

2011

EXPOSURE DRAFT

**EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS
LEGISLATION AMENDMENT BILL 2011**

EXPLANATORY DOCUMENT

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

Introduction

In July 2009, the Australian Government released exposure draft legislation to facilitate consultation on reforms to Australia's laws on extradition and mutual assistance in criminal matters. Submissions were sought from the public during the two month consultation period, which concluded on 31 August 2009. Submissions were placed on the Attorney-General's Department's website (unless the author requested the submission remain confidential). Public submissions can be accessed through www.ag.gov.au/extraditionandmareforms.

While stakeholders welcomed many features of the exposure draft legislation, some areas of possible improvement were identified. A number of changes have been made to the draft Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill as a result of the feedback received during the public consultation process. Examples are set out below.

- The amendments to enable courts to defer and consolidate judicial review of extradition decisions have been removed from the Bill as a number of practical problems were identified with this proposal during the consultation process. Alternative means of streamlining the extradition process have been included in the Bill (see Division 3 of Part 3 of Schedule 2).
- The proposal to make 'political offence' a discretionary, rather than mandatory, ground of refusal in both the *Extradition Act 1988* and the *Mutual Assistance in Criminal Matters Act 1987* has been removed. 'Political offence' will remain a mandatory ground of refusal in both Acts.
- The amendments to authorise the collection, use and disclosure of personal information under the *Privacy Act 1988* have been narrowed in scope.
- The proposal to enable the Attorney-General to give an undertaking to a foreign country about the maximum sentence that may be imposed on a person if extradited to Australia has been amended to expressly require consultation with the relevant State or Territory authorities before the undertaking is given.

Stakeholders were also asked to identify any additional or alternative amendments that would assist in streamlining and modernising Australia's extradition and mutual assistance laws. As a result, a number of new proposals have been included in the Bill. Significant new proposals are set out below.

- The existing grounds for refusing an extradition or mutual assistance request would be expanded to include discrimination on the basis of a person's sexual orientation.
- The matters required to be considered by the Attorney-General when determining whether to issue a notice pursuant to section 16 stating that an extradition request has been received (a section 16 notice) would be streamlined. The Attorney-General would no longer be required to consider issues such as dual criminality or extradition objections before issuing a section 16 notice.
- Bail would be available, in special circumstances, during the later stages of the extradition process, including, for example, where a person has consented to surrender and is waiting for a determination by the Attorney-General as to whether he or she should be surrendered.

- The period in which the Attorney-General may determine whether to accept an extradition request would be extended by five days to enable a more thorough examination of requests.
- Telecommunications carriers and carriage service providers would be able to recover costs incurred when responding to requests for assistance from foreign law enforcement agencies.
- Foreign law enforcement agencies could be provided with prospective telecommunications data, subject to safeguards. This would facilitate Australia's accession to the Council of Europe *Convention on Cybercrime*.

These changes respond to feedback from the 2009 exposure draft legislation. They are designed to reduce delays in current processes, ensure Australia does not become a safe haven for fugitives and the proceeds of crime, and expand the range of law enforcement tools available through the mutual assistance process. The changes also strengthen human rights protections and safeguard rights.

The Australian Government welcomes comment from stakeholders on these reforms prior to introduction of the amendment legislation into Parliament.

Please send written comments by 14 March 2011 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
3-5 National Circuit
BARTON ACT 2600

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* 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 Justice is also authorised to perform these functions. References to ‘the Attorney-General’ throughout this document should be read to include both the Attorney-General and the Minister for Justice.

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 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 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 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, and
- clarify privacy and information disclosure provisions relating to extradition and mutual assistance processes.

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

- reduce delays in extradition processes by streamlining the early stages of the extradition process
- extend the availability of bail in extradition proceedings
- allow a person to waive the extradition process, subject to certain safeguards
- extend the circumstances in which persons may be prosecuted in Australia as an alternative to extradition
- allow a person to consent to being surrendered for a wider range of offences
- modify the definition of ‘political offence’ to clarify this ground of refusal does not extend to specified crimes such as terrorism, and

- require Australia to refuse to extradite a person if he or she may be prejudiced by reason of his or her sex or sexual orientation following surrender.

Schedule 3 contains amendments 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 on which Australia can refuse 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.

Schedule 1

General amendments relating to extradition and mutual assistance in criminal matters

Part 1—Amendments relating to Federal Magistrates

(This Part has not been amended following the 2009 consultation process.)

1.1 Currently, functions under the Extradition Act and the Mutual Assistance Act can be exercised 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 The Bill would 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, the Bill would 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. It is therefore appropriate that these functions continue to be limited to State and Territory magistrates in the mutual assistance context. Federal Magistrates would be able to exercise a range of other functions under the Mutual Assistance Act, such as ‘take evidence’ and production of document proceedings under section 13, and issuing search warrants under section 38C.

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 to be conferred on a Federal Magistrate would be in his or her personal capacity (as opposed to in his or her judicial capacity as member of a particular court). The 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

(This Part has been amended following the 2009 consultation process.)

1.6 Part 2 would clarify the application of the *Privacy Act 1988* to extradition and mutual assistance processes. These proposals are designed to provide greater transparency and certainty by

providing that the collection, use and disclosure of information for extradition and mutual assistance processes is specifically authorised by law.

1.7 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 the extradition of a person to or from Australia. The scope of this provision has been narrowed since the 2009 consultation process to ensure the provision is only as broad as is necessary to facilitate a person's extradition to or from Australia.

1.8 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 providing or obtaining international assistance in criminal matters. The scope of this provision has also been narrowed since the 2009 consultation process. Proposed section 43D would only apply where the collection, use or disclosure of personal information is reasonably necessary for the purposes of providing or obtaining international assistance in criminal matters *by the Attorney-General or an officer of his or her Department*. This encompasses both international assistance which is authorised by the Attorney-General under the Mutual Assistance Act *and* assistance that can be provided outside the scope of the Mutual Assistance Act, such as voluntarily obtained witness statements, the provision of which may be facilitated by the Attorney-General's Department. This amendment does not impact on exchanges of information between other law enforcement agencies, such as police to police assistance provided or obtained by the Australian Federal Police (AFP).

1.9 Subsection 336E(1) of the *Migration Act 1958* makes it an offence to disclose identifying information if the disclosure is not a 'permitted disclosure'. It is proposed that the definition of 'permitted disclosure' in subsection 336E(2) of the Migration Act be amended to include a disclosure that is for the purposes of:

- the extradition of a person either to or from Australia, or
- the provision or obtaining of international assistance in criminal matters by the Attorney-General or an officer of his or her Department.

The scope of this provision has been narrowed since the 2009 consultation process in a similar manner to the changes to the Extradition Act and the Mutual Assistance Act.

Part 3—Amendments relating to foreign evidence

(This Part has been removed in response to concerns identified during the consultation process.)

Schedule 2

Amendments relating to extradition

Part 1—Statutory appeal of extradition decisions

(Some amendments that were contained in this Part of the Bill, including the proposal to defer and consolidate judicial review, have been removed following the 2009 consultation process.)

2.1 Part 1 would remove the jurisdiction of the State and Territory Supreme Courts to hear appeals made under the Extradition Act and limit jurisdiction to appeal 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 of Australia.

2.2 Other proceedings in the extradition context, such as applications for judicial review of decisions made by the Attorney-General, are generally brought in the Federal Court. This amendment seeks to overcome the jurisdictional complexities that can arise where proceedings in the same matter are brought in both State and federal courts. This amendment would also build on the federal courts' existing expertise in extradition matters.

Part 2—Waiver of extradition

(A minor adjustment has been made to this Part following the 2009 consultation process, as described below.)

2.3 Part 2 would provide a more streamlined process for persons who wish to consent to surrender to a 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 amendments, persons would have the option to either waive extradition or use the existing consent process.

2.4 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.

2.5 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.

2.6 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 the 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.

2.7 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 he or she:

- does not have substantial grounds for believing that, if the person were surrendered, the person would be in danger of being subjected to torture, and
- is satisfied that on surrender there is no real risk the death penalty will be carried out upon the person in relation to any offence.

A minor amendment was made to the provisions relating to torture following the 2009 consultation process. This amendment ensures all provisions relating to torture in the Extradition Act are consistent with the wording of Australia's non-refoulement obligation under the United Nations *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.

2.8 After a person elects to waive extradition, any other extradition processes which are on foot, including any proceedings to determine eligibility for surrender, would be stayed, unless and until the magistrate decides not to accept the person's election to waive extradition. 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.

2.9 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 15A(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.

2.10 The proposed amendments contain a number of safeguards to ensure a person cannot waive his or her extradition under duress and to ensure persons are not at risk of being subject to the death penalty or torture on return to the requesting country, while significantly streamlining the extradition process for persons who consent to being surrendered.

Part 3—Other amendments

Division 1—Amendments relating to political offences

(This Division has been amended following the 2009 consultation process.)

2.11 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 in section 5 of the Act provides that certain offences are not 'political offences'.

2.12 The Bill would amend section 5 to expressly exclude the following from the political offence definition:

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

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

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

2.15 It is intended that 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 Regulations would also make clear that an offence constituted by the murder, kidnapping or other attack on a head of state or head of government, or his or her family, is not considered a political offence for the purposes of Australia’s extradition law.

2.16 Division 1 also makes consequential amendments to subsection 91T(3) of the *Migration Act 1958*, which refers to the definition of political offence in the Extradition Act.

2.17 The 2009 exposure draft had also proposed to make political offence a discretionary ground for refusing extradition, rather than a mandatory extradition objection. This amendment has not been included in the revised exposure draft.

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

(This Division has been expanded following the 2009 consultation process.)

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

2.19 Division 2 would extend the grounds of discrimination in paragraphs 7(b) and 7(c) to include discrimination on the basis of ‘sex’ and ‘sexual orientation’. This expands on the 2009 exposure draft Bill, which proposed to include the additional ground of sex discrimination. These amendments

would ensure that an extradition request must be refused where surrender is sought for the purpose of punishing the person on account of his or her sex or sexual orientation, or where the person may be discriminated against upon surrender on the basis of his or her sex or sexual orientation. A similar amendment to the Mutual Assistance Act is included in Part 1 of Schedule 3.

Division 3—Notice of receipt of extradition request

(The amendments in this Division expand upon the amendments included in the 2009 exposure draft Bill.)

2.20 Division 3 would streamline the initial stages of the extradition process, by limiting the factors the Attorney-General is required to consider before issuing a notice under section 16 of the Extradition Act conferring jurisdiction on a magistrate to conduct extradition proceedings. This would ensure extradition cases can be considered in detail by a magistrate more promptly.

2.21 Currently, under the Extradition Act, the Attorney-General must not give a notice under section 16:

- unless he or she is of the opinion that:
 - the person is an extraditable person in relation to the extradition country (subparagraph 16(2)(a)(i)), and
 - dual criminality is satisfied (subparagraph 16(2)(a)(ii)), or
- if the Attorney-General is of the opinion that there is an extradition objection in relation to the extradition offence (paragraph 16(2)(b)).

2.22 The Bill would amend section 16 of the Extradition Act to provide that the Attorney-General may exercise his or her general discretion to issue a notice conferring jurisdiction on a magistrate to consider an extradition request provided he or she is satisfied the person is an extraditable person in relation to the extradition country. There would be no statutory requirement for the Attorney-General to consider extradition objections (that is, mandatory grounds for refusing extradition) or dual criminality (that is, whether the conduct the person is alleged to have committed constituted an offence under Australian law if the conduct occurred in Australia) before issuing a section 16 notice.

2.23 The proposed amendments would not remove any substantive rights. Dual criminality and extradition objections would continue to be assessed in detail by the magistrate when determining eligibility for surrender. The Attorney-General would again assess the existence of any extradition objection in determining whether to surrender the person. In addition, if it was clear at the section 16 stage that an extradition objection existed or that dual criminality would not be satisfied (for example, because the extradition request related to conduct that is not criminalised under Australian law), the Attorney-General could exercise his or her discretion not to issue the section 16 notice, terminating the extradition process at the initial stages. The amendments would, however, streamline processes and ensure that extradition matters can proceed to consideration by a magistrate promptly.

2.24 This Division expands upon the amendments that were included in the 2009 exposure draft Bill, which limited the Attorney-General's consideration of dual criminality at the section 16 stage.

Division 4—Consent to accessory extradition

(This Division has not been amended following the 2009 consultation process.)

2.25 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’ (known as ‘consent to accessory extradition’). 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. 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.

2.26 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.

2.27 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.

2.28 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.

2.29 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.

2.30 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.

2.31 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

(This Division has been amended following the 2009 consultation process.)

2.32 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.

2.33 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.

2.34 In practice, the making of any such undertaking would require the agreement of the relevant Commonwealth, State or Territory authorities responsible for the conduct of proceedings following the person's return to Australia, and on whose behalf the extradition request has been initiated. The Bill has been amended following the 2009 consultation process to make clear that, where the undertaking relates to an offence that is to be prosecuted in a State or Territory, the Attorney-General must, before giving an undertaking, consult with the Attorney-General of the State or Territory concerned.

2.35 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

(This Division has been amended following the 2009 consultation process.)

2.36 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.

2.37 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 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. The drafting of the current provision has been updated following the 2009 consultation process to clarify the operation of the provision, particularly in relation to the *Criminal Code* (Cth).

2.38 The Attorney-General would have a discretion to refer the matter to the relevant law enforcement agency for investigation and the Office of 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. The Prosecution Policy requires the CDPP to be satisfied that there is sufficient evidence to prosecute the case, and that it is evident from the facts of the case and all the surrounding circumstances that the prosecution would be in the public interest.

2.39 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

(This Division has not been amended following the 2009 consultation process.)

2.40 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

2.41 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 Extradition Act does not specify the processes for making such an amendment.

2.42 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 time at which the magistrate determines the person is eligible for surrender, or the person consents to surrender under section 18.

2.43 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.

2.44 Proposed subsections 18(1A) and 19(4A) would 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.

When notices are taken to be ‘given’

2.45 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. For example, it would provide that a notice is taken to be given at the time at which the notice, or a copy of the notice, would be delivered in the ordinary course of post. 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.

2.46 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—Amendments relating to remand and bail

(This Division has been added following the 2009 consultation process.)

2.47 This Division would make amendments to extend the availability of bail in the extradition process. This Division would also make amendments to provide the Attorney-General with an additional five days in which to consider whether to issue a section 16 notice stating that an extradition request has been received. These proposals were included following the 2009 public consultation process.

Extending the availability of bail

2.48 Currently under the Extradition Act, a person may be remanded on bail during the early stages of the extradition process if special circumstances exist. However, once a person is eligible for surrender, either following a determination of eligibility by a magistrate or where the person consents to extradition, he or she must be committed to prison.

2.49 The amendments in Division 8 would extend the availability of bail to the later stages of the extradition process. Bail would be made available, if special circumstances exist, to persons who have consented to extradition or have been finally determined eligible for surrender by a magistrate. Bail would be granted by either a magistrate acting *persona designata*, or a court, depending on the circumstances. Extending the availability of bail would ensure the Extradition Act is sufficiently flexible to accommodate extenuating circumstances that may justify granting a person bail, such as a person's health or family situation.

Additional time for the Attorney-General to consider extradition requests

2.50 This Division would also amend the Extradition Act to provide the Attorney-General with an additional five days following the receipt of an extradition request to consider the request and determine whether to issue a section 16 notice.

2.51 The Extradition Act currently provides that, where a person is arrested on a provisional arrest warrant in urgent circumstances, the person may be released from custody if the Attorney-General has not issued a notice stating that a formal extradition request has been received (a 'section 16 notice') within 45 days. The period of 45 days may be varied through Regulations.

2.52 Many of Australia's treaties with other countries require an extradition request to be made within a certain period of a person being arrested on a provisional arrest warrant. However, the Extradition Act requires the Attorney-General to issue a section 16 notice within that same period. In circumstances where a person has been provisionally arrested and the Attorney-General receives the extradition request on the last day of the specified time period, he or she may not have sufficient time to consider the request and determine whether to issue the section 16 notice. The Bill would allow the Attorney-General an additional five days following the receipt of an extradition request for the Attorney-General to consider the request and determine whether to issue a section 16 notice. If at the expiration of that five day period, the Attorney-General has not issued a section 16 notice, the person would be brought before a magistrate and the magistrate would be required to release the person unless satisfied the Attorney-General is likely to make a decision to give, or not to give, a section 16 notice within a reasonable time period, or, in circumstances where the extradition request has not yet been received:

- exceptional circumstances have prevented the extradition country from providing an extradition request, and

- the Attorney-General is likely to receive an extradition request within a reasonable time period, and
- the Attorney-General is likely to make a decision to give, or not to give, a section 16 notice within a reasonable time period.

2.53 This amendment would better align the operation of the Extradition Act with Australia's obligations under bilateral extradition treaties and would ensure the Attorney-General has sufficient opportunity to give due consideration to extradition requests before issuing a section 16 notice.

Division 9—Other minor technical amendments

(This Division is largely unchanged following the 2009 consultation process, although a number of additional minor and technical amendments, identified below, have been added.)

2.54 Division 9 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

2.55 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 in urgent circumstances prior to receipt of a full extradition request. 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.

2.56 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

2.57 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.

2.58 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.

2.59 Proposed section 21A 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.

Protection against torture

(This proposal has been added following the 2009 consultation process.)

2.60 The Bill would amend the wording of paragraph 22(3)(b) of the Extradition Act to better align this provision with Australia's obligations under the United Nations *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Convention against Torture).

2.61 Paragraph 22(3)(b) currently requires the Attorney-General to be satisfied that a person will not be subjected to torture on surrender to an extradition country before making a surrender determination. The Explanatory Memorandum to the Extradition Act makes clear that this is intended to implement Australia's obligations under the Convention against Torture. Accordingly, it is proposed to amend this wording to provide that the Attorney-General may only make a surrender determination if he or she does not have substantial grounds for believing that, if the person were surrendered to the extradition country, the person would be in danger of being subjected to torture. This wording mirrors the wording of the non-refoulement obligation in Article 3 of the Convention.

Form and execution of surrender warrants and temporary surrender warrants

2.62 Paragraph 26(1)(c) provides that a surrender warrant or temporary surrender warrant must require that a person held in custody be released to the custody of 'a police officer'. Paragraph 26(1)(d) provides that a surrender warrant or temporary surrender warrant must authorise 'the police officer' to transport the person in custody for the purposes of enabling the person to be placed in the custody of a specified person to transport the person out of Australia. This specified person is called the 'foreign escort officer'. The Bill would amend the terminology in these paragraphs.

2.63 First, 'a police officer' and 'the police officer' would be amended to 'any police officer'. It is not always practicable for the same police officer to transport a person from custody through to surrender to the foreign escort. These amendments would ensure that the police officer who takes custody of the person when released from prison is able to transfer the person into the custody of another police officer if necessary for the purposes of executing a surrender warrant.

2.64 Second, 'foreign escort officer' would be replaced with '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.

2.65 Third, 'specified person' would be replaced with 'a specified person or a person included in a specified class'. The term '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.

2.66 Similar amendments would also be made to the provisions relating to foreign escort officers for extradition from Australia to New Zealand.

Penalty units

(This proposal has been added following the 2009 consultation process.)

2.67 This proposal would ensure the Regulations can prescribe penalties for offences by reference to a maximum number of penalty units rather than a maximum monetary amount. This reflects modern drafting practice for penalties.

Schedule 3

Amendments relating to providing mutual assistance in criminal matters

Part 1—Grounds of refusal

(This Part has been amended following the 2009 consultation process, as identified below.)

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.

Torture as a mandatory ground of refusal

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

3.3 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.

Discrimination on the ground of sexual orientation

(This proposal has been included following the 2009 consultation process.)

3.4 Currently, assistance cannot be provided under the Mutual Assistance Act if there are substantial grounds for believing that the request was made for the purpose of prosecuting or punishing a person on account of the person's race, sex, religion, nationality or political opinions.

3.5 In response to feedback from the public consultation process, the Bill would extend these grounds to include discrimination on the basis of a person's sexual orientation. This is consistent with the changes proposed to the Extradition Act in Division 2 of Part 3, Schedule 2.

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 current double jeopardy ground for refusal only refers to situations where the person has been acquitted, pardoned or punished in the *requesting country*. The amendment to the double jeopardy ground for refusal would 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*, as well as the requesting country in respect of the offence or conduct.

3.9 The amendments outlined in paragraph 3.16 below would ensure the grounds for refusal in the Mutual Assistance Act apply to the *investigation* of a person for an offence or alleged conduct. However, unlike the other grounds for refusal in the Mutual Assistance Act, the double jeopardy ground is currently limited to the *prosecution* of a person and does not apply at the *punishment* stage. The double jeopardy ground would be amended so that it applies at the punishment stage. This would ensure that Australia is able to refuse to provide assistance at the investigation, prosecution or punishment stage in circumstances where the person has previously been acquitted, pardoned or punished in Australia, the requesting country or a third country in respect of the offence or conduct.

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

3.10 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 also 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.

3.11 This 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

3.12 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 (dual criminality). Unlike the dual criminality provision in the Extradition Act, the Mutual Assistance Act does not specify the time at which dual criminality is to be assessed. To ensure consistency with the Extradition Act, Part 1 would amend the dual criminality ground for refusal to provide 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

3.13 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.

3.14 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

3.15 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 in the Mutual Assistance Act to align mutual assistance legislation with Australian statutes of limitation. Statutes of limitation have now been removed for most criminal offences in Australia. As a result, the lapse of time ground for refusal is rarely used. 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

3.16 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

(An additional amendment has been included following the 2009 consultation process to ensure that a request relating to the confiscation, or restraining, of the proceeds or instrument of an offence that is a political offence can be refused.)

3.17 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

(Amendments have been made to this Part following the 2009 consultation process to clarify the drafting of these proposals.)

Requests for live video link evidence

3.18 Section 12 of the Mutual Assistance Act deals with requests by Australia for evidence to be taken in a foreign country. 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.

3.19 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.

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

3.21 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.

3.22 Subsection 13(4A) of the Mutual Assistance Act 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. However, there is no corresponding provision dealing with examination or cross-examination of a witness by foreign legal representatives in person. Part 2 would amend existing subsection 13(4A) to 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

3.23 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

(This Division has not been amended following the 2009 consultation process)

3.24 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.

3.25 Section 13A of the Mutual Assistance Act provides a 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 currently cannot be provided to a foreign country under section 13A.

3.26 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 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.

3.27 Under the amendments, the relevant foreign offence would have to carry a specified maximum penalty which meets 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’ 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.

3.28 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.

3.29 Under the 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

(This Division has been amended following the 2009 consultation process to insert an express provision enabling Australia to request a foreign country to use a surveillance device for Australian purposes.)

Requests by Australia

(This proposal has been inserted following the 2009 consultation process)

3.30 Proposed section 15A would provide an express power enabling Australia to request an appropriate authority of a foreign country to authorise the use of a surveillance device in that country and arrange for information obtained pursuant to the use of that device to be sent to Australia.

3.31 The surveillance device could only be requested where it is reasonably necessary to obtain information relevant to the commission of an Australian offence punishable by three or more years imprisonment, or if the use of a surveillance device is reasonably necessary to obtain information relevant to the identity or location of the offenders.

3.32 While Australia is able to make requests for a country to provide this type of assistance under the executive power, the amendment would ensure express provision is made in the legislation, consistent with other types of assistance.

3.33 The Bill does not amend the Mutual Assistance Act to include a corresponding express request provision relating to stored communications. This is because countries tend to obtain this material in different ways, including through search warrants and production orders. Accordingly, Australia will continue to rely on the existing request provisions in the Act in addition to the executive power when making requests for stored communications material.

Requests by foreign countries

3.34 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.

3.35 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 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.

3.36 Under the amendments, the relevant foreign offence would have to carry a maximum penalty which meets 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.

3.37 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
- about any other appropriate matters.

3.38 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 condition 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.

3.39 An undertaking would not be required in relation to a stored communications warrant, as the material obtainable pursuant to a stored communications warrant is different in nature and sensitivity to that which can be obtained pursuant to a surveillance device warrant. Stored communications

warrants enable access to documents such as e-mail records, whereas surveillance device warrants are capable of enabling physical surveillance of persons.

3.40 Under the 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

(This Division has been amended following the 2009 consultation process to include amendments relating to prospective telecommunications data and cost recovery for carriers and carriage service providers.)

Historical telecommunications data

3.41 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.

3.42 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 38C of the Mutual Assistance Act following authorisation by the Attorney-General under section 15. However, historical telecommunications data cannot currently be provided to foreign countries on an agency-to-agency basis.

3.43 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.

3.44 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 there is an assessment of factors such as Australian security or other national interests as well as privacy issues before the data could be disclosed to the foreign country.

Prospective telecommunications data

3.45 Currently, the Telecommunications (Interception and Access) Act enables an authorised officer from an Australian law enforcement agency to authorise a telecommunications carrier to disclose prospective telecommunications data – this is, telecommunications data that comes into existence during the period the authorisation is in force. However, this type of authorisation can only be made in relation to a domestic offence, not a foreign offence.

3.46 On 30 April 2010, the Government announced its intention that Australia accede to the Council of Europe *Convention on Cybercrime*. Division 3 of Part 3 would amend the Telecommunications (Interception and Access) Act to enable the collection of prospective telecommunications data for foreign law enforcement purposes. This would enable Australia to meet the obligations contained in Article 33 of the Convention.

3.47 The amendments would only enable this type of assistance to be provided where the country has made a mutual assistance request and the Attorney-General has authorised provision of the assistance.

3.48 In order to authorise the provision of assistance, the Attorney-General would need to be satisfied that:

- an investigation relating to a criminal matter involving an offence against the law of the foreign country (the requesting country) has commenced in the requesting country, and
- the offence to which the investigation related was punishable by a maximum penalty of imprisonment for three or more years, imprisonment for life or the death penalty.

3.49 If the Attorney-General authorises the assistance, an authorised officer of the AFP would be required to determine whether or not to authorise a carrier or carriage service provider to disclose information or documents. In making this determination, the authorised officer would need to be satisfied that the disclosure was:

- reasonably necessary for the investigation of an offence against a law of a foreign country that is punishable by imprisonment for three or more years, imprisonment for life or the death penalty, and
- appropriate in all the circumstances.

3.50 If an authorised officer was satisfied of these matters and made the authorisation, he or she (or another authorised officer of the AFP) would again be required to be satisfied of these matters before the information or documents could be disclosed to a foreign country.

3.51 ‘Authorised officer of the AFP’ would be defined to include the Commissioner, Deputy Commissioner, or a senior executive AFP employee who has been authorised in writing by the Commissioner.

3.52 The authorisation would remain valid for a period of 21 days. There would be an ability to extend the period for a further 21 days, but no further extensions would be permitted. For an extension to be made, the authorised officer would need to be satisfied that the initial authorisation by the Attorney-General had been made in accordance with the requirements set out above and would also need to be satisfied that the disclosure was still:

- reasonably necessary for the investigation of an offence against a law of a foreign country that is punishable by imprisonment for three or more years, imprisonment for life or the death penalty, and
- appropriate in all the circumstances.

The Attorney-General would not be required to make a second authorisation before an extension could be granted.

3.53 These provisions are designed to reflect, as far as possible, the existing provisions in the Telecommunications (Interception and Access) Act which enable law enforcement agencies to access prospective information documents for domestic purposes.

Secondary use and disclosure of telecommunications data

3.54 The 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.

3.55 Section 182 of the Telecommunications (Interception and Access) Act currently outlines when telecommunications data obtained for a domestic purpose can be used or disclosed for another domestic purpose. The amendments would ensure that telecommunications data obtained for a foreign purpose is also able to be used or disclosed for a domestic purpose.

Division 4—Recovery of costs by carriage service providers etc for providing assistance to Australian law enforcement authorities

(This Division has been added following the 2009 consultation process.)

3.56 Under the *Telecommunications Act 1997*, carriers and carriage service providers are entitled to recover the costs associated with assisting Australian law enforcement agencies on a ‘no profit, no cost’ basis where the assistance is required for the purpose of enforcing Australian criminal laws or Australian laws imposing pecuniary penalties. However, the provisions do not entitle carriers and carriage service providers to cost recovery where the assistance provided is required for the purposes of enforcing foreign criminal laws.

3.57 A number of reforms outlined in this exposure draft legislation would involve obtaining assistance from carriers and carriage service providers pursuant to the Telecommunications (Interception and Access) Act (for example, providing prospective telecommunications data in response to a mutual assistance request, or providing historical telecommunications data on a police to police basis). The amendments in Division 4 would extend the cost recovery regime to requests relating to the enforcement of foreign criminal laws. This would ensure consistency for carriers and carriage service providers regardless of whether they are providing assistance for domestic law enforcement or foreign law enforcement purposes.

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

(This Division has been amended following the 2009 consultation process to clarify the process for providing forensic evidence to a foreign country.)

3.58 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.

3.59 Currently, Australia cannot conduct a compulsory forensic procedure on a suspect in 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.

3.60 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 in 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.

3.61 The 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.

3.62 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 in 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.

3.63 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 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

3.64 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.

3.65 Prior to requesting a suspect to consent to a forensic procedure for a domestic offence, a constable must be satisfied on the balance of probabilities of certain factors including that the person is a suspect and that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence.

3.66 The constable is also required to balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned, against the public interest in upholding the physical integrity of the suspect. In balancing these interests, the constable must consider a range of matters 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.

3.67 However, when determining whether a forensic procedure should be carried out on a suspect in a foreign offence, the constable would be required to instead balance the public interest in Australia providing and receiving international assistance in criminal matters, against the public

interest in upholding the physical integrity of the suspect. In balancing these interests, the constable must consider the same range of matters as need to be considered for a domestic offence.

3.68 A suspect in a domestic offence must 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. A suspect in a foreign offence must be informed of these matters as well as additional matters including the name of the foreign law enforcement agency, what the forensic evidence may be able to be used for and how the forensic evidence would be retained.

3.69 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

3.70 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 amendments to Division 5 would enable forensic procedures to be carried out on a suspect in 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.

3.71 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.

3.72 Part 4 would amend the Mutual Assistance Act so that the Attorney-General would have to authorise the AFP, or the relevant State or Territory police force, to apply to a magistrate for an order for a suspect in a foreign offence to undergo a forensic procedure. 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.

3.73 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.

3.74 Prior to ordering a forensic procedure for a domestic offence, a magistrate must be satisfied on the balance of probabilities of certain factors including that the person is a suspect and that the forensic procedure is likely to produce evidence tending to confirm or disprove that the suspect committed a relevant offence.

3.75 The magistrate is also required to balance the public interest in obtaining evidence tending to confirm or disprove that the suspect committed the offence concerned, against the public interest in upholding the physical integrity of the suspect. In balancing these interests, the magistrate must consider a range of matters such as the seriousness of the circumstances surrounding the commission of the offence, the degree of the suspect's alleged participation, 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.

3.76 However, the amendments to Division 5 would ensure that, when determining whether to order that a forensic procedure should be carried out on a suspect in a foreign offence, a magistrate must instead balance the public interest in Australia providing and receiving international assistance in criminal matters, against the public interest in upholding the physical integrity of the suspect. In balancing these interests, the magistrate must consider the same range of matters as need to be considered for a domestic offence.

Forensic procedures on volunteers, children and incapable persons

Volunteers

3.77 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 amendments to Division 6B would clarify the application of forensic procedures provisions to volunteers in relation to foreign criminal matters. Under Division 6B, a child or incapable person is considered a volunteer if his or her parent or guardian has consented to the procedure.

3.78 A volunteer can only consent to the carrying out of a forensic procedure for a domestic offence after being informed of certain matters including:

- the way in which the forensic procedure is to be carried out
- that the volunteer is under no obligation to undergo the forensic procedure
- that the forensic procedure may produce evidence that might be used in a court of law
- that a legal practitioner may be consulted
- that the volunteer, parent or guardian may at any time withdraw consent, and
- the way in which information obtained following the procedure may be used and stored.

3.79 In addition to these matters, a volunteer would only be able to consent to the carrying out of a forensic procedure for a foreign offence after being informed of the following:

- the name of the foreign law enforcement agency that has made the request
- that forensic evidence resulting from the forensic procedure would be provided to the foreign law enforcement agency
- that the forensic evidence would be able to be used in proceedings in the foreign country
- that the retention of the forensic evidence would be governed by the laws of the foreign country
- that the retention of the forensic evidence would be subject to undertakings given by the foreign law enforcement agency, and

- the content of those undertakings.

3.80 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 – absence of consent

3.81 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 amendments, this mechanism would be made available in relation to foreign criminal matters 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.

3.82 Part 4 would amend the Mutual Assistance Act so that the Attorney-General would have to authorise the AFP, or the relevant State or Territory police force, to apply to a magistrate for an order for a child or incapable person to undergo a forensic procedure in relation to a foreign offence. 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.

3.83 Further, the Attorney-General would 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.

3.84 Following an authorisation by the Attorney-General under the Mutual Assistance Act, a magistrate would be able to order that a child or incapable person undergo a forensic procedure in relation to a foreign criminal matter, 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.

3.85 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 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.

Provision of forensic evidence to a foreign country

3.86 The amendments would insert a new Division 9A into Part 1D of the Crimes Act which would govern the provision of forensic evidence to a foreign country. Where forensic evidence was obtained under an order from a magistrate, the forensic evidence would be able to be provided to the foreign country subject to any directions from the Attorney-General as to how the evidence is to be

provided. Where forensic evidence was obtained voluntarily from a suspect or from a volunteer, the evidence would be provided directly to the foreign law enforcement agency if the Commissioner is satisfied that the foreign law enforcement agency has given appropriate undertakings as to the retention, use and destruction of the evidence and that it is appropriate in all the circumstances of the case to do so.

Requests by Australia for forensic procedures

3.87 Part 4 of Schedule 3 would insert a new provision into the Mutual Assistance Act specifically enabling Australia to request a foreign country to carry out forensic procedures on persons in foreign countries to assist Australian investigations and prosecutions. While Australia is currently able to make requests for a country to provide this type of assistance under the executive power, the amendment would ensure provision is made in the legislation, consistent with other types of assistance.

Part 5—Proceeds of crime

(This Part has not been amended following the 2009 consultation process.)

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

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

3.89 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 amendments.

3.90 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.

3.91 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

3.92 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 fast and fluid nature of proceeds of crime investigations.

3.93 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.

3.94 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 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.

Part 6—Other amendments

(Some minor changes have been made to this Part following the 2009 consultation process.)

Definition of serious offence

3.95 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.

3.96 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 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 in a Commonwealth offence cannot be compelled to undergo a forensic procedure unless the relevant offence is an indictable offence.

3.97 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 assistance in relation to serious corporate offences that may only carry monetary fines as penalties. Two examples of such offences are the cartel offences in sections 44ZZRF and 44ZZRG of the *Competition and Consumer Act 2010*. These proposed offences target the conduct of corporations, so have a maximum penalty expressed in monetary terms, rather than a term of imprisonment.

3.98 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

3.99 Part 6 would also make a range of minor and technical amendments to the Mutual Assistance Act.

- Section 3 would be amended to explain how a foreign currency is to be translated into an Australian dollar amount for the purposes of the Mutual Assistance Act.
- Section 15 would be amended to remove the requirement for the Attorney-General’s authorisation to specify the State or Territory in which an authorised officer must apply for a search warrant. Section 15 would also be amended to clarify that the authorisation can be for one or more search warrants. This would mean that the Attorney-General would only be required to make one authorisation regardless of the jurisdiction in which the evidential material is believed to be located and how many search warrants may be necessary.
- Section 16 would be amended to remove the requirement for the Attorney-General to determine certain facts, such as whether a person is a foreign prisoner, and whether he or she has given consent to being removed from Australia in order to give evidence overseas. The Attorney-General would not have to be satisfied of these matters as they could be established sufficiently on evidence provided to the Department. The Attorney-General would still be required to make arrangements with the foreign country in relation to the request.
- Section 39A would be amended to clarify that the Attorney-General may make a mutual assistance request to a foreign country on behalf of a defendant in criminal appeal proceedings. References to ‘original proceeding’ would be removed, as they create an impression that appeal proceedings are excluded from the provision, which is not the intention of the provision.
- Section 43 would be amended to remove the requirement for documents to be sealed by the foreign country before they can be admitted into proceedings under the Mutual Assistance Act. This would ensure consistency with the provisions of the Foreign Evidence Act, which does not require documents to be sealed by the foreign country. The Foreign Evidence Act only requires testimony obtained from a foreign country to purport to be signed by a judge, magistrate or officer in or of a foreign country to which a request has been made.
- Section 44 would be amended to replace the reference to a \$1,000 fine with a penalty unit amount of 10 penalty units.