

2009

EXPOSURE DRAFT

**EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS
LEGISLATION AMENDMENT BILL 2009**

EXPLANATORY DOCUMENT

(Circulated by the authority of the
Minister for Home Affairs, the Hon Brendan O'Connor MP)

Introduction

The Australian Government has approved the release of exposure draft legislation to facilitate further public consultation on proposed reforms to Australia's extradition and mutual assistance in criminal matters laws. The proposed reforms are designed to promote more responsive and flexible measures in securing international crime cooperation while maintaining the integrity of key safeguards.

Effective cooperation with other countries has become increasingly important to Australia's efforts to fight transnational and domestic crime. The growth in international travel has made it easier for criminals to cross borders and escape justice. The emergence of new technologies has made it increasingly common for evidence and proceeds of crimes committed in one country to be located in another. While technological developments have increased the capacity of law enforcement to combat crime, existing legislation does not always enable these advancements in technology to be utilised effectively in cooperating with foreign counterparts.

Australia's extradition and mutual assistance legislation, established over 20 years ago, does not always adequately address the changing nature and extent of transnational and domestic criminal activity. The Attorney-General's Department conducted a comprehensive review of Australia's extradition and mutual assistance legislation. Discussion papers on options for reform were publicly released in 2005 and 2006. The Department also conducted face-to-face consultations with a number of stakeholders and interested parties. All submissions received were taken into account in developing further proposals for reform.

Key proposals in the exposure draft legislation are directed towards reducing delays in current processes, ensuring Australia does not become a safe haven for fugitives and the proceeds of crime, and expanding the range of law enforcement tools available through the mutual assistance process. The proposed reforms maintain appropriate safeguards and judicial review, and strengthen certain human rights protections in the existing legislation.

The exposure draft legislation is intended to provide a basis to seek further feedback from stakeholders and the public on the proposed measures. While the exposure draft is designed to facilitate discussion on proposed legislative provisions, the Australian Government would also welcome further or alternative ideas for reform, as well as general comments on Australia's international crime cooperation arrangements.

Please send written comments by 31 August 2009 to the Attorney-General's Department at reviews@ag.gov.au, or by mail to:

Legislation and Policy Section
International Crime Cooperation Division
Attorney-General's Department
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Explanation of key terms

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* (the Extradition Act) 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* (the Mutual Assistance Act) provides the legislative basis for mutual assistance in Australia.

The Extradition Act and the Mutual Assistance Act authorise the Attorney-General to perform certain functions under the Acts. Under the *Acts Interpretation Act 1901* and the administrative arrangements, the Minister for Home Affairs is also authorised to perform these functions.

Further information about extradition and mutual assistance can be found on the Attorney-General's Department website, at www.ag.gov.au/extraditionandma.

Scope of the proposed 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 proposed legislative reforms are focused on Government to Government assistance and, with some minor exceptions, do not affect forms of agency to agency assistance.

Overview of the Bill

The exposure draft legislation comprises three schedules.

Schedule 1 contains general proposed amendments which relate to both extradition and mutual assistance. Key proposals for reform would:

- enable Federal Magistrates to perform functions under the Extradition Act and the Mutual Assistance Act
- clarify privacy and information disclosure provisions relating to extradition and mutual assistance processes, and
- streamline the requirements for adducing certain types of foreign evidence into Australian criminal and related proceedings.

Schedule 2 contains proposed amendments to the Extradition Act. Key proposals for reform would:

- reduce delays in extradition processes by providing the court with a discretion to defer and consolidate judicial review and statutory appeal rights, without removing any review rights
- 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 political offence ground of refusal and clarify that it does not apply 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 following surrender.

Schedule 3 contains proposed amendments to the Mutual Assistance Act. Key proposals for reform would:

- 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 of refusal for Australia to provide mutual assistance to other countries, and
- streamline the process for authorising proceeds of crime action under the Mutual Assistance Act, and allow registration and enforcement of foreign non-conviction based proceeds of crime orders from any country.

Further information about the proposals is set out below.

Schedule 1

General amendments relating to extradition and mutual assistance in criminal matters

Part 1—Amendments relating to Federal Magistrates

1.1 Currently, functions under the Extradition Act and the Mutual Assistance Act are exercisable by State and Territory magistrates. Part 1 contains amendments which would enable Federal Magistrates to perform functions under these Acts, in addition to State and Territory magistrates. These amendments are designed to reduce delays in valuable court time by increasing the availability of magistrates to conduct proceedings under the Acts.

1.2 It is proposed to confer on Federal Magistrates all functions currently conferred on State and Territory magistrates under the Extradition Act. The Extradition Act confers a number of functions on State and Territory magistrates, including the power to hear consent matters under section 18 of the Act and to determine eligibility for surrender under section 19. State and Territory magistrates also perform a number of other functions under the Extradition Act, including issuing an arrest warrant under section 12 and ordering the remand of persons under section 15.

1.3 Similarly, it is proposed to confer on Federal Magistrates all functions under the Mutual Assistance Act, with the exception of those conferred by Division 2 of Part VI relating to proceeds of crime proceedings. Under the *Proceeds of Crime Act 2002*, these proceedings can only be heard before State and Territory magistrates. State and Territory magistrates currently exercise a range of functions under the Mutual Assistance Act, including ‘take evidence’ and production of document proceedings under section 13 and authorising of search warrants under section 15.

1.4 All functions assigned to magistrates under the Extradition Act and the Mutual Assistance Act are administrative as opposed to judicial. Accordingly, the functions proposed to be conferred on a Federal Magistrate would be in his or her personal capacity (as opposed to a member of a particular court) and would be unaffected by any future proposed changes to Federal court structures. The proposed amendments include consent and nomination provisions setting out the procedure whereby Federal Magistrates may consent to the conferral of functions under each Act.

1.5 Part 1 of Schedule 2 of the Bill would limit jurisdiction to review extradition decisions to Federal Courts. Sections 21 and 35 of the Extradition Act which relate to review of a magistrate’s orders would accordingly be amended to refer to the Federal Court.

Part 2—Amendments relating to information sharing

1.6 Part 2 would clarify the application of the *Privacy Act 1988* to extradition and mutual assistance processes. Proposed section 54A of the Extradition Act would provide that the collection, use or disclosure of personal information is authorised by law for the purposes of the Privacy Act where it is reasonably necessary for the purposes of, or for purposes relating to, the extradition of a person to or from Australia.

1.7 Similarly, proposed section 43D of the Mutual Assistance Act would authorise the collection, use or disclosure of personal information where it is reasonably necessary for the purposes of, or purposes relating to, the provision or obtaining of mutual assistance by Australia.

1.8 Subsection 336E(1) of the *Migration Act 1958* makes it an offence to disclose identifying information if the disclosure is not a 'permitted disclosure'. The Bill would amend the definition of 'permitted disclosure' in subsection 336E(2) of the Migration Act to clarify that a permitted disclosure includes a disclosure that is for a purpose relating to the extradition of a person either to or from Australia, or the provision or obtaining of international assistance in criminal matters by Australia.

1.9 These proposals are designed to provide greater transparency and certainty by providing that the collection, use and disclosure of information for processes under the Extradition Act or the Mutual Assistance Act is specifically authorised by law.

Part 3—Amendments relating to foreign evidence

1.10 Part 3 would amend the *Foreign Evidence Act 1994* to streamline the requirements for admitting certain types of evidence obtained in response to a request by the Attorney-General to a foreign country into Australian criminal and related court proceedings.

1.11 Proposed section 26A would provide for foreign material obtained under a warrant or other instrument to be accompanied by a certificate signed by a senior officer of a foreign law enforcement agency attesting to the process used to obtain the material. The Bill defines a 'foreign law enforcement agency' in section 3 of the Foreign Evidence Act to include a police force of the foreign country, as well as other persons responsible for the enforcement of laws in the foreign country, such as the prosecuting authority. Where provided, the certificate would be presumed to constitute proof of the matters contained in the certificate: see proposed subsection 26A(2).

1.12 Proposed subsection 26A(3) would provide that no adverse inference can be drawn from the fact that such material is not accompanied by a certificate, or if the certificate does not include all of the requisite information.

1.13 The Bill would not affect other provisions in the Foreign Evidence Act. The Court would retain a broad general discretion to refuse to admit foreign material.

Schedule 2

Amendments relating to extradition

Part 1—Deferral and consolidation of judicial review and statutory appeal of extradition decisions

2.1 Currently, a person can seek judicial review of extradition decisions at a number of stages in the extradition process, including in both State and Federal courts. Initial review or appeal decisions may then be challenged in higher courts. During this time, the person will usually be held in custody in Australia, and proceedings in the requesting country will be stalled.

2.2 Part 1 would amend the Extradition Act to provide the court with a discretion to defer and consolidate judicial review and statutory appeals. This discretion would apply to the statutory appeal process from the magistrate's decision about eligibility for surrender (section 21 appeal). The discretion would also apply to judicial review of decisions made by the Attorney-General, particularly a decision under section 16 of the Act to issue a notice stating that an extradition request has been received (section 16 review).

2.3 The amendments would provide that the court may defer section 21 appeal proceedings (proposed section 21A) and may also defer any judicial review proceedings, including section 16 review proceedings (proposed section 27A), until after the Attorney-General makes a determination under section 22 as to whether the person should be surrendered. Currently, the Attorney-General cannot make a surrender determination until section 21 appeal proceedings have been completed. The amendments in Part 1 would give the Attorney-General a discretion to make a surrender determination prior to appeal and review proceedings being finalised in appropriate cases. If the Attorney-General determines that a person should not be surrendered, the person would be released from remand immediately. This would ensure that time is not spent considering matters on appeal if the Attorney-General ultimately determines the person should not be surrendered.

2.4 Proposed subsection 21A(2) would require the Court to notify the Attorney-General of its intention to defer section 21 appeal proceedings until after the Attorney-General makes a surrender determination under section 22 in relation to the person. Similarly, proposed paragraph 27A(2)(a) provides for the High Court or the Federal Court to give notice to the Attorney-General that it intends to defer conducting judicial review proceedings until after the Attorney-General makes a surrender determination.

2.5 Where the Attorney-General is informed that a court intends to defer judicial review or section 21 appeal proceedings, the Attorney-General may make a determination about surrender provided that the person has been found eligible for surrender by a magistrate. If the Attorney-General decides not to exercise his or her discretion to make a surrender determination prior to the appeal and review proceedings being finalised, the Attorney-General must notify the court of this decision.

2.6 Proposed section 27B provides that where there are more than one appeal or review proceedings on foot, the court may consolidate the proceedings, hear the proceedings one after another, or stay one of the proceedings until after the completion of another. This

proposal would build greater flexibility into Australia's extradition arrangements. For example, where there are multiple applications to review or appeal decisions at various stages in the extradition process, the court could choose to hear all of the appeal and review matters together. This may be particularly helpful where the same issues are raised in each of the appeal and review proceedings. The court could also delay hearing some of the appeal and review proceedings until a decision is made by a higher court on a particular issue common to the proceedings.

2.7 The amendments would not remove any substantive review or appeal rights. A person who is the subject of an extradition request would still be able to seek review of all stages of the extradition process.

2.8 Part 1 would also limit jurisdiction to review extradition decisions to Federal courts. This would assist in removing jurisdictional complexities where proceedings are brought in both State and Federal courts.

Part 2—Waiver of extradition

2.9 Part 2 would provide a more streamlined process for persons who wish to consent to surrender to the requesting country. Where a person is arrested following an extradition request or a provisional arrest request, the person could 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. Under the proposed amendments, persons would have the option to either waive extradition or use the existing consent process.

2.10 The amendments in Part 2 would enable a person to elect to waive extradition at any time after the person is remanded under section 15, until the magistrate advises the Attorney-General that the person has consented to extradition under section 18, or until the magistrate makes a determination about eligibility for surrender under section 19.

2.11 Proposed subsection 15A(3) provides that a person may inform a magistrate that he or she wishes to waive extradition. If a person wishes to waive extradition, he or she must waive extradition with respect to all of the offences contained in the provisional arrest request or the extradition request. It would not be possible to waive extradition for some, but not all, of the offences contained in the relevant request.

2.12 The magistrate must be satisfied of certain matters set out in proposed subsection 15A(6), namely that the person's election is informed and voluntary, the person understands certain consequences of electing to waive extradition, and the person has had an opportunity to obtain legal advice. If the magistrate is satisfied of these matters, the magistrate would be required to notify the Attorney-General of the person's election to waive extradition.

2.13 If notified by a magistrate that a person has elected to waive extradition, the Attorney-General would be required to determine if the person should be surrendered in accordance with proposed section 15B. The Attorney-General could only determine the person be surrendered if satisfied there is no real risk that, following surrender, the person may be subjected to torture, or the death penalty may be imposed on the person.

2.14 After a person elects to waive extradition, any other extradition processes which are on foot will be stayed, unless and until the magistrate decides not to accept the person's election to waive extradition. Any proceedings to determine eligibility for surrender would be stayed during this time. The Attorney-General would also be prevented from issuing a section 16 notice unless and until the magistrate determines not to accept the person's request to waive extradition. This would ensure time and resources are not wasted on the extradition process if the person wishes to waive extradition.

2.15 Section 17 currently provides that a person may be released from remand if the Attorney-General has not issued a section 16 notice within 45 days of the person being remanded following provisional arrest. Proposed subsections 17(4) and (5) would provide that these provisions do 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 proposed paragraph 15B(7)(a) would 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.

Part 3—Other amendments

Division 1—Amendments relating to political offences

2.16 Currently, a person cannot be extradited from Australia for a political offence. A political offence is defined in the Extradition Act as an offence against the law of the foreign country that is of a political character. The definition expressly excludes a range of offences including some contained in multilateral treaties set out in the Act and others specified in regulations. Section 7 of the Extradition Act sets out a number of mandatory grounds of refusal for extradition, known as 'extradition objections'. Division 1 of Part 3 would amend the definition of political offence and make political offence a discretionary ground for refusing extradition, rather than a mandatory extradition objection.

2.17 The amendments to section 5 would streamline the 'political offence' definition by ensuring that all exceptions to the definition are contained in regulations, rather than in the Act. Australia is a 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. Australia implements its obligations under these treaties by providing that such offences are excluded from the definition of political offence. Such exemptions are currently set out in both the Act and the regulations. Providing for exceptions to the political offence definition to be set out in regulations, rather than the Act, will ensure the extradition regime can be kept up-to-date with Australia's international obligations without requiring frequent amendments to the Act.

2.18 The regulations would also expressly exclude from the definition of political offence other conduct which, if the conduct occurred in Australia, would constitute a terrorism, genocide, crimes against humanity or war crimes offence. The definition would also make clear that 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.

2.19 Division 1 of Part 3 would also make political offence a discretionary ground of refusal for extradition. These amendments would ensure that the extradition of perpetrators of serious crimes is not *automatically* precluded simply on the basis of claims that the alleged criminal activities had a political element. The mandatory extradition objection relating to discrimination on the basis of political opinions in paragraph 7(c) of the Act would be retained. That is, the Attorney-General would be required to refuse extradition if on surrender, the person may be prejudiced at trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her political opinions. Part 1 of Schedule 3 would also make the political offence ground of refusal in the Mutual Assistance Act discretionary: see paragraph 3.3 below.

2.20 Division 1 also makes consequential amendments to section 91T of the *Migration Act 1958*, which refers to the definition of political offence in the Extradition Act.

Division 2—Extradition objection on the grounds of sex

2.21 Currently, a person cannot be extradited if he or she would be discriminated against on the basis of his or her race, religion, nationality or political opinions following surrender to the requesting country. Division 2 would extend the grounds of discrimination to cover the additional ground of sex. This would align the Extradition Act with the discrimination ground for refusal in the Mutual Assistance Act.

Division 3—Dual criminality etc

2.22 A person may only be extradited from Australia if the conduct the person is alleged to have committed would constitute an offence under Australian law if it had occurred in Australia. This is known as ‘dual criminality’.

2.23 Currently, the Attorney-General must not issue a section 16 notice unless he or she is of the opinion that dual criminality is established. Similarly, the magistrate is required to be satisfied that dual criminality is established before determining that a person is eligible for surrender under section 19.

2.24 Division 3 would amend section 16 to provide that the Attorney-General must not give a section 16 notice unless he or she is of the opinion *that it is likely* that dual criminality is established.

2.25 The amendment would remove duplication by making clear that the Attorney-General is only required to make a preliminary assessment of dual criminality. The magistrate would continue to consider the issue of dual criminality in detail in determining if the person is eligible for surrender.

Division 4—Consent to accessory extradition

2.26 Section 20 of the Extradition Act allows a person who has either consented to his or her surrender, or been found eligible for surrender by a magistrate, to consent to also being surrendered for offences that are not ‘extradition offences’. This is known as ‘consent to accessory extradition’. Where a person has consented to accessory extradition offences, the foreign country is able to prosecute the person for both the extradition and accessory

offences. This provision enables a person to have all outstanding charges dealt with upon their return to the foreign country.

2.27 An ‘extradition offence’ is defined in relation to a foreign country in section 5 of the Extradition Act as an offence punishable by imprisonment for not less than 12 months. Under the current provisions of the Extradition Act, it is unclear whether a person may consent to being prosecuted for offences that are punishable by imprisonment for over 12 months, but are not being considered as part of the extradition proceedings because dual criminality is not established.

2.28 A person may wish to consent to prosecution for an offence which is not an offence under Australian law, even though Australia could not extradite the person for such an offence under the Extradition Act. For example, the person may wish to have all outstanding offences dealt with in the one process on return to the country where he or she is facing charges.

2.29 Division 4 would enable a person to consent to extradition for ‘additional extradition offences’. Additional extradition offences would include offences punishable by more than 12 months imprisonment that were listed in the extradition request but not listed in the section 16 notice issued by the Attorney-General. The person could only consent to extradition for additional extradition offences that were not included on the section 16 notice because the offence did not meet the test for dual criminality.

2.30 The person could not consent to an offence for which there is an ‘extradition objection’. Prior to asking the person if he or she wishes to consent to accessory extradition offences, the magistrate would be required to be satisfied that the person is, or has had an opportunity to be, legally represented, and to inform the person of certain consequences of consenting to additional extradition offences.

2.31 Where a person consents to additional extradition offences, the offences would be deemed to be ‘qualifying extradition offences’ for the purposes of section 22. The Attorney-General would consider the additional extradition offences in determining whether the person is eligible for surrender under section 22. The Attorney-General would therefore retain a general discretion to refuse extradition and would also be required to be satisfied that there are no ‘extradition objections’ in relation to the additional extradition offences.

2.32 These amendments would ensure that persons facing extradition have the option to face all charges in the foreign country simultaneously in the event that they are surrendered to that country.

Division 5—Extradition to Australia from other countries

2.33 Some countries will not extradite to Australia 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 give rise to particular difficulties in cases where the offender may be technically liable to a life sentence, even when there is no likelihood of such a sentence actually being imposed given the circumstances of the offence.

2.34 Proposed section 44A would provide that where the Attorney-General has given an undertaking to the requested country before a person is surrendered to Australia either

stating that life imprisonment will not be imposed on the person, or specifying the maximum period of imprisonment that may be imposed on the person, that undertaking must be upheld if the person is convicted of a particular offence or offences under Australian law. The provision would provide that where the Attorney-General gives an undertaking stating that life imprisonment will not be imposed, the person must not be sentenced to life imprisonment. The provision would also provide that the person must not be sentenced to a period of imprisonment that is more than the period specified in the Attorney-General's undertaking in the case of an undertaking relating to a maximum sentence.

2.35 In practice, the making of any such undertaking would require obtaining approval from the relevant Commonwealth, State or Territory authorities responsible for the conduct of proceedings following the fugitive's return to Australia, and on whose behalf the extradition request has been initiated.

2.36 The amendments would not enable the Attorney-General to give undertakings as to the minimum sentence that would be imposed on a person.

Division 6—Prosecution in lieu of extradition

2.37 Currently, a person can only be prosecuted in Australia in lieu of extradition under section 45 of the Act in limited circumstances where extradition has been refused because the person is an Australian citizen. As a matter of policy, Australia generally does not refuse to extradite Australian citizens solely on the grounds of nationality.

2.38 Division 6 would amend section 45 of the Extradition Act to enable a person to be prosecuted where Australia has refused extradition, regardless of the person's nationality. The amendments would enable a person to be prosecuted for conduct which occurred outside Australia, if the conduct would have constituted an offence against a law of a State or Territory had it occurred in Australia. Prosecution would not be dependent on Australia exercising extraterritorial jurisdiction in relation to the specific offence. As is currently the case, prosecution in lieu could only occur with the consent of the Attorney-General.

2.39 The Attorney-General would have a discretion to refer the matter to the relevant law enforcement agency for investigation and the Commonwealth Director of Public Prosecutions (CDPP) for prosecution. The CDPP would need to independently assess whether a prosecution should be undertaken, in accordance with its Prosecution Policy. Prosecution Policy requires the CDPP to be satisfied that there was 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.

2.40 This amendment would 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.

Division 7—Technical amendments relating to notices

2.41 Division 7 would make various minor and technical amendments to the provisions in the Extradition Act which provide for the Attorney-General to give notice. The Extradition Act makes provision for the Attorney-General to give notice 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).

Issuing an amended section 16 notice

2.42 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. While subsection 10(4) of the Extradition Act implies that a section 16 notice can be amended, there is no express power in the Extradition Act for the Attorney-General to amend the notice and the Act does not specify the processes for making such an amendment.

2.43 Proposed section 16A would make specific provision for the Attorney-General to amend a section 16 notice. The amendments would enable the Attorney-General to amend the notice at any time up until the magistrate determines the person is eligible for surrender, or the person consents to surrender under section 18.

2.44 Proposed subsection 16A(4) would provide that if the amended notice lists new extradition offences, the Attorney-General may only give the notice if the conditions in section 16 are satisfied with respect to the new offences. That is, 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.

2.45 Proposed subsections 18(3) and 19(4A) provide that where the Attorney-General gives an amended notice containing new offences while proceedings are being conducted under either section 18 or 19, the magistrate may adjourn proceedings to give the person and the extradition country additional time to prepare for the proceeding.

Release from remand

2.46 Subsection 17(2) provides that where a person is on remand following provisional arrest and the Attorney-General does not issue a section 16 notice within 45 days of the person's arrest, the person must be brought before a magistrate. The magistrate must, unless satisfied that a section 16 notice *is likely to be given* within a reasonable period, order the person be released from remand. As it currently reads, this provision could be interpreted as requiring the magistrate to form a view as to the likelihood of the Attorney-General deciding in favour of issuing the notice, as opposed to merely being satisfied that the Attorney-General will make a decision about whether or not to issue the notice.

2.47 Item 66 would amend subsection 17(2) to make clear that the magistrate must release the person unless satisfied that the Attorney-General *is likely to make a decision to give, or not give*, a section 16 notice within a reasonable period.

2.48 Items 67 and 68 would make consequential amendments to subsection 17(3).

When notices are taken to be 'given'

2.49 Proposed section 46A would provide clear rules for the method by which a notice may be 'given' and the time at which such notices are taken to be given. The provisions would apply to section 16 notices, including amended notices, as well as other types of notices given by the Attorney-General to a magistrate.

2.50 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.

Division 8—Other minor technical amendments

2.51 Division 8 would make a series of minor and technical amendments to the Extradition Act. A number of these amendments would simplify the language of the Extradition Act and rectify technical drafting issues. Details of the more substantive amendments in this Division are set out below.

Extradition arrest warrants

2.52 This Division makes various amendments to change references to ‘provisional arrest warrants’ in Part II of the Extradition Act to refer to ‘extradition arrest warrants’. Generally in an international context, ‘provisional arrest’ refers to circumstances in which a person is arrested prior to receipt of a full extradition request in urgent cases. Section 12, which is entitled ‘provisional arrest warrant’ enables a magistrate to issue a warrant for a person’s arrest either before or after an extradition request has been received. References to ‘provisional arrest warrants’ in Part II of the Act include both warrants issued before and after an extradition request has been made.

2.53 The amendments would change references to ‘provisional arrest warrants’ in Part II to ‘extradition arrest warrants’ to avoid the 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.

Admission of evidence on review or appeal

2.54 Paragraph 21(6)(d) provides that where a person or the foreign 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.

2.55 While it is likely that the review court would interpret this provision 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 documents. For example, if the review court were able to consider documents tendered by the person but wrongly excluded by the magistrate, it is not clear under paragraph 21(6)(d) that the foreign country could provide the review court with further information relating to the wrongly excluded material.

2.56 Proposed section 21B would make clear that if the review court considers evidence was wrongly excluded, the review court may consider both the wrongly excluded evidence as well as further evidence or submissions *directly relating* to the excluded evidence.

Foreign escort officers

2.57 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 called the 'foreign escort officer'.

2.58 This phrase 'specified person' requires Australia to obtain the name of the escort officer at the time of issuing the surrender warrant, which can be some time prior to the person being surrendered. This can cause difficulties if the person specified in the warrant later becomes unavailable. Item 99 would amend paragraph 26(1)(d) to provide that the warrant must nominate 'a specified person or a person included in a specified class'.

2.59 The amendments would also refer to the person as the 'escort officer' rather than the 'foreign 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.

2.60 Items 105 and 106 make similar amendments to the provisions relating to foreign escort officers for extradition from Australia to New Zealand.

Schedule 3

Amendments relating to providing mutual assistance in criminal matters

Part 1—Grounds of refusal

3.1 Part 1 of Schedule 3 would amend section 8 of the Mutual Assistance Act, which sets out the grounds on which the Attorney-General may or must refuse a mutual assistance request from a foreign country.

Political offence

3.2 Currently, the Attorney-General must refuse a request for assistance in a criminal matter 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.

3.3 Part 1 of Schedule 3 would make political offence a discretionary ground for refusing mutual assistance, rather than a mandatory ground. As ‘political offence’ is defined in the Mutual Assistance Act by reference to the Extradition Act, the proposal to exclude certain types of conduct from the definition of political offence in the Extradition Act (outlined at paragraphs 2.16 to 2.18 above) would also apply to mutual assistance requests.

Torture as a mandatory ground of refusal

3.4 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 involving 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.

3.5 Part 1 would 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. This amendment would provide enhanced protection in cases where there are torture concerns and affirm Australia’s strong position against torture. This amendment would also be consistent with the recommendations made by the United Nations Committee Against Torture.

Double jeopardy

3.6 Currently, the Attorney-General must refuse a request where it relates to the prosecution of an offence or conduct for which the person has previously been acquitted, pardoned or punished in the requesting country. This reflects the principle known as ‘double jeopardy’.

3.7 Under Part 1, the double jeopardy ground for refusal would be made discretionary, enabling assistance to be provided in appropriate matters. 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.

3.8 The amendment to the double jeopardy ground for refusal would also make clear that a request for assistance may be refused where the person has previously been acquitted, pardoned or punished in Australia or a third country in respect of the offence or conduct. The current double jeopardy ground for refusal only refers to situations where the person has been acquitted, pardoned or punished in the requesting country.

Limit the discretion to provide assistance in death penalty matters where a person has been arrested or detained on suspicion of committing an offence

3.9 Currently, the Attorney-General must refuse a request for assistance where it relates to the prosecution or punishment of a person charged with, or convicted of, an offence for which the death penalty may be imposed, unless special circumstances exist. Part 1 would extend this ground for refusal to apply to circumstances in which a person has been *arrested* or *detained* on suspicion of committing an offence which carries the death penalty, regardless of whether formal charges have been laid.

3.10 This proposed amendment recognises that under some legal systems a suspect may be formally charged later in the legal process than in Australia. In such a situation the suspect may be held under arrest or detained for longer periods of time without being formally charged. It is appropriate that the protections contained in the Mutual Assistance Act in relation to the death penalty apply irrespective of differences in criminal procedure in foreign countries.

Dual criminality ground for refusal to apply at time request received

3.11 Currently, the Attorney-General can 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. Unlike the dual criminality provision in the Extradition Act, the Mutual Assistance Act does not specify the time at which dual criminality is assessed. To ensure consistency with the Extradition Act, Part 1 would amend the dual criminality ground for refusal so that it provides that dual criminality exists if the relevant conduct is an offence against Australian law *at the time at which the request is received*.

Remove extraterritoriality as a ground for refusal

3.12 Currently, the Attorney-General can refuse a request for assistance where the request relates to conduct that occurred outside the foreign country (that is, where the foreign country has criminalised the conduct extraterritorially), and Australia does not criminalise the same conduct extraterritorially. Many countries exercise extraterritorial jurisdiction for criminal offences and Australia now asserts extraterritorial jurisdiction for many offences including terrorism, war crimes, crimes against humanity, genocide and child sex tourism. As a result, the extraterritoriality ground for refusal is rarely used. Under Part 1, this ground for refusal would be repealed.

3.13 The Attorney-General would still 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, under paragraph 8(2)(a) of the Mutual Assistance Act (dual criminality). The Attorney-General would also retain a broad general discretion to refuse assistance under paragraph 8(2)(g).

Remove lapse of time as a ground for refusal

3.14 Currently, the Attorney-General can refuse a request for assistance relating to conduct that could no longer be prosecuted in Australia due to lapse of time. This ground of refusal was originally included 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. Under Part 1, this ground for refusal would be repealed. The Attorney-General would retain a broad general discretion to refuse assistance under paragraph 8(2)(g) of the Mutual Assistance Act.

Clarify that the grounds for refusal apply at the investigation stage

3.15 Currently, many of the grounds for refusal in the Mutual Assistance Act are expressed as applying to a request relating to the *prosecution or punishment* of a person for an offence or alleged conduct. As a significant proportion of mutual assistance requests seek assistance during the investigation stage, Part 1 would amend relevant grounds for refusal so that they also expressly apply to requests that relate to the investigation of a person.

Clarify that the grounds for refusal apply to proceeds of crime requests

3.16 Currently, it is not clear how some of the grounds for refusal in the Mutual Assistance Act apply to requests for proceeds of crime action. In particular, requests relating to non-conviction based proceeds of crime action may not be considered as relating to the investigation, prosecution or punishment of a person for an offence or alleged conduct. Non-conviction based proceeds of crime action does not require a person to have been prosecuted for an offence, or require that they are likely to be prosecuted in the future. Part 1 would insert new grounds for refusal clarifying the application of relevant grounds for refusal to proceeds of crime matters.

Part 2—Video link evidence

Requests for live video link evidence

3.17 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 Mutual Assistance Act. However, section 13 in particular is not very clear in its application to such requests. Part 2 of Schedule 3 would amend the Mutual Assistance 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.

3.18 Section 13 of the Mutual Assistance Act deals with requests by a foreign country for evidence to be taken from a witness before an Australian magistrate. 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 proposed amendments would also set out the role of the Australian magistrate in conducting the proceedings in cooperation with the foreign court. If the foreign court requests the Australian magistrate to take some form of action in relation to the proceedings, the Australian magistrate would have a discretion as to whether to take that action.

3.19 Requests by a foreign country for evidence to be given by a witness in Australia by video link that do not require the involvement of an Australian magistrate would continue to be handled outside of the Mutual Assistance Act framework on an 'agency-to-agency' basis.

3.20 Part 2 would further amend existing subsection 13(4A) of the Mutual Assistance Act, which currently enables a witness giving evidence in a take evidence proceeding in Australia to be examined or cross-examined via video link by foreign legal representatives in the requesting country. There is no commensurate provision dealing with examination or cross-examination of a witness by foreign legal representatives in person. The proposed amendment would make clear that the magistrate may allow foreign legal representatives to examine or cross-examine a witness either in person or by video link.

Requests for recording of take evidence proceedings

3.21 Part 2 also contains amendments to sections 12 and 13 of the Mutual Assistance Act to 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.

Part 3—Telecommunications and surveillance devices

Division 1—Provision of certain lawfully obtained material

3.22 Currently, telecommunications interception (TI) product and covertly accessed stored communications material (such as email records) 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 Mutual Assistance Act.

3.23 Section 13A of the Mutual Assistance Act provides a different, more streamlined procedure for providing certain material to a foreign country. It allows Australia to provide directly to a foreign country material that was lawfully obtained by, and is lawfully in the possession of, a domestic enforcement agency following the Attorney-General's authorisation. Under section 13A the material is not required to be produced before a magistrate before it can be provided to a foreign country. TI product and covertly accessed stored communications material cannot currently be provided to a foreign country under section 13A.

3.24 Division 1 of Part 3 would amend the Mutual Assistance Act and the *Telecommunications (Interception and Access) Act 1979* so that the section 13A mechanism is available for the provision of TI product and covertly accessed stored communications material. Information in relation to the warrant used by the domestic enforcement agency to obtain the TI product or covertly accessed stored communications material would also be able to be provided under section 13A. This could include information such as that included in the application for the warrant, the telecommunications service to which the warrant relates and persons specified in the warrant as using the telecommunications service.

3.25 Under the proposed amendments, the relevant foreign offence would have to carry a maximum penalty above a threshold level before the TI product or covertly accessed stored communications material would be able to be provided under section 13A. For TI product, the threshold would be 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 A\$10,000,000. The definition of 'cartel offence' proposed to be inserted in the Mutual Assistance Act would be limited to offences committed by corporations. TI product would be able to be provided in relation to a foreign offence that targets cartel-type conduct by *an individual* provided the relevant offence carries a maximum penalty of seven years imprisonment or more.

3.26 For covertly accessed stored communications material, the threshold would be a maximum penalty of at least three years imprisonment, life imprisonment, the death penalty, or a fine of at least the equivalent of 900 penalty units. Under section 4AA of the *Crimes Act 1914* one penalty unit is currently A\$110.

3.27 Under the proposed amendments, the Attorney-General would be required to report to Parliament annually on the number of occasions TI material and covertly accessed stored communications material was provided to a foreign country following an authorisation under section 13A of the Mutual Assistance Act.

Division 2—Requests for covert access to stored communications and use of surveillance devices

3.28 Currently, prescribed Australian agencies may apply for a warrant to covertly access stored communications (for example, email records) or use a surveillance device to assist in the investigation of domestic offences. However, there is no mechanism to enable either of these types of warrant to be obtained to assist a foreign criminal investigation.

3.29 Division 2 of Part 3 would amend the Mutual Assistance Act, the *Telecommunications (Interception and Access) Act* and the *Surveillance Devices Act 2004* so that following a mutual assistance request from a foreign country, the Attorney-General may authorise the Australian Federal Police (AFP) or a State (or, in the case of surveillance devices, Territory) police force to apply for a stored communications warrant or surveillance device warrant.

3.30 Under the proposed amendments, the relevant foreign offence would have to carry a maximum penalty above a threshold level before the Attorney-General could authorise seeking a warrant. For a stored communications warrant the threshold would be a maximum penalty of at least three years imprisonment, life imprisonment, the death penalty, or a fine of at least the equivalent of 900 penalty units. Under section 4AA of the *Crimes*

Act one penalty unit is currently A\$110. For a surveillance device warrant the threshold would be a maximum penalty of at least three years imprisonment, life imprisonment or the death penalty.

3.31 Before authorising the relevant agency to seek a surveillance device warrant, the Attorney-General would also have to be satisfied that the foreign country has given appropriate undertakings:

- that the material the foreign country receives will only be used for the purpose for which it was provided
- about the destruction of the material following its use, and
- any other appropriate matters.

3.32 There would be no requirement that the foreign country provide similar undertakings before the Attorney-General authorises a stored communications warrant. However, stored communications material would only be able to be provided to the foreign country on the conditions that:

- the information will only be used for the purposes for which the foreign country requested it, and
- the information will be destroyed when it is no longer required.

The Attorney-General would also be able to place other conditions on the provision of the material as appropriate.

3.33 Under the proposed amendments, the Attorney-General would be required to report to Parliament annually on the number of stored communications or surveillance device warrant applications made following a mutual assistance request, the number of warrants issued, the number of warrant applications refused and a breakdown of the types of offences for which warrants were issued.

Division 3—Amendments relating to telecommunications data

3.34 Under the Telecommunications (Interception and Access) Act, an authorised officer from an Australian enforcement agency can authorise a telecommunications carrier to disclose historical telecommunications data, such as subscriber details and call charge records, if that officer is of the belief that the disclosure is reasonably necessary for the enforcement of the criminal law. In this context, criminal law is interpreted to mean the criminal law of Australia. A warrant is not required for the enforcement agency to obtain this data from a telecommunications carrier.

3.35 Mutual assistance procedures may be used to provide historical telecommunications data to foreign countries for the investigation or prosecution of foreign criminal offences through the use of a search warrant under section 15 of the Mutual Assistance Act. However, historical telecommunications data cannot currently be provided to foreign countries on an agency-to-agency basis.

3.36 Division 3 of Part 3 would amend the Telecommunications (Interception and Access) Act to allow the AFP to obtain historical telecommunications data from a telecommunications carrier and pass that data on to a foreign law enforcement agency

without the need for a request to be made by the foreign country under the Mutual Assistance Act—that is, on an agency to agency basis.

3.37 The disclosure of the data by a telecommunications carrier to the AFP and its subsequent disclosure to the foreign law enforcement agency would have to be authorised by the AFP Commissioner, an AFP Deputy Commissioner or a senior executive AFP officer who has been authorised in writing by the AFP Commissioner (an ‘authorised officer’). The authorised officer would have to be satisfied that the disclosure of the data is reasonably necessary for the enforcement of the criminal law of a foreign country and the disclosure is appropriate in all the circumstances before authorising the disclosure of the material to the foreign law enforcement agency. The second of these requirements would ensure that there is an assessment of factors such as Australian security or other national interests as well as privacy issues before the data is authorised to be disclosed to the foreign country.

3.38 The proposed amendments would also enable the secondary disclosure of telecommunications data originally obtained for domestic law enforcement purposes to a foreign law enforcement agency to assist a foreign investigation. Such a disclosure would also have to be authorised by an authorised officer who is satisfied that it is reasonably necessary for the enforcement of the criminal law of a foreign country and the disclosure is appropriate in all the circumstances.

Part 4—Carrying out forensic procedures at the request of a foreign country etc

3.39 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.

3.40 Currently, Australia cannot conduct a compulsory forensic procedure on a suspect of a foreign offence in response to a request from a foreign country. 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. However, the application of relevant provisions in the Crimes Act to these circumstances is not as clear as it could be.

3.41 Part 4 of Schedule 3 would amend the Mutual Assistance 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 of a foreign 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, or child or incapable person, on behalf of a foreign law enforcement agency.

3.42 The proposed amendments would only apply in relation to foreign criminal matters involving offences that carry a maximum penalty of more than 12 months imprisonment, death or a fine of more than 300 penalty units. Under section 4AA of the Crimes Act one penalty unit is currently A\$110. This is consistent with the existing Crimes Act provisions on forensic procedures, which provide for forensic procedures to be carried out on suspects of indictable offences.

3.43 Under the Crimes Act, there are several streams for obtaining forensic material from a person, depending on the person's situation in relation to a criminal matter and whether they consent to undergoing a forensic procedure. In the case of a suspect of an offence, there are three streams:

- (i) forensic procedure carried out following informed consent of suspect
- (ii) compulsory 'non-intimate' forensic procedure carried out following order by a senior constable, and
- (iii) compulsory forensic procedure carried out following order by a magistrate.

3.44 There are also two further streams: one for the carrying out of forensic procedures on certain convicted offenders, and one for volunteers, children and incapable persons. The proposed amendments in Part 4 would only make available for the purposes of international cooperation forensic procedures through streams (i) and (iii) above in relation to suspects, and the stream for volunteers, children and incapable persons.

Forensic procedures with suspect's informed consent

3.45 Part 4 would amend relevant provisions of Division 3 of Part 1D of the Crimes Act, which deals with forensic procedures carried out with the informed consent of a suspect. The proposed amendments to Division 3 would enable forensic procedures to be carried out on a suspect of a foreign offence using the same mechanism and providing the same safeguards as currently apply for a suspect of a domestic offence. Safeguards would include that the constable must consider a range of issues before requesting a suspect to consent to a forensic procedure, such as the age, physical health and mental health of the suspect, and whether there are other means of obtaining evidence in relation to the alleged involvement of the suspect. The suspect must also be informed of a range of matters, including 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.

3.46 If a suspect provides informed consent to undergo a forensic procedure, a request from a foreign country under the Mutual Assistance Act would not be required before the procedure is carried out. Rather, the AFP, or relevant State or Territory police force, would be able to carry out the procedure on behalf of a foreign law enforcement agency on an agency to agency basis.

Forensic procedures on a suspect following a magistrate's order

3.47 Part 4 would amend relevant provisions of Division 5 of Part 1D of the Crimes Act, which deals with forensic procedures carried out on a suspect following a magistrate's order. The proposed amendments to Division 5 would enable forensic procedures to be carried out on a suspect of a foreign offence if a magistrate has ordered that this take place. This approach would be used in situations where the suspect has refused consent to a forensic procedure.

3.48 Unlike the process for forensic procedures carried out with the informed consent of a suspect, this mechanism would only be available following a request from the foreign country pursuant to the Mutual Assistance Act. This mechanism would not be available on the basis of an agency to agency request from a foreign law enforcement agency.

3.49 Before a magistrate would be able to order a suspect of a foreign offence to undergo a forensic procedure, the Attorney-General would have to authorise the AFP, or the relevant State or Territory police force, to apply for the order. Before authorising an application, the Attorney-General would have to be satisfied that the foreign country has given appropriate undertakings in relation to the retention, use and destruction of the forensic material, or information obtained from analysis of that forensic material, and any other undertakings considered necessary.

3.50 If the suspect is not a child or incapable person, the Attorney-General would also have to be satisfied that the suspect has been given an opportunity to consent and has not consented to the procedure. If the suspect is a child or incapable person, the Attorney-General would have to be satisfied that the consent of the parent or guardian cannot reasonably be obtained or has been withdrawn, and believe that the authorisation would be appropriate having regard to the best interests of the child or incapable person.

3.51 The proposed amendments to Division 5 would enable a magistrate to compel a suspect of a foreign offence to undergo a forensic procedure, following an authorisation by the Attorney-General, in the same way as currently applies to a suspect of a domestic offence. In determining whether to grant such an order, a magistrate would be required to consider similar types of issues to those for domestic criminal matters. These include safeguard considerations such as the age, physical health and mental health of the suspect, the welfare of the subject, and whether there are other means of obtaining evidence in relation to the suspect's involvement.

Forensic procedures on volunteers, children and incapable persons

Volunteers

3.52 Part 4 would amend relevant provisions of Division 6B of Part 1D of the Crimes Act, which deals with forensic procedures carried out with the informed consent of a volunteer, or on a child or incapable person. The proposed amendments to Division 6B would clarify the application of forensic procedures provisions to volunteers in relation to foreign criminal matters. The same mechanism and safeguards as apply to volunteers in relation to domestic criminal matters would apply to such volunteers. Applicable safeguards include that the volunteer must be informed about how the procedure is to be carried out, that the volunteer is under no obligation to consent to the procedure, and that the evidence produced might be used in court.

3.53 Under Division 6B, a child or incapable person whose parent or guardian has volunteered that person to undergo a forensic procedure on their behalf is considered a volunteer.

3.54 In the case of volunteers undergoing a forensic procedure, a request from a foreign country under the Mutual Assistance Act would not be required before the procedure is carried out. Rather, the AFP, or relevant State or Territory police force, would be able to carry out the procedure on behalf of a foreign law enforcement agency on an agency to agency basis.

Children and incapable persons

3.55 Where the parent or guardian of a child or incapable person refuses or withdraws consent to a forensic procedure, Division 6B provides for a magistrate to order the carrying out of the forensic procedure. Under the proposed amendments, this mechanism would be made available in relation to foreign criminal matters. However, as with obtaining a magistrate's order to compel a suspect of a foreign offence to undergo a forensic procedure, a request from the foreign country pursuant to the Mutual Assistance Act would first be required. This mechanism would not be available on the basis of an agency to agency request from a foreign law enforcement agency.

3.56 Before a magistrate would be able to order that a child or incapable person undergo a forensic procedure, the Attorney-General would have to authorise the AFP, or relevant State or Territory police force, to apply for the order. Before authorising an application, the Attorney-General would have to be satisfied that the foreign country has given appropriate undertakings in relation to the retention, use and destruction of the forensic material, or information obtained from analysis of that forensic material, and any other undertakings considered necessary.

3.57 The Attorney-General would further have to be satisfied either that the consent of the parent or guardian cannot reasonably be obtained or has been withdrawn, or the parent or guardian is a suspect in the foreign criminal matter. The Attorney-General would also have to believe that the authorisation would be appropriate having regard to the best interests of the child or incapable person.

3.58 The proposed amendments to Division 6B would enable a magistrate to order that a child or incapable person undergo a forensic procedure, following an authorisation by the Attorney-General, in the same way as currently applies in domestic criminal matters. In determining the application, the magistrate would be required to consider the same types of issues as if the application concerned a domestic criminal matter. These include safeguard considerations such as the best interests of the child or incapable person and, as far as they can be ascertained, any wishes of the child or incapable person about whether the procedure should be carried out.

3.59 Under existing subsection 23XWQ(4) of the Crimes Act, a child or incapable person cannot be forced to undergo a forensic procedure if they object to or resist the procedure even though a magistrate may have ordered that the procedure be carried out. Under the proposed amendments, this provision would also apply if a child or incapable person objects to or resists a forensic procedure in relation to a foreign criminal matter that has been ordered by a magistrate.

Requests by Australia for forensic procedures

3.60 Currently, the Mutual Assistance Act does not contemplate requests by Australia for the carrying out of forensic procedures on persons in foreign countries to assist Australian investigations and prosecutions. Requests by Australia for the carrying out of forensic procedures by foreign countries currently rely on the executive power of the Australian Government to make mutual assistance requests. Part 4 of Schedule 3 would insert a new provision into the Mutual Assistance Act dealing specifically with these types of requests by Australia.

Part 5—Proceeds of crime

Register and enforce foreign non-conviction based proceeds of crime orders from any country

3.61 Currently, the Mutual Assistance Act only allows Australia to register and enforce foreign non-conviction based proceeds of crime orders from certain countries that have been declared in regulations. Part 5 of Schedule 3 would amend the Mutual Assistance Act to allow the Attorney-General to authorise the Commonwealth Director of Public Prosecutions to apply to a court for the registration of foreign non-conviction based proceeds of crime orders from any country.

3.62 Under existing provisions of the Mutual Assistance Act, a registered foreign proceeds of crime order is enforced as if it were an Australian proceeds of crime order made under the *Proceeds of Crime Act 2002*. These provisions would continue to apply to all non-conviction based proceeds of crime orders registered under the proposed amendments.

3.63 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 effective tools for restraining and forfeiting the proceeds of crime, because obtaining a conviction often takes a substantial period of time allowing greater dispersal of assets by offenders.

3.64 In addition to enabling the registration in Australia of foreign proceeds of crime orders, the Mutual Assistance Act enables a temporary Australian restraining order to be placed over proceeds of foreign crimes where criminal proceedings have commenced or are about to commence in the foreign country. Currently, this action can also be taken where confiscation proceedings have commenced, or are about to commence, in a foreign country that is listed in the regulations. Part 5 would make amendments to the Mutual Assistance Act enabling a temporary Australian restraining order to be placed over proceeds of crime where confiscation proceedings have commenced, or are about to commence, in *any* foreign country.

Improve and strengthen proceeds of crime mechanisms for foreign countries

3.65 The Mutual Assistance 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 fluid and fast nature of proceeds of crime investigations.

3.66 Currently, a notice to a financial institution under the Mutual Assistance 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.

3.67 Part 5 would streamline the authorisation process for the proceeds of crime investigative tools in the Mutual Assistance Act to ensure Australia can respond more efficiently to requests for assistance. Under the proposed amendments, a senior AFP officer would be able to issue notices to financial institutions to help determine whether it is necessary to take further action under the Mutual Assistance Act or the Proceeds of Crime Act. Further, the Attorney-General would 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 Proceeds of Crime Act to appropriately respond to a specific mutual assistance request.

3.68 Part 5 also contains a number of proposed minor amendments to Part VI of the Mutual Assistance Act that would improve Australia's ability to assist foreign countries in proceeds of crime matters.

Part 6—Other amendments

Definition of serious offence

3.69 There are some forms of assistance that can only be requested or provided under the Mutual Assistance 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.

3.70 Part 6 of Schedule 3 would adjust the 'serious offence' definition in two ways. First, the threshold period of imprisonment would change to 'exceeding 12 months'. This would 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 considered necessary because some forms of assistance that can be provided under the Mutual Assistance Act, or would 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 of a Commonwealth offence cannot be compelled to undergo a forensic procedure unless the relevant offence is an indictable offence.

3.71 Second, 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 all forms of assistance in relation to serious corporate offences that may only carry monetary fines as penalties. An example of such offences are two of the proposed new cartel offences to be inserted in the *Trade Practices Act 1974* by the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008, proposed sections 44ZZRF and 44ZZRG. These proposed offences target the conduct of corporations, so have a maximum penalty expressed in monetary terms, rather than a term of imprisonment.

3.72 It is important that Australia be in a position to request and provide mutual 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 Organized Crime*, which apply to offences committed by ‘legal persons’ as well as natural persons.

Other minor and technical amendments

3.73 Part 6 would also make a range of minor and technical amendments to the Mutual Assistance Act, including:

- explaining how an Australian dollar amount is to be converted into the relevant foreign currency amount for the purposes of the Mutual Assistance Act
- clarifying that the Mutual Assistance Act does not affect the provision or obtaining of forms of international assistance in criminal matters that are not covered by the Act
- removing 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
- clarifying that the Attorney-General may make a mutual assistance request to a foreign country on behalf of a defendant in criminal appeal proceedings, and
- removing the requirement for documents to be sealed by the foreign country before they can be admitted into proceedings under the Mutual Assistance Act, to ensure consistency with the provisions of the Foreign Evidence Act.