained in the way requested originally by Australia.

Section 15F – Requests by foreign countries for surveillance devices

3.211 New section 15F will establish the means by which Australia may respond to a foreign country's request for a surveillance device. It will enable the Attorney-General to authorise an eligible law enforcement officer to apply for a surveillance devices warrant under section 14 of the SD Act, if satisfied of the following matters:

- a request has been received from the foreign country
- an investigation or investigative proceeding relating to a criminal matter has commenced in the requesting country
- the offence the subject of the investigation or investigative proceeding is punishable by a maximum penalty of three or more years imprisonment, life imprisonment or death, and
- the requesting country has given appropriate undertakings in relation to the use and destruction of information obtained as a result of the surveillance device and any other matter the Attorney-General considers relevant.

3.212 The applicable threshold of a maximum penalty of three or more years imprisonment, life imprisonment or death mirrors the threshold that applies to whether a surveillance device can be sought for the investigation of domestic offences. This will ensure that surveillance devices will only be able to be used to investigate foreign offences that would also warrant the use of surveillance devices if those offences had been committed in Australia.

3.213 Although this amendment will allow assistance to be provided in relation to an offence that carries the death penalty, section 8 of the MA Act provides that where a mutual assistance request relates to a death penalty offence, assistance must be refused unless 'special circumstances' exist. Special circumstances could include material that provides exculpatory evidence, or where the requesting country has provided an undertaking that the death penalty will not be sought, or if imposed, will not be carried out.

3.214 'Eligible law enforcement officer' will be defined by reference to paragraphs (a) and (c) of the definition of 'law enforcement officer' in subsection 6(1) of the SD Act. As such, the following persons will be able to be authorised by the Attorney-General to apply for a surveillance device warrant in response to a mutual assistance request:

- the Commissioner or Deputy Commissioner of the AFP
- any AFP employee
- any special member or person seconded to the AFP, or
- an officer (however described) of the police force of a State or Territory, or any person who is seconded to that police force.

3.215 ‘Investigative proceeding’ will be defined in the MA Act by reference to paragraphs (a) and (b) of the existing definition of ‘proceeding’ in the MA Act:

- gathering evidential material that may lead to the laying of a criminal charge (paragraph (a)), or
- assessing evidential material in support of the laying of a criminal charge (paragraph (b)).

Surveillance Devices Act 2004

Items 51 to 53 – Subsection 6(1)

3.216 Subsection 6(1) sets out definitions that are relevant to the operation of the SD Act. Items 51 to 53 will add new definitions relevant to the changes being made by this Division.

Item 51 – Subsection 6(1)

3.217 Item 50 will insert a new power into the MA Act to enable Australia to use a surveillance devices warrant for the purposes of assisting a foreign investigation or investigative proceeding.

3.218 This item will insert a definition of ‘investigative proceeding’ into subsection 6(1) of the SD Act which will have the same meaning as the term carries in the MA Act.

3.219 ‘Investigative proceeding’ will be defined in the MA Act by reference to paragraphs (a) and (b) of the existing definition of ‘proceeding’ in the MA Act:

- gathering evidential material that may lead to the laying of a criminal charge (paragraph (a)), or
- assessing evidential material in support of the laying of a criminal charge (paragraph (b)).

3.220 Under some legal systems, a suspect may be formally charged with an offence later in the legal process than in Australia. Accordingly, the inclusion of ‘investigative proceeding’ in addition to ‘investigation’ will enable the Attorney-General to authorise Australian law enforcement to apply for a surveillance devices warrant to assist foreign law enforcement at any point where evidence is still being gathered before charges have been laid.

Item 52 – Subsection 6(1)

3.221 Currently, prescribed Australian agencies may apply to an eligible judge or nominated AAT member for a warrant to use a surveillance device to assist in the investigation of domestic offences. The prescribed agency’s investigation must relate to a domestic offence that is punishable by imprisonment for at least three years. This law enforcement tool is not currently available for the investigation or prosecution of a foreign offence.

3.222 Items 65 to 67 will insert various reporting requirements relating to the number of mutual assistance applications made each year.

3.223 This item will insert a definition of 'mutual assistance application' in subsection 6(1) of the SD Act. 'Mutual assistance application' will be defined as an application for a surveillance device warrant made under a mutual assistance authorisation.

3.224 A definition of 'mutual assistance authorisation' will be inserted in the SD Act by item 53 and will mean an authorisation under subsection 15F(1) of the MA Act. Subsection 15F(1) will be inserted in the MA Act by item 50. The subsection will set out the conditions that must be met before the Attorney-General can authorise an eligible law enforcement officer to apply for a surveillance device warrant.

3.225 Item 54 will insert new subsection 14(3A) to enable a law enforcement officer to make an application for a surveillance device warrant (for foreign purposes) if authorised to do so by the Attorney-General under a 'mutual assistance authorisation' – a 'mutual assistance application'.

Item 53 – Subsection 6(1)

3.226 Currently, prescribed Australian agencies may apply to an eligible judge or nominated Administrative Appeals Tribunal member for a warrant to use a surveillance device to assist in the investigation of domestic offences. The prescribed agency's investigation must relate to a domestic offence that is punishable by imprisonment for at least three years. This law enforcement tool is not currently available for the investigation or prosecution of a foreign offence.

3.227 Item 54 will insert new subsection 14(3A) to enable a law enforcement officer to apply for a surveillance device warrant if authorised to do so by the Attorney-General under a 'mutual assistance authorisation'.

3.228 This item will insert a definition of 'mutual assistance authorisation' in subsection 6(1) of the SD Act which will mean an authorisation under subsection 15F(1) of the MA Act. Subsection 15F(1) will be inserted in the MA Act by item 50. The subsection will set out the conditions that must be met before the Attorney-General can authorise an eligible law enforcement officer to apply for a surveillance device warrant.

Item 54 – After subsection 14(3)

3.229 Section 14 of the SD Act sets out the process for applying for a surveillance device warrant. It also sets out the requirements that must be met in an application. However, this section is currently limited to applications for 'relevant offences' which is defined as Commonwealth or State offences that have a federal aspect that carry a penalty of at least three years imprisonment. As such, a surveillance device warrant cannot be sought with respect to foreign offences.

3.230 This item will insert new subsection (3A) in section 14. Subsection 14(3A) will extend the application of section 14 to foreign offences. It will enable a law enforcement officer, or another person on his or her behalf, to apply for a surveillance device warrant in

relation to foreign offences. Subsection 14(3A) will set out the requirements that must be met before an application can be made. These are:

- the Attorney-General has authorised the application under subsection 15F(1) of the MA Act (which will be inserted by item 50)

- the law enforcement officer will need to suspect on reasonable grounds that the use of a surveillance device is necessary to obtain evidence of:

    - the commission of the offence to which the authorisation relates, or

    - the identity or location of the persons suspected of committing the offence.

3.231 This threshold test is similar to that which currently applies for applications for warrants for domestic offences – suspicion on reasonable grounds that the use of a surveillance device is necessary to enable evidence to be obtained of the commission of the offence or the identity or location of the offenders. This ensures that applications for surveillance device warrants are subjected to the same level of rigour and scrutiny whether they apply to domestic or foreign offences. It also ensures that the use of a surveillance device for foreign purposes cannot occur in instances where the use of a device could not be authorised for a domestic purpose.

Item 55 – Subsection 14(4)

3.232 Subsection 14(4) of the SD Act states that an application for a surveillance device warrant under subsection (1) or (3) may be made to an eligible Judge or nominated AAT member.

3.233 This item will include a reference to new subsection (3A) in subsection 14(4). The substitution of '(1) or (3)' with '(1), (3), or (3A)' will clarify that an application made pursuant to new subsection 14(3A) may be made to an eligible Judge or nominated AAT member. This item is consequential upon item 54, which will insert subsection 14(3A) which will enable applications for surveillance device warrants to be made with respect to foreign offences.

Item 56 – After paragraph 16(1)(b)

3.234 Section 16 states the matters about which an eligible Judge or nominated AAT member must be satisfied in order to issue a surveillance device warrant.

3.235 This item will insert paragraph 16(1)(ba). It is consequential upon item 54, which will insert subsection 14(3A). Subsection 14(3A) will enable applications for surveillance device warrants to be made with respect to foreign offences.

3.236 New paragraph 16(1)(ba) will provide that, in the case of a warrant sought in relation to a mutual assistance authorisation, the eligible Judge or nominated AAT member must be satisfied that:

- the mutual assistance authorisation is in force, and

- there are reasonable grounds for the suspicion founding the application for the warrant.

3.237 A mutual assistance authorisation will be in force if the Attorney-General has authorised an application for a surveillance device warrant under subsection 15F(1) of the MA Act, which will be inserted by item 50.

3.238 The 'reasonable grounds for the suspicion founding the application for the warrant' test is the same which applies to an application for a surveillance device warrant in relation to a domestic offence and refers to the suspicion the applying officer must have as set out in new subsection 14(3A) which will be inserted by item 54. These factors will ensure that applications for surveillance device warrants are subjected to the same level of rigour and scrutiny whether they apply to domestic or foreign offences.

Item 57 – Paragraph 16(2)(a)

3.239 Subsection 16(2) of the SD Act requires the eligible Judge or nominated AAT member to have regard to certain matters when determining whether a surveillance device warrant should be issued. Paragraph 16(2)(a) requires the eligible Judge or nominated AAT member in the case of a warrant sought in relation to a relevant offence, to have regard to the nature and gravity of the alleged offence.

3.240 This item would insert the phrase 'or a mutual assistance authorisation' after 'relevant offence' in paragraph 16(2)(a). It is consequential upon item 54, which will insert subsection 14(3A) in the SD Act. Subsection 14(3A) will enable applications for surveillance device warrants to be made with respect to foreign offences.

3.241 The amendment by this item will therefore provide that when a surveillance device warrant is sought in relation to domestic offence or, in the case of a mutual assistance authorisation, in relation to a foreign offence, the eligible Judge or nominated AAT member must have regard to the nature and gravity of the alleged offence when determining whether a warrant should be issued. This ensures that applications for surveillance device warrants are subjected to the same level of rigour and scrutiny whether they apply to domestic or foreign offences.

Item 58 – Paragraph 16(2)(e)

3.242 Subsection 16(2) of the SD Act requires the eligible Judge or nominated AAT member to have regard to certain matters when determining whether a surveillance device warrant should be issued. Paragraph 16(2)(e) requires the eligible Judge or nominated AAT member to have regard to 'the likely evidentiary or intelligence value of any evidence or information sought to be obtained'.

3.243 This item would insert the phrase 'in the case of a warrant sought in relation to a relevant offence or a recovery order - ' before 'the likely' in paragraph 16(2)(e). It is consequential upon item 54, which will insert subsection 14(3A). Subsection 14(3A) will enable applications for surveillance device warrants to be made with respect to foreign offences. This item is also consequential upon item 59, which will insert paragraph 16(2)(ea).

3.244 The amendment by this item will limit the application of paragraph 16(2)(e) to cases where the warrant was sought in relation to a relevant offence or a recovery order. Therefore, paragraph 16(2)(e) will not apply in the case of a warrant sought in relation to a mutual assistance authorisation.

Item 59 – After paragraph 16(2)(e)

3.245 Subsection 16(2) requires the eligible Judge or nominated AAT member to have regard to certain matters when determining whether a surveillance device warrant should be issued.

3.246 This item will insert new paragraph 16(2)(ea). New paragraph 16(2)(ea) will provide that, in the case of a warrant sought in relation to a mutual assistance authorisation, the eligible Judge or nominated AAT member must have regard to the likely evidentiary or intelligence value of any evidence or information sought to be obtained, to the extent that it is possible to determine this from the information obtained from the foreign country.

3.247 While new paragraph 16(2)(ea) and paragraph 16(2)(e) (which will be amended by item 58) require the eligible Judge or nominated AAT member to have regard to the same matter (the likely evidentiary or intelligence value of any evidence or information sought to be obtained), they distinguish between a warrant sought in relation to a mutual assistance authorisation and a warrant sought in relation to a domestic offence or a recovery order with the inclusion of the words 'to the extent that it is possible to determine this from the information obtained from the foreign country' in new paragraph 16(2)(ea). This is because the likely evidentiary or intelligence value of evidence or information sought in relation to a foreign offence may be difficult to obtain from the requesting country. For example, civil law countries do not assess the weight of a single piece of evidence in the same manner as the common law system.

Item 60 – After subparagraph 17(1)(b)(iii)

3.248 Paragraph 17(1)(b) specifies the information a surveillance device warrant must contain, such as the name of the applicant, the alleged offences in respect of which the warrant is issued, and the date the warrant is issued.

3.249 This item will insert new subparagraph 17(1)(b)(iiia) which will require a warrant issued in relation to a mutual assistance authorisation to specify the offence or offences against the law of a foreign country to which the warrant relates.

3.250 This is consistent with subparagraph 17(1)(b)(ii), which requires the warrant to specify the alleged domestic offences in respect of which the warrant was issued.

Item 61 – Subsection 20(2)

3.251 Section 20 enables an eligible Judge or nominated AAT member to revoke a surveillance device warrant on his or her own motion at any time before the expiration of the period of validity specified in the warrant. Subsection 20(2) specifies certain circumstances in which the chief officer of the agency to which the warrant was issued must revoke a surveillance device warrant. The circumstances in which the warrant must be revoked are

currently set out in paragraphs 21(2)(a) and (b) and 21(3)(a) and (b) and relate to the use of the surveillance device no longer being necessary.

3.252 This item will omit 'or 21(3)(a) and (b)' and substitute it with ', 21(3)(a) and (b) or 21(3A)(a) and (b)'. This item is consequential upon item 62, which will insert subsection 21(3A). New subsection 21(3A) will set out the circumstances in which a surveillance device warrant issued in relation to a mutual assistance authorisation must be revoked.

3.253 As such, the amendment by this item will ensure that if the circumstances set out in paragraphs 21(2)(a) and (b), 21(3)(a) and (b) or 21(3A)(a) and (b) are met in relation to a surveillance device warrant, the chief officer of the law enforcement agency to which the warrant was issued must revoke the warrant by instrument in writing.

Item 62 – After subsection 21(3)

3.254 Section 21 sets out the procedure for the discontinuance of a surveillance device warrant if it is no longer necessary.

3.255 This item will insert new subsection 21(3A). Subsection 21(3A) will provide the procedure for revoking and discontinuing the use of a surveillance device issued in respect of a mutual assistance authorisation.

3.256 Subsection 21(3A) will apply if:

- a surveillance device warrant has been sought following authorisation by the Attorney-General under subsection 15F(1) of the MA Act which will be inserted by item 50, and

- the chief officer of the law enforcement agency to which the warrant was issued is satisfied that the use of the surveillance device is no longer required for the purpose for which it was issued (obtaining evidence relating to the commission of the offence against the law of a foreign country or the identity or location of the person suspected of committing the offence).

3.257 Examples of when the use of the surveillance device may no longer be necessary include where:

- the suspect has been identified

- a person has been eliminated as a suspect in relation to a particular offence that the foreign country is investigating

- co-offenders have been identified, and

- sufficient evidence for a prosecution has been collected.

3.258 Where these conditions are met, the chief officer must take the necessary steps to ensure that the use of the surveillance device is discontinued. Further, the amendments which will be made by item 61 will also require the chief officer to revoke the warrant.

3.259 This item will ensure that procedures for discontinuing the use of a surveillance device obtained in response to a mutual assistance request are the same as those for discontinuing the use of a surveillance device obtained for a domestic purpose.

Item 63 – After paragraph 21(5)(b)

3.260 Section 21 sets out the procedure for discontinuing a surveillance device warrant if it is no longer necessary. Subsection 21(5) places responsibilities on the law enforcement officer to whom the warrant was issued to inform the chief officer if they believe the use of the device is no longer necessary.

3.261 This item will insert new paragraph 21(5)(c). Paragraph 21(5)(c) will apply to the law enforcement officer:

- to whom a warrant was issued in response to a mutual assistance authorisation, or
- who is primarily responsible for executing the warrant.

3.262 Under new paragraph 21(5)(c), if that officer believes that the surveillance device is no longer required to enable evidence to be obtained of the commission of the offence the subject of the mutual assistance authorisation, or of the identity or location of the suspects, he or she must immediately inform the chief officer of his or her law enforcement agency. The chief officer would then be required to comply with the requirements set out in subsection 21(3A) which will be inserted by item 62.

3.263 This item will ensure that procedures for discontinuing the use of a surveillance device obtained in response to a mutual assistance request are the same as those for discontinuing the use of a surveillance device obtained for a domestic purpose.

Item 64 – Paragraph 45(4)(f)

3.264 Subsections 45(1) and (2) contain offences for the unauthorised use, recording, communication or publishing of any protected information. Protected information is defined in section 44 of the SD Act and generally includes any information obtained from the use of a surveillance device or related to the use of a surveillance device including the application for that device. Subsection 45(3) sates that protected information may not be admitted into evidence in any proceedings.

3.265 Subsection 45(4) lists exceptions to the offences in subsections 45(1) and (2) and to the rule in subsection 45(3) that protected information may not be admitted into evidence in any proceedings.

3.266 The exception in paragraph 45(4)(f) applies to the communication of information to a foreign country, or the use of that information in accordance with the MA Act, if that communication relates to an offence against the laws of a foreign country that is punishable by a maximum penalty of three years imprisonment, life imprisonment or death. However, this exception currently only applies in circumstances where the information was originally acquired pursuant to a surveillance device warrant issued for a domestic purpose and provided to the foreign country under section 13A of the MA Act.

3.267 This item would repeal paragraph 45(4)(f) and replace it with new paragraph 45(4)(f). New paragraph 45(4)(f) will insert an additional exception. It will apply to the communication of information if it is authorised under subsection 13A(1) of the MA Act (as is currently allowed), as well as if the information was obtained under, or relates to, a surveillance devices warrant issued in relation to a mutual assistance authorisation.

3.268 This will ensure that any information obtained pursuant to a surveillance device warrant executed in response to a mutual assistance request is able to be lawfully disclosed to the country that made the request without it being an offence under the SD Act.

Items 65, 66 and 67 – After paragraph 50(1)(a), after paragraph 50(1)(e) and after paragraph 50(1)(i)

3.269 Section 50 requires the chief officer of a law enforcement agency to provide an annual report to the Minister setting out certain matters.

3.270 These items will insert new paragraphs 50(1)(aa), 50(1)(ea) and 50(1)(ia).

3.271 New paragraph 50(1)(aa) will require the annual report to set out the number of mutual assistance applications made by or on behalf of, and the number of warrants issued to, law enforcement officers in the agency during that year.

3.272 New paragraph 50(1)(ea) will require the annual report to set out the number of mutual assistance applications made by, or on behalf of, law enforcement officers of the agency that were refused during that year, and the reasons for refusal.

3.273 A mutual assistance application will be an application made in respect of a mutual assistance authorisation made by the Attorney-General under subsection 15F(1) following a request from a foreign country.

3.274 New paragraph 50(1)(ia) will require the annual report to set out the Commonwealth, State or Territory offence (if any) which corresponds to the relevant foreign offence in respect of which a mutual assistance application was made by, or on behalf of, law enforcement officers of that agency during the year.

3.275 These requirements will ensure that the issue and use of surveillance device warrants in response to mutual assistance requests are subject to similar accountability and transparency requirements as those applicable to domestic offences. The requirements would differ in one important respect. Australian authorities would not be obliged to obtain information about the prosecutions and convictions that result from the use of surveillance device warrants from foreign counterparts, as it would not be feasible for them to do so.

3.276 As subsection 50(4) of the SD Act requires the Minister to table the annual report in Parliament, the amendments by these items will ensure there is transparency and accountability as to how often information lawfully obtained for a domestic purpose, is provided to a foreign country for the purpose of foreign law enforcement.

Item 68 – After subparagraph 53(2)(c)(iii)

3.277 Section 53 requires the chief officer of a law enforcement agency to cause a register to be kept of warrants, emergency authorisations and tracking device authorisations sought by law enforcement officers of that agency. Subsection 53(2) requires the register to specify certain matters including the relevant offence in relation to which the warrant was issued.

3.278 This item will insert new subparagraph 53(2)(c)(iiia) which will, where the warrant was issued in relation to a mutual assistance authorisation, require the register to specify the relevant foreign offence to which the authorisation relates. This mirrors the requirement for warrants sought in relation to domestic offences.

Item 69 – Application of amendments made by this Division

3.279 This item will provide that the amendments made by Part 3 of Schedule 3 apply in relation to a request by a foreign country that is being considered on or after the day on which this item commences. The commencement for this item will be a day to be fixed by proclamation.

This application provision also specifies that the amendments made by this Part will apply from the day of commencement regardless of whether the request was made before or after that day. While this provision would apply to requests made before the date of Royal Assent, it would not create any retrospective criminal liability. The provision is necessary to enable there to be certainty with regards to the applicable law when processing requests made by foreign countries for assistance.

PART 4 – CARRYING OUT FORENSIC PROCEDURES AT THE REQUEST OF A FOREIGN COUNTRY ETC.

3.280 Forensic procedures (for example, obtaining fingerprints and DNA samples) can provide compelling evidence which may confirm or exclude a person as a suspect in the commission of an offence. These procedures are used in criminal investigations throughout Australia.

3.281 Currently, Australia cannot conduct a compulsory forensic procedure on a suspect in relation to a foreign serious offence in response to a request from a foreign country. Australia can conduct a forensic procedure on a volunteer in response to a request from a foreign country where that person provides informed consent (or in the case of a child or incapable person, where their parent or guardian provides informed consent) to the forensic procedure. However, the application of relevant provisions in the Crimes Act to these circumstances is not as clear as it could be.

3.282 Part 4 of Schedule 3 will amend the MA Act and the Crimes Act to enable the AFP, or a State or Territory police force, to carry out a forensic procedure on a suspect in relation to a foreign serious offence, either with informed consent or compulsorily, at the request of a foreign country. Part 4 would also clarify the procedures for obtaining forensic material from a volunteer on behalf of a foreign law enforcement agency.

3.283 Under the Crimes Act, there are several mechanisms for obtaining forensic material from a person, depending on the person's status in relation to a criminal matter and whether he or she consents to undergoing a forensic procedure. In the case of a suspect of an offence, there are three options:

(i) forensic procedure carried out following the informed consent of a suspect

(ii) compulsory 'non-intimate' forensic procedure carried out following an order by a senior constable, and

(iii) compulsory forensic procedure carried out following an order by a magistrate.

3.284 There are also two further regimes: one for the carrying out of forensic procedures on certain convicted offenders, and one for volunteers. The amendments in Part 4 would only make available, for the purposes of international cooperation, forensic procedures through mechanisms (i) and (iii) above in relation to suspects, and the regime for volunteers.

Crimes Act 1914

Item 70 – Simplified outline of Part ID

3.285 The simplified outline of Part ID summarises the main provisions contained in Part ID of the Crimes Act. This item will insert a paragraph to outline the application of the Crimes Act in cases where the forensic procedure is to be carried out in response to a request made by a foreign country under the MA Act or a request by a foreign law enforcement agency. The amendment will highlight that certain rules contained within the Crimes Act relating to the carrying out of forensic procedures will not apply or will be modified in their

application to forensic procedures carried out at the request of a foreign country or a foreign law enforcement agency.

Item 71 – 75 – Definitions (subsection 23WA(1))

3.286 Section 23WA sets outs the definitions that are relevant to the operation of Part ID of the Crimes Act. Items 71 to 75 will add new, or amend existing, definitions relevant to the changes being made by this Part.

Item 71 – Definition of foreign law enforcement agency

3.287 The amendments made by this Part will allow a forensic procedure to be carried out at the request of a foreign law enforcement agency and will also provide for the provision of forensic material to a foreign law enforcement agency.

3.288 This item will insert a definition of 'foreign law enforcement agency' into subsection 23WA(1) of the Crimes Act. 'Foreign law enforcement agency' will be defined as the police force of a foreign country (however described) or any other authority or person responsible for the enforcement of the laws of a foreign country.

Item 72 – Definition of foreign serious offence

3.289 The amendments made by this Part will enable a forensic procedure to be carried out in relation to investigating, or prosecuting a person for a 'foreign serious offence'.

3.290 This item will insert a definition of 'foreign serious offence' into subsection 23WA(1) of the Crimes Act. The term will have the same meaning as in the MA Act. 'Foreign serious offence' is defined in the MA Act as a serious offence against a law of a foreign country. Item 153 will redefine 'serious offence' to mean an offence for which the maximum penalty is death or imprisonment for a period exceeding 12 months, or a fine exceeding 300 penalty units as defined in section 4AA of the Crimes Act.

3.291 Although this amendment will allow assistance to be provided in relation to an offence that carries the death penalty, section 8 of the MA Act provides that where a mutual assistance request relates to a death penalty offence, assistance must be refused unless 'special circumstances' exist. Special circumstances could include material that provides exculpatory evidence, or where the requesting country has provided an undertaking that the death penalty will not be sought, or if imposed, will not be carried out.

Item 73 – Definition of forensic evidence

3.292 The amendments made by this Part will enable forensic evidence to be obtained and provided to a foreign country.

3.293 This item will insert a definition of 'forensic evidence' into subsection 23WA(1) of the Crimes Act for the purposes of Part ID. 'Forensic evidence' will be taken to either mean: evidence of forensic material, or evidence consisting of forensic material, taken from a suspect or volunteer by a forensic procedure, or evidence of any results of the analysis of the forensic material. There is currently no definition of 'forensic evidence' in the Crimes Act.

Item 74 – Definition of investigating constable

3.294 'Investigating constable' is defined in subsection 23WA(1) of the Crimes Act as the constable in charge of the investigation of the commission of an offence in relation to which a forensic procedure is carried out or proposed to be carried out.

3.295 The amendments made by this Part will allow a forensic procedure to be carried out at the request of a foreign law enforcement agency and will also provide for the provision of forensic material to a foreign law enforcement agency.

3.296 This item will add a second limb to the definition of 'investigating constable' to cover situations where the forensic procedure is being carried out at the request of a foreign country and as such there is no investigating constable in Australia. An 'investigating constable', in the case of a request by a foreign country, will be defined as the constable in charge of coordinating the response to the request. This will ensure that the 'investigating constable' will be clearly identifiable in all cases.

Item 75 – Definition of suspect

3.297 'Suspect' is defined in subsection 23WA(1) of the Crimes Act, in relation to an indictable offence, as:

- a person whom a constable suspects on reasonable grounds has committed the indictable offence
- a person charged with the indictable offence; or
- a person who has been summonsed to appear before a court in relation to the indictable offence.

3.298 'Indictable offence' is defined by reference to Commonwealth indictable offences or State indictable offences that have a federal aspect (generally offences that carry a penalty of at least 12 months imprisonment). The definition does not extend to foreign offences.

3.299 The amendments made by this Part will allow a forensic procedure to be carried out at the request of a foreign law enforcement agency for the investigation or prosecution of a foreign serious offence (a definition of which will be inserted by item 72).

3.300 This item will amend the definition of suspect to ensure it extends to suspects in foreign serious offences. The expanded definition will extend to a person in respect of whom a forensic procedure has been requested by a foreign country or a foreign law enforcement agency because the foreign county has started investigating whether the person has committed an indictable offence or started proceedings against the person for an indictable offence.

3.301 Further, item 76 will ensure that where the provisions of Part ID apply because of a request by a foreign country or foreign law enforcement agency, a reference to an 'indictable offence' will be taken to be a reference to a 'foreign serious offence' (a definition of which will be inserted by item 72).

Item 76 – At the end of section 23WA

3.302 Item 76 will add a new subsection to the end of section 23WA of the Crimes Act to clarify how the provisions of Part ID are intended to operate following a request by a foreign country or foreign law enforcement agency. New subsection 23WA(9) will state that where a request is made by a foreign country or foreign law enforcement agency, the provisions of Part ID will apply as if a reference to an indictable offence is a reference to a foreign serious offence.

3.303 The term 'foreign serious offence' will have the same meaning in the Crimes Act as in the MA Act (a definition will be added by item 72). 'Foreign serious offence' is defined in the MA Act as a serious offence against a law of a foreign country. Item 153 will redefine 'serious offence' to mean an offence for which the maximum penalty is death or imprisonment for a period exceeding 12 months, or a fine exceeding 300 penalty units as set out in section 4AA of the Crimes Act.

3.304 As indictable offences are limited to those exceeding 12 months imprisonment, the provisions of Part ID will only be able to be utilised for the investigation of foreign offences in circumstances in which they would be able to be used in Australia.

3.305 Although this amendment will allow assistance to be provided in relation to an offence that carries the death penalty, section 8 of the MA Act provides that where a mutual assistance request relates to a death penalty offence, assistance must be refused unless 'special circumstances' exist. Special circumstances could include material that provides exculpatory evidence, or where the requesting country has provided an undertaking that the death penalty will not be sought, or if imposed, will not be carried out.

Items 77 to 84 – Division 3 of Part ID

3.306 Division 3 of Part ID of the Crimes Act contains provisions which govern the carrying out of a forensic procedure on a suspect with their informed consent. However, the Division does not authorise the carrying out of a forensic procedure on a suspect who is a child or an incapable person. The Division sets out the process for obtaining the suspect's consent including the matters that must be considered by a constable before seeking the suspect's consent and the matters the suspect must be informed of before he or she is able to consent.

3.307 Items 77 to 84 will amend various provisions in Division 3 of Part ID so that the Division also applies to carrying out a forensic procedure on a person suspected of having committed a foreign serious offence with their consent.

Item 77 – Subparagraph 23WF(2)(b)(i)

3.308 Section 23WF of the Crimes Act sets out the procedure that applies when a constable seeks a suspect's consent to a forensic procedure. Subparagraph 23WF(2)(b)(i) requires the constable to give the suspect a written statement setting out certain information the suspect is required to be given under paragraphs 23WJ(1)(a), (e), (f), (g), (h), (i) and (j).

3.309 Item 79 will insert a new paragraph into subsection 23WJ(1) (paragraph 23WJ(1)(ib)) which will set out further information a suspect will be required to be given if the suspect is

being asked to undergo a forensic procedure because of a request by a foreign law enforcement agency.

3.310 This item will amend subparagraph 23WF(2)(b)(i) to insert a reference to new paragraph 23WJ(1)(ib) (which will be inserted by item 79) to ensure that this information will have to be given to a suspect in writing before he or she is able to consent to a forensic procedure.

Item 78 – Subsection 23WI(2)

3.311 Section 23WI of the Crimes Act sets out the matters that are to be considered by a constable before requesting a suspect consent to a forensic procedure, including that the constable must be satisfied on the balance of probabilities that the request for consent to the forensic procedure is justified in all the circumstances.

3.312 Subsection 23WI(2) currently stipulates that in determining whether a request is justified in all the circumstances, the constable must balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.

3.313 This item will repeal subsection 23WI(2) and replace it with a new subsection with two paragraphs.

3.314 New paragraph 23WI(2)(a) will cover circumstances where the forensic procedure has been requested by a foreign country and paragraph 23WI(2)(b) will cover all other cases.

3.315 New paragraph 23WI(2)(a) will require a constable to balance the public interest in Australia providing and receiving international assistance in criminal matters, against the public interest in upholding the physical integrity of the suspect. Given the fundamental importance of reciprocity in international cooperation in criminal matters, it is important that this is taken into account by the magistrate in determining whether the carrying out of the forensic procedure is justified in all the circumstances.

3.316 New paragraph 23WI(2)(b) will mirror the existing subsection 23WI(2) and will require the constable to balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.

3.317 This amendment will ensure that the factors considered by the constable are relevant to the case at hand and are balanced against the public interest in upholding the physical integrity of the suspect (regardless of whether the forensic procedure is for domestic or foreign purposes).

Item 79 – After paragraph 23WJ(1)(ia)

3.318 Subsection 23WJ(1) of the Crimes Act sets out the matters that a suspect must be informed of before he or she is able to consent to the carrying out of a forensic procedure. These include how the procedure is to be carried out, that the evidence produced might be used in court proceedings, and that the suspect may refuse to consent.

3.319 This item will insert a new paragraph into subsection 23WJ(1) which will set out further information a suspect will be required to be given if the suspect is being asked to undergo a forensic procedure because of a request by a foreign law enforcement agency.

3.320 The specific matters of which the suspect must be informed are:

- the name of the foreign law enforcement agency that has made the request
- that forensic evidence obtained from the procedure will be provided to that agency
- that the evidence may be used in proceedings in the foreign country
- that the retention of the evidence will be governed by the laws of the foreign country and undertaking given by the foreign law enforcement agency, and
- the content of undertakings given by the foreign law enforcement agency relating to the retention of the evidence.

3.321 This amendment will ensure that a suspect in relation to a foreign serious offence is informed of all relevant matters relating to the request for the forensic procedure before he or she is requested to consent to a forensic procedure, as is currently the case for suspects of domestic offences. The additional matters will also ensure that the suspect is aware that he or she is consenting to the information obtained from the procedure being made available to foreign law enforcement authorities for a foreign offence and that the retention of the information will be governed by foreign not domestic law.

Item 80 – After subsection 23WJ(4)

3.322 Subsections 23WJ(3) and (4) of the Crimes Act require a constable to inform a suspect who is in custody of the consequences of their decision if he or she decides not to consent to an intimate or non-intimate forensic procedure.

3.323 If a suspect who is in custody does not consent to a non-intimate forensic procedure the constable must inform the suspect that a constable may order the carrying out of the forensic procedure under Division 4 if he or she is satisfied of certain matters (including that that the suspect is in lawful custody, there are reasonable grounds to believe that the suspect committed a relevant offence and the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed the offence and the carrying out of the forensic procedure without consent is justified in all the circumstances).

3.324 If the constable is not satisfied of those factors (and as such cannot order the carrying out of the forensic procedure), the constable must inform the suspect that an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

3.325 If a suspect who is in custody does not consent to an intimate forensic procedure the constable must inform the suspect that an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

3.326 This item will insert a new subsection 4A into section 23WJ. This new subsection will state that subsections (3) and (4) as described above do not apply if the suspect is being

asked to undergo a forensic procedure (whether intimate or non-intimate) because of a request by a foreign law enforcement agency.

3.327 New subsection 23WJ(6) (which will be inserted by item 82) will outline the matters a suspect must be informed of by a constable if he or she refuses to consent to a forensic procedure following a request by a foreign law enforcement agency.

Item 81 – Subsection 23WJ(5)

3.328 Subsection 23WJ(5) requires a constable to inform a suspect who is not in custody of the consequences of their decision if he or she decides not to consent to a forensic procedure (whether intimate or non-intimate). The constable must inform the suspect that, if the suspect does not consent, an application may be made to a magistrate for an order authorising the carrying out of the forensic procedure.

3.329 This item will amend subsection 23WJ(5) to ensure that it will not apply to suspects who are being asked to undergo a forensic procedure because of a request by a foreign country.

3.330 New subsection 23WJ(6) (which will be inserted by item 82) will outline the matters a suspect must be informed of by a constable if he or she refuses to consent to a forensic procedure following a request by a foreign law enforcement agency.

Item 82 – At the end of section 23WJ

3.331 Subsections 23WJ(3), (4) and (5) set out the consequences if a suspect does not consent to a forensic procedure. Amendments made by items 80 and 81 will limit the application of these subsections to persons suspected of having committed domestic offences.

3.332 This item will insert a new subsection at the end of section 23WJ. New subsection 23WJ(6) will outline the consequences where a suspect who is being asked to undergo a forensic procedure because of a request from a foreign law enforcement agency refuses to consent to the procedure.

3.333 This new subsection will require the constable to inform the suspect (regardless of whether the suspect is in custody or not and regardless of whether the procedure is an intimate or non-intimate procedure) that if the suspect does not consent, the foreign country may request that the forensic procedure be carried out and, following the request, the Attorney-General may authorise a constable to apply to a magistrate for an order for the carrying out of the procedure.

3.334 This provision is consistent with the consequences of not consenting to a forensic procedure for domestic purposes (as set out in subsection 23WJ(3), (4) and (5)). Further, given the intrusive nature of forensic procedures, it is appropriate that the Attorney-General be required to approve any application for a forensic procedure where a person does not consent. This is consistent with the Attorney-General's role in authorising the use of other coercive powers under the MA Act.

3.335 Item 112 will insert relevant provisions into the MA Act (section 28B) which will govern how and when the Attorney-General may accept a request from a foreign country and authorise an application to a magistrate for the carrying out of a forensic procedure.

3.336 Further, items 86 to 91 will amend various provisions in Division 5 of Part ID (which govern the carrying out of a forensic procedure on a suspect by order of a magistrate) so that the Division also enables a magistrate to order the carrying out of a forensic procedure on a person suspected of having committed a foreign serious offence following the Attorney-General's approval.

Item 83 – Subsection 23WL(2) (note)

3.337 Subsection 23WL(1) of the Crimes Act requires, where possible, the tape recording of a constable's giving of information about the proposed forensic procedure and the suspect's response. Subsection 23WL(2) requires a written record to be made where a tape recording is not practicable.

3.338 The note at the end of the section states that Division 9 of Part ID contains provisions about making copies of material (including copies of tapes) available to the suspect.

3.339 Item 83 will renumber the note as 'Note 1' as a result of the second note which will be inserted by item 84.

Item 84 – At the end of section 23WL

3.340 Subsection 23WL(1) of the Crimes Act requires, where possible, the tape recording of a constable's giving of information about the proposed forensic procedure and the suspect's response. Subsection 23WL(2) of the Crimes Act requires a written record to be made where a tape recording is not practicable.

3.341 This item will insert a second note at the end of section 23WL. This note will state that where a foreign law enforcement agency has requested that a forensic procedure be carried out, section 23YQD(2) will allow a copy of the tape recording or written record to also be provided to the foreign law enforcement agency.

3.342 Subsection 23YQD(2) will be inserted by item 103 and will provide that where a person has consented to the forensic procedure, a copy of the tape recording or written record may be provided to the foreign law enforcement agency with the relevant forensic evidence. This is appropriate as it will enable the foreign country to obtain a record of the person consenting to the carrying out of the forensic procedure (for example, the fact that the person consented to the forensic procedure may be relevant to the admissibility of the forensic material as evidence in court proceedings).

Item 85 – After subsection 23WM(2)

3.343 Division 4 of Part ID of the Crimes Act sets out the process for how and when a senior constable can order that a person carry out a non-intimate forensic procedure on a suspect where he or she has not consented to a forensic procedure under Division 3 of Part ID.

3.344 This item will clarify that a senior constable under Division 4 of Part ID cannot authorise the carrying out of a forensic procedure on a suspect who has not consented if the procedure has been requested by a foreign country or a foreign law enforcement agency. This will ensure that any forensic procedure carried out on a suspect without their consent must be as a result of a formal request by the foreign country and subsequent approval by the Attorney-General.

Items 86 to 91 – Division 5 of Part ID

3.345 Division 5 of Part ID of the Crimes Act contains provisions which govern the carrying out of a forensic procedure on a suspect by order of a magistrate. The Division operates where a person has not consented to the forensic procedure under Division 3 of Part ID.

3.346 The Division sets out the process for obtaining an order from a magistrate including the matters that must be considered by the magistrate before he or she makes an order for the carrying out of the forensic procedure.

3.347 Items 86 to 91 will amend various provisions in Division 5 of Part ID so that the Division also enables a magistrate to order the carrying out of a forensic procedure on a person suspected of having committed a foreign serious offence.

Item 86 – Section 23WR

3.348 Section 23WR of the Crimes Act sets out the circumstances in which a magistrate may order that a forensic procedure be carried out on a suspect.

3.349 This item will insert '(1)' at the beginning of the section. This is necessary as a new, second subsection will be inserted by item 87.

Item 87 – At the end of section 23WR

3.350 Section 23WR of the Crimes Act sets out the circumstances in which a magistrate may order that a forensic procedure be carried out on a suspect. These include if:

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

3.351 This item will add a new paragraph which will set out a further circumstance in which a magistrate may order a forensic procedure be carried out on a suspect. The new paragraph 23WR(1)(d) will state that a forensic procedure may also be carried out on a suspect if the forensic procedure has been requested by a foreign country (and subsequently approved by the Attorney-General under the MA Act).

3.352 This new paragraph will provide a basis for a magistrate to order the carrying out of a forensic procedure on a suspect for a foreign purpose (if satisfied of the matters set out in section 23WT). However, the magistrate will only be able to make such an order if the procedure has been requested by the foreign country and has been approved by the Attorney-General under section 28B of the MA Act, which will be inserted by item 112.

Further, the amendments that will be made by items 89 and 90 to section 23WT will set out further matters that the magistrate must consider before ordering the carrying out of a forensic procedure following a request from a foreign country.

3.353 This item will also insert a new subsection 23WR(2). This new subsection will clarify that a magistrate is not authorised to order the carrying out of a forensic procedure on a suspect if the procedure has been requested by a foreign law enforcement agency. This will ensure that any forensic procedure carried out on a suspect without their consent must be as a result of a formal request by the foreign country and subsequent approval by the Attorney-General.

Item 88 – Paragraph 23WS(a)

3.354 This item replaces the reference to section 23WR in paragraph 23WS(a) with a reference to subsection 23WR(1). This is a result of the amendment which will be made by item 86 which will renumber what is currently section 23WR as subsection 23WR(1) to take account of new subsection 23WR(2) which will be inserted by item 87.

Item 89 – After paragraph 23WT(1)(c)

3.355 Subsection 23WT(1) of the Crimes Act sets out the matters of which a magistrate must be satisfied before ordering that a forensic procedure be carried out on a suspect. These include that on the evidence before him or her, there are reasonable grounds to believe that the suspect committed a relevant offence, there are reasonable grounds to believe that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence and the carrying out of the forensic procedure is justified in all the circumstances. These matters will all need to be considered before a magistrate makes an order for the carrying out of a forensic procedure on a suspect following a request from a foreign country (as will be allowed under new paragraph 23WR(1)(d) which will be inserted by item 87).

3.356 This item will insert a new matter into subsection 23WT(1) that must also be considered by a magistrate before ordering the carrying out of a forensic procedure on a suspect. New paragraph 23WT(1)(ca) will require, where the forensic procedure has been requested by a foreign country, the magistrate to be satisfied on the balance of probabilities that the constable has been authorised by the Attorney-General under the MA Act to make the application for an order.

3.357 The Attorney-General will be able to authorise an application for the carrying out of a forensic procedure under new section 28B of the MA Act which will be inserted by item 112.

Item 90 – Subsection 23WT(2)

3.358 Section 23WT of the Crimes Act sets out the matters of which a magistrate must be satisfied before ordering a suspect to undergo a forensic procedure, including that the magistrate must be satisfied on the balance of probabilities that the carrying out of the forensic procedure is justified in all the circumstances.

3.359 Subsection 23WT(2) currently stipulates that in determining whether the carrying out of the forensic procedure is justified in all the circumstances, the constable must balance the

public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.

3.360 This item will repeal subsection 23WT(2) and replace it with a new subsection with two paragraphs.

3.361 New paragraph 23WT(2)(a) will cover circumstances where the forensic procedure has been requested by a foreign country and paragraph 23WT(2)(b) will cover all other cases.

3.362 New paragraph 23WT(2)(a) will require a constable to balance the public interest in Australia providing and receiving international assistance in criminal matters, against the public interest in upholding the physical integrity of the suspect. Given the fundamental importance of reciprocity in international cooperation in criminal matters, it is important that this is taken into account by the magistrate in determining whether the carrying out of the forensic procedure is justified in all the circumstances.

3.363 New paragraph 23WT(2)(b) will mirror the existing subsection 23WT(2) and will require the constable to balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned against the public interest in upholding the physical integrity of the suspect.

3.364 This amendment will ensure that the factors considered by the constable are relevant to the case at hand and are balanced against the public interest in upholding the physical integrity of the suspect (regardless of whether the forensic procedure is for domestic or foreign purposes).

Item 91 – Paragraph 23WU(2)(b)

3.365 Section 23WU of the Crimes Act stipulates who can apply to a magistrate for an order to carry out a forensic procedure on a suspect. Subsection 23WU(2) sets out the requirements that must be met when applying for such an order. Paragraph 23WU(2)(b) requires the application to be supported by evidence on oath or by affidavit dealing with the matters referred to in paragraphs 23WT(1)(a), (b), (c) and (d) (the matters a magistrate must be satisfied of before ordering the forensic procedure).

3.366 Paragraph 23WU(2)(b) will be amended by this item to also include a reference to paragraph 23WT(1)(ca) (which will be inserted by item 89). New paragraph 23WT(1)(ca) will require, where the forensic procedure has been requested by a foreign country, that the magistrate be satisfied on the balance of probabilities that the constable has been authorised by the Attorney-General under the MA Act to make the application for an order.

3.367 This item will ensure that the application contains evidence dealing with this particular matter as it is a matter that is required to be considered by the magistrate in determining whether to make an order.

Item 92 – Paragraph 23XA(1)(a)

3.368 This item will amend paragraph 23XA(1)(a) of the Crimes Act to remove the reference to section 23WR and replace it with a reference to subsection 23WR(1). This is as

a result of the amendments that will be made by items 86 and 87 which will add a second subsection to section 23WR.

Items 93 to 98 – Division 6B of Part ID

3.369 Division 6B of Part ID of the Crimes Act contains provisions which govern the carrying out of a forensic procedure on a volunteer. It details how a volunteer is able to consent to a procedure and whose consent is needed to carry out a procedure on a child or incapable person. It also sets out the circumstances in which a magistrate may order the carrying out of a forensic procedure on a child or incapable person.

3.370 These items will amend various provisions in Division 6B of Part ID so that the Division also governs the carrying out of a forensic procedure on a volunteer, child or incapable person for foreign purposes.

Item 93 – After paragraph 23XWR(2)(d)

3.371 Division 6B of Part ID of the Crimes Act deals with the carrying out of forensic procedures on volunteers and certain other persons. Section 23XWR governs when a volunteer or other person can consent to a forensic procedure.

3.372 Subsection 23XWR(1) of the Crimes Act states that a volunteer, or parent or guardian of a child or incapable person can only give informed consent if it is done in the presence of an independent person after a constable informs the volunteer, parent or guardian of certain matters including those listed in subsection 23XWR(2).

3.373 This item will amend subsection 23XWR(2) to insert new matters that the person must be informed of before he or she is able to consent to the carrying out of the forensic procedure. New paragraph 23XWR(2)(da) will state that where the volunteer will undergo the procedure as a result of a request by a foreign law enforcement agency, the person will need to be informed of the following:

- the name of the foreign law enforcement agency that has made the request
- that forensic evidence obtained from the procedure will be provided to that agency
- that the evidence may be used in proceedings in the foreign country
- that the retention of the evidence will be governed by the laws of the foreign country, and
- any undertakings given by the foreign country relating to the retention of the evidence.

3.374 These new matters that the person must be informed of relate to the forensic procedure being for the purpose of a foreign investigation as opposed to a domestic investigation and that the evidence obtained may be used for these foreign purposes and be in the control of the foreign agency.

3.375 This amendment will ensure that the volunteer is aware that he or she is consenting to the information obtained from the procedure being made available to foreign law

enforcement authorities for a foreign offence and that the retention of the information will be governed by foreign not domestic law. This includes that if evidence or information has already been provided to the foreign country, withdrawing consent will mean the return of evidence or information is subject to foreign laws.

3.376 The amendment that will be made by this item will enable a forensic procedure to be carried out on a volunteer (with their consent) or a child or incapable person (with the consent of their parent or guardian), following a request from a foreign law enforcement agency.

3.377 If a volunteer who is able to consent to a forensic procedure does not provide their consent to the carrying out of the procedure, or withdraws their consent, then the forensic procedure will not be carried out on that volunteer under any circumstances (as it is not possible to obtain an order from a magistrate for the carrying out of a forensic procedure on a volunteer who is not a child or incapable person).

3.378 However, it will still be possible to carry out a forensic procedure on a child or incapable person following a formal mutual assistance request by the foreign country for the carrying out of the forensic procedure on that child or incapable person. New section 28B of the MA Act (which will be inserted by item 112) will govern when the Attorney-General can authorise a constable to apply for an order for the carrying out of the procedure. Section 23XWU of the Crimes Act (which will be amended by items 95 and 96) will govern when a magistrate may order the carrying out of the forensic procedure following a formal mutual assistance request and authorised by the Attorney-General.

Item 94 – at the end of section 23XWS

3.379 Subsection 23XWS(1) of the Crimes Act requires, where possible, the tape recording of a constable's giving of information related to the proposed forensic procedure and the volunteer's, or volunteer's parent's or guardian's, response. Subsection 23XWS(2) of the Crimes Act requires a written record to be made where a tape recording is not practicable.

3.380 This item will insert two notes at the end of section 23XWS.

3.381 Note 1 will mirror the existing note following section 23WL (which governs the recording of the giving of information to a suspect). It will state that Division 9 contains provisions about making copies of material (including copies of tapes) available to volunteers.

3.382 Note 2 will state that where a tape recording or written record is made, section 23YQD(2) will allow a copy of the tape recording or written record to be provided to the foreign law enforcement agency where the forensic procedure is requested by a foreign law enforcement agency.

3.383 Subsection 23YQD(2) will be inserted by item 103 and will ensure that where a person has consented to the forensic procedure, a copy of the recording (tape recording or a written record) may also be provided to the foreign law enforcement agency. This is appropriate as it will enable the foreign country to obtain a record of the person consenting to the carrying out of the forensic procedure (for example, the fact that the person consented to the forensic procedure may be relevant to the admissibility of the forensic material as evidence in court proceedings).

Item 95 – At the end of subsection 23XWU(1)

3.384 Subsection 23XWU(1) of the Crimes Act sets out the circumstances in which a magistrate may order the carrying out of a forensic procedure on a child or incapable person. These are if:

- the consent of the parent or guardian of the child or incapable person cannot reasonably be obtained
- the parent or guardian of the child or incapable person refuses consent and the magistrate is satisfied that there are reasonable grounds to believe:
    - that the parent or guardian is a suspect, and
    - that the forensic procedure is likely to produce evidence tending to confirm or disprove that he or she committed an offence, or
- the parent or guardian of the child or incapable person consented to the carrying out of the forensic procedure, but subsequently withdraws that consent.

3.385 This item will insert a new circumstance in which a magistrate may order the carrying out of a forensic procedure on a child or incapable person. New paragraph 23XWU(1)(d) will state that a magistrate can order a child or incapable person to undergo a forensic procedure if, where the forensic procedure has been requested by a foreign country, a constable has been authorised by the Attorney-General under the MA Act to make the application for an order.

3.386 This new paragraph will provide a basis for a magistrate to order the carrying out of a forensic procedure on a child or incapable person for a foreign purpose (if satisfied of the matters set out in section 23XWU). However, the magistrate will only be able to make such an order if the procedure has been requested by the foreign country and has been approved by the Attorney-General under section 28B of the MA Act which will be inserted by item 112.

3.387 Further, the amendment that will be made by item 96 will clarify that a magistrate must not make an order for the carrying out of a forensic procedure on a child or incapable person if the procedure has been requested by a foreign law enforcement agency (police-to-police assistance) as opposed to the foreign country (formal mutual assistance request).

3.388 This is appropriate because it aligns with other amendments made by this Part which will require a formal mutual assistance request and the authorisation of the Attorney-General before a forensic procedure can be carried out on any person who refuses to consent to a procedure.

3.389 While the amendment made by this item will enable a magistrate to order the carrying out of a forensic procedure on a child or incapable person, the factors listed in subsection 23XWU(2) will be required to be taken into account by the magistrate in

determining whether or not to make the order. The factors that the magistrate will need to take into account include:

- if the forensic procedure is being carried out for the purposes of the investigation of a particular offence – the seriousness of the circumstances surrounding the commission of the offence

- the best interests of the child or incapable person

- so far as they can be ascertained, any wishes of the child or incapable person with respect to whether the forensic procedure should be carried out, and

- whether the carrying out of the forensic procedure is justified in all the circumstances.

3.390 These factors will need to be appropriately balanced by the magistrate to determine whether or not to order that the forensic procedure be carried out.

3.391 Further, despite any order by the magistrate for the carrying out of the forensic procedure, subparagraph 23XWQ(2)(b)(ii) and subsection 23XWQ(3) of the Crimes Act will continue to prevent the carrying out of a forensic procedure on a child or an incapable person who objects to or resists the carrying out of the procedure.

Item 96 – After subsection 23XWU(1)

3.392 Item 95 will amend subsection 23XWU(1) to allow a magistrate to order a child or incapable person to undergo a forensic procedure if, where the forensic procedure has been requested by a *foreign country*, a constable has been authorised by the Attorney-General under the MA Act to make the application for an order.

3.393 This item will insert new subsection 23XWU(1A) into section 23XWU to clarify that a magistrate will not be able to order the carrying out of a forensic procedure on a child or incapable person if the procedure has been requested by a *foreign law enforcement agency*.

3.394 This will confirm that a formal mutual assistance request, authorisation by the Attorney-General and an order from a magistrate will all be necessary to obtain forensic evidence from a child or incapable person without the consent of their parent or guardian. The material will not be able to be obtained in response to a request made through police channels.

3.395 This is appropriate because it aligns with other amendments made by this Part which will require a formal mutual assistance request and the authorisation of the Attorney-General before a forensic procedure can be carried out on any person who refuses to consent to a procedure.

Items 97 and 98 – Subsection 23XWV(2) and after subsection 23XWV(2)

3.396 Section 23XWV of the Crimes Act sets out a process for the retention of forensic material obtained by consent from a volunteer (which includes a child or incapable person) in circumstances where the consent for the retention of the forensic material taken, or information obtained from the procedure, is withdrawn.

3.397 Subsection 23XWV(2) sets out certain factors a magistrate must be satisfied of before he or she can order that the forensic material be retained notwithstanding the withdrawal of consent.

3.398 Item 97 will amend subsection 23XWV(2) to insert the words 'Subject to subsection (2A), a magistrate' at the commencement of the subsection.

3.399 Item 98 will insert new subsection 23XWV(2A). This new subsection will, despite the operation of current subsection 23XWV(2), state that a magistrate may not make an order to retain the forensic material following the withdrawal of consent if:

- the volunteer was asked to undergo a procedure as a result of a request by a foreign law enforcement agency, and

- the forensic evidence has already been provided to the foreign law enforcement agency.

3.400 This is appropriate because, while Australia could request the foreign country to return the material (where it has already been provided before the consent was withdrawn), some use may have already been made of it - it may, for example, have been adduced in evidence in proceedings, which would pose difficulties. While the volunteer retains his or her right to withdraw consent to the retention of material, once the material has been provided, it is a matter for the foreign country as to how to respond to the withdrawal of consent.

3.401 This also aligns with the amendments that will be made by item 93 which will provide that a volunteer must be informed of certain matters prior to consenting, including that the retention of the material will be governed by the laws of the foreign country, as well as any undertakings that country provides.

Item 99 – At the end of Division 7 of Part ID

3.402 Division 7 of Part ID of the Crimes Act provides for the admissibility of evidence associated with a forensic procedure.

3.403 This item will insert a new subdivision into Division 7. New Subdivision C – Application (section 23YBA) – will clarify that this Division does not apply in relation to a proceeding in a foreign country for the purposes of which forensic evidence has been provided because of a request by the foreign country or a foreign law enforcement agency.

3.404 This is appropriate because the admissibility of the forensic evidence in proceedings in a foreign country is a matter which would be governed by that country's evidence laws.

Item 100 – Before section 23YC

3.405 Division 8 of Part ID deals with the destruction of forensic material.

3.406 Item 100 will insert a new section at the beginning of Division 8. New section 23YBB will state that Division 8 does not apply to forensic evidence provided in response to a request by a foreign country or a foreign law enforcement agency.

3.407 This is because the continued retention of forensic material provided to a foreign country is a matter for that country in accordance with its own laws, subject to any undertakings the foreign country provided in relation to the forensic material.

Item 101 – At the end of subsection 23YF(1)

3.408 Division 9 sets out general provisions relating to the operation of Part ID of the Crimes Act. Section 23YF of the Crimes Act governs the obligations of investigating constables relating to tape recordings that have been required to be made under Part ID.

3.409 This item will insert two new notes at the end of subsection 23YF(1).

3.410 Note 1 will state that where a forensic procedure has been carried out as a result of a request by a foreign country, a copy of anything made may also be provided to the foreign country under subsections 23YQB(2) and (3). These subsections will be inserted by item 103.

3.411 Note 2 will state that where a forensic procedure has been carried out as a result of a request by a foreign law enforcement agency, a copy of anything made may also be provided to the foreign law enforcement agency under subsections 23YQD(3) and (4). These subsections will be inserted by item 103.

Item 102 – After section 23YK

3.412 Sections 23YI to 23YK of the Crimes Act contain general provisions relating to proof of certain matters relating to the operation of Part ID in court proceedings.

3.413 This item will insert a new section which will clarify that sections 23YI to 23YK do not apply in relation to a proceeding in a foreign country for the purposes of which forensic evidence has been provided in response to a request by the foreign country or a foreign law enforcement agency.

3.414 This is appropriate because the conduct of proceedings in foreign courts is a matter for the foreign country's laws.

Item 103 – After Division 9 of Part ID – Division 9A – Carrying out forensic procedures at the request of a foreign jurisdiction

3.415 Under the Crimes Act, Australia cannot compel a suspect to undergo a forensic procedure in respect of a foreign serious offence in response to a request from a foreign country. Further, while Australia can conduct a forensic procedure on a volunteer, or child or incapable person, in response to a request from a foreign country where that person provides informed consent (or in the case of a child or incapable person, their parent or guardian provides informed consent) to the forensic procedure, the application of relevant provisions in the Crimes Act to these circumstances is not as clear as it could be.

3.416 This item will insert a new Division which will govern the provision of forensic evidence to a foreign country following the carrying out of a forensic procedure for a foreign purpose.

Division 9A – Carrying out forensic procedures at the request of a foreign jurisdiction

Subdivision A – Requests by foreign countries

3.417 New Subdivision A will govern the process for providing forensic evidence to a foreign country following a request by the foreign country.

Section 23YQA

3.418 New section 23YQA will outline the application of the subdivision. It will state that the Subdivision applies if:

- a request is made by a *foreign country* that a forensic procedure be carried out on a person, and

- the Attorney-General has authorised a constable to apply to a magistrate for an order authorising the carrying out of the forensic procedure.

3.419 That is, this subdivision will cover forensic evidence obtained following a formal mutual assistance request. The Attorney-General will have the power to give an authorisation under new section 28B which will be inserted by item 112.

3.420 Although this subdivision simply refers to a request by a foreign country in relation to a *person*, the subdivision will only apply to forensic procedures carried out on a suspect or a child or incapable person following a request from a foreign country. This is because the Attorney-General can only authorise forensic procedures on these classes of persons under new section 28B of the MA Act (which will be inserted by item 112). This subdivision will not apply where a forensic procedure is carried out following a request from a foreign law enforcement agency and consent to the procedure by the suspect, volunteer or the volunteer's parent or guardian.

3.421 Further, forensic procedures will only be able to be carried out on a suspect or a child or incapable person (where their parent or guardian is a suspect) following a request from a foreign country in relation to a foreign serious offence. A foreign serious offence will be defined (by item 72) as a serious offence against a law of a foreign country. Item 153 will redefine 'serious offence' to mean an offence for which the maximum penalty is death, imprisonment for a period exceeding 12 months, or, a fine exceeding 300 penalty units as set out in section 4AA of the *Crimes Act 1914*.

Section 23YQB

3.422 New section 23YQB will set out the process for providing forensic evidence to the foreign country for the purposes of this subdivision.

3.423 Subsection 23YQB(1) will provide that where forensic evidence has been obtained from a forensic procedure carried out on a person (following Attorney-General approval), the evidence is to be provided to the foreign country in accordance with a direction given by the Attorney-General under section 28C of the MA Act (which will be inserted by item 112). In practice, the provision of this material may be through police channels or through each country's central authority responsible for processing mutual assistance requests.

3.424 New section 28C of the MA Act will allow the Attorney-General to provide directions to the constable as to how forensic evidence is to be provided to the foreign country.

3.425 New subsection 23YQB(2) will provide for the transmission of copies of audio recordings or transcripts of tape recordings to foreign countries.

3.426 The subsection will state that where an audio recording, transcript of a tape recording or copies of recordings or transcripts are made available to a person as required by subsection 23YF(1) (which will apply in relation to forensic procedures for foreign offences in the same way it currently applies to forensic procedures for domestic offences), they may also be provided to the foreign country. However, if a direction is given by the Attorney-General under new section 28C (which will be inserted by item 112), then the transmission of an audio recording, transcript of a tape recording or copies of recordings or transcripts will be required to be done in a way that accords with any direction.

3.427 New subsection 23YQB(3) will govern the provision of video recordings to a foreign country where a video recording or both a video and audio recording were made.

3.428 In circumstances where only a video recording was made, or where both an audio and video recording were made, and the person is given a copy of the video recording or given the opportunity to view the video recording, then a copy of the video recording may also be provided to the foreign country. However, if a direction is given by the Attorney-General under new section 28C (which will be inserted by item 112), then the transmission of a copy of the video recording will be required to be done in a way that accords with any direction.

3.429 Subsections 23YQB(2) and (3) are appropriate as they will ensure the foreign country has a record of the carrying out of the forensic procedure. This may be relevant to the admissibility of the forensic material as evidence in court proceedings.

Subdivision B – Requests by a foreign law enforcement agency

3.430 New Subdivision B will govern the process for providing forensic evidence to a foreign country following a request by the foreign country.

Section 23YQC

3.431 New section 23YQC will outline the application of the subdivision. It will state that the Subdivision applies if a request is made by a foreign law enforcement agency for a forensic procedure to be carried out on:

- a suspect in relation to a foreign serious offence who has consented to the procedure, or
- a volunteer.

3.432 That is, this subdivision will cover the provision of forensic evidence obtained as a result of police-to-police assistance without the need for a formal mutual assistance request. In all circumstances, evidence that will be able to be provided under this subdivision would have been obtained with the person's consent.

3.433 A foreign serious offence will be defined (by item 72) as a serious offence against a law of a foreign country. Item 153 will redefine 'serious offence' to mean an offence for which the maximum penalty is death or imprisonment for a period exceeding 12 months, or a fine exceeding 300 penalty units as defined in section 4AA of the Crimes Act.

Section 23YQD

3.434 New section 23YQD will set out the process for providing forensic evidence to the foreign country for the purposes of this Subdivision.

3.435 Subsection 23YQD(1) will state that the Commissioner may provide forensic evidence directly to a foreign law enforcement agency. The Commissioner will only be able to do so if satisfied that the foreign law enforcement agency has given appropriate undertakings in relation to the retention, use and destruction of the forensic evidence and that it is appropriate in all the circumstances to do so.

3.436 It is also appropriate that the Commissioner be responsible for the provision of the material as the material will have been obtained on a police-to-police basis and therefore should be able to be transferred to the foreign country through the appropriate police channels, subject to the considerations set out above.

3.437 New subsection 23YQD(2) will ensure that where a person has consented to the forensic procedure, a copy of the recording (tape recording or a written record) may also be provided to the foreign country. Section 23WL (suspects) and section 23XWS (volunteers) govern the recording of the giving of information and consent.

3.438 This is appropriate as it will ensure the foreign country has a record of the person consenting to the carrying out of the forensic procedure. The fact that the person consented to the forensic procedure may be relevant to the admissibility of the forensic material as evidence in court proceedings.

3.439 New subsection 23YQD(3) will provide for the transmission of copies of audio recordings or transcripts of tape recordings to foreign countries.

3.440 The subsection will state that where the audio recording, transcript of the recording or copies of recordings or transcripts are made available to a suspect as required by subsection 23YF(1) (which will apply in relation to forensic procedures for foreign offences in the same way it currently applies to forensic procedures for domestic offences), they may also be provided to the foreign country.

3.441 New subsection 23YQD(4) will govern the provision of video recordings to a foreign country where a video recording or both a video and audio recording were made.

3.442 In circumstances where only a video recording was made, or where both an audio and video recording were made, and the suspect is given a copy of the video recording or given the opportunity to view the video recording, then a copy of the video recording may also be provided to the foreign country.

3.443 Subsections 23YQD(3) and (4) are appropriate as they will ensure the foreign country has a record of the carrying out of the forensic procedure. This may be relevant to the admissibility of the forensic material as evidence in court proceedings.

Item 104 – Section 23YQA

3.444 This item will renumber current section 23YQA of the Crimes Act as section 23YQE as a result of new Division 9A which will be inserted by item 103.

Item 105 – After subsection 23YUB(1)

3.445 Subsection 23YUB(1) of the Crimes Act states that the Minister may enter into arrangements with the responsible Ministers of the participating jurisdictions (States and Territories) for the establishment and maintenance of a register of orders for the carrying out of forensic procedures made under Part ID or corresponding laws of participating jurisdictions.

3.446 This item will insert a new subsection to follow subsection 23YUB(1). New subsection 23YUB(1A) will clarify that the orders referred to in subsection 23YUB(1) do not include orders for the carrying out of a forensic procedure on a person made in response to a request by a foreign country. Although this new subsection will simply refer to forensic procedures carried out on a *person* in response to a request from a foreign country, the subsection will only apply to forensic procedures carried out on a suspect or a child or incapable person, and not other volunteers. This is because the Attorney-General can only authorise forensic procedures on these classes of persons under new section 28B of the MA Act (which will be inserted by item 112).

3.447 This will ensure that the register does not contain information about orders made by a magistrate for foreign purposes. This is appropriate as it is a register for Australian investigatory purposes.

Mutual Assistance in Criminal Matters Act 1987

Items 106 to 111 – Subsection 3(1)

3.448 Subsection 3(1) of the MA Act sets out definitions that are relevant to the operation of the Act. Items 106 to 111 will insert new definitions relevant to the changes that will be made by this Schedule.

Item 106 – Subsection 3(1)

3.449 Item 112 will insert a new Part into the MA Act which will govern requests by and to Australia for forensic procedures. New section 28B of the MA Act will set out the circumstances in which, following a request from a foreign country, the Attorney-General may authorise a constable to apply to a magistrate for an order for the carrying out of a forensic procedure on a child or incapable person.

3.450 This item will insert a definition of 'child' in subsection 3(1) of the MA Act. 'Child' will be defined by reference to the definition of child in Part ID of the Crimes Act which is a person who is at least 10 years of age but under 18 years of age.

Item 107 – Subsection 3(1)

3.451 Item 112 will insert a new Part into the MA Act which will govern requests by and to Australia for forensic procedures. New section 28C will enable the Attorney-General to direct a constable as to how the forensic evidence obtained from the carrying out of a forensic procedure is to be provided to a foreign country.

3.452 This item will insert a definition of 'forensic evidence' in subsection 3(1) of the MA Act. 'Forensic evidence' will be defined by reference to the definition of 'forensic evidence' in Part ID of the Crimes Act which will be inserted by item 73. It will be taken to either mean: evidence of forensic material, or evidence consisting of forensic material, taken from a suspect or volunteer by a forensic procedure, or evidence of any results of the analysis of the forensic material. Item 108 will insert a definition of forensic material into the MA Act which will be defined by reference to the definition of the term in Part ID of the Crimes Act.

Item 108 – Subsection 3(1)

3.453 Item 112 will insert a new Part into the MA Act which will govern requests by and to Australia for forensic procedures. New section 28B will set out the circumstances in which, following a request from a foreign country, the Attorney-General may authorise a constable to apply to a magistrate for an order for the carrying out of a forensic procedure on a person. Among other matters of which the Attorney-General must be satisfied, the Attorney-General may only authorise an application if the foreign country has given appropriate undertakings in relation to the retention, use and destruction of forensic material.

3.454 This item will insert a definition of 'forensic material' in subsection 3(1) of the MA Act. 'Forensic material' will be defined by reference to the definition of 'forensic material' in Part ID of the Crimes Act, which encompasses samples, hand prints, finger prints, foot prints or toe prints, photographs or video recordings, or casts or impressions that have been taken from or of a person's body by a forensic procedure.

Item 109 – Subsection 3(1)

3.455 Item 112 will insert a new Part into the MA Act which will govern requests by and to Australia for forensic procedures. New section 28B will set out the circumstances in which, following a request from a foreign country, the Attorney-General may authorise a constable to apply to a magistrate for an order for the carrying out of a forensic procedure on a person.

3.456 This item will insert a definition of 'forensic procedure' in subsection 3(1) of the MA Act. 'Forensic procedure' will be defined by reference to the definition of 'forensic procedure' in Part ID of the Crimes Act, namely, an intimate or non-intimate forensic procedure not including any intrusion into a person's body cavities except the mouth or the taking of any sample for the sole purpose of establishing the identity of the person from whom the sample is taken.

Item 110 – Subsection 3(1)

3.457 Item 112 will insert a new Part into the MA Act which will govern requests by and to Australia for forensic procedures. New section 28B will set out the circumstances in which,

following a request from a foreign country, the Attorney-General may authorise a constable to apply to a magistrate for an order for the carrying out of a forensic procedure on a child or incapable person.

3.458 This item will insert a definition of 'incapable person' in subsection 3(1) of the MA Act. 'Incapable person' will be defined by reference to the definition of 'incapable person' in Part ID of the Crimes Act meaning an adult who is incapable of:

- understanding the general nature and effect of, and purposes of carrying out, a forensic procedure, or

- indicating whether he or she consents or does not consent to a forensic procedure being carried out.

Item 111 – Subsection 3(1)

3.459 Item 112 will insert a new Part into the MA Act which will govern requests by and to Australia for forensic procedures. New section 28B will set out the circumstances in which, following a request from a foreign country, the Attorney-General may authorise a constable to apply to a magistrate for an order for the carrying out of a forensic procedure on a child or incapable person. The Attorney-General will only be able to make an authorisation if the consent of the parent or guardian cannot be obtained or if the parent or guardian is a suspect in relation to the foreign offence.

3.460 This item will insert a definition of 'parent' in subsection 3(1) of the MA Act. 'Parent' will be defined by reference to the definition of 'parent' in the Crimes Act, which generally defines parent as:

- the adult who is legally entitled to, and has, custody of the person, or

- the adult who is legally responsible for the day-to-day care, welfare and development of the person and has the person in his or her care.

Item 112 – After Part IV

3.461 Items 70 to 105 will make various amendments to Part ID of the Crimes Act to enable Australia to provide assistance to other countries in relation to forensic evidence. The amendments to the Crimes Act will enable assistance to be provided either through police-to-police channels or through the formal mutual assistance process depending on whether the person undergoing the forensic procedure has consented to the procedure.

3.462 This item will amend the MA Act to insert corresponding provisions to facilitate the execution of a formal request from a foreign country for forensic evidence. It will also insert a specific power into the MA Act to enable Australia to request the same type of assistance from foreign countries.

Part IVA – Forensic Procedures

Division 1 – Requests by Australia

Section 28A

3.463 This item will insert a new section into the MA Act which will specifically enable Australia to request a foreign country to carry out forensic procedures on persons in foreign countries to assist Australian investigations and prosecutions. While Australia is currently able to make requests for a country to provide this type of assistance under the executive power, the amendment will ensure provision is made in the legislation to enable these requests to be made, consistent with other types of assistance covered by the MA Act.

3.464 Subsections 28A(1) and (2) will set out the circumstances in which Australia will be able to request assistance and the type of assistance that may be requested. Under subsection 28A(1), assistance will be able to be requested if a proceeding relating to a criminal matter has commenced in Australia and a person in a foreign country is capable of giving assistance that may result in evidence relevant to the proceeding. Under subsection 28A(2), assistance will be able to be requested if an investigation relating to a criminal matter has commenced in Australia and a person in a foreign country is capable of giving assistance that may result in evidence relevant to the proceeding.

3.465 These two separate subsections will ensure that Australia is able to request assistance at all stages of the process, regardless of whether a person has been charged or whether proceedings have commenced. The main pre-requisite is that the person in the foreign country be capable of giving assistance that may result in evidence relevant to the investigation or proceeding. This could potentially include exculpatory evidence.

3.466 The type of assistance that will be able to be requested under both subsections 28A(1) and (2) will be the carrying out of a forensic procedure by the foreign country for the purpose of giving assistance in connection with the proceeding or investigation. A definition of 'forensic procedure' will be inserted in the MA Act by item 109.

3.467 Subsection 28A(3) will clarify that Australia may request that a forensic procedure be carried out in the foreign country even if, under Australian law, the forensic procedure could not have been carried out by using processes similar to those used in the foreign country.

3.468 This is appropriate because it is a matter for the foreign country to carry out the forensic procedure in accordance with its applicable domestic procedures. This would also be the case in the reverse situation where a foreign country requests assistance from Australia. The forensic procedure would be carried out in Australia in accordance with our own domestic requirements (set out in Part ID of the Crimes Act which will be amended by items 70 to 105).

3.469 Subsections 28A(4) and (5) relate to the admissibility of evidence that was obtained by the foreign country otherwise than in accordance with the request.

3.470 Subsection 28A(4) will provide that subsection 28A(5) will apply where Australia has made a request under new section 28A and the foreign country obtains any thing relevant to

the proceeding or investigation by a lawful process in that country other than the carrying out of a forensic procedure.

3.471 Subsection 28A(5) will provide that the thing obtained by the foreign country is not inadmissible as evidence and is not precluded from being used for the purposes of the investigation simply on the ground that it was obtained otherwise than in accordance with Australia's request.

3.472 The formal mutual assistance processes are important in ensuring that evidence obtained from other countries is admissible in Australian criminal proceedings. The admissibility of forensic evidence in criminal proceedings can be challenged where legislative procedures governing the collection of samples from suspects have not been complied with. The amendments to the MA Act by this item will ensure forensic evidence obtained by the foreign country in accordance with their own laws in response to a formal request under this new section will not be rendered inadmissible from Australian proceedings on the basis that it was not taken in accordance with Australian laws. These amendments are not intended to displace the operation of other applicable rules of evidence.

3.473 These provisions are appropriate because as long as the foreign country obtains the evidence requested by Australia in accordance with its domestic requirements, it should not matter that the evidence was not obtained in a way envisaged by Australia's request.

Division 2 – Requests by foreign countries

Section 28B

3.474 Items 70 to 105 will amend Part ID of the Crimes Act to establish processes for carrying out forensic procedures on behalf of a foreign country following a formal mutual assistance request.

3.475 This item will insert a new section into the MA Act which will govern the process for the Attorney-General to respond to a formal request from a foreign country for the carrying out of a forensic procedure on a person for the purpose of investigating a foreign offence, or for a prosecution relating to a foreign offence. It will enable the Attorney-General to authorise a constable to apply to a magistrate for an order for the carrying out of the forensic procedure if satisfied of certain matters.

3.476 Subsection 28B(1) will provide that the Attorney-General is able to authorise a constable to apply to a magistrate for the carrying out of a forensic procedure following a request from a foreign country. Where the person who is to be subject to the order is a 'suspect' (as defined in subsection 23WA(1) of the Crimes Act), then the constable authorised by the Attorney-General to apply for an order must be an authorised applicant.

3.477 'Suspect' is currently defined in subsection 23WA(1) of the Crimes Act, in relation to an indictable offence, as:

- a person whom a constable suspects on reasonable grounds has committed the indictable offence
- a person charged with the indictable offence; or

- a person who has been summonsed to appear before a court in relation to the indictable offence.

3.478 Item 75 will amend the definition of suspect to ensure it extends to persons suspected of having committed a foreign serious offence. The expanded definition will define suspect as a person in respect of whom a forensic procedure has been requested by a foreign country or a foreign law enforcement agency because the foreign county has started investigating whether the person has committed an indictable offence or started proceedings against the person for an indictable offence.

3.479 An 'authorised applicant' in relation to a forensic procedure that is to be carried out on a suspect is defined in subsection 23WA(1) of the Crimes Act as the constable in charge of a police station or the *investigating constable* in relation to a relevant offence.

3.480 Item 74 will add a second limb to the definition of 'investigating constable' to cover situations where the forensic procedure is being carried out at the request of a foreign country and as such there is no investigating constable in Australia. An 'investigating constable', in the case of a request by a foreign country, will be defined as the constable in charge of coordinating the response to the request. Therefore, the person authorised by the Attorney-General to apply for an order to carry out a forensic procedure on a suspect following a request from a foreign country must be the constable in charge of a police station or the constable in charge of coordinating the response to the request.

3.481 Subsection 28B(2) will set out certain conditions that must be satisfied before the Attorney-General can make an authorisation under subsection 28B(1). There are different conditions that must be satisfied depending on whether the forensic procedure is requested in relation to a suspect or a child or incapable person.

3.482 In relation to a suspect, the Attorney-General must be satisfied that:

- a foreign country has requested that a forensic procedure be carried out on a person
- the foreign country has started investigating whether that person has committed a foreign serious offence or started proceedings against that person for a foreign serious offence
- the person is or is believed to be in Australia
- the foreign country has given appropriate undertakings in relation to the retention, use and destruction of the forensic material and/or information obtained from analysing that forensic material that would be provided to that country after the carrying out of the forensic procedure
- the foreign country has given any other undertaking considered necessary by the Attorney-General, and
- the person has been given an opportunity to consent to the forensic procedure and has not consented to it.

3.483 The provisions governing how a person is to be given an opportunity to consent to the carrying out of a forensic procedure are set out in Division 3 of Part ID of the Crimes Act which will be amended by items 77 to 84.

3.484 In relation to a child or incapable person, the Attorney-General must be satisfied:

- a foreign country has requested that a forensic procedure be carried out on a person
- the person is or is believed to be in Australia
- the foreign country has given appropriate undertakings in relation to the retention, use and destruction of the forensic material and/or information obtained from analysing that forensic material that would be provided to that country after the carrying out of the forensic procedure
- the foreign country has given any other undertaking considered necessary by the Attorney-General, and
- of the matters specified in new subsection 28B(3).

3.485 Subsection 28B(3) will specify certain additional matters that the Attorney-General must be satisfied of before he or she is able to authorise an application for the carrying out of a forensic procedure on a child or incapable person. First, the Attorney-General must be satisfied that either:

- the consent of the parent or guardian cannot reasonably be obtained or has been withdrawn, or
- the parent or guardian is a suspect in relation to the foreign serious offence.

3.486 Division 6B of Part ID of the Crimes Act, including the amendments that will be made to that Division by items 93 to 98, sets out the process for obtaining the consent of the parent or guardian and also for the withdrawal of that consent. If consent cannot be obtained, or is withdrawn, then the forensic procedure cannot be carried out without an order by a magistrate. However, to obtain an order from a magistrate, a formal mutual assistance request will need to be made for the carrying out of the forensic procedure on the child or incapable person, at which point, new section 28B will govern the authorisation process in relation to that request.

3.487 Further, the Attorney-General must also believe that, having regard to the best interests of the child or incapable person, it is appropriate to make the authorisation. This also aligns with the factors that must be considered by a magistrate under subsection 23XWU(2) of the Crimes Act in determining whether, following authorisation by the Attorney-General, he or she should make an order that the forensic procedure be carried out on the child or incapable person.

3.488 If the Attorney-General authorises a constable, or authorised applicant, to apply for an order for the carrying out of a forensic procedure, the provisions in Division 5 (for suspects) or Division 6B (for children or incapable persons) of Part ID of the Crimes Act (which will be amended by items in this Part) will apply to the application process.

Section 28C

3.489 New section 28C will enable the Attorney-General to direct a constable as to how forensic evidence obtained through the carrying out of a forensic procedure authorised by the Attorney-General under new subsection 28B(1) is to be provided to the foreign country.

Item 113 – Application of amendments made by this Part

3.490 This item will provide that the amendments made by Part 4 of Schedule 3 will apply in relation to a request by a foreign country that is being considered on or after the day on which this item commences. The commencement for this item will be a day to be fixed by proclamation.

3.491 This application provision also specifies that the amendments made by this Part will apply from the day of commencement regardless of whether the request was made before or after that day. The provision is necessary to enable there to be certainty with regards to the applicable law when processing requests made by foreign countries for assistance.

PART 5 – PROCEEDS OF CRIME

3.492 Proceeds of crime action is a vital mutual assistance tool. Part VI of the MA Act enables Australia to:

- register and enforce foreign forfeiture and pecuniary penalty orders where there is a conviction for a foreign serious offence
- register and enforce foreign orders which are not conviction-based for countries specified in regulations, and
- use a range of investigative tools, including monitoring orders and production orders, on behalf of a foreign country to identify, locate and quantify the proceeds of crime.

3.493 This Part will make a range of amendments to Part VI of the MA Act to improve the operation of the proceeds of crime provisions.

Mutual Assistance in Criminal Matters Act 1987

Item 114 – Subsection 3(1)

3.494 Subsection 3(1) of the MA Act sets out definitions that are relevant to the operation of the MA Act.

3.495 Item 145 will repeal and replace subsection 34Y(1) with a new subsection that will outline the range of offences in relation to which an authorised officer can apply for a monitoring order. Included in the new list of offences is a 'cartel offence'.

3.496 This item will insert a definition of 'cartel offence' into subsection 3(1) of the MA Act. 'Cartel offence' will be defined as an offence by a corporation involving cartel conduct. This definition is limited to cartel offences that are committed by corporations and will not extend to offences committed by individuals.

3.497 While 'cartel conduct' is an undefined term, a 'cartel provision' is defined in the *Competition and Consumer Act 2010* as including any fixing, controlling or maintaining the price of goods or services.

3.498 This will ensure the definition is given a wide meaning so that foreign offences aiming to regulate this type of behaviour fall within the definition.

Item 115 – Subsection 34(1)

3.499 Subsection 34(1) of the MA Act enables the Attorney-General to authorise the DPP to apply for the registration of a foreign forfeiture order or foreign pecuniary penalty order in a specified court.

3.500 This item will amend subsection 34(1) by removing the requirement for the Attorney-General to specify the court in which the application for the order to be registered is to be made. This is a procedural amendment and will not change the rights of any person affected by the order.

3.501 It is not necessary for the Attorney-General to specify the court in which the application should be made. It is the role of the DPP to make the application so they are best placed to determine the most appropriate jurisdiction and court in which to make the application to register the foreign order.

Item 116 – Subsection 34(2)

3.502 A non-conviction based proceeds of crime order restrains or forfeits property that is, or is alleged to be, the proceeds or an instrument of an offence, or the benefit derived from an offence, regardless of whether the person alleged to have committed the offence has been convicted of that offence, or whether charges have been laid against that person. A non-conviction based proceeds of crime order may also be made over property where the person who committed the offence has not yet been identified. Non-conviction based proceeds of crime orders are efficient and effective tools for restraining and forfeiting the proceeds of crime, especially where the identity of the person to whom the goods belong is unknown, the prosecution of the person is unsuccessful, the person has fled the jurisdiction, or where a prosecution is likely to be lengthy and that could prevent the timely forfeiture of criminal assets.

3.503 Currently, subsection 34(2) of the MA Act provides for the registration and enforcement of foreign non-conviction based proceeds of crime orders made in certain countries specified in regulations for the purpose of this subsection.

3.504 Further, subsection 34J(1) of the MA Act enables the Attorney-General to authorise the DPP to apply for a temporary Australian restraining order in relation to proceeds of foreign crimes where confiscation proceedings have commenced, or are about to commence, in a foreign country that is specified in the regulations for the purposes of subsection 34(2) (a non-conviction based restraining order).

3.505 This item will amend subsection 34(2) to remove the requirement that the foreign country be specified in regulations in order for Australia to enforce a non-conviction based proceeds of crime order or seek a temporary non-conviction based restraining order.

3.506 This amendment is appropriate given the more widespread use of non-conviction based proceeds of crime orders around the world. This will enable Australian authorities to act quickly to register these types of orders at the request of any country rather than being limited to countries specified in regulations. Having to list countries in the regulations can be a time consuming process and as such can cause unnecessary delay which may allow offenders to disperse assets.

3.507 While the amendment by this item will potentially facilitate the enforcement of a non-conviction based proceeds of crime order from any country, the grounds for refusal in section 8 of the MA Act, as amended by Part 1 of this Schedule, will still need to be considered by the Attorney-General in determining whether to authorise the DPP to apply to a court for the registration of the order.

Item 117 – Subsection 34(2)

3.508 Currently, subsection 34(2) of the MA Act enables the Attorney-General to authorise the DPP to apply for the registration of a foreign non-conviction based proceeds of crime order from certain countries specified in regulations.

3.509 This item will amend subsection 34(2) by removing the requirement for the Attorney-General to specify the court in which the application for the order to be registered is to be made. This is a procedural amendment and will not change the rights of any person affected by the order.

3.510 It is not necessary for the Attorney-General to specify the court in which the application should be made. It is the role of the DPP to make the application so they are best placed to determine the most appropriate jurisdiction and court in which to make the application to register the foreign order.

Item 118 and 119 – Paragraphs 34(3)(a) and (b) and subsection 34(3)

3.511 Subsection 34(3) of the MA Act enables a foreign country to request Australia's assistance in registering and enforcing a restraining order made in that foreign country against property that is reasonably suspected of being in Australia. The foreign restraining order must have been made in respect of:

- in any case, a foreign serious offence for which a person has been convicted (a conviction-based order), or

- in relation to countries specified in regulations for the purposes of subsection 34(2), the alleged commission of a foreign serious offence whether or not the identity of the person who committed the offence is known (non-conviction based order).

3.512 If satisfied of the above factors, the Attorney-General may authorise the DPP to apply for the registration of the foreign restraining order in a specified court.

3.513 Section 34A governs the registration of a foreign restraining order, while sections 34E to 34H govern how a foreign restraining order that has been registered is enforced and cancelled if necessary.

<u>Item 118 – Paragraphs 34(3)(a) and (b)</u>

3.514 This item will repeal paragraphs 34(3)(a) and (b) of the MA Act and replace them with new paragraphs.

3.515 New paragraph 34(3)(a) will continue to enable the Attorney-General to authorise the DPP to apply to a court for the registration of a conviction-based restraining order made in any country.

3.516 New paragraph 34(3)(b) will enable the Attorney-General to authorise the DPP to apply to a court for the registration of a non-conviction based foreign restraining order made in *any country* in contrast to current paragraph 34(3)(b) which is limited to certain countries specified in regulations. This mirrors the change that will be made by item 116 which will

allow a non-conviction based foreign forfeiture or pecuniary penalty order made in any country to be enforced in Australia.

3.517 This amendment is appropriate given the more widespread use of non-conviction based proceeds of crime orders around the world. This will enable Australian authorities to act quickly to register these types of orders at the request of any country rather than being limited to countries specified in regulations. Having to list countries in the regulations can be a time consuming process and as such can cause unnecessary delay which may allow offenders to disperse assets.

3.518 While the amendment by this item will potentially facilitate the enforcement of a non-conviction based restraining order from any country, the grounds for refusal in section 8 of the MA Act, as amended by Part 1 of this Schedule, will still need to be considered by the Attorney-General in determining whether to authorise the DPP to apply to a court for the registration of the order.

Item 119 – subsection 34(3)

3.519 This item will amend subsection 34(3) of the MA Act by removing the requirement for the Attorney-General to specify the court in which the application for the foreign restraining order to be registered is to be made. This is a procedural amendment and will not change the rights of any person affected by the order.

3.520 It is not necessary for the Attorney-General to specify the court in which the application should be made. It is the role of the DPP to make the application so they are best placed to determine the most appropriate jurisdiction and court in which to make the application to register the foreign order.

Item 120 – Subsection 34(4)

3.521 Section 34 of the MA Act enables the Attorney-General to authorise the DPP to apply for the registration of certain foreign orders in a specified court.

3.522 Items 115, 117 and 119 will amend subsections 34(1), (2) and (3) of the MA Act respectively to remove the requirement that the Attorney-General specify the court in which the DPP is to apply to have the order registered.

3.523 Subsection 34(4) of the MA Act currently provides that where the Attorney-General specifies a court, it must be a court that has proceeds jurisdiction in the State or Territory in which the property, or some of the property that is subject to the foreign order, is reasonably suspected of being located.

3.524 This item will repeal subsection 34(4). As items 115, 117 and 119 will remove the requirement for the Attorney-General to specify the court in which the application is to be made, subsection 34(4) is no longer necessary.

Item 121 – Before subsection 34A(1)

3.525 Items 115, 117 and 119 will amend subsections 34(1), (2) and (3) of the MA Act respectively to remove the requirement that the Attorney-General specify the court in which the DPP is to apply to have a foreign order registered. Item 120 will repeal subsection 34(4)

which currently requires the Attorney-General, when specifying the court in which the application is to be made, to specify a court that has proceeds jurisdiction in the State or Territory in which the property, or some of the property that is subject to the foreign order, is reasonably suspected of being located.

3.526 Section 34A of the MA Act sets out the process for registering a foreign order. This item will insert a new subsection at the beginning of section 34A. New subsection 34(1A) will require the DPP to apply for the registration of a foreign order in a court with proceeds jurisdiction.

3.527 As it is more appropriate for the DPP to determine the court in which to make the application, new subsection 34(1A) will recognise that in making the decision, the DPP must ensure the application is to a court with proceeds jurisdiction. 'Proceeds jurisdiction' is defined by reference to the definition in the POC Act. Section 335 of that Act defines a court with proceeds jurisdiction generally as any State or Territory court with jurisdiction to deal with criminal matters on indictment.

Item 122 – Subsection 34A(1)

3.528 Items 115, 117 and 119 will amend subsections 34(1), (2) and (3) of the MA Act respectively to remove the requirement that the Attorney-General specify the court in which the DPP is to apply to have the order registered. Item 120 will repeal subsection 34(4) which currently requires the Attorney-General, when specifying the court in which the application is to be made, to specify a court that has proceeds jurisdiction in the State or Territory in which the property, or some of the property that is subject to the foreign order, is reasonably suspected of being located.

3.529 Section 34A sets out the process for registering a foreign order. Item 121 will insert a new subsection at the beginning of section 34A which will require the DPP to apply for the registration of a foreign order in a court with proceeds jurisdiction.

3.530 This item will amend subsection 34(1) to include the words 'with proceeds jurisdiction' after the reference to 'a court' as a result of the amendment which will be made by item 121. This recognises that the application by the DPP must be to a court with proceeds jurisdiction

Items 123 to 125 – Section 34F

3.531 Currently, subsection 34F(1) of the MA Act states that a faxed copy of a sealed or authenticated copy of a foreign order (or amendment to a foreign order) is to be regarded for the purposes of the MA Act as the same as the sealed or authenticated version.

3.532 If the registration of an order is effected by means of a faxed copy, subsection 34F(2) (as it is currently drafted) then requires the sealed or authenticated copy of the foreign order to be filed with the court within 21 days of the registration of the foreign order. If this does not occur, the registration ceases to have effect after 21 days.

3.533 This recognises that it may be impracticable for the foreign country to produce immediately the actual order made by the foreign court for the purposes of proceedings in Australia. Such a requirement would undermine the purpose of the provisions which is to

Item 123 – Subsection 34F(1)

3.534 This item will repeal and replace subsection 34F(1) with a new subsection which will ensure the provision is kept up to date with modern technology. New subsection 34F(1) will have the same purpose and effect but will apply if the copy of the order (or amendment to the foreign order) is sent by email or other electronic means, as well as being sent by fax.

3.535 This amendment is designed to ensure that any copy of the foreign order, however it is sent to Australia, is to be regarded as the same as the sealed or authenticated copy.

Item 124 – Subsection 34F(2)

3.536 This item will remove the reference to 'faxed' in subsection 34F(2) of the MA Act as a result of the amendment that will be made by item 123, which will enable a copy of the foreign order to be sent to Australia by email or other electronic means as well as by fax.

3.537 As such, subsection 34F(2) will apply where the registration of an order is effected by means of a copy, regardless of the way it was sent (be it fax, email or other electronic means).

Item 125 – Subsection 34F(2)

3.538 This item will amend subsection 34F(2) of the MA Act to extend the period of time a foreign country has to provide the sealed or authenticated copy of the foreign order. Currently, a registered foreign order ceases to have effect after 21 days if the sealed or authenticated copy of the foreign order is not filed with the court.

3.539 This item will extend the period to 45 days. This recognises that it may take some time to obtain the sealed or authenticated copy of the foreign order and the registration should not cease to have effect simply because this has not taken within place three weeks.

Item 126 – Subsection 34J(1)

3.540 This item will remove '(1)' from the beginning of subsection 34J(1) of the MA Act because of the amendment which will be made by item 129 which will repeal subsection 34J(2).

Item 127 – Subparagraph 34J(1)(a)(ii)

3.541 Subsection 34J(1) of the MA Act sets out the process for obtaining a restraining order on behalf of a foreign country (as opposed to subsection 34(3) which provides the basis for registering a restraining order made in a foreign country).

3.542 The Attorney-General may only authorise the DPP to apply for a restraining order if there are reasonable grounds to believe that property that may be made, or is about to be

made, the subject of a foreign restraining order is located in Australia and either:

- criminal proceedings have commenced or there are reasonable grounds to suspect that criminal proceedings are about to commence in a foreign country in respect of a foreign serious offence (subparagraph 34J(1)(a)(i)), or

- in relation to countries specified in regulations for the purposes of subsection 34(2) of the MA Act, foreign confiscation proceedings have commenced, or there are reasonable grounds to suspect that confiscation proceedings are about to commence (subparagraph 34J(1)(a)(ii)).

3.543 If satisfied of the above matters, the Attorney-General may authorise the DPP to apply for a restraining order in a specified court in relation to that property.

3.544 This item will repeal subparagraph 34J(1)(a)(ii) and replace it with a new subparagraph which will not contain any limitation on the countries that are able to request that a restraining order be sought on the basis of *confiscation* proceedings. This is currently limited to countries that are specified in regulations for the purposes of subsection 34(2) (registration and enforcement of foreign forfeiture and pecuniary penalty orders).

3.545 This amendment is appropriate given the more widespread use of non-conviction based proceeds of crime orders around the world. This will enable Australian authorities to act quickly to seek these types of orders at the request of any country rather than being limited to countries specified in regulations. Having to list countries in the regulations can be a time consuming process and as such can cause unnecessary delay which may allow offenders to disperse assets.

3.546 While the amendment by this item will potentially facilitate the enforcement of a non-conviction based restraining order on behalf of any country, the grounds for refusal in section 8 of the MA Act, as amended by Part 1 of this Schedule, will still need to be considered by the Attorney-General in determining whether to authorise the DPP to apply to a court for the order.

Item 128 – Subsection 34J(1)

3.547 Subsection 34J(1) of the MA Act enables the Attorney-General to authorise the DPP to apply for a restraining order in a specified court on behalf of a foreign country.

3.548 This item will amend subsection 34J(1) by removing the requirement for the Attorney-General to specify the court in which the application for the foreign restraining order to be registered is to be made. This is a procedural amendment and will not change the rights of any person affected by the order.

3.549 It is not necessary for the Attorney-General to specify the court in which the application should be made. It is the role of the DPP to make the application so they are best placed to determine the most appropriate jurisdiction and court in which to make the application to register the foreign order.

Item 129 – Subsection 34J(2)

3.550 Section 34J of the MA Act enables the Attorney-General to authorise the DPP to apply to a specified court for a restraining order on behalf of a foreign country.

3.551 Item 128 will amend subsection 34J(1) to remove the requirement that the Attorney-General specify the court in which the DPP is to apply for the restraining order.

3.552 Subsection 34J(2) currently requires that where the Attorney-General specifies a court, it must be a court that has proceeds jurisdiction in the State or Territory in which the property, or some of the property that is subject to the foreign order, is reasonably suspected of being located.

3.553 This item will repeal subsection 34J(2). As item 128 will remove the requirement for the Attorney-General to specify the court in which the application is to be made, subsection 34J(2) is no longer necessary.

Item 130 – Paragraph 34K(3)(b)

3.554 Section 34K sets out the process for applying for a restraining order once the DPP is authorised to do so by the Attorney-General. It sets out how certain parts of the POC Act apply to the application and any restraining order made as a result.

3.555 Paragraph 34K(3)(b) states that references in Part 2-1 of the POC Act to a court with proceeds jurisdiction are to be taken as references to the court specified in the authorisation made by the Attorney-General under section 34J of the MA Act (section 34J of the MA Act currently enables the Attorney-General to authorise the DPP to apply *to a specified court* for a restraining order on behalf of a foreign country).

3.556 Item 128 will amend subsection 34J(1) of the MA Act to remove the requirement that the Attorney-General specify the court in which the DPP is to apply for the restraining order.

3.557 This item will repeal paragraph 34K(3)(b) of the MA Act. As item 128 will remove the requirement for the Attorney-General to specify the court in which the application is to be made in the authorisation, paragraph 34K(3)(b) is no longer necessary.

Items 131 and 132 – Paragraph 34K(3)(c) and paragraph 34K(3)(d)

3.558 Item 126 will remove '(1)' from the beginning of subsection 34J(1) because of the amendment which will be made by item 129 which will repeal subsection 34J(2).

3.559 These items will update references as a result of the amendment that will be made by item 126.

3.560 Item 131 will replace the reference to subparagraph 34J(1)(a)(i) in paragraph 34K(3)(c) with a reference to subparagraph 34J(a)(i) and item 132 will replace the reference to subparagraph 34J(1)(a)(ii) in paragraph 34K(3)(d) with a reference to subparagraph 34J(a)(ii).

Item 133 – Subparagraph 34K(3)(d)(i)

3.561 Section 34K of the MA Act sets out the process for applying for a restraining order once authorised to do so by the Attorney-General. It sets out how certain parts of the POC Act apply to the application for any restraining order made as a result of that application.

3.562 Subparagraph 34K(3)(d)(i) of the MA Act operates where proceedings have been commenced under the POC Act as a result of subparagraph 34J(1)(a)(ii) (where foreign confiscation proceedings have commenced, or there are reasonable grounds to suspect that confiscation proceedings are about to commence). This subparagraph states that references in Part 2-1 of the POC Act to reasonable grounds to suspect that a person has committed a serious offence are to be taken to be references to reasonable grounds to suspect that such proceedings have commenced or are about to commence in the foreign country.

3.563 This item will replace the words 'such proceedings' with 'foreign confiscation proceedings' in subparagraph 34K(3)(d)(i) to ensure the scope of the subparagraph is clear.

Items 134 to 151

3.564 The MA Act contains a number of investigative tools that Australia can use to assist foreign countries in proceeds of crime matters. These include notices to financial institutions, monitoring orders, search warrants and production orders. However, the authorisation process for these tools is inadequate to keep pace with the fast and fluid nature of proceeds of crime investigations.

3.565 Currently, a notice to a financial institution under the MA Act must be authorised by the Attorney-General or a senior officer of the Attorney-General's Department. Monitoring orders, search warrants and production orders must be the subject of a separate authorisation from the Attorney-General each time an authorised officer wishes to apply to a court to use one of these tools to assist the execution of a mutual assistance request. Further, the Attorney-General's authorisations must be jurisdiction-specific, which can mean an authorised officer may need to seek multiple authorisations to satisfy a single request.

3.566 Items 134 to 151 will streamline the authorisation process for the proceeds of crime investigative tools in the MA Act. In particular, the Attorney-General will be able to give a general authorisation allowing an authorised officer to make the necessary applications for monitoring orders, search warrants or production orders under the POC Act to appropriately respond to a specific mutual assistance request. This will ensure Australia can respond more efficiently to requests for assistance.

<u>Item 134 – Section 34N</u>

3.567 Section 34N of the MA Act sets out the circumstances in which the Attorney-General may authorise an authorised officer of an enforcement agency to apply for a production order under the POC Act. The authorisation must specify the State or Territory in which the application is to be made. This current section therefore requires more than one authorisation if production orders in different States and Territories are needed.

3.568 The section also only applies if the foreign country requests the Attorney-General to obtain the issue of a production order requiring that certain documents be produced or made available for inspection.

3.569 The wording of this section severely limits the extent to which it is able to be utilised. For example, if the foreign country makes a more general request for assistance in obtaining evidence relating to a certain investigation or proceeding, but does not specifically request the use of a production order, then this section cannot be used even if a production order is the most appropriate investigative tool.

3.570 Item 151 will insert new section 34ZG in the MA Act. This new section will enable the Attorney-General to make a general authorisation for an authorised officer of an enforcement agency to make any applications under the POC Act necessary to respond to a request for assistance from a foreign country. In particular, this general authorisation will be able to be made where the foreign country requests assistance in relation to a criminal investigation or proceeding without the foreign country needing to specify the exact tool with which the evidence should be obtained.

3.571 This item will repeal section 34N of the MA Act. As a result of the new general authorisation that will be able to be made under new section 34ZG, section 34N will no longer be necessary.

Item 135 - Saving of existing authorisations

3.572 Item 134 will repeal section 34N of the MA Act which currently sets out the circumstances in which the Attorney-General may authorise an authorised officer of an enforcement agency to apply for a production order under the POC Act.

3.573 This item will ensure that any authorisations that have been made under section 34N continue to operate notwithstanding the fact that section 34N will be repealed by item 134. This is appropriate because repealing section 34N does not affect the circumstances in which the authorisation was originally made in accordance with the requirements set out in section 34N. Therefore, any authorisation made by the Attorney-General under section 34N prior to it being repealed by item 134 will continue to be able to be relied upon for the purpose of applying for a production order under the POC Act.

Item 136 – Subsection 34P(1)

3.574 Section 34P of the MA Act specifies the process for applying for and making production orders. Currently, subsection 34P(1) provides that if an authorised officer has been authorised to apply for a production order under subsection 34N(1), then the authorised officer may apply for such a production order.

3.575 Item 134 will repeal section 34N and item 151 will insert a new section 34ZG which will enable the Attorney-General to make a general authorisation for an authorised officer of an enforcement agency to make any applications under the POC Act necessary to respond to a request for assistance from a foreign country.

3.576 This item will repeal subsection 34P(1) and replace it with a new subsection that will enable an authorised officer to apply for a production order under the POC Act if authorised

by the Attorney-General under new section 34ZG (which will be inserted by item 151). The application for the production order must be in relation to the foreign serious offence that was the subject of the request.

3.577 Part 3-2 of the POC Act will continue to apply to the application for a production order and any production order that is made as a result of the application.

Item 137 – Paragraph 34P(3)(b)

3.578 Section 34P of the MA Act enables a production order to be sought under the POC Act to assist with a foreign investigation or proceeding. Subsection 34P(2) states that Part 3-2 of the POC Act applies to the application for a production order and any production order that is made as a result of the application. Subsection 34P(3) effects some minor changes to Part 3-2 of the POC Act for the purposes of an application made in response to a foreign request. Paragraph 34P(3)(b) states that any reference in that Part to a magistrate is to be taken to be a reference to a magistrate of the State or Territory specified in the authorisation made by the Attorney-General under subsection 34N(1).

3.579 Item 134 will repeal section 34N and item 151 will insert a new section 34ZG which will enable the Attorney-General to make a general authorisation for an authorised officer of an enforcement agency to make any applications under the POC Act necessary to respond to a request for assistance from a foreign country.

3.580 As a result of the amendments that will be made by those two items, the Attorney-General will no longer need to specify the State or Territory in which the production order is to be sought.

3.581 As such, this item will repeal paragraph 34P(3)(b). Any reference to 'magistrate' in Part 3-2 of the POC Act will continue to be a reference simply to the magistrate hearing the application in whichever State or Territory the application is made.

Item 138 – Subsection 34Q(2)

3.582 Subsection 34Q(1) of the MA Act provides for the retention of documents obtained pursuant to a production order pending a direction from the Attorney-General as to how the document is to be dealt with. Subsection 34Q(2) states directions from the Attorney-General may include a direction that documents be sent to an authority of the foreign country that requested the obtaining of the production order.

3.583 Item 151 will insert a new section 34ZG which will enable the Attorney-General to make a general authorisation for an authorised officer of an enforcement agency to make any applications under the POC Act necessary to respond to a request for assistance from a foreign country where that foreign country has requested assistance in relation to a criminal investigation or proceeding.

3.584 As a result of the amendment that will be made by item 151, the foreign country will no longer be required to request that a production order be obtained.

3.585 This item will amend subsection 34Q(2) to remove the reference to 'the obtaining of the production order' and replace it with a reference to 'assistance in respect of the foreign

serious offence'. This recognises that under the amendments that will be made by this Part, a foreign country will no longer be required to specify the investigative tool that should be used to obtain the information that is requested and the foreign country will simply be able to make a general request for assistance which will only need to specify what is sought and not how it should be obtained.

Items 139 – Subsection 34R(1)

3.586 Section 34R of the MA Act outlines when the Attorney-General or a senior Departmental officer may issue a notice to a financial institution requiring them to produce certain documents. The documents that are able to be requested are documents relevant to determining whether an account is held by a certain person, whether a person is a signatory to an account and details of accounts such as transactions on an account and the balance of the account.

3.587 This item (and items 141 and 142) will make some minor amendments to section 34R to change who is able to issue such a notice to a financial institution.

3.588 Item 139 will amend subsection 34R(1) of the MA Act so that officers who are empowered to issue a notice to a financial institution correspond more directly with those who can issue a notice for domestic purposes under the POC Act. While there are a range of officers who can issue these notices under the POC Act (such as the Taxation Commissioner, the CEO of the Australian Crime Commission and the CEO of Customs), this item will limit who can issue a notice under the MA Act to the officers mentioned in paragraphs 213(3)(a), (b) and (c) of the POC Act, that is:

- the Commissioner of the AFP
- a Deputy Commissioner of the AFP, and
- a senior executive AFP employee (within the meaning of the *Australian Federal Police Act 1979*) who is a member of the AFP and who is authorised in writing by the Commissioner for the purposes of this section 213 of the POC Act.

3.589 This limitation of the exercise of the powers under section 34R is appropriate as the AFP will be the agency which will most likely be liaising with foreign officers to obtain relevant information for the purposes of the foreign investigation.

3.590 These amendments will allow a senior AFP officer to issue notices to financial institutions and will remove the power of the Attorney-General or a senior Departmental officer to issue such a notice. This is appropriate as the purpose of section 34R of the MA Act is to help a foreign agency determine whether it is appropriate that further action be pursued under the MA Act or the POC Act. If further action is appropriate, a formal mutual assistance request from the foreign country would be needed (for example, if it was determined that a restraining order should be obtained in respect of a particular account).

3.591 Subsection 34R(2) of the MA Act sets out the circumstances in which a notice is able to be issued. It states that a notice can only be issued if the Attorney-General or senior Departmental officer reasonably believes that giving the notice is required:

- to determine whether to take action under Division 2 of Part VI of the MA Act or under the POC Act, or

- in relation to proceedings commenced under Division 2 of Part VI of the MA Act or under the POC Act.

Item 140 - Saving of existing authorisations

3.592 Item 139 will amend section 34R of the MA Act to align the people who can issue a notice to a financial institution with those able to do so under the POC Act (as opposed to those currently included in the MA Act –the Attorney-General or a senior Departmental officer).

3.593 This item will ensure that any notices that have been made under section 34R continue to operate notwithstanding the fact that section 34R will be amended by item 139. This is appropriate because changing who is able to issue a notice under section 34R does not affect the fact that the person who originally issued the notice was able to do so at the time the notice was issued. Therefore, any notice issued under section 34R prior to it being repealed by item 139 will continue to have effect – that is, a financial institution that has been issued with a notice under section 34R will still have to comply with the notice.

Items 141 and 142 – Subsection 34R(2) and subsection 34R(3)

3.594 Item 141 will omit the reference to 'Attorney-General or the senior Departmental' in subsection 34R(2) as a consequence of the amendment that will be made by item 139. As a result, subsection 34R(2) will simply refer to 'the officer' (that is, one of the officers that will be able to issue a notice under subsection 34R(1) which will be amended by item 139) needing to believe on reasonable grounds that the circumstances stipulated in subsection 34R(2) exist.

3.595 Subsection 34R(3) contains a definition of senior Departmental officer. Item 142 will repeal subsection 34R(3). As items 139 and 141 will repeal the references to 'senior Departmental officer', subsection 34R(3) will no longer be required.

Item 143 – Section 34X

3.596 Section 34X of the MA Act sets out the circumstances in which the Attorney-General may authorise an authorised officer of an enforcement agency to apply for a monitoring order under the POC Act. The authorisation must specify the court in which the application is to be made. This current provision would therefore require more than one authorisation if monitoring orders in different States and Territories were required as courts can only issue monitoring orders in relation to their own jurisdiction.

3.597 Also, section 34X only applies if information is sought in relation to certain foreign serious offences. The offences in respect of which the section currently applies are:

- offences punishable by imprisonment for three or more years that:
    - involve unlawful conduct relating to a narcotic substance
    - are money laundering offences
    - involve unlawful conduct by a person that causes, or is intended to cause, a benefit to the value of at least $10,000 for that person or another person, or
    - involve unlawful conduct by a person that causes, or is intended to cause, a loss to the foreign country in question or another person of at least $10,000
- offences involving the smuggling of migrants
- offences involving failure to report financial transactions, and
- ancillary offences in respect of any of the above offences.

3.598 The section also only applies if the foreign country specifically requests the Attorney-General to obtain the issue of an order directing a financial institution to give information about transactions conducted through a certain account.

3.599 The wording of this section severely limits the extent to which it is able to be utilised. For example, if the foreign country makes a more general request for assistance in obtaining evidence relating to a certain investigation or proceeding such as requesting information about a certain person's financial dealings, but does not specifically request the use of an order directing a bank to give certain information, then this section cannot be used even if a monitoring order is the most appropriate investigative tool.

3.600 Item 151 will insert new section 34ZG in the MA Act. This new section will enable the Attorney-General to make a general authorisation for an authorised officer of an enforcement agency to make any applications under the POC Act necessary to respond to a request for assistance from a foreign country. In particular, this general authorisation will be able to be made where the foreign country requests assistance in relation to a criminal investigation or proceeding without the foreign country needing to specify the exact tool by which the evidence should be obtained.

3.601 This item will repeal section 34X. As a result of the new general authorisation that will be able to be made under new section 34ZG, section 34X will no longer be necessary.

<u>Item 144 – saving of existing authorisations</u>

3.602 Item 143 will repeal section 34X of the MA Act which currently sets out the circumstances in which the Attorney-General may authorise an authorised officer of an enforcement agency to apply for a monitoring order under the POC Act.

3.603 This item will ensure that any authorisations that have been made under section 34X continue to operate notwithstanding the fact that section 34X will be repealed by item 143. This is appropriate because repealing section 34X does not affect the circumstances in which the authorisation was originally made in accordance with the requirements set out in section 34X. Therefore, any authorisation made by the Attorney-General under section 34X prior to it being repealed by item 143 will continue to be able to be relied upon for the purpose of applying for a monitoring order under the POC Act.

Item 145 – Subsection 34Y(1)

3.604 Section 34Y of the MA Act sets out the process for applying for and making monitoring orders. Subsection 34Y(1) states that if an authorised officer has been authorised to apply for a monitoring order under subsection 34X(1), then the authorised officer may apply for such a monitoring order.

3.605 Item 143 will repeal section 34X and item 151 will insert a new section 34ZG which will enable the Attorney-General to make a general authorisation for an authorised officer of an enforcement agency to make any applications under the POC Act necessary to respond to a request for assistance from a foreign country.

3.606 This item will repeal subsection 34Y(1) and replace it with a new subsection that will enable an authorised officer to apply for a monitoring order under the POC Act if authorised by the Attorney-General under new section 34ZG (which will be inserted by item 151). The application for the monitoring order must be in relation to the foreign serious offence that was the subject of the request.

3.607 Further, new subsection 34Y(1) will limit the operation of section 34Y in a way that will be similar to how section 34X (which will be repealed by item 143) currently limits the section.

3.608 New subsection 34Y(1) will only apply if the foreign serious offence to which the request relates is:

- an offence punishable by imprisonment for three or more years that:
    - involves unlawful conduct relating to a narcotic substance
    - is a money laundering offence
    - involves unlawful conduct by a person that causes, or is intended to cause, a benefit to the value of at least $10,000 for that person or another person, or
    - involves unlawful conduct by a person that causes, or is intended to cause, a loss to the foreign country in question or another person of at least $10,000
- an offence involving the smuggling of migrants
- an offence involving failure to report financial transactions
- a cartel offence

- an offence involving terrorism, or

- an ancillary offence in respect of any of the above offences.

3.609 While most of these offences are covered by current subsection 34X(2) of the MA Act, a few new offences have been included. These are a cartel offence and an offence involving terrorism. A monitoring order is also able to be issued in relation to domestic offences of this nature and this amendment recognises the importance of ensuring that assistance is able to be provided to foreign countries in circumstances where law enforcement tools are able to be used for domestic purposes.

3.610 Item 114 will insert a definition of 'cartel offence' to mean an offence committed by a corporation involving cartel conduct.

3.611 Subsection 34Y(2) will continue to ensure that Part 3-4 of the POC Act applies to the application for a monitoring order and any monitoring order that is made as a result of the application.

Item 146 – Paragraph 34Y(3)(a)

3.612 Section 34Y of the MA Act enables a monitoring order to be sought under the POC Act to assist with a foreign investigation or proceeding. Subsection 34Y(2) states that Part 3-4 of the POC Act applies to the application for a monitoring order and any monitoring order that is made as a result of the application. Subsection 34Y(3) effects some minor changes to Part 3-4 of the POC Act for the purposes of an application made in response to a foreign request. Paragraph 34Y(3)(a) states that any reference in that Part to a serious offence is to be taken to be a reference to an offence of the kind referred to in paragraph 34X(1)(a).

3.613 Item 143 will repeal section 34X and item 145 will repeal and insert a new subsection 34Y(1) which will set out the foreign serious offences to which the section will apply.

3.614 As such, this item will amend subparagraph 34Y(3)(a) to remove the reference to offences of the kind referred to in paragraph 34X(1)(a) and replace it with a reference to an offence of the kind referred to in paragraph 34Y(1)(a), (b), (c), (d), (e) or (f). This amendment will ensure that any reference to a serious offence in Part 3-4 of the POC Act is taken to be a reference to an offence of the kind referred to in these paragraphs for the purposes of a monitoring order sought pursuant to an authorisation under the MA Act.

Item 147 – Section 34ZA

3.615 Section 34ZA of the MA Act sets out the circumstances in which the Attorney-General may authorise an authorised officer of an enforcement agency to apply for a search warrant under the POC Act. The authorisation must specify the State or Territory in which the application is to be made. This current provision therefore requires more than one authorisation if search warrants are required in different States and Territories.

3.616 The section also only applies if the foreign country requests the Attorney-General to obtain the issue of a search warrant relating to the proceeds or instrument of an offence or a property-tracking document in relation to the offence.

3.617 The wording of this section severely limits the extent to which it is able to be utilised. For example, if the foreign country makes a more general request for assistance in obtaining evidence relating to a certain investigation or proceeding, but does not specifically request the use of a search warrant, then this section cannot be used even if a search warrant is the most appropriate investigative tool.

3.618 Item 151 will insert new section 34ZG in the MA Act. This new section will enable the Attorney-General to make a general authorisation for an authorised officer of an enforcement agency to make any applications under the POC Act necessary to respond to a request for assistance from a foreign country. In particular, this general authorisation will be able to be made simply where the foreign country requests assistance in relation to a criminal investigation or proceeding without the foreign country needing to specify the exact tool by which the evidence should be obtained.

3.619 This item will repeal section 34ZA. As a result of the new general authorisation that will be able to be made under new section 34ZG, section 34ZA will no longer be necessary.

Item 148 – saving of existing authorisations

3.620 Item 147 will repeal section 34ZA of the MA Act which currently sets out the circumstances in which the Attorney-General may authorise an authorised officer of an enforcement agency to apply for a search warrant under the POC Act.

3.621 This item will ensure that any authorisations that have been made under section 34ZA continue to operate notwithstanding the fact that section 34ZA will be repealed by item 147. This is appropriate because repealing section 34ZA does not affect the circumstances in which the authorisation was originally made in accordance with the requirements set out in section 34ZA. Therefore, any authorisation made by the Attorney-General under section 34ZA prior to it being repealed by item 147 will continue to be able to be relied upon for the purpose of applying for a search warrant under the POC Act.

Item 149 – Subsection 34ZB(1)

3.622 Section 34ZB of the MA Act sets out the process for applying for and issuing search warrants. Subsection 34ZB(1) states that if an authorised officer has been authorised to apply for a search warrant under subsection 34ZA(1), then the authorised officer may apply for such a warrant.

3.623 Item 147 will repeal section 34ZA of the MA Act and item 151 will insert a new section 34ZG in the MA Act which will enable the Attorney-General to make a general authorisation that authorises an authorised officer of an enforcement agency to make any applications under the POC Act necessary to respond to a request for assistance from a foreign country.

3.624 This item will repeal subsection 34ZB(1) and replace it with a new subsection that will enable an authorised officer to apply for a search warrant under the POC Act if authorised by the Attorney-General under new section 34ZG (which will be inserted by item 151).

3.625 Part 3-5 of the POC Act will continue to apply to the application for a search warrant and any search warrant issued as a result of the application.

Item 150 – Paragraph 34ZB(3)(b)

3.626 Section 34ZB of the MA Act enables a search warrant to be sought under the POC Act for the purposes of a foreign criminal investigation or proceeding. Subsection 34ZB(2) states that Part 3-5 of the POC Act applies to the application for a search warrant and any search warrant issued as a result of the application. Subsection 34ZB(3) effects some minor changes to Part 3-5 of the POC Act for the purposes of an application made in response to a foreign request. Paragraph 34ZB(3)(b) states that any reference in that Part to a magistrate is to be taken to be a reference to a magistrate of the State or Territory specified in the authorisation made by the Attorney-General under subsection 34ZA(1).

3.627 Item 147 will repeal section 34ZA and item 151 will insert a new section 34ZG which will enable the Attorney-General to make a general authorisation for an authorised officer of an enforcement agency to make any applications under the POC Act necessary to respond to a request for assistance from a foreign country.

3.628 As a result of the amendments that will be made by those two items, the Attorney-General will no longer need to specify the State or Territory in which the search warrant is to be sought.

3.629 As such, this item will repeal paragraph 34ZB(3)(b). Any reference to ‘magistrate’ in Part 3-5 of the POC Act will continue to be a reference simply to the magistrate hearing the application in whichever State or Territory the application is made.

Item 151 – At the end of Division 2 of Part VI

3.630 The MA Act contains a number of investigative tools that Australia can use to assist foreign countries in proceeds of crime matters. These include monitoring orders, search warrants and production orders. However, the authorisation process for these tools is inadequate to keep pace with the fast and fluid nature of proceeds of crime investigations.

3.631 In particular, monitoring orders, search warrants and production orders must be the subject of a separate authorisation from the Attorney-General each time an authorised officer wishes to apply to a court to use one of these tools to assist the execution of a mutual assistance request. Further, the Attorney-General’s authorisations must be jurisdiction-specific, which can mean an authorised officer may need to seek multiple authorisations to satisfy a single request.

3.632 This item will insert a new Subdivision into Part VI of the MA Act. Subdivision G – Authorisation of authorised officers – will contain new section 34ZG.

3.633 The new section will apply if:

- a foreign country has commenced an investigation or proceeding relating to a criminal matter involving a foreign serious offence
- the foreign country requests assistance in relation to that proceeding or investigation, and
- the assistance that is requested may be obtained under the POC Act in the form of a production order, search warrant or monitoring order.

3.634 If Attorney-General is satisfied that the requisite circumstances exist, the Attorney-General will be able to make a general authorisation for an authorised officer of an enforcement agency to make any applications under the POC Act necessary to respond to a request by the foreign country.

3.635 The authorisation will enable the authorised officer to apply for a production order under section 34P, which will be amended by items 136 and 137, a monitoring order under section 34Y, which will be amended by items 145 and 146, or a search warrant under section 34ZB as amended by items 149 and 150. Each of these sections, when amended by the respective items, will govern the process for applying for each of the investigative tools.

3.636 This new section will significantly streamline the authorisation process in comparison to the current process where the Attorney-General needs to make a separate authorisation for each investigative tool and also needs to make a separate authorisation depending on the jurisdiction in which the authorisation is to be used.

3.637 The other benefit of this amendment is that it will mean the foreign country will be able to make one general request without having to make separate requests depending on the type of investigative tool that will need to be used to obtain the information that the foreign country has requested.

3.638 Subsection 3(1) of the MA Act sets out definitions that are relevant to this new general authorisation power. In particular, subsection 3(1) defines ‘criminal matter’ as including:

- a criminal matter relating to revenue (including taxation and customs duties)
- a criminal matter relating to foreign exchange control
- a matter relating to the forfeiture or confiscation of property in respect of an offence
- a matter relating to the imposition or recovery of a pecuniary penalty in respect of an offence, and
- a matter relating to the restraining of dealings in property, or the freezing of assets, that may be forfeited or confiscated, or that may be needed to satisfy a pecuniary penalty imposed, in respect of an offence.

3.639 Subsection 3(1) also defines a proceeding in relation to a criminal matter as including a proceeding before a judicial officer or a jury for the purpose of gathering evidential material that may lead to the laying of a criminal charge or assessing evidential material in support of the laying of a criminal charge. This definition recognises that under some criminal justice systems, a suspect may be formally charged with an offence later in the criminal justice process than in Australia, but 'proceedings' may have commenced prior to charges having been laid for the purpose of gathering evidence.

3.640 Subsection 3(1) defines a foreign serious offence as a serious offence against a law of a foreign country. Serious offence is currently defined in subsection 3(1). However, item 153 of this Schedule will redefine 'serious offence' to mean an offence for which the maximum penalty is death or imprisonment for a period exceeding 12 months, or a fine exceeding 300 penalty units as set out in section 4AA of the Crimes Act.

3.641 Although this amendment will allow assistance to be provided in relation to an offence that carries the death penalty, section 8 of the MA Act provides that where a mutual assistance request relates to a death penalty offence, assistance must be refused unless 'special circumstances' exist. Special circumstances could include material that provides exculpatory evidence, or where the requesting country has provided an undertaking that the death penalty will not be sought, or if imposed, will not be carried out.

Item 152 – Application of amendments made by items 114 to 151

3.642 Subsection (1) of this item will provide that the amendments made by items 115 to 133, but not including item 125, apply in relation to a request by a foreign country that is being considered on or after the day on which this item commences. The commencement for this item will be a day to be fixed by proclamation.

3.643 This subsection also specifies that the amendments made by these items will apply from the day of commencement regardless of whether the request was made before or after that day. The provision is necessary to enable there to be certainty with regard to the applicable law when processing requests made by foreign countries for assistance.

3.644 The amendments made by items 115 to 133, not including item 125 will, among other things, enable Australia to register non-conviction based orders from any country and seek a non-conviction based restraining order on behalf of any country.

3.645 Item 125 will amend subsection 34F(2) so that a foreign country has 45 days (instead of 21 days) following the registration of a foreign order in a court to have the sealed or authenticated copy of a foreign order filed with that court. If this does not occur, the registration ceases to have effect.

3.646 Subsection (2) of item 152 will provide that the amendment made by item 125 will only apply in relation to the registration of a foreign order that has effect on or after commencement. This is appropriate because it will ensure that the timeframes in which a foreign country needs to provide the sealed or authenticated copy of the foreign order are clear. Further, if item 125 applied in relation to orders that had been registered before commencement of this item, it is possible that orders which may have ceased to have effect because the 21 days had passed, could come back into operation with the extension of the

time period to 45 days. Applying this item only to orders that have effect on or after commencement will prevent this from happening.

3.647 Items 114 and 134 to 151 will streamline the authorisation process for the proceeds of crime investigative tools in the MA Act. Subsection (3) of item 152 will provide that the amendments made by these items will only apply to authorisations made by the Attorney-General on or after the commencement of this item.

PART 6 – OTHER AMENDMENTS

3.648 This Part will make a range of miscellaneous amendments to the MA Act to improve the operation of the MA Act.

Mutual Assistance in Criminal Matters Act 1987

Item 153 – Subsection 3(1) (definition of *serious offence*)

3.649 Subsection 3(1) of the MA Act sets out definitions that are relevant to the operation of the MA Act.

3.650 There are some forms of assistance that can only be requested or provided under the MA Act where the alleged offence is a 'serious offence'. One example is where Australia or the foreign country requests that the other country execute a search warrant to obtain particular material. A 'serious offence' is currently defined as an offence the maximum penalty for which is death, or imprisonment for not less than 12 months.

3.651 This item will amend the definition of 'serious offence' in subsection 3(1) of the MA Act in two ways. First, the threshold period of imprisonment will change to 'exceeding 12 months'. This will align the 'serious offence' definition with the penalty threshold for an 'indictable offence' in the Crimes Act. Section 4G of the Crimes Act defines an 'indictable offence' as an offence against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months. This change is necessary because some forms of assistance that can be provided under the MA Act, or will be able to be provided subject to the passage of this Bill, are only available for domestic purposes for the investigation of an indictable offence. For example, a suspect in a Commonwealth offence cannot be compelled to undergo a forensic procedure unless the relevant offence is an indictable offence.

3.652 Although this amendment will allow assistance to be provided in relation to an offence that carries the death penalty, section 8 of the MA Act provides that where a mutual assistance request relates to a death penalty offence, assistance must be refused unless 'special circumstances' exist. Special circumstances could include material that provides exculpatory evidence, or where the requesting country has provided an undertaking that the death penalty will not be sought, or if imposed, will not be carried out.

3.653 Secondly, a monetary fine of 'exceeding 300 penalty units' would be incorporated into the definition. Under section 4AA of the Crimes Act one penalty unit is currently A$110. The inclusion of a monetary fine element in the 'serious offence' definition would enable Australia to request and provide assistance in relation to serious corporate offences that may only carry monetary fines as penalties. Two examples of such offences are the cartel offences in sections 44ZZRF and 44ZZRG of the *Competition and Consumer Act 2010*. These proposed offences target the conduct of corporations, so have a maximum penalty expressed in monetary terms, rather than a term of imprisonment.

3.654 It is important that Australia be in a position to request and provide assistance in relation to serious offences committed by corporations. This approach reflects international efforts to combat 'white collar' crime in general, for example through the *United Nations Convention Against Corruption* and the *United Nations Convention Against Transnational*

Item 154 – After subsection 3(1)

3.655 There are some forms of assistance that can only be requested or provided under the MA Act where the alleged offence carries a certain penalty level. As a result of the amendments that will be made by this Bill, certain types of assistance will only be able to be requested or provided if a certain monetary threshold is reached. For example, item 39 of this Schedule will amend subsection 13A(2) of the MA Act to enable lawfully intercepted information and interception warrant information to be provided to a foreign country following an authorisation by the Attorney-General where the relevant foreign offence carries a maximum penalty of at least seven years imprisonment, life imprisonment, the death penalty or, in the case of a foreign cartel offence, a fine of at least the equivalent of $A10,000,000.

3.656 This item will insert a new subsection which will explain how foreign currency is to be translated into an Australian dollar amount for the purposes of determining whether a particular threshold is reached under the MA Act. New subsection 3(1A) will provide that the penalty or fine carried by a foreign offence is to be converted into Australian dollars using the daily exchange rate listed on the Australian Tax Office website on the day that the request is received.

3.657 If the country does not have a daily exchange rate listed on the Australian Tax Office website, the exchange rate to be used is the exchange rate that applies at the time the request is received.

3.658 This subsection will provide clarity in determining whether a particular foreign offence satisfies the penalty threshold required for Australia to be able to provide the requested assistance.

Item 155 – Paragraphs 5(a) and (b)

3.659 Section 5 of the MA Act sets out the objects of the Act. The objects listed are specific and relate to the different powers currently set out in the MA Act.

3.660 Paragraph 5(a) provides that the object of the MA Act is to regulate the provision by Australia of the following types of assistance:

- the taking of evidence
- the issue of a search warrant and seizure of any thing relevant to a foreign investigation or proceeding
- the forfeiture or confiscation of property
- the recovery of pecuniary penalties, and
- the restraining of dealings in property that may be confiscated or forfeited.

3.661 Paragraph 5(b) provides that the object of the MA Act is also to facilitate the provision by Australia of assistance in criminal matters where a foreign country requests that arrangements be made for a person to travel to the country to give evidence in a proceeding or to give assistance in relation to an investigation.

3.662 This item will repeal paragraphs 5(a) and (b) and replace them with a new general objects provision.

3.663 New paragraph 5(a) will state that the object of the MA Act is to regulate the provision by Australia of international assistance in criminal matters when a request is made in respect of which powers may be exercised under the Act.

3.664 This new general objects provision will ensure that the objects of the MA Act do not need to be updated each time a new power is inserted into the MA Act. This also mirrors the approach taken in section 3 of the Extradition Act.

Item 156 – Subsection 15(1)

3.665 Section 15 of the MA Act contains only one subsection. This item will remove '(1)' from the commencement of the section. This is not needed as there is not a second subsection.

Item 157 – Subsection 15(1)

3.666 Section 15 of the MA Act currently requires the Attorney-General to specify the State or Territory in which an authorised officer must apply for a search warrant. Section 15 also lacks clarity in relation to whether an authorisation under section 15 can be relied upon to apply for more than one search warrant.

3.667 This item will amend section 15 in two ways. First, this item will remove the requirement in section 15 for the Attorney-General's authorisation to specify the State or Territory in which an authorised officer must apply for a search warrant. Secondly, section 15 will be amended to clarify that the authorisation can be relied upon to apply for one or more search warrants.

3.668 These amendments will mean that the Attorney-General will only be required to make one authorisation regardless of the jurisdiction in which the evidential material is believed to be located and how many search warrants may be necessary.

Items 158 and 159 – Paragraph 16(1)(b) and paragraph 16(2)(b)

3.669 Section 16 of the MA Act currently enables Australia to request a foreign country to authorise the attendance of a foreign prisoner at a hearing in connection with an Australian proceeding, or removal of the foreign prisoner to Australia to assist with an Australian investigation.

3.670 The exercise of this power is currently subject to the Attorney-General being of the opinion that certain circumstances exist, including that the person is a foreign prisoner and that the person is capable of giving evidence relevant to the proceeding or giving assistance in relation to the investigation.

3.671 These items will amend subsections 16(1) and (2) to remove the requirement for the Attorney-General to determine certain facts, such as whether a person is a foreign prisoner, and whether he or she has given consent to being removed to Australia. These matters are able to be established sufficiently on the basis of information provided to the Department.

3.672 The Attorney-General will still be required to make arrangements with the foreign country in relation to the request as set out in subsection 16(3) (for example, in relation to the custody of the person while in Australia and the return of the person to the foreign country).

Item 160 – Paragraph 35B(c)

3.673 Section 35B of the MA Act enables a court to make certain ancillary orders relating to foreign restraining orders that have been registered in Australia. Paragraph 35B(c) enables the court to order the owner of the property subject to the restraining order to give to the Official Trustee a statement, verified by the oath of the owner, setting out such particulars of the property as the court considers appropriate.

3.674 This item will amend paragraph 35B(c) to enable the owner of the property to verify their statement by oath or by affirmation. This will ensure that a person has the option of giving a statement that is verified on oath or affirmation depending on a person's beliefs.

Item 161 – Subsection 38B(1)

3.675 Item 156 will remove '(1)' from the commencement of section 15 of the MA Act as there is no second subsection. This item will, as a consequence of the amendment that will be made by item 156, replace the reference to subsection 15(1) in subsection 38B(1) with a reference to section 15.

Item 162 – Subsections 38B(2) and (3)

3.676 Section 38B of the MA Act sets out the process for applying for a search warrant if authorised to do so by the Attorney-General under section 15 of the MA Act. Subsections 38B(2) and (3) require the police officer applying for a warrant in relation to premises (subsection 38B(2)) or a person (subsection 38B(3)) to provide information on oath when applying for the warrant.

3.677 This item will amend subsections 38B(2) and (3) to enable the police officer to provide information on oath or affirmation. This will ensure that a person has the option of providing information on oath or affirmation depending on a person's beliefs.

Items 163 and 164 – Subsection 39A(1) and paragraphs 39A(2)(a) and (3)(c)

3.678 Section 39A enables the Attorney-General to make requests to a foreign country for assistance in relation to a criminal matter on behalf of a defendant. Subsection 39A(1) currently refers to a defendant in a proceeding and calls that proceeding the 'original proceeding'.

3.679 Item 163 will remove the reference to 'original proceeding' in subsection 39A(1). Item 164 will remove the reference to 'original' before the word proceeding in paragraphs 39A(2)(a) and (3)(c).

3.680 These amendments will clarify that the Attorney-General may make a mutual assistance request to a foreign country on behalf of a defendant in criminal appeal proceedings. The references to 'original proceeding' will be removed, as they create an impression that appeal proceedings are excluded from the provision, which is not the intention of the provision.

Item 165 – Subsection 43(2)

3.681 Section 43 of the MA Act states that any duly authenticated document is admissible in evidence in proceedings under the MA Act or in any proceeds of crime proceeding arising as a result of a request made under the MA Act.

3.682 Subsection 43(2) sets out when a document is duly authenticated for the purposes of subsection 43(1). This subsection currently requires the document to be:

- signed or certified by a Judge, magistrate or officer in or of the foreign country, and
- sealed with an official or public seal of the foreign country or of a Minister of State or of a Department or officer of the Government of the foreign country.

3.683 This item will repeal subsection 43(2) and replace it with a new subsection that only requires the document to be signed or certified by a Judge, magistrate or officer in or of the foreign country. This will ensure consistency with the provisions of the *Foreign Evidence Act 1994*, which does not require documents to be sealed by the foreign country. The Foreign Evidence Act only requires testimony obtained from a foreign country to purport to be signed by a judge, magistrate or officer in or of the foreign country to which the request was made.

Item 166 – Paragraph 44(c)

3.684 Section 44 of the MA Act provides that the Governor-General may make regulations prescribing certain matters which are required or permitted by the MA Act, or are necessary or convenient to be prescribed for carrying out or giving effect to the MA Act. In particular, paragraph 44(c) provides that the Governor-General may make regulations relating to the performance by magistrates of functions under the MA Act including the taking of evidence on oath and the administering of oaths.

3.685 As Part 2 of this Schedule will amend the MA Act to enable evidence to be taken on oath or affirmation, this item will amend paragraph 44(c) to enable regulations to be made with respect to taking evidence on oath or affirmation and administering oaths or affirmations. These amendments recognise that a person should have the option of giving evidence that is verified on oath or affirmation depending on a person's beliefs.

Item 167 – Paragraph 44(d)

3.686 Section 44 provides that the Governor-General may make regulations prescribing certain matters which are required or permitted by the MA Act, or are necessary or convenient to be prescribed for carrying out or giving effect to the MA Act. In particular, paragraph 44(c) provides that the Governor-General may make regulations prescribing penalties not exceeding a fine of $1,000 for offences against the regulations.

3.687 This item will replace the reference to ‘a fine of $1,000’ with ‘10 penalty units’. Under section 4AA of the Crimes Act, one penalty unit equates to $A110. This will ensure the regulations can prescribe penalties for offences by reference to a maximum number of penalty units rather than a maximum monetary amount. This reflects modern drafting practice for penalties.

Item 168 – Application of amendments made by items 157 and 165

3.688 The amendment that will be made by item 157 will mean that the Attorney-General will only be required to make one authorisation under section 15 for a police officer to apply for a search warrant regardless of the jurisdiction in which the evidential material is believed to be located and how many search warrants may be necessary.

3.689 Subsection (1) of item 168 will provide that the amendment that will be made by item 157 will only apply to authorisations made on or after the commencement of this item. Therefore, any authorisation made by the Attorney-General prior to the commencement of this item will continue only to enable an application for a warrant in the State or Territory that is specified in the warrant.

3.690 Item 165 will amend the requirements that need to be met under section 43 of the MA Act for a document to be duly authenticated for the purposes of proceedings in connection with the MA Act.

3.691 Subsection (2) of item 168 will provide that the amendments made by item 165 will only apply in relation to proceedings of a kind mentioned in subsection 43(1) that begin on or after the commencement of this item. Therefore, even if a particular document had not yet been admitted as evidence prior to the commencement of this item, if the proceeding had commenced, a document will only be duly authenticated if the requirements currently set out in subsection 43(2) are met, not the requirements in subsection 43(2) after amendments that will be made by item 165 commence. This will ensure that the evidential rules relating to whether or not a document is admissible do not change during proceedings.

SCHEDULE 4 – CONTINGENT TECHNICAL AMENDMENTS

GENERAL OUTLINE

4.1 The Bill contains amendments which are contingent upon the commencement of amendments in other Bills currently before Parliament.

4.2 This Schedule contains a range of technical amendments which will, when combined with the commencement table in clause 2 of the Bill, ensure that the amendments are made regardless of whether the other Bills before Parliament have already commenced prior to the commencement of this Bill.

Migration Act 1958

Item 1 – Subsection 5(1)(paragraph (b) of the definition of *non-political offence*)

4.3 Item 35 of Schedule 2 of this Bill will amend subsection 91T(3) of the Migration Act as a result of the amendment being made to the definition of 'political offence' in the Extradition Act. However, this item will only commence if item 20 of Schedule 1 to the *Migration Amendment (Complementary Protection) Bill has not yet commenced.*

4.4 Item 20 of Schedule 1 of the *Migration Amendment (Complementary Protection) Bill 2011*, which is currently before Parliament, will repeal subsection 91T(3) of the Migration Act and item 4 of Schedule 1 of that Bill will insert a definition of 'non-political crime' in subsection 5(1) of the Migration Act which will refer to the definition of 'political offence' in the Extradition Act..

4.5 Item 1 of Schedule 4 of this Bill will amend paragraph (b) of the definition on 'non-political crime in subsection 5(1) of the Migration Act (which will be inserted by the *Migration Amendment (Complementary Protection) Bill* 2011) as a result of the amendment being made to the definition of 'political offence' in the Extradition Act.

4.6 This item will commence on the later of

- a single day to be fixed by proclamation or at the end of the six month period beginning on the day this Bill receives Royal Assent, whichever is earlier, or
- immediately after the commencement of item 20 of the *Migration Amendment (Complementary Protection) Bill*

4.7 Therefore, if this Bill commences first:

- item 35 of Schedule 2 will amend subsection 91T(3) of the Migration Act, then
- when the *Migration Amendment (Complementary Protection) Bill 2011* commences item 20 of Schedule 1 of that Bill will repeal subsection 91T(3) of the Migration Act and item 4 of Schedule 1 of that Bill will insert the reference to the definition of 'political offence' in paragraph (b) of subsection 5(1) of the Migration Act, and then

- this item will commence immediately after the commencement of the *Migration Amendment (Complementary Protection) Bill 2011* and will amend paragraph (b) of the definition on 'non-political crime' in subsection 5(1) of the Migration Act.

4.8 If the *Migration Amendment (Complementary Protection) Bill 2011* commences before item 35 of Schedule 2 of this Bill, that item will never commence and:

- item 20 of Schedule 1 of that Bill will repeal subsection 91T(3) of the Migration Act and item 4 of Schedule 1 of that Bill will insert the reference to the definition of 'political offence' in paragraph (b) of subsection 5(1) of the Migration Act, and then

- this item will commence immediately after the commencement of the *Migration Amendment (Complementary Protection) Bill 2011* and will amend paragraph (b) of the definition on 'non-political crime' in subsection 5(1) of the Migration Act.

Mutual Assistance in Criminal Matters Act 1987

Items 2 to 4

4.9 Items 50 (which will insert Part IIIC governing assistance in relation to surveillance devices in the MA Act) and 53 (which will insert a definition of 'mutual assistance authorisation' in subsection 6(1) of the SD Act) of Schedule 3 rely on provisions in the Cybercrime Bill having commenced before they commence.

4.10 The provisions of the Cybercrime Bill which are being relied upon are the definition of 'investigative proceeding' which will be inserted by item 2 of Schedule 2 and new sections 15B and 15D of the MA Act which will be inserted by items 4 and 27 of Schedule 2 respectively.

4.11 Items 2, 3 and 4 in Schedule 4 will commence instead of items 50 and 53 in Schedule 3 if this Bill commences before the Cybercrime Bill.

Item 2 – After Part IIIB

4.12 This item will insert Part IIIBA into the MA Act. Part IIIBA will govern assistance in relation to surveillance devices. Part IIIBA will contain two sections; the first will deal with requests made by Australia and the second will deal with requests made by foreign countries.

4.13 This item will only commence on a single day to be fixed by proclamation or at the end of the six month period beginning on the day this Bill receives Royal Assent, whichever is earlier. However, if item 2 of Schedule 2 to the Cybercrime Bill commences before that time, this item will never commence.

Section 15C – Requests by Australia for surveillance devices

4.14 New section 15C will enable Australia to request an appropriate authority of a foreign country to authorise the use of a surveillance device in that country and arrange for information obtained through the use of that device to be sent to Australia.

4.15 The threshold test for requesting such assistance will be:

- if the use of a surveillance device is reasonably necessary to obtain information relevant to the commission of an Australian offence punishable by three or more years imprisonment, or

- if the use of a surveillance device is reasonably necessary to obtain information relevant to the identity or location of the offenders.

4.16 If the foreign country obtained the requested information lawfully, but by a means other than using a surveillance device, that information would not be inadmissible as evidence in Australia, or precluded from use in an Australian investigation, because it was obtained otherwise than in accordance with the request.

4.17 This is appropriate because as long as the foreign country obtained the evidence in accordance with their domestic requirements, it should not matter that the evidence was not obtained in the way requested originally by Australia.

Section 15CA – Requests by foreign countries for surveillance devices

4.18 New section 15CA will establish the means by which Australia may respond to a foreign country's request for a surveillance device. It will enable the Attorney-General to authorise an eligible law enforcement officer to apply for a surveillance device warrant under section 14 of the SD Act, if satisfied of the following matters:

- a request has been received from the foreign country

- an investigation or investigative proceeding relating to a criminal matter has commenced in the requesting country

- the offence the subject of the investigation or investigative proceeding is punishable by a maximum penalty of three or more years imprisonment, life imprisonment or death, and

- the requesting country has given appropriate undertakings in relation to the use and destruction of information obtained as a result of the use of the surveillance device and any other matter the Attorney-General considers relevant.

4.19 The threshold of a maximum penalty of three or more years' imprisonment, life imprisonment or death mirrors the threshold that applies to whether a surveillance device can be sought for the investigation of domestic offences. This will ensure that surveillance devices will only be able to be used to investigate foreign offences of a similar level of seriousness as would be required to obtain a surveillance device for the purposes of a domestic investigation.

4.20 Although this amendment will allow assistance to be provided in relation to an offence that carries the death penalty, section 8 of the MA Act provides that where a mutual assistance request relates to a death penalty offence, assistance must be refused unless 'special circumstances' exist. Special circumstances could include material that provides

exculpatory evidence, or where the requesting country has provided an undertaking that the death penalty will not be sought, or if imposed, will not be carried out.

4.21 'Eligible law enforcement officer' will be defined in this section by reference to paragraphs (a) and (c) of the definition of 'law enforcement officer' in subsection 6(1) of the SD Act. As such, the following persons will be able to be authorised by the Attorney-General to apply for a surveillance device warrant in response to a mutual assistance request:

- the Commissioner or Deputy Commissioner of the AFP
- any AFP employee
- any special member or person seconded to the AFP, or
- an officer (however described) of the police force of a State or Territory, or any person who is seconded to that police force.

4.22 'Investigative proceeding' will be defined in this section by reference to paragraphs (a) and (b) of the existing definition of 'proceeding' in the MA Act:

- gathering evidential material that may lead to the laying of a criminal charge (paragraph (a)), or
- assessing evidential material in support of the laying of a criminal charge (paragraph (b)).

Item 3

4.23 Item 2 of this Schedule will insert a new section 15CA in the MA Act. This new section will, in subsection 15CA(2), contain a definition of 'investigative proceeding'.

4.24 However, item 2 of Schedule 2 of the Cybercrime Bill (which is currently before Parliament) will also insert a definition of 'investigative proceeding' in the MA Act.

4.25 As item 2 of Schedule 4 of this Bill will insert a definition of investigative proceeding, that definition will need to be repealed if the Cybercrime Bill commences.

4.26 As such, this item will commence immediately after the commencement of item 2 of Schedule 2 to the Cybercrime Bill to repeal the definition. However, if item 2 of Schedule 2 of the Cybercrime Legislation Amendment Act 2011 does not commence, this item will never commence.

Surveillance Devices Act 2004

Item 4

4.27 Item 53 of Schedule 3 of this Bill will insert a definition of 'mutual assistance authorisation' in subsection 6(1) of the SD Act which will be defined as an authorisation under subsection 15F(1) of the MA Act (which will be inserted by item 53 of Schedule 3 of

this Bill). Item 53 of Schedule 3 of this Bill will only commence on proclamation if item 2 of Schedule 2 of the Cybercrime Bill has commenced before that time.

4.28 Therefore, if item 2 of Schedule 2 of the Cybercrime Bill has not commenced prior to proclamation, item 53 of Schedule 3 of this Bill will never commence. As such, item 4 of Schedule 4 will instead insert a definition of 'mutual assistance authorisation' in the SD Act to mean an authorisation under subsection 15CA(1) of the MA Act. Subsection 15CA(1) of the MA Act will be inserted by item 2 of this Schedule.

4.29 This item will commence on a single day to be fixed by proclamation or at the end of the six month period beginning on the day this Bill receives Royal Assent, whichever is earlier. However, if item 2 of Schedule 2 to the Cybercrime Bill commences before that time, this item will never commence.