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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

# ANTI-TERRORISM BILL 2004

## EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Honourable Philip Ruddock MP)

## OUTLINE

The Bill contains in Schedule 1 amendments to Part 1C of the *Crimes Act 1914*, the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the Schedule of the *Criminal Code Act 1995* ('the *Criminal Code*') and the *Proceeds of Crime Act 2002*. All these proposed amendments improve Australia's counter-terrorism legal framework.

The objects of this Bill are:

(a) to amend Part 1C of the *Crimes Act 1914* by permitting the fixed investigation period applying to the investigation of federal terrorism offences to be extended by a maximum of 20 hours if judicially authorised and subject to all the existing procedural safeguards enshrined in Part 1C

(b) to amend Part 1C of the *Crimes Act 1914* by permitting the authorities to reasonably suspend or delay questioning of a person arrested for a terrorism offence to make inquiries in overseas locations that are in different time zones to obtain information relevant to that terrorism investigation

(c) to amend the *Crimes (Foreign Incursions and Recruitment) Act 1978* to enhance the foreign incursions offences, particularly in situations where terrorist organisations are operating as part of the armed forces of a state

(d) to amend the *Criminal Code Act 1995* to strengthen the counter-terrorism legislation relating to membership of terrorist organisations and the offence of providing training to or receiving training from a terrorist organisation, and

(e) to amend the *Proceeds of Crime Act 2002* to improve restrictions on any commercial exploitation by a person who has committed foreign indictable offences.

None of these amendments are intended to operate retrospectively.

<u>Part 1C of the Crimes Act</u>

Part 1C of the *Crimes Act 1914* was inserted in 1991 to address the uncertainty caused by the High Court's decision in *Williams v R* [1987] HCA 36; (1986) 161 CLR 278.

In *Williams*, the High Court held that law enforcement agencies lacked the power to detain and question suspects, or to continue other investigations into a suspect's alleged involvement in criminal activity, prior to bringing an arrested person before a magistrate. Part 1C makes it clear that an arrested person may be detained for questioning, prior to being brought before a magistrate or other judicial officer, for the purpose of:

(i) investigating whether that person committed the offence for which they were arrested, and/or

(ii) investigating whether the person committed another Commonwealth offence that an investigating official suspects them of committing.

Part 1C also introduced important investigatory safeguards to balance the practical consideration that police should be able to question a suspect about an offence before they are brought before a judicial officer. These safeguards were intended to ensure any evidence obtained during such questioning was an accurate reflection of the truth and could be relied upon in court. One example of the safeguards found in Part 1C is the requirement to record admissions or confessions. Fixed time limits for post-arrest investigations are another crucial investigatory safeguard in Part 1C.

This Bill would adjust two of these safeguards so that authorities investigating the commission of terrorism offences are not overly constrained. The two key constraints are: (i) the inadequate duration of the investigation period for investigations of terrorism offences, even when extended by a magistrate or other judicial officer and (ii) the inability of Australia's law enforcement authorities to make inquiries in overseas locations that are in different time zones to obtain information relevant to their investigations without exhausting the fixed investigation period.

*Investigation period*

An important procedural safeguard is the prescription of a fixed time during which police may question arrested suspects in relation to all federal offences, including terrorism offences, before bringing them before a magistrate or other judicial officer. (A person may be arrested for a federal offence if a constable believes on reasonable grounds that the person has committed or is committing the offence and proceeding

by summons would not be appropriate.) The fixed time for questioning arrested suspects is currently four hours, with one eight hour extension possible for serious offences. A total investigation period of 12 hours, as is currently the case, is not sufficient for complex terrorism investigations. It is proposed that the initial investigation period continue as four hours with a further 20 hours possible if the investigation period is extended. There would be no limit on the number of extensions that may be granted, provided that a magistrate or other judicial officer separately authorises each extension. However, the maximum time for these extensions would be capped at 20 hours. It would be open for a magistrate or other judicial officer to issue a single extension for up to 20 hours. In cases where extensions up to the maximum time allowed for questioning are necessary and authorised, the total investigation period for investigations of terrorism offences would be 24 hours.

*Overseas inquiries*

The investigation period runs from the point when the person is arrested. However, there are prescribed events which do not count for the purposes of the time limit. For example, the time it takes for the person to communicate with a legal practitioner and for that legal practitioner to arrive, or for the person to receive medical treatment, or for a forensic procedure to be carried out, is not counted. These periods of time are set out in Part 1C, and are known as 'dead time'. The Bill would retain all of the existing 'dead time' provisions for investigations into terrorism offences.

However, it is possible that during investigations into terrorism offences it will be necessary to halt the questioning of an arrested suspect so that investigators can obtain relevant information from authorities overseas. This is particularly so for investigations into terrorism offences as many of these investigations will have an international aspect. Seeking and obtaining relevant information from overseas is complicated given that overseas authorities operate (or do not operate, as the case may be) in different time zones. It is proposed that this process should constitute 'dead time', but with two important provisos: (i) the decision to halt questioning and utilise the 'dead time' mechanism must be reasonable and (ii) the period for which questioning is suspended or delayed must be reasonable, with the maximum allowable

'dead time' capped by the amount of the time zone difference between the place of investigation and the relevant overseas location.

*Maintaining existing investigatory safeguards*

The existing investigatory safeguards in Part 1C of the *Crimes Act 1914* would be retained for suspects being investigated for terrorism offences. Key safeguards include the right to communicate with a legal practitioner, friend or relative (section 23G), an interpreter (section 23N) and a consular office (section 23P). A suspect's right to remain silent would be retained (section 23S). The tape recording of any admissions or confessions made by a suspect during questioning would continue to be a pre-requisite to establish the admissibility of any such admission or confession (section 23V). Suspects would also have a right to a copy of recorded interviews (section 23U).

Crimes (Foreign Incursions and Recruitment) Act

The *Crimes (Foreign Incursions and Recruitment) Act 1978* (Foreign Incursions Act) is designed to prohibit Australian citizens and those ordinarily resident in Australia from engaging in hostile activities in a foreign state. For the purposes of the Foreign Incursions Act, hostile activities include, among other things, acting to overthrow the government of a foreign state and engaging in armed hostilities in a foreign state.

Recognising that there may be instances where Australian citizens, especially those who are dual nationals, wish to join the legitimate armed forces of a foreign state, the Foreign Incursions Act does not apply to actions taken in the course of a person's service with the armed forces of a foreign state. Accordingly, paragraph 6(4)(a) states: "Nothing in this section applies to an act done by a person in the course of, and as part of, the person's service in any capacity in or with the armed forces of the government of a foreign state" (referred to hereinafter as the 6(4)(a) defence).

As events in Afghanistan demonstrate, in today's security environment terrorist organisations may be fighting as part of or alongside the armed forces of a foreign state. In some cases, those foreign forces may even be fighting against our own Defence Forces. In those circumstances, it is not appropriate that the 6(4)(a) defence be available to excuse people from the reach of the Foreign Incursions Act.

The Bill would make amendments to address this issue. It would also make amendments to increase the penalty for an offence against section 6 of the Act, modify the one year presence in Australia requirement for non-citizens and non-residents, and insert a new ministerial certificate provision.

Criminal Code

The Bill would remove the requirement that an organisation must be specified in regulations as a terrorist organisation in order for the membership offence in section 102.3 of the Criminal Code to apply. This would make the membership offence consistent with the other terrorism offence provisions in Division 102 of the Criminal Code. As a result, a person may be guilty of the offence of being a member of an organisation that is found by a court to be a terrorist organisation (and where that organisation is not listed in regulations as a terrorist organisation) on the basis of facts presented in the course of a trial

The Bill would also modify the offence of providing training to or receiving training from a terrorist organisation in section 102.5 of the Criminal Code.

Proceeds of Crime Act

The *Proceeds of Crime Act 2002* allows for literary proceeds orders where a court is satisfied that a person has committed an indictable offence (whether or not the person has been convicted of the offence) and derived literary proceeds from that offence. It also applies where a court is satisfied that a person has committed a foreign indictable offence (whether or not the person has been convicted of the offence) and that person has derived in Australia literary proceeds from the offence. The intention of the literary proceeds regime is to prevent criminals exploiting their notoriety for commercial purposes.

The amendments in this Bill will improve restrictions on any commercial exploitation by any person who has committed a foreign indictable offence. It is critical that those involved in terrorist activity or other serious crime are not able to benefit from their notoriety.

*The definition of 'foreign indictable offence'*

A foreign indictable offence is an offence against a law of a foreign country constituted by conduct that would have constituted an offence against a law of the Commonwealth, a State or Territory punishable by at least 12 months imprisonment if it had occurred in Australia.

The amendment in this Bill to the definition of foreign indictable offence specifies that the time at which the double criminality test is to be applied is the time of the application for a restraining or confiscation order, whichever occurs first. The amendment also specifies that, for the purpose of the definition of foreign indictable offence, an offence against a law of a foreign country includes offences triable by a military commission established under a specified order of the President of the United States of America. Some who are alleged to have committed terrorist related offences may be dealt with by a US military commission.

*The definition of 'literary proceeds'*

Section 153 of the *Proceeds of Crime Act 2002* requires that any benefit that a person derives from the commercial exploitation of the person's notoriety results from the person having committed an indictable or foreign indictable offence. The amendment in this Bill is intended to make it clear that the notoriety need only be indirectly linked to the offence.

Currently, where a foreign indictable offence is the relevant offence, only literary proceeds derived in Australia are subject to the literary proceeds regime and a person could seek to make a literary profit from their crimes overseas and then transfer those profits to Australia. The definition of literary proceeds will be extended to cover this situation so that literary proceeds transferred to Australia can also be subjected to literary proceeds orders. A person will, for instance, still be able to publish material or give media interviews about their experiences but they will not be able to profit from such in Australia.

## FINANCIAL IMPACT STATEMENT

The Bill is not expected to have a significant impact on Commonwealth expenditure or revenue.

The financial impact of the amendments to Part 1C of the *Crimes Act 1914* are difficult to quantify. Longer investigation periods for terrorism offences may require more AFP resources to be devoted to a particular investigation. However, in other cases an extended investigation period may lead to the acquisition of information that results in the early elimination of a suspect from further inquiries and better focusing of subsequent AFP investigations. This may have cost benefits for the AFP.

It is not possible to estimate the cost of bringing any new *Proceeds of Crime Act 2002* confiscation proceedings, particularly in the area of literary proceeds, or the cost of preserving and realising property that is the subject of orders made after the amendments. However, it is expected that the revenue generated from the confiscation of property will offset the investigative and legal costs in bringing proceedings and administering property.

The amendments to the *Crimes (Foreign Incursions and Recruitment) Act 1978* and the *Criminal Code Act 1995* are not expected to have any financial impact.

## NOTES ON ITEMS

**Clause 1 – Short title**

It is proposed that the short title of the Act will be the Anti-terrorism Act 2004.

**Clause 2 - Commencement**

The Act will commence on the day after the day it receives Royal Assent. This is necessary due to the current status of the security environment. It would be most unfortunate if legislative improvements already identified by the Parliament could not be used in a situation where an incident occurred between Royal Assent and a later commencement date.

**Clause 3 – Schedule(s)**

This clause provides that the Acts specified in Schedule 1 to the Bill (*Crimes Act 1914*, *Crimes (Foreign Incursions and Recruitment) Act 1978*, *Criminal Code Act 1995* and *Proceeds of Crime Act 2002*) are amended as set out in each case.

**Clause 4 – Application of amendments**

Subclause 4(1) applies the amendments to the *Proceeds of Crime Act 2002* contained in this Act to any applications made under the Proceeds of Crime Act after the commencement of this clause, including an application in relation to: conduct that occurred before the commencement of this Act, proceeds derived or realised before the commencement of this Act, or literary proceeds derived or transferred to Australia before the commencement of this Act.

Subclause 4(2) provides that the proposed new ministerial certificate provision in item 17 of Schedule 1 will not apply to proceedings for offences alleged to have been committed before the commencement of this Act.

**SCHEDULE 1 – AMENDMENTS**

This Schedule sets out the amendments to be made to the *Crimes Act 1914*, *Crimes (Foreign Incursions and Recruitment) Act* 1978, *Criminal Code Act 1995* and *Proceeds of Crime Act 2002*.

*Crimes Act 1914*

**Item 1 – Subsection 23B(1) (definition of investigation period)**

This item amends the existing definition of 'investigation period' to ensure that it applies to the two separate investigatory regimes that would operate: the regime for investigations into offences other than terrorism offences under section 23C and the regime for the investigation of terrorism offences under proposed section 23CA.

The 'investigation period' is the period between the arrest of a person and their release or when they are brought before a judicial officer. The person can be questioned for the purposes of the investigation during the investigation period.

**Item 2 – Subsection 23B(1) (definition of terrorism offence)**

This item inserts a new definition of 'terrorism offence' into subsection 23B(1) of Part 1C. A 'terrorism offence' is defined to mean only those offences contained in Division 72 and Part 5.3 of the Criminal Code. Division 72 of the Criminal Code contains offences targeting international terrorist activities using explosive or lethal devices, giving effect to Australia's international obligations under the International Convention for the Suppression of Terrorist Bombings, done at New York on 15 December 1997. Part 5.3 of the Criminal Code contains a suite of federal terrorism offences, including offences targeting persons engaging in terrorist acts, providing or receiving training connected with terrorist acts, and directing the activities of a terrorist organisation.

The definition of 'terrorism offence' helps set the parameters within which the proposed new investigatory framework for terrorism offences would operate, and underscores an important aspect of the Bill: the proposed amendments to Part 1C do not alter the investigatory framework and applicable safeguards applying to the investigation of offences other than terrorism offences.

Under section 11.6 of the Criminal Code any reference to a federal offence in federal law includes a reference to the related inchoate offences of attempt, incitement and conspiracy found in Part 2.4 of the Criminal Code (sections 11.1, 11.4 and 11.5). This means that investigations into the offences of attempting, inciting or conspiring to commit a terrorism offence would also be covered by the proposed new

investigatory framework. Investigations that draw on the complicity and common purpose or innocent agency provisions of Part 2.4 of the Criminal Code (sections 11.2 and 11.3) in relation to terrorism offences will also be covered by the proposed new investigatory framework. This is because a person to whom those provisions would apply is taken to have committed the primary offence, which in this case would be a terrorism offence.

**Item 3 – Subsection 23C(1)**

This item clarifies that the existing provisions of section 23C in Part 1C, which prescribe the fixed time limit and 'dead time' mechanisms, would continue to apply to the investigation of federal offences other than terrorism offences, but would not apply to the investigation of terrorism offences. Instead, section 23C is essentially replicated in proposed section 23CA, but with one new 'dead time' provision. Proposed section 23CA would apply exclusively to the investigation of federal terrorism offences.

**Item 4 – Subsection 23C(6)**

This item replaces existing subsection 23C(6) to ensure that it reflects the two separate investigatory regimes that would operate: the regime for investigations into offences other than terrorism offences under section 23C and the regime for investigations into terrorism offences under proposed section 23CA.
Subsection 23C(6) is an important protection and guarantees that if a suspect is arrested within 48 hours of a previous arrest relating to the same circumstances, the investigation period is reduced by the amount of time exhausted by the investigation period that followed the previous arrest. This means that a suspect cannot be released from custody and immediately re-arrested (or, even, re-arrested within 48 hours) and subjected to a further maximum period of questioning by investigating officials. It is proposed that this safeguard continue to apply to both investigations into terrorism and other offences.

**Item 5 – New Section 23CA**

This item sets out an investigatory framework that is to apply only when a person is arrested for a terrorism offence (as defined in proposed item 2 of Schedule 1). A

person may be arrested for a terrorism offence if a police officer believes on reasonable grounds that the person has committed or is committing the offence and proceeding by summons would not be appropriate.

Where a person has been arrested for an offence other than terrorism and in the course of their inquiries investigating officials form a belief on reasonable grounds that the person has committed a terrorism offence, then the person must be arrested for the terrorism offence in order for the investigatory framework under proposed section 23CA to apply. In practice, this would involve the investigating officials informing the person that they were now detaining the person for a particular terrorism offence. If a person is not arrested for a terrorism offence, the existing investigatory framework under section 23C would apply, regardless of whether the person is in fact being questioned about terrorism offences.

The proposed investigatory framework for the investigation of terrorism offences is essentially the same as that which currently applies to the investigation of all federal offences under section 23C. The only substantive differences from the existing framework are that:

(i) an extra 'dead time' provision has been included to account for time lost due to obtaining information from overseas locations in different time zones, and

(ii) additional extensions of the investigation period are possible but only with judicial authorisation and up to a maximum of 20 hours (see item 7).

*Proposed subsection 23CA(2)*

Proposed subsection 23CA(2) specifically allows a person to be detained for questioning for the purpose of investigating whether they committed the terrorism offence for which they have been arrested and/or whether they committed another terrorism offence that an investigating official reasonably suspects the person to have committed. This provision requires that any person detained for these purposes must not be held beyond the end of the designated investigation period, which is provided in proposed subsection 23CA(4).

*Proposed subsections 23CA(4) and (5)*

Proposed subsection 23CA(4) provides that the investigation period extends from the time of arrest for a reasonable time, having regard to all the circumstances. A maximum investigation period of four hours is prescribed for terrorism offences. For persons who are or who appear to be under 18, and Aboriginal persons or Torres Strait Islanders, the maximum investigation period is two hours. These maximum investigation periods would be subject to extension under proposed section 23DA (see item 7 below). Proposed subsection 23CA(5) requires that the number and complexity of matters being investigated be considered in determining the appropriate period of time a person should be held.

The maximum investigation periods under proposed subsection 23CA(4) are the same as those under existing section 23C and, as is currently the case under that provision, the investigation period in each particular case only extends for a *reasonable period* having regard to all the circumstances. The maximum investigation periods provided under subsection 23CA(4) are the *maximum* periods a person can be detained and only operate as an absolute cap when a reasonable period from the time of arrest has not already expired.

*Proposed subsection 23CA(3)*

Proposed subsection 23CA(3) replicates existing subsection 23C(3). It requires that a person must either be released (unconditionally or on bail) within the investigation period, or be brought before a judicial officer within the investigation period or as soon as practicable after the expiry of that period. 'Judicial officer' is defined in proposed subsection 23CA(10) as a magistrate, a justice of the peace or a person authorised to grant bail under the law of the State or Territory in which the person was arrested.

*Proposed subsections 23CA(6) and (7)*

Proposed subsection 23CA(6) mirrors the proposed amended version of subsection 23C(6) (see item 4 above). These provisions are an important protection and guarantee that if a suspect is arrested within 48 hours of a previous arrest relating to the same circumstances, the investigation period is reduced by the amount of time

exhausted by the investigation period that followed the previous arrest. This means that a suspect cannot be released from custody and immediately re-arrested (or even re-arrested within 48 hours) and subjected to a further fixed period of questioning by investigating officials.

Proposed subsection 23CA(7) replicates existing subsection 23C(6A). It provides that the protection of subsection 23CA(6) does not apply if a person is arrested a second time within 48 hours for conduct completely separate from their conduct which led to the original arrest. Specifically, proposed subsection 23CA(7) only applies either where the later arrest is for a federal offence that was committed after the detention for the original arrest, or where the later arrest is for a federal offence that arose in different circumstances to those to which the original arrest applies and for which new evidence has been obtained since that earlier arrest. Where either of these situations exist, the person detained cannot be questioned about the offence for which they were originally arrested or the circumstances surrounding that offence.

*Proposed subsection 23CA(8)*

Proposed subsection 23CA(8) mirrors existing subsection 23C(7) in prescribing specific situations that may occur after arrest during which the 'clock stops' for the purposes of the time limits on investigation periods. The time it takes for these situations to occur is known as 'dead time' and questioning cannot occur during these periods. Proposed subsection 23CA(8) contains the same list of 'dead time' provisions as existing subsection 23C(7), such as the time taken to convey the person from the place of arrest to the place where questioning is to occur, the time taken for a legal practitioner to arrive at the place of questioning, and the time taken for a person to receive medical attention. However, proposed subsection 23CA(8) contains a new provision, which allows the time taken to obtain information relevant to the investigation from a place outside Australia that is in a different time zone to be counted as 'dead time' for the purpose of the time limits on the investigation period (proposed paragraph 23CA(8)(m)). This new 'dead time' provision would only apply where a person has been arrested for a terrorism offence.

Time zone differences between countries impose constraints on investigations with an international aspect, as investigators may need to obtain information from overseas

critical to informing interviews with suspects. It is possible that during terrorism investigations, halting the questioning of an arrested suspect will be necessary so that investigators can obtain relevant information from overseas authorities in other time zones.

Proposed paragraph 23CA(8)(m) contains two important qualifiers. Firstly, any suspension or delay of questioning to receive information from an overseas location in a different time zone must be *reasonable*. A suspension or delay would, for example, be unreasonable if the information could be obtained from an overseas location without delay, regardless of any time zone differences, or if the same information as that sought overseas could be obtained from a location. A suspension or delay of questioning may also be unreasonable if the information to be obtained from overseas has little relevance to the questioning of the person detained.

The second qualifier in proposed paragraph 23CA(8)(m) is that the period for which questioning is suspended or delayed must also be *reasonable* and is capped so that the dead time cannot exceed the difference in time zones between the place of the investigation and the relevant overseas location.

*Proposed subsection 23CA(9)*

Proposed subsection 23CA(9) replicates existing subsection 23C(8). It provides that in any proceedings, the prosecution bears the burden of showing that the person detained was brought before a judicial officer as soon as practicable and that any period of time during the investigation period that was counted as dead time was in fact covered by the dead time provisions in proposed subsection 23CA(8). This means the prosecution would be required to show that any suspension or delay of questioning to seek and/or obtain relevant information from an overseas location in a different time zone was in fact reasonable.

*Proposed subsection 23CA(10)*

Proposed subsection 23CA(10) defines judicial officer for the purposes of proposed subsection 23CA as a magistrate, a justice of the peace or a person authorised to grant bail under the law of the State or Territory in which the person was arrested. This definition replicates the definition of judicial officer in existing section 23C.

**Item 6 – Subsection 23D(1)**

This item clarifies that the provisions of section 23D in Part 1C, which regulate extensions of the investigation period for serious offences, do not regulate extensions of the investigation period for investigations into terrorism offences. Instead, item 7 of the Bill inserts a similar set of provisions to section 23D, applicable only to terrorism investigations, which allow any number of extensions of the investigation period, but only up to a total time of 20 hours.

**Item 7 – New Section 23DA**

This item sets out the mechanism for extending the investigation period beyond the initial maximum period of four hours for investigations into terrorism offences. It is similar to the current mechanism for extensions of the investigation period for serious offences in existing section 23D. Existing subsection 23D(5) provides that the investigation period can only be extended once for a maximum of eight hours. Proposed subsection 23DA(7), in contrast, allows the investigation period for investigations into terrorism offences to be extended any number of times, but only until the total aggregate time of the extensions reaches 20 hours.

The effect of proposed section 23DA in combination with proposed section 23CA is that a person arrested for a terrorism offence may be detained for questioning for a maximum of 24 hours (not including dead time) if extensions of the investigation period up to the maximum total of 20 hours are granted. Currently for serious offences including terrorism offences, the maximum period a person can be detained for questioning is 12 hours. Twelve hours is unlikely to allow sufficient time in all circumstances to investigate a terrorism offence, because of the potential complexity of such investigations and the potential need to involve a range of jurisdictions, both in Australia and overseas. Terrorist attacks are likely to involve many players and can be coordinated from a range of locations around the world.

Proposed subsection 23DA(1) provides that an investigating official may apply for an extension of the investigation period, in relation to a person who is under arrest for a terrorism offence. The application is to be made at or before the end of the investigation period, the time limit for which is provided in proposed

subsection 23CA(4) or, if one or more extensions have already been granted, in the written authority provided by the granting judicial officer.

Proposed subsections 23DA(2) to (6) replicate the mechanism for making applications to a judicial officer for an extension of the investigation period currently used for all serious federal offences under section 23D.

Proposed subsection 23DA(7) provides that the investigation period for terrorism offences may be extended for any number of times, but only so that the total time of the extensions does not exceed 20 hours. This differs from existing subsection 23D(5), which provides that only one extension of up to eight hours is allowed for the investigation of serious offences.

**Item 8 – Subsection 23E(1)**

This item allows applications for an extension of the investigation period under proposed section 23DA to be made by telephone, fax, etc in the same way that applications can currently be made under section 23D.

**Item 9 – At the end of subsection 23E(3)**

This item contains a consequential amendment including the appropriate reference to proposed subsection 23DA(5).

**Item 10 – Subsection 23WD(4) (note)**

This item contains a consequential amendment removing the specific reference to existing subsection 23C(7), because proposed subsection 23CA(8) is now also relevant. The note will refer more generally to Part 1C as a result of the amendment.

**Item 11 – Subsection 23WM(4) (note)**

This item contains a consequential amendment removing the specific reference to existing subsection 23C(7), because proposed subsection 23CA(8) is now also relevant. The note will refer more generally to Part 1C as a result of the amendment.

**Item 12 – Paragraph 23XGD(2)(h)**

This item contains a consequential amendment including a reference to proposed subsection 23CA(8).

*Crimes (Foreign Incursions and Recruitment) Act 1978*

**Item 13 – Subsection 6(1) (penalty)**

This item raises the maximum penalty available for an offence against section 6 of the Foreign Incursions Act from 14 years to 20 years. Offences constituted by acts similar to those constituting an offence under the Foreign Incursions Act include war crimes, terrorism offences and treason. Those offences carry penalties ranging from 20 years to life imprisonment.

The increased penalty reflects the fact that in today's international security environment it is more likely than when the Foreign Incursions Act was first developed that Australian citizens may fight with groups that are in armed opposition to Australian forces. Twenty years is an appropriate penalty, capturing both the very serious hostile acts listed in section 6 of the Foreign Incursions Act and providing a real disincentive to commit the less serious hostile acts.

**Item 14 – Paragraph 6(2)(b)**

A person does not commit an offence against the Foreign Incursions Act unless that person was an Australian citizen, ordinarily resident in Australia, or was in Australia for a purpose connected with an act constituting an offence at any time during the one year period preceding the doing of that act. As a result of the last formulation, a person who, not being an Australian citizen or ordinarily resident in Australia, was present in Australia 366 days prior to the doing of an act constituting an offence cannot be prosecuted for an offence under the Act.

This item removes from section 6(2)(b) of the Foreign Incursions Act the words "during the period of one year immediately preceding" and substitutes in their place the word "before". As a result, a person who was present in Australia for a purpose connected with the doing of an act constituting an offence at any time before the doing of an act can be prosecuted for an offence under the Act. This will ensure that persons will not escape the reach of the Foreign Incursions Act merely because they

were present in Australia 366 days before the doing of the acts constituting an offence.

**Item 15 – At the end of section 6 (application of paragraph 6(4)(a))**

A person who commits a hostile act in the course of, and as part of, his or her service in any capacity in or with the armed forces of a government of a foreign state does not commit a hostile activity for the purposes of section 6 of the Foreign Incursions Act (the 6(4)(a) defence). Where a terrorist organisation is part of the armed forces of a government, a person engaged in such an organisation will not be liable for an offence under the Act.

Item 15 limits the application of paragraph 6(4)(a) so that it does not apply to persons who engage in hostile activities while in or with an organisation or who, when entering a foreign state, intend to engage in hostile activities while in or with an organisation if, at the time of committing the act or entering the foreign state, the organisation was prescribed in regulations made under the Foreign Incursions Act or prescribed as a terrorist organisation listed in the Criminal Code Regulations.

By providing power to make regulations to list prohibited groups from time to time, the Foreign Incursions Act will outlaw participation with new and emerging terrorist groups from the moment it becomes evident that they pose a threat to Australia's security. In instances where the Australian Defence Force is fighting in an armed conflict overseas, it would be appropriate to quickly list an organisation or group so that Australians fighting with that group against the ADF will not be free from the consequences of their actions. Providing for the prescription of organisations and groups by regulation also means that cases for listing can be considered on an individual basis rather than trying to fit an organisation or group into a legislative definition which may over time prove inadequate as international relations and the security environment change. Importantly, listings made in the regulations will still be subject to disallowance and will not have retrospective application.

**Item 16 – Paragraph 7(2)(b)**

This item amends paragraph 7(2)(b) in the same way that item 14 amends paragraph 6(2)(b).

**Item 17 – After subsection 11(3) (ministerial certificate)**

Section 11 of the Foreign Incursions Act currently provides for three types of ministerial certificates, two serving as prima facie evidence of the facts recognised in the certificates and one serving as conclusive evidence of recognised facts. The three types of certificates relate to facts that are difficult to prove or that may have implications for Australia's international relations because of the political nature of the facts (for example, whether a place or an area is or is in an independent sovereign state, whether a person was acting in the course of his duty to the Commonwealth, or whether an authority was in effective governmental control of a state or part of a state). Proving whether a group or organisation is part of the armed forces of a state is similarly difficult to prove and may also have implications for Australia's international relations.

Item 17 inserts into the Foreign Incursions Act a provision enabling a Minister to issue a certificate attesting to the fact that a group was not part of the armed forces of a state at any one time. Such a certificate would be prima facie evidence of the fact stated therein.

**Item 18 – At the end of the Act (regulations)**

This item inserts a regulation-making power into the Foreign Incursions Act. A regulation-making power is necessary to enable the listing of prescribed organisations.

*Criminal Code Act 1995*

**Item 19 –Paragraph 102.3(1)(b) of the Criminal Code**

This item repeals paragraph 102.3(1)(b) of the Criminal Code and substitutes a new paragraph 102.3(1)(b). The new paragraph makes membership of a terrorist organisation, however defined by section 102.1 of the Criminal Code, an offence. The requirement that an organisation is a terrorist organisation because of paragraph (b), (c) (d) or (e) of the definition of ***terrorist organisation*** in section 102.1 is removed. This amendment makes the offence of membership of a terrorist organisation consistent with the other offence provisions in Division 102 of the Criminal Code by

allowing paragraph 102.3(1)(b) to apply where a court has found an organisation to be a terrorist organisation.

**Item 20 – Section 102.5 of the Criminal Code**

Item 20 replaces section 102.5 of the Criminal Code with modified offences of providing training to or receiving training from a terrorist organisation. The amended section 102.5 includes a strict liability component.

*Proposed subsection 102.5(1)*

For the offence in proposed subsection 102.5(1), the prosecution has to prove that: the person intentionally provides training to, or intentionally receives training from, an organisation; and the organisation is a terrorist organisation; and the person is reckless as to whether the organisation is a terrorist organisation. Under the Criminal Code (section 5.4), a person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist, and having regard to the circumstances known to him or her, it is unjustifiable to take the risk. The proposed offence in subsection 102.5(1) will still cover the situation where a person knows the organisation is a terrorist organisation. (Subsection 5.4(4) of the Criminal Code provides that if recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy the fault element.)

*Proposed subsections 102.5(2) – 102.5(4)*

For the offence in proposed subsection 102.5(2), the prosecution has to prove that: the person intentionally provides training to, or intentionally receives training from, an organisation; and the organisation is a terrorist organisation that has been specified by regulations under Division 102 of the Criminal Code.

Under proposed subsection (3), strict liability would apply to the element in paragraph (2)(b) (that the organisation is a terrorist organisation specified by regulations). The prosecution still has to prove that the person intentionally provided training to or intentionally received training from an organisation, and that the organisation is a terrorist organisation specified by regulations. However, the prosecution would not have to prove that the person was aware that it was a specified terrorist organisation.

Application of paragraph 6.1(2)(b) of the Criminal Code means that the person would have a mistake of fact defence available under section 9.2 of the Criminal Code. In the case of proposed subsection 102.5(2), this would mean that a person is not criminally responsible if before the time of the offending conduct the person considered whether or not the organisation was a specified terrorist organisation and the person was under a mistaken but reasonable belief that it was not such an organisation. The defendant bears the evidential burden in this case. If the person can point to evidence that they had such a mistaken belief then it is for the prosecution to prove beyond reasonable doubt that there was no mistaken belief.

In addition to the normal mistake of fact defence attaching to strict liability, proposed subsection 102.5(4) also includes a recklessness exception. The offence in proposed subsection 102.5(2) will not apply if the person is not reckless as to the organisation being a specified terrorist organisation. Application of subsection 13.3(3) of the Criminal Code means that the person bears an evidential burden in relation to this matter. If the person can point to evidence suggesting a reasonable possibility that the exception applies, then it is for the prosecution to prove beyond reasonable doubt that the exception has no application.

*Proceeds of Crime Act 2002*

**Item 21 – Paragraph 20(1)(d)**

This item replaces existing paragraph 20(1)(d) of the *Proceeds of Crime Act 2002* to remove the condition that literary proceeds must have been derived in Australia when there are reasonable grounds to suspect that a person has committed a foreign indictable offence. In effect, the amendment will allow a restraining order to be granted under section 20 in relation to a foreign indictable offence without consideration of whether the literary proceeds in question have been derived in Australia.

**Item 22 – Paragraphs 20(3)(b) and (c)**

This item replaces existing paragraphs 20(3)(b) and (c) to remove the requirement that an authorised officer suspects that a suspect derived in Australia literary proceeds from the foreign indictable offence in question.

**Item 23 - Paragraph 152(2)(c)**

This item repeals the existing requirement that a court must be satisfied that a person has derived in Australia literary proceeds in relation to a foreign indictable offence.

**Item 24 – Paragraph 153(1)(a)**

This item amends the definition of literary proceeds. Section 153 requires that any benefit that a person derives from the commercial exploitation of the person's notoriety results from the person having committed an indictable or foreign indictable offence. The amendment makes it clear that the notoriety need only be indirectly linked to the offence and that this will be sufficient to fall within the definition of literary proceeds. For example, this amendment is intended to vitiate a claim that a person's notoriety stems from circumstances related to their commission of an offence, such as their place of incarceration, and not from the actual commission of the offence.

**Item 25 – After subsection 153(3)**

This item amends the definition of literary proceeds in relation to foreign indictable offences. In addition to benefits derived in Australia, benefits transferred to Australia have been included in the definition of literary proceeds. This amendment will allow literary proceeds orders to be sought where, for instance, a person commercially exploits their criminality overseas and subsequently transfers their benefits to Australia.

**Item 26 – After section 337**

This item inserts a new meaning of foreign indictable offence. Proposed section 337A is intended to clarify that the time at which the double criminality test is to be applied is the time of the application for the restraining or confiscation order in question, whichever comes first. The courts will be required to consider whether there was a comparable Australian offence at the time of the application for the restraining or confiscation order, not at the time of the offence against a law of the foreign country.

For the purpose of considering the meaning of foreign indictable offence, proposed subsection 337A(3) inserts a specific category of offences that are to be considered as offences against a law of a foreign country. This subsection covers offences that are triable by a military commission of the United States of America established under a specified military order. Some who are alleged to have committed terrorism related offences may be dealt with by a US military commission.

**Item 27 – Section 338 (definition of foreign indictable offence)**

This item repeals the existing definition of foreign indictable offence.