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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL SECURITY LEGISLATION AMENDMENT BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Robert McClelland MP)

Abbreviations used in the Explanatory Memorandum

ACC	Australian Crime Commission
ACC Act	*Australian Crime Commission Act 2002*
ADJR Act	*Administrative Decision (Judicial Review) Act 1977*
AFP	Australian Federal Police
AFP Act	*Australian Federal Police Act 1979*
AIC	Australian Intelligence Community
ALRC	Australian Law Reform Commission
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
AUSTRAC	Australian Transaction Reports and Analysis Centre
CEO	Chief Executive Officer
Charter Act	*Charter of the United Nations Act 1945*
DIGO	Defence Imagery and Geospatial Organisation
DIO	Defence Intelligence Organisation
DSD	Defence Signals Directorate
IGIS	Inspector-General of Intelligence and Security
IGIS Act	*Inspector-General of Intelligence and Security Act 1986*
NSI Act	*National Security Information (Criminal and Civil Proceedings) Act 2004*
ONA	Office of National Assessments
PJC-ACC	Parliamentary Joint Committee on the Australian Crime Commission
PJCIS	Parliamentary Joint Committee on Intelligence and Security
PJC-LE	Parliamentary Joint Committee on Law Enforcement
PJC-LE Bill	*Parliamentary Joint Committee on Law Enforcement Bill 2010*
Sheller Committee	Security Legislation Review Committee

NATIONAL SECURITY LEGISLATION AMENDMENT BILL 2010

OUTLINE

This Bill implements a package of reforms to Australia's national security legislation, announced by the Government in August 2009. The package of reforms was subject to extensive public consultation through a Discussion Paper on the proposed amendments. Public consultation on the proposed reforms concluded in October 2009.

Many of the proposed reforms in this Bill will implement the Government's response to several independent and bipartisan parliamentary committee reviews of Australian national security and counter-terrorism legislation, which was tabled in Parliament on 23 December 2008. These reviews are:

- Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (November 2008)
- Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code by the Parliamentary Joint Committee on Intelligence and Security (September 2007)
- Review of Security and Counter-Terrorism Legislation by the Parliamentary Joint Committee on Intelligence and Security (December 2006), and
- Review of Sedition Laws in Australia by the Australian Law Reform Commission (July 2006).

The Bill will primarily amend the *Criminal Code Act 1995* (the Criminal Code), the *Crimes Act 1914* (the Crimes Act), the *Charter of the United Nations Act 1945* (the Charter Act), the *National Security Information (Criminal and Civil Proceedings) Act 2004* (the NSI Act), and the *Inspector-General of Intelligence and Security Act 1986* (the IGIS Act).

Schedule 1 contains proposed amendments to the treason and sedition offences in Division 80 of the Criminal Code in response to recommendations from various reviews.

Schedule 2 includes proposed amendments to Division 102 of the Criminal Code that will:

- amend the definition of 'advocates' in paragraph 102.1(1A)(c) to clarify that an organisation advocates the doing of a terrorist act if the organisation directly praises the doing of a terrorist act in circumstances where there is a *substantial* risk that such praise might have the effect of leading a person to engage in a terrorist act
- amend subsection 102.1(3) to extend the period of a regulation that lists a terrorist organisation from 2 to 3 years
- amend the terrorist organisation listing review provision in section 102.1A to reflect the current name of the Parliamentary Joint Committee on Intelligence and Security, and
- make miscellaneous amendments to definitional provisions within Part 5.3 to implement the Government's policy of ensuring equality of same sex partnerships in Commonwealth legislation.

Schedule 3 will amend Part 1C of the Crimes Act which sets out the investigation powers of law enforcement officers when a person has been arrested for a Commonwealth offence. The amendments will clarify and improve the practical operation of Part 1C, including addressing

issues raised by the findings of the Clarke Inquiry into the Case of Dr Mohamed Haneef (November 2008).

Schedule 4 contains proposed amendments that will amend Part 1AA of the Crimes Act to provide police with a power to enter premises without a warrant in emergency circumstances relating to a terrorism offence where there is material that may pose a risk to the health or safety of the public.

Schedule 5 contains proposed amendments that will modify the search warrant provisions in Part 1AA of the Crimes Act so that, in emergency situations, the time available for law enforcement officers to re-enter premises under a search warrant can be extended to 12 hours, or, where authorised by an issuing authority in exceptional circumstances, a longer time not exceeding the life of the warrant.

Schedule 6 will amend the Crimes Act to include a specific right of appeal for both the prosecution and the defendant against a decision to grant or refuse bail for a person charged with terrorism or other national security offences.

Schedule 7 will amend the Charter Act to implement the Australian Government's response to recommendation 22 of the Parliamentary Joint Committee on Intelligence and Security's Report *Review of Security and Counter-Terrorism Legislation*, tabled in Parliament in December 2006, to improve the standard for listing a person, entity, asset or class of assets. The Schedule will also amend the Charter Act to provide for the regular review of listings under the Charter Act.

Schedule 8 contains amendments to the NSI Act to improve its practical operation and ensure the appropriate protection and disclosure of national security information in criminal and civil proceedings.

Schedule 9 contains proposed amendments to enable the Prime Minister to request the Inspector-General of Intelligence and Security (IGIS) to inquire into an intelligence or security matter relating to any Commonwealth department or agency. This reflects the increasing interaction between a range of Commonwealth departments and agencies and the Australian Intelligence Community on intelligence and security matters. To fully consider an intelligence or security matter, it may sometimes be necessary for the IGIS to consider the role played by a non-AIC department or agency in relation to that matter.

Schedule 10 contains consequential amendments that arise as a consequence of the *Parliamentary Joint Committee on Law Enforcement Bill 2010*, which will establish the Parliamentary Joint Committee on Law Enforcement. This new committee will replace the current Parliamentary Joint Committee on the Australian Crime Commission, and will be responsible for oversight of the Australian Crime Commission and the Australian Federal Police.

FINANCIAL IMPACT STATEMENT

There is no direct financial impact on Government revenue from this Bill.

NOTES ON CLAUSES

Clause 1: Short title

This clause provides that the Bill, when passed, may be cited as the *National Security Legislation Amendment Act 2010*.

Clause 2: Commencement

This clause sets out when the various parts of the Bill commence.

Sections 1 to 3 of the Bill (the short title, the commencement and the schedules provision) and anything in the Bill not covered elsewhere in the table in clause 2 will commence on the day the Act receives Royal Assent.

Part 1 of Schedule 1 to the Bill will repeal existing offences in the *Crimes Act 1914* (the Crimes Act) and will amend existing treason and sedition offences in the *Criminal Code Act 1995* (the Criminal Code). This part will commence the day after the Act receives Royal Assent. Part 2 of Schedule 1 to the Bill, which will insert new offences of urging violence against groups and members of groups into the Criminal Code, will commence on the twenty eighth day after the Act receives Royal Assent. This is to ensure that there is some prior notice before these new offence provisions commence.

Schedules 2 to 7 to the Bill will commence the day after the Act receives Royal Assent. These schedules will amend Part 5.3 of the Criminal Code, amend the investigation powers under Part 1C of the Crimes Act, insert a new emergency entry power and provide greater flexibility for re-entry under a search warrant under Part 1AA of the Crimes Act, amend section 15AA of the Crimes Act to provide for a right of appeal in bail cases, and amend the listing provisions in the *Charter of the United Nations Act 1945*. However, if item 6 of Schedule 1 to the *Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Act 2010* commences before the Act receives Royal Assent, item 21 of Schedule 2 will not commence at all. This is because both item 21 of Schedule 2 and item 6 of Schedule 1 to the *Law and Justice Legislation Amendment (Identity Crimes and Other Measures) Act 2010* both propose to insert a definition of 'de facto partner' into the Dictionary of the Criminal Code.

Schedule 8 to the Bill will amend the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act). Schedule 8, except for items 17, 103 and 107, will commence on the twenty-eighth day after the Act receives Royal Assent. This is to ensure that there is some prior notice before these new provisions, which include offence provisions, commence. Items 103 and 107 will commence on Proclamation, or 6 months from Royal Assent. These items insert two new offences, which provide that a person commits an offence where they engage in conduct which results in contravention of the requirements relating to storage, handling or destruction of national security information, currently outlined in the *National Security Act (Criminal and Civil Proceedings) Regulations 2005*. The substance of these requirements, set out in the *Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings* document, is currently being revised to ensure that they establish clear standards, which are necessary for the imposition of an offence for non-compliance. Accordingly, it is appropriate that these

items, and item 17 which is consequential to these items, commence on Proclamation, after these revisions have been completed.

Schedule 9 to the Bill will amend the *Inspector-General of Intelligence and Security Act 1986* and will commence the day after this Act receives Royal Assent.

Schedule 10 to the Bill includes consequential amendments relating to the establishment of the Parliamentary Joint Committee on Law Enforcement by the Parliamentary Joint Committee on Law Enforcement Bill 2010. If the *Parliamentary Joint Committee on Law Enforcement Act 2010* has commenced when this Bill receives the Royal Assent, Schedule 10 will commence the day after Royal Assent. If the *Parliamentary Joint Committee on Law Enforcement Act 2010* has not received Royal Assent, Schedule 10 will commence on the same day as the commencement of the *Parliamentary Joint Committee on Law Enforcement Act 2010*.

Clause 3: Schedule(s)

This clause makes it clear that the Schedules to the Bill will amend the Acts set out in those Schedules in accordance with the provisions set out in each Schedule.

Schedule 1 – Treason and urging violence

Overview

Schedule 1 contains amendments to the treason and sedition (urging violence) offences in response to recommendations from various reviews. The proposed amendments take into account the recommendations of these reviews and also the input received as a result of public consultation on this Bill.

The treason offences in section 80.1 of the Criminal Code were reviewed by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in 2006 following the review undertaken by the Security Legislation Review Committee (Sheller Committee). The Sheller Committee tabled its report, *Report of the Security Legislation Review Committee* (Sheller Committee Report), in Parliament in June 2006. The PJCIS tabled its report, *Review of Security and Counter-Terrorism Legislation* (2006 PJCIS Report) in Parliament in December 2006.

The sedition offences in section 80.2 of the Criminal Code were reviewed by the Australian Law Reform Commission (ALRC) in 2006 as part of its review of sedition and related laws in Australia (the treason offences were also considered as part of this review). The ALRC report, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC Report), was tabled in Parliament in September 2006.

The ALRC made numerous recommendations to improve and clarify the offences to ensure greater understanding of their operation. The Government accepted the recommendations of the ALRC report, which included removing the term 'sedition' and replacing it with the phrase 'urging violence' and clarifying and modernising elements of the offences. Schedule 1 of this Bill will also extend the offence to cover urging violence against a group or individual on the basis of national and ethnic origin in addition to race, religion, nationality or political opinion.

Part 1 – Amendments commencing day after Royal Assent

Crimes Act 1914

Item 1: Subparagraph 24F(2)(b)(ii)

Item 1 is a consequential amendment to the *Crimes Act 1914* (Crimes Act), required as a result of the amendment to the treason offence and the creation of the new treason offence at section 80.1AA. Subparagraph 24F(2)(b)(ii) of the Crimes Act provides that assisting an enemy at war with the Commonwealth is not an act done in good faith. As the proclamation of an enemy will now form part of the treason offence in paragraph 80.1AA(1)(b) and not the treason offence at paragraph 80.1(1)(e), this item will remove the reference to paragraph 80.1(1)(e) and substitute paragraph 80.1AA(1)(b) in subparagraph 24F(2)(b)(ii) of the Crimes Act.

Item 2: Part IIA (heading)

This item will repeal the current heading of Part IIA of the Crimes Act (which includes a reference to protection of the Constitution) and insert a new heading 'Protection of public and other services'. This will more accurately reflect the content of the Part following the repeal of a number of offences (see item 3).

Item 3: Sections 30A to 30H and 30R

This item will repeal sections 30A to 30H and 30R of Part IIA of the Crimes Act, most of which relate to unlawful associations. These provisions are no longer relevant in the current security environment, and offences within the Criminal Code relating to terrorist organisations adequately address associating with a terrorist organisation. This implements recommendations of both the ALRC and the 1991 *Committee of Review of Commonwealth Criminal Law* (Gibbs Committee). Section 30C, which contains the offence of advocating or inciting to crime, is also proposed to be repealed as it is effectively redundant in light of the offence in subsection 80.2(1).

Criminal Code Act 1995

Item 4: Part 5.1 (heading)

This item will amend the heading for Part 5.1 of the Criminal Code to reflect other proposed amendments to the titles of particular offences, namely substituting "sedition" offences to become "urging violence" offences.

Item 5: Division 80 (heading)

This item will amend the heading for Division 80 of the Criminal Code to reflect other proposed amendments to the titles of particular offences, namely substituting "sedition" offences to become "urging violence" offences.

Item 6: Before section 80.1A

This item will insert a new Subdivision A and clarify that section 80.1A makes provision for preliminary matters.

Item 7: Before section 80.1

This item will create a new Subdivision B dealing with the offence of treason.

Item 8: Subsection 80.1(1)

This item will delete "called treason" from subsection 80.1(1) of the Criminal Code as it is not needed.

Item 9: Paragraphs 80.1(1)(e) and (f)

This item will repeal paragraphs 80.1(1)(e) and (f) of the Criminal Code. The offences contained within these paragraphs have been revised and are proposed to be included in new section 80.1AA (see item 15).

Item 10: Paragraph 80.1(1)(g)

This item is a technical provision to give effect to the amendment made by item 11.

Item 11: Paragraph 80.1(1)(h)

This item will repeal the redundant offence at paragraph 80.1(1)(h) of the Criminal Code of forming an intention to do any act referred to in section 80.1 and manifesting that intention by an overt act, as ancillary offences set out under Part 2.4, Division 11 of the Criminal Code (attempt, complicity and common purpose, incitement and conspiracy) provide equivalent coverage.

Item 12: Subsections 80.1(1A) and (1B)

This item will repeal subsections 80.1(1A) and 80.1(1B) of the Criminal Code as they relate to offences which are proposed to be repealed under items 9 and 11 respectively and are therefore redundant.

Item 13: Paragraphs 80.1(2)(a) and (b)

This item is a technical provision to reflect that treason offences are proposed to be included in a new Subdivision B.

Item 14: Subsection 80.1(5)

This item will repeal subsection 80.1(5) of the Criminal Code as it relates exclusively to an offence that is proposed by item 11 to be repealed and is therefore redundant.

Item 15: After section 80.1

This item will insert a new section 80.1AA into the Criminal Code. It will replace paragraphs 80.1(1)(e) and (f) of the Criminal Code (repealed by item 9) with new offences and implement a number of recommendations made by the PJCIS and ALRC.

Requiring an allegiance element

The traditional underpinning of the concept of treason is a breach of a person's obligation to the Crown and loyalty to Australia. Currently, the treason offences under paragraphs 80.1(1)(e) and (f) of the Criminal Code can be committed by anyone acting anywhere in the world. The 2006 PJCIS Report noted that these offences apply to people who have no allegiance and do not benefit from the protection of the Australian State.

The proposed new paragraphs 80.1AA(1)(f) and (4)(e) of the Criminal Code provide for an allegiance or duty requirement within the treason offence. In order for a person to commit

the offences in proposed new section 80.1AA of the Criminal Code, the person must be a citizen of Australia or a resident of Australia, or must have voluntarily placed himself or herself under the protection of the Commonwealth, or must be a body corporate incorporated under a law of a State or Territory or the Commonwealth.

Proposed subsections 80.1AA(3) and 80.1AA(5) will make it clear that the fault element for paragraphs 80.1AA(1)(f) and 80.1AA(4)(e) of the Criminal Code is 'intention', as defined in subsection 5.2(2). In order to make out the offence, it would therefore be necessary to prove that, at the time of committing the offence, the person intended to, rather than simply being reckless as to the fact: be an Australian citizen or resident; voluntarily place himself or herself under the protection of the Commonwealth; or to be a body corporate incorporated under a law of a State or Territory or the Commonwealth.

Clarifying providing assistance to the enemy

Both the PJCIS and ALRC noted it was possible that the term 'assist' in the treason offence could be given a broad interpretation and that this was not appropriate, given the seriousness of the offence. This item will qualify the treason offences at proposed new paragraphs 80.1AA(1)(d) and (e) and 80.1AA(4)(c) and (d) of the Criminal Code, to the effect that the offences will only apply when a person provides *material* assistance to the enemy. This will clarify that the conduct standard in the proposed new offences in section 80.1AA of the Criminal Code must be conduct that will materially assist the enemy. It reflects the intended operation of the offence by making it clear that, in order to commit the offence, a person must provide assistance to the enemy that is real or concrete.

Ensuring a Proclamation of an enemy is not retrospective

Proposed new subsection 80.1AA(2) of the Criminal Code will clarify that a Proclamation, made for the purposes of paragraph 80.1AA(1)(b) of the Criminal Code, declaring an enemy to be an enemy at war with the Commonwealth, may not be expressed to take effect before the day on which it is made. Proposed subsection 80.1AA(2) of the Criminal Code also provides that a Proclamation may take effect from a day before the day on which it is registered under the *Legislative Instruments Act 2003*, but not before the day on which it is made.

In a national security emergency situation, where a decision is made to declare an enemy to be an enemy at war with the Commonwealth by a Proclamation under paragraph 80.1AA(1)(b) of the Criminal Code, it may be desirable for the Proclamation to take effect immediately. This means that the act of assisting an enemy specified in a Proclamation could become an offence under subsection 80.1AA(1) of the Criminal Code from the time that the Proclamation is made, rather than the time that the Proclamation is registered, which can be several days after the Proclamation has been made.

Proposed subsection 80.1AA(6) replicates current subsection 80.2(9) by providing that the offences in proposed subsections 80.1AA(1) and (4) of proposed section 80.1AA do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature. However, a defendant bears an evidential burden to establish that his or her conduct was engaged in for the purposes of the providing aid of a humanitarian nature.

Item 16: Saving - Proclamations

This item is a technical transition provision that will ensure there is no interruption to the operation of a Proclamation that is in force for the purposes of paragraph 80.1(1)(e) of the Criminal Code, and provides the Proclamation will have the same effect as if it had been made for the purposes of paragraph 80.1AA(1)(b) of the Criminal Code.

Item 17: Before section 80.2

This item inserts a new Subdivision C entitled 'Urging Violence' to replace the subsection previously titled 'Sedition'.

The proposed urging violence offences criminalise the urging of force or violence. While the offences in sections 80.2A and 80.2B of the Criminal Code, in effect, condemn ethno-racially or religiously motivated discrimination, they are serious criminal offences that target conduct that has the potential to impact on the security of the Commonwealth. The offences have been carefully drafted to capture conduct that is criminally culpable. It is desirable for these offences to be located with related offences in Chapter 5 of the Criminal Code.

Item 18: Subsection 80.2(1)

Item 18 repeals the existing sedition offence in subsection 80.2(1) and replaces it with a new offence called 'Urging the overthrow of the Constitution or Government by force or violence'. This new offence will be committed if a person intentionally urges another person to overthrow by force or violence the Constitution, the Government of the Commonwealth, of a State or of a Territory, or the lawful authority of the Government of the Commonwealth, with the intention that force or violence will occur. While section 5.6 of the Criminal Code makes it clear that this offence would include the fault element of intention contained in section 5.2 of the Code, the proposed new offence specifically includes the fault element of intention within the offence to ensure clarity and understanding of the operation of the offence.

The amendment would also add an additional element at paragraph 80.2(1)(b) by requiring that the person intend that the force or violence will occur as a result of the urging.

Item 19: Subsection 80.2(2)

Item 19 will amend subsection 80.2(2) to delete 'first-mentioned' person and replace with 'first' person to ensure clarity and consistency within the section.

Item 20: Subsection 80.2(3)

Item 20 will repeal the existing sedition offence at subsection 80.2(3) and replace it with a new offence called 'Urging interference in Parliamentary elections or constitutional referenda by force or violence'. The amendment will extend the offence to include urging interference by force or violence with lawful processes for referenda, and will include an additional fault element that the person intends that force or violence occur. While section 5.6 of the Criminal Code makes it clear that this offence would include the fault element of intention contained in section 5.2 of the Code, the proposed new offence specifically includes the fault element of intention within the offence to ensure clarity and understanding of the operation of the offence**.**

Item 21: Subsection 80.2(4)

Item 21 contains technical amendments required as a result of amendments to the sedition offences.

Item 22: Subsection 80.2(6)

Item 22 will amend subsection 80.2(6) to delete 'first-mentioned' person and replace with 'first' person to ensure clarity and consistency within the section.

Item 23: At the end of subsection 80.2(6)

Item 23 will add a note to ensure readers are aware that section 80.3 contains a defence for acts done in good faith.

Item 24: Subsections 80.2(7) to (9)

Item 24 will repeal subsections 80.2(7) to (9) which contain the offences relating to the urging of a person to assist an organisation or country engaged in armed hostilities with the Commonwealth or Australian Defence Force (ADF). These sections will be repealed because the treason offences in proposed sections 80.1 and 80.1AA will adequately criminalise action taken by a person to assist an enemy engaged in hostilities against Australia and the ADF.

Item 25: Before section 80.3

Item 25 will create a new Subdivision D containing common provisions for both the treason and sedition subdivisions.

Items 26 to 27: Section 80.3

Items 26 and 27 are technical amendments necessary as a result of other amendments to Part 5.1 of the Criminal Code outlined in this Explanatory Memorandum.

Item 28: At the end of section 80.3

Item 28 will provide additional matters to which a court may have regard when considering a defence under subsection 80.3(1) to the urging violence offences in Subdivision C of Division 80. Section 80.3 contains a defence for acts done in good faith. It lists a number of matters the court may have regard to when considering the defence. The ALRC recommended that, in relation to the urging violence offences (in Subdivision C), the trier of fact should have regard to the context in which the conduct occurred. The proposed new subsection 80.3(3) will provide that, in considering a defence for the urging violence offences, the court may have regard to any matter, including whether the acts were done in relation to artistic work, for genuine academic or scientific purposes, or in the dissemination of news or current affairs.

Item 29: Application

Item 29 is a technical amendment to clarify the operation of proposed new subsection 80.3(3).

Item 30: Section 80.5

Item 30 will repeal section 80.5, which requires that the Attorney-General must give consent before proceedings for an offence against Division 80 may commence. This is consistent with a recommendation by the ALRC.

Item 31: Application

Item 31 will clarify how the proposed amendment repealing section 80.5 will apply. This amendment will only apply to offences committed after the commencement of the new provision. Proceedings for offences against Division 80 committed before the commencement of the new provisions will still require the Attorney-General's consent.

Item 32: Dictionary

Item 32 will inset a definition of 'referendum' in the Criminal Code Dictionary and provide that it has the same meaning as in the *Referendum (Machinery Provisions) Act 1984*.

Part 2 – Amendments commencing 28 days after Royal Assent

Criminal Code Act 1995

Items 33 and 34: Subsections 80.2(5) and (6)

These items will repeal sections 80.2(5) and 80.2(6) which contain the offence of urging violence within the community. These subsections are proposed to be replaced by new sections 80.2A (urging violence against groups) and 80.2B (urging violence against members of groups).

Item 35: At the end of Subdivision C of Division 80

Item 35 will insert new offences of 'urging violence against groups' and 'urging violence against members of groups'. The amendments will extend the urging community violence offence to cover circumstances in which a person urges a group to use force or violence against a group distinguished by national origin or ethnic origin (in addition to existing race, religion, nationality or political opinion).

Under proposed section 80.2A, a person will commit an offence if the person intentionally urges another person or a group to use force or violence against the targeted group, intends that force or violence will occur and is reckless as to whether the targeted group is distinguished by race, religion, nationality, national origin, ethnic origin or political opinion. In addition, under proposed subsection 80.2A(1), the use of force or violence must threaten the peace, order and good government of the Commonwealth. Proposed subsection 80.2A(2) replicates the offence in subsection 80.2A(1), but does not require that the force or violence would threaten the peace, order and good government of the Commonwealth. Accordingly, it carries a lower penalty of 5 years' imprisonment, compared to the penalty of 7 years for subsection 80.2A(1).

Proposed new section 80.2B contains the offence of urging violence against individual members of groups as opposed to groups as a whole. This offence complements the offence of urging violence against groups contained in proposed section 80.2A. Under proposed

section 80.2B, a person will commit an offence if they intentionally urge another person or group to use force or violence against a person, they intend that the force or violence occur and they urge such force or violence by reason of their belief that the person is a member of a group distinguished by race, religion, nationality, national origin, ethnic origin or political opinion.

Similarly to proposed section 80.2A, subsection 80.2B(1) requires that the force of violence threaten the peace, order and good government of the Commonwealth, while subsection 80.2B(2) replicates the offence in subsection 80.2B(1) but does not include this requirement. Accordingly, subsection 80.2B(2) has a lower maximum penalty of 5 years compared to the maximum penalty under subsection 80.2B(1) of 7 years imprisonment. Proposed subsection 80.2B(3) also clarifies that, for the purposes of the offences in proposed subsections 80.2B(1) and 80.2B(2), it is immaterial whether the targeted person is actually a member of the targeted group. The relevant factor is that the person urging the force or violence believes they are.

Both proposed sections 80.2A and 80.2B contain provisions for alternative verdicts. Subsections 80.2A(4) and (5) and 80.2B(5) and (6) provide for the option of an alternative verdict against subsections 80.2A(2) and 80.2B(2) respectively. Subsections 80.2A(2) and 80.2B(2) do not contain the requirement that the force or violence must threaten the peace, order, and good government of the Commonwealth. This means that in both sections 80.2A and 80.2B, where the prosecution is unable to prove this final element of the offence under subsection (1) – which carries a maximum penalty of seven years imprisonment – the defendant may still be found guilty of an offence against subsection (2).

Items 36 and 37: Section 80.4

Item 36 will amend section 80.4 to apply section 15.2 of the Criminal Code (extended geographical jurisdiction – Category B) to offences against subsections 80.2A(2) and 80.2B(2) (Category D is applied to the other offences). This amendment to apply Category B geographical jurisdiction to these offences reflects the fact that these offences are aimed at conduct occurring primarily in Australia. On the other hand, Category D geographical jurisdiction applies whether or not the offence is committed in Australia and wherever the result of the conduct occurs.

Schedule 2 – Terrorism

Overview

Schedule 2 includes amendments to Division 102 of the *Criminal Code Act 1995* (Criminal Code). Division 102 of the Criminal Code contains the definition of a 'terrorist organisation', the process for proscribing terrorist organisations and the terrorist organisation offences.

Part 1 of Schedule 2 will:

- amend the definition of 'advocates' in paragraph 102.1(1A)(c) to clarify that an organisation advocates the doing of a terrorist act if the organisation directly praises the doing of a terrorist act in circumstances where there is a *substantial* risk that such praise might have the effect of leading a person to engage in a terrorist act
- amend subsection 102.1(3) to extend the period of a regulation that lists a terrorist organisation from 2 to 3 years
- amend the terrorist organisation listing review provision in section 102.1A to reflect the current name of the Parliamentary Joint Committee on Intelligence and Security, and

Part 2 of Schedule 2 contains amendments to definitional provisions within Part 5.3 of the Criminal Code to implement the Government's policy of ensuring equality of same sex partnerships in Commonwealth legislation. The majority of this policy was implemented through the enactment of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008*. The proposed amendments ensure that the definitions in the *Acts Interpretation Act 1901* of de facto partner, child, step-parent and step-child apply or are replicated in the Criminal Code. These definitions are important in the Criminal Code as they apply to the terrorist organisation association offence in section 102.8 and to the preventative detention regime in Division 105 of Part 5.3 of the Criminal Code. These definitions form part of important safeguards within the terrorist organisation association offence and preventative detention regime. Part 3 of Schedule 2 contains a related amendment that is contingent upon another Bill that is before the Parliament.

Part 1 - Terrorism

Classification (Publications, Films and Computer Games) Act 1995

Item 1: paragraph 9A(2)(c)

This is a consequential amendment to mirror the change to the definition of 'advocates' in Division 102 of the Criminal Code in item 2.

Section 9A of the Classification (Publications, Films and Computer Games) Act provides that publications, films or computer games that advocate the doing of a terrorist act must be classified 'Refused Classification'. For the purpose of 'advocating the doing of a terrorist act', it uses the same terminology as in subsection 102.1(1A) of the Criminal Code.

Criminal Code Act 1995

Item 2: paragraph 102.1(1A)(c)

This item inserts the word 'substantial' before 'risk' in paragraph 102.1(1A)(c).

Paragraph 102.1(2)(b) of the Criminal Code provides that the Governor-General may make a regulation proscribing an organisation as a terrorist organisation if the Attorney-General is satisfied that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

Currently, paragraph 102.1(1A)(c) of the Criminal Code provides that an organisation advocates the doing of a terrorist act if the organisation directly praises the doing of a terrorist act in circumstances where there is a *risk* that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.

It has always been intended that the risk threshold within the definition of 'advocates' must be substantial. Accordingly, the inclusion of the word 'substantial' clarifies that the risk must be real and apparent on the evidence presented. This amendment is consistent with the language of the Criminal Code in relation to the concept of risk; for example, 'substantial risk' is used in the definition of 'recklessness' in section 5.4 of the Criminal Code.

Item 3: Subsection 102.1(3)

This item will replace the phrase 'second anniversary' with 'third anniversary' in subsection 102.1(3).

Currently under subsection 102.1(3) of the Criminal Code, the listing of an organisation ceases to have effect two years after its commencement, or if the Attorney-General ceases to be satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, whichever occurs first.

The purpose of the automatic expiration is to ensure that if the Government wishes to continue the proscription, the Attorney-General has considered afresh all the relevant information and is satisfied that there is a sufficient factual basis to justify the proscription for a further period.

The proposed amendments to subsection 102.1(3) will provide that a regulation proscribing an entity as a terrorist organisation under the Criminal Code will automatically expire on the third anniversary of the day on which it took effect. This is consistent with a recommendation of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its *Inquiry into the Proscription of 'terrorist organisations' under the Australian Criminal Code* (September 2007). The Committee, which is responsible for reviewing all listings of terrorist organisations (pursuant to section 102.1A of the Criminal Code), concluded that extending the period of a listing regulation from two to three years would offer an adequate level of oversight.

Item 4: Transitional – existing regulations specifying organisations

Item 3 will amend subsection 102.1(3) to extend the period of a regulation that lists a terrorist organisation from 2 to 3 years.

Item 4 will insert transitional provisions so that the proposed amendments to subsection 102.1(3) will apply to listing regulations which are in force at the time the amendment commences. However, the amendment will not apply to such a regulation that has ceased to have effect before the commencement of the section.

Item 5: Subsection 102.1A(1)

This item will update the name of the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in subsection 102.1A(1).

In accordance with section 102.1A of the Criminal Code, when the Government decides to list an organisation as a terrorist organisation, that decision may be publicly reviewed by the PJCIS. Any person who wishes to raise any issues with the decision to list an organisation may submit their objections or concerns to the PJCIS.

At the time of enacting section 102.1A of the Criminal Code, the PJCIS was referred to as the Parliamentary Joint Committee on ASIO, ASIS and DSD.

The proposed amendment will update subsection 102.1A(1) to reflect the current name of the PJCIS.

Item 6: Subsection 102.1A(2)

This item will repeal subsection 102.1A(2).

Subsection 102.1A(2) of the Criminal Code required the PJCIS to conduct a review into the operation, effectiveness and implications of the terrorist organisation proscription provisions in Division 102 of the Criminal Code as soon as possible after the third anniversary of the commencement of the section. The PJCIS conducted this review in 2007 and tabled its report in September 2007. As the statutory review process provided for in subsection 102.1A(2) of the Criminal Code is now complete, the proposed amendment will repeal this provision.

Part 2 - Miscellaneous

Criminal Code Act 1995

Item 7: At the end of section 100.5

Currently, section 100.5 of the Criminal Code provides that the Acts Interpretation Act, as it was in force on the day Schedule 1 to the *Criminal Code Amendment (Terrorism) Act 2003* commenced, applies to this part. As a result, no amendments to the Acts Interpretation Act made after that day apply to this Part.

Item 7 will add subsection 100.5(3) to recognise the new definition of ‘de facto partner’ which was inserted into the Acts Interpretation Act by the *Same-Sex Relationships (Equal*

Treatment in Commonwealth Laws – Superannuation) Act 2008. The new definition of 'de facto partner' encompasses members of both same-sex and opposite-sex de facto relationships. This amendment will implement the Commonwealth Government's policy to remove all discrimination against same-sex couples while the remainder of the Acts Interpretation Act as it was in force at that time will continue to apply.

Items 8 to 10: Definition of 'close family member'

Item 8: Subsection 102.1(1) (paragraph (a) of the definition of 'close family member')

Subsection 102.1(1) of the Criminal Code currently contains the definition of 'close family member'. This definition is important in the context of the terrorist organisation association offence in section 102.8 of the Criminal Code. Subsection 102.8(4) of the Criminal Code provides that the terrorist organisation association offence does not apply if the association is with a 'close family member' and relates only to a matter that could reasonably be regarded (taking into account the person's cultural background) as a matter of family or domestic concern (section 102.8).

Currently paragraph 102.1(1)(a) provides that a close family member consists of the 'person's spouse, de facto spouse or same-sex partner'.

Item 8 will remove the words 'de facto spouse or same sex partner' and replace them with an updated definition of 'de facto partner'. This amendment will align the Criminal Code with the Acts Interpretation Act. The definition of 'de facto partner' in the Acts Interpretation Act applies to de facto relationships whether the parties to the relationship are of the same-sex or opposite-sex.

Items 9 and 10: Subsection 102.1(1)

To avoid doubt, item 10 will insert subsection 102.1(19) to emphasise the definition of 'close family member' located in subsection 102.1(1).

The current definition of 'close family member' could be discriminatory as it may not extend to relationships between a child and their co-mother or co-father's relatives. The policy intention is to ensure same-sex parents and their families are recognised as part of the child's family consistently across Commonwealth legislation. This provision will ensure that the definition of 'close family member' includes relationships traced through the child-parent relationship and will thus ensure that same-sex parents and their families are recognised as 'relatives' of the child.

Item 9 will insert a note at the end of the definition of 'close family member' in subsection 102.1(1) to refer to proposed subsection 102.1(19).

Items 11 and 12: Definition of 'family member'

Item 11: Subsection 105.35(3) (paragraph (a) of the definition of 'family member')

Currently, subsection 105.35(3) of the Criminal Code contains the definition of 'family member'. This definition is important in the context of the preventative detention regime as

section 105.35 contains an essential safeguard by ensuring that a person being preventatively detained has the right to contact family members.

Currently, paragraph 105.35(3)(a) provides that a family member consists of the 'person's spouse, de facto spouse or same-sex partner'.

This item will remove the words 'de facto spouse or same-sex partner' and replace them with an updated definition of 'de facto partner'. This amendment will align the Criminal Code with the Acts Interpretation Act. The definition of 'de facto partner' in the Acts Interpretation Act applies to de facto relationships whether the parties to the relationship are of the same sex or opposite sexes. This amendment will ensure that the Commonwealth Government's policy of ensuring equality of same-sex partnerships is replicated in the Criminal Code.

Item 12: At the end of section 105.35

This item will insert subsection 105.35(4) to ensure that the definition of 'family member' in subsection 105.35(3) includes relationships that are traced through the child-parent relationship.

The current definition of 'family member' could be discriminatory as it may not extend to relationships between a child and the child's co-mother or co-father's relatives. The policy intention is to ensure same-sex parents and their families are recognised as part of the child's family consistently across Commonwealth legislation.

Item 13: Subsections 272.3(2) and (3)

Items 21, 22 and 24 in Part 2 of Schedule 2 will insert the definitions of 'de facto partner', 'parent' and 'step-parent' into the Dictionary in the Criminal Code. Given the definition of 'de facto partner', 'parent' and 'step-parent' in this Bill will apply more generally to the Criminal Code, the definition of 'de facto partner,' 'parent' and 'step-parent' currently in section 272.3 will no longer be necessary. Accordingly, item 13 will delete the definitions of 'de facto partner', 'parent' and 'step-parent' in section 272.3.

Items 14 to 19: Subsection 390.1(1) (definitions of 'child', 'close family member', 'de facto partner', 'parent', 'stepchild' and 'step-parent')

Subsection 390.1(1) currently contains the definitions of 'child', 'de facto partner', 'parent,' 'stepchild' and 'step-parent'.

Items 20 to 24 will insert the definitions of 'child', 'de facto partner', 'parent', 'step-child' and 'step-parent' into the Dictionary of the Criminal Code. Given these definitions will apply more generally to the Criminal Code, items 14 and 16 to 19 will repeal these definitions in subsection 390.1(1) as they will no longer be necessary.

Subsection 390.1(1) also currently has a definition of 'close family member.' Item 15 will amend paragraph (c) of this definition to substitute the word 'stepchild' for 'step-child.' This is consequential to item 2 which will insert the definition of 'step-child' into the Dictionary of the Criminal Code.

Items 20 to 24: Dictionary in the Criminal Code

Item 20: New definition of 'child'

This item will insert the definition of 'child' in the Criminal Code dictionary. The effect of this definition will be that in addition to children within the ordinary meaning of the term, the provision will include a new class of children within the meaning of the *Family Law Act 1975* as amended by the *Family Law Act Amendment (De Facto Financial Matters and Other Measures) Act 2008*. The *Family Law Act 1975* has rules about the parentage of children, including those born following artificial conception procedures. The meaning of 'child' in the *Family Law Act 1975* includes children:

- born to a woman as the result of an artificial conception procedure while that woman was married to, or was a de facto partner of another person (whether of the same or opposite sex), and
- who are children of a person because of an order of a State or Territory court made under a State or Territory law prescribed for the purposes of section 60HB of the *Family Law Act 1975*, giving effect to a surrogacy agreement.

This will ensure that the children of same-sex couples are recognised consistently across Commonwealth laws.

Item 21: New definition of 'de facto partner'

This item will insert the definition of 'de facto partner' in the Criminal Code. The definition will have the meaning given by the Acts Interpretation Act.

Item 22: New definition of 'parent'

This item will insert a definition of 'parent' into the Criminal Code Dictionary.

Item 23: New definition of 'step-child'

This item will insert a definition of 'step-child' into the Criminal Code Dictionary. The ordinary meaning of 'step-child' is a 'child of a husband or wife by a former union'. As same-sex couples cannot marry, the child of one member of the couple by a former relationship cannot be considered to be the other member of the couple's step-child. This is also the case for children of opposite-sex de facto partners by a former relationship.

The proposed amendment will expand the definition of 'step-child' to include a child of an opposite-sex or same-sex de facto partner by a former relationship. This is achieved by providing that a 'step-child' includes a child who would be the step-child of a person who is the de facto partner of a parent of the child, except that the person and the parent are not legally married. It is not necessary to establish that the person and the parent are capable of being legally married. The definition is inclusive and does not limit who is a step-child for the purposes of the Criminal Code. The insertion of this definition ensures that step-children of both opposite-sex and same-sex de facto relationships are recognised for the purposes of the Criminal Code.

Item 24: New definition of ‘step-parent’

This item will insert the definition of ‘step-parent’ into the Criminal Code dictionary. The ordinary meaning of ‘step-parent’ is a ‘spouse of a parent of a child by a former union’. As same-sex couples cannot marry, a same-sex de facto partner of a parent cannot be considered to be a step-parent of a child born into a former relationship of the parent, de facto or otherwise. This also applies to opposite-sex de facto partners of parents of children who are born into a former relationship of the birth parent, de facto or otherwise.

The proposed amendment will expand the definition of ‘step-parent’ (where relevant) to include a same-sex or opposite-sex de facto partner of a parent of a child by a former relationship. This is achieved by providing that the partner is a ‘step-parent’ where that partner would be the child’s step-parent, except that the partner and the parent are not legally married. It is not necessary to establish that the partner and the parent are capable of being legally married.

The definition is inclusive and does not limit who is a step-parent for the purposes of the Criminal Code. The insertion of this definition ensures that step-parents of children of both opposite-sex and same-sex de facto relationships are recognised for the purposes of the Criminal Code.

Schedule 3 – Investigation of Commonwealth offences

Overview

At common law, a person must be brought before a judicial officer following arrest as soon as reasonably practicable. A person who is arrested may be detained only for the purpose of bringing the person before a judicial officer to be dealt with according to law. This common law principle was restated in *Williams v R* [1987] HCA 36; (1986) 161 CLR 278.

In *Williams*, the High Court looked at the issue of whether a suspect, after his arrest, was detained longer than was reasonably necessary to enable him to be brought before a magistrate. The relevant State law had provided that the suspect should be taken before a justice as soon as practicable. The High Court held that 'as soon as practicable' gave no power to question an arrested person about the offence for which they had been arrested or other offences and did not make justifiable a delay which resulted only from the fact that the arresting officers wished to question them.

Following the High Court decision in *Williams*, Part 1C was inserted into the *Crimes Act 1914* (Crimes Act) to make it clear that an arrested person may be detained, prior to being brought before a magistrate or other judicial officer, for the purpose of:

- investigating whether that person committed the offence for which they were arrested, and/or
- investigating whether the person committed another Commonwealth offence that an investigating official suspects them of committing.

Part 1C provides a framework for how a person can be detained and questioned once they have been arrested for a Commonwealth offence. It also contains important investigatory safeguards to balance the practical consideration that police should be able to question a suspect about an offence before they are brought before a judicial officer.

Part 1C was amended in 2004 by the *Anti-Terrorism Act 2004*. The purpose of the amendments was to provide for a longer investigation period for investigations of terrorism offences and provide for additional types of time which were excluded from the investigation period. Rather than creating a separate regime for the investigation of terrorism offences, the terrorism provisions were built into the existing Part 1C structure with many of the provisions being based on the existing provisions in Part 1C.

The provisions in Part 1C were considered by the Hon John Clarke QC, who was appointed by the Commonwealth Attorney-General to conduct an independent inquiry into the case of Dr Mohamed Haneef. Mr Clarke produced a Report (the Clarke Report) on his inquiry, which was tabled in Parliament on 23 December 2008. One aspect of the Report looked at deficiencies in the relevant laws of the Commonwealth that were connected to Dr Haneef's case, including Part 1C of the Crimes Act.

Schedule 3 will amend Part 1C in response to the findings in the Clarke Report. The proposed amendments will clarify the original policy intent of the terrorism investigation powers and improve the practical operation of Part 1C. The proposed amendments are designed to achieve the following general objectives:

- clarify the interaction between the power of arrest without warrant under section 3W with the powers of investigation under Part 1C

- set a maximum 7 day limit on the amount of time that can be specified by a magistrate and disregarded from the investigation period when a person has been arrested for a terrorism offence ('specified disregarded time')

- clarify how the investigation period and time that is disregarded from the investigation period are calculated, and

- clarify the procedures that apply when making an application to extend the period of investigation or apply for a period of specified disregarded time, including the enhancement of safeguards.

Crimes Act 1914

Item 1: Subsection 23B(1) - definition of 'arrested'

This item will repeal the definition of 'arrested' in existing section 23B(1) and substitute a revised definition.

The powers of detention under Part 1C only apply where the person is under a valid state of arrest. Currently, subsection 23B(1) provides that a person is 'arrested' if the person is arrested for a Commonwealth offence and the person's arrest has not ceased under subsection (3) or (4). Subsection 23B(3) provides that the person ceases to be arrested if the person is remanded in respect of that offence. Subsection 23B(4) provides that the person ceases to be arrested when an investigating official believes that the person is taking part in covert investigations and those investigations are being conducted by the official for the purpose of investigating whether another person has been involved in the commission of an offence or suspected offence.

The proposed revised definition will also provide that a person is arrested if 'the person has not been released' to make it clear that a person could cease to be arrested in other circumstances. For example, the person could be released under subsection 3W(2) which provides for the release of an arrested person if the constable in charge of the investigation no longer believes on reasonable grounds that the person committed the offence.

These proposed amendments will, in conjunction with the more substantial amendments to existing sections 23C and 23CA (see items 9, 10 and 16), clarify that a person is not arrested for a Commonwealth offence if the person has been released under subsection 3W(2).

Item 2: Subsection 23B(1) - new definition of 'authorising officer'

This item will insert a new definition of 'authorising officer'.

Currently, if a person is arrested for a terrorism offence, an investigating official may apply for an extension of the investigation period under section 23DA or for a specified period of time to be disregarded from the investigation period under section 23CB.

Item 16 will include an additional safeguard so that before an investigating official may make one of these applications, the application must be approved by an authorising officer.

Item 2 will define an authorising officer as the Commissioner, the Deputy Commissioner or a member or special member of the Australian Federal Police (AFP) of or above the rank of superintendent, where the investigating official is from the AFP. An authorising officer could also be a member of a State or Territory police force holding an equivalent rank (State police as well as the AFP utilise the terrorism provisions under Part 1C).

Item 3: Subsection 23B(1) - definition of 'investigation period'

This item contains a consequential amendment that will amend the definition of 'investigation period' by omitting reference to section '23CA' and substituting it with section '23DB'. This is because section 23CA will be replaced by proposed section 23DB in item 16.

Item 4: Subsection 23B(1) - definition of 'judicial officer'

This item will relocate the definition of 'judicial officer' at the beginning of Part 1C so that the term is located with the other definitions that apply to Part 1C.

'Judicial officer' is currently defined within subsections 23C(9) and 23CA(10) to mean a magistrate, justice of the peace or a person authorised to grant bail under the law of the State or Territory in which the person was arrested.

The definition of 'judicial officer' in item 4 will replicate this current definition.

Item 5: Subsection 23B(1) – definition of 'serious Commonwealth offence'

This item will re-locate the definition of 'serious Commonwealth offence' so that it is located with other relevant definitions at the beginning of Part 1C.

It reflects the current definition of 'serious Commonwealth offence' contained in existing subsection 23D(6).

Item 6: Subsection 23B(1) - definition of 'under arrest'

This item will repeal and substitute the definition of 'under arrest' so that it is consistent with the revised definition of 'arrested' in item 1.

Item 7: Subsection 23B(3)

This item is a consequential amendment because the definition of 'judicial officer' will be centrally relocated to the beginning of Part 1C (see item 4).

Item 8: Before Section 23C

This item will insert a new Subdivision A – Non-terrorism offences into Division 2 of Part 1C.

Currently, Division 2 of Part 1C (Powers of detention) includes provisions relating to the investigation of both terrorism and non-terrorism offences. This is because the terrorism provisions were built into the existing Part 1C provisions. To facilitate a clearer understanding of the provisions, the terrorism and non-terrorism provisions in Division 2 of Part 1C will be separated into two separate subdivisions. Subdivision A will deal with the investigation of non-terrorism offences and Subdivision B will deal with the investigation of terrorism offences.

This item will also change the current heading to existing section 23C to reflect that this provision deals with the period of investigation if a person has been arrested for a non-terrorism offence. This title more accurately reflects the nature of the section.

Item 9: At the end of subsection 23C(1)

This item will add a note at the end of subsection 23C(1).

Existing subsection 23C(1) provides that the provisions in section 23C, which allow a person to be detained, only apply if a person is arrested for a Commonwealth offence (other than a terrorism offence).

There has been some uncertainty as to how the power of arrest under existing section 3W interacts with section 23C. Subsection 3W(1) provides that a constable may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds that the person has committed or is committing a Commonwealth offence and that proceedings by summons against the person would not achieve one or more specified purposes, including ensuring the appearance of the person before a court in respect of the offence. Subsection 3W(2) provides that if the constable in charge of the investigation ceases to hold this belief, then the person must be released.

The proposed new note under subsection 23C(1) will reinforce that a person is not arrested for a Commonwealth offence if the person has been released under subsection 3W(2). This will make it clear that a person cannot be detained under section 23C if the person has been released under subsection 3W(2). This proposed amendment is part of a broader set of amendments that will clarify the relationship between section 3W and Part 1C (see item 10).

Item 10: Subsections 23C(2) and (3)

This item will repeal subsections 23C(2) and 23C(3) and replace them with new subsections 23C(2), (2A) and (3).

Currently, subsection 23C(2) provides that a person may be detained for the purpose of investigating:

- whether the person committed the offence for which they were arrested and/or
- whether the person committed another offence that an investigating official reasonably suspects the person to have committed.

If a person has been arrested under subsection 3W(1) for a Commonwealth offence, section 3W(2) provides that if the constable in charge of the investigation ceases to hold a reasonable belief that the person has committed the offence then the person must be released.

The Clarke Report suggested it is possible for some to misinterpret the second limb in subsection 23C(2) to mean that once a person is arrested, the person can be detained under the second limb regardless of whether the requisite belief under section 3W is maintained.

Proposed new subsection 23C(2) is based on the existing subsection but is designed to make it clear that a person may only be detained under that subsection *while arrested for the Commonwealth offence*. If a person is released under subsection 3W(2) the person may not be detained under subsection 23C(2) because they will no longer be arrested (see the revised definition of 'arrested' at item 1).

Proposed paragraph 23C(2)(a) will provide that the person may, while arrested for the Commonwealth offence, be detained for the purpose of investigating whether the person committed the offence.

Proposed paragraph 23C(2)(b) will provide that the person may, while arrested for the Commonwealth offence, be detained for the purpose of investigating whether the person committed another Commonwealth offence that an investigating official reasonably suspects the person has committed. The 'reasonable suspicion' requirement in paragraph 23C(2)(b) is a safeguard to ensure that a person could not be questioned about any other kind of offence if there was no basis or suspicion that the person committed that offence.

Proposed subsection 23C(2A) provides that the person must not be detained under subsection 23C(2) once the investigation period has ceased. To avoid doubt, it will also specify that this provision will not affect any other power to detain the person under other legislative regimes. This may include, for example, provisions which allow a person to be detained under State or Territory legislation or the Commonwealth preventative detention regime in Part 5.3 of the Criminal Code.

Proposed subsection 23C(3) reformulates the existing subsection 23C(3) so that if a person is not released within the investigation period, the person must be brought before a judicial officer within the investigation period or, if it is not practicable to do so within the investigation period, as soon as practicable after the end of the investigation period.

Item 11: Subsection 23C(4)

This item will omit reference to 'section 23D' and substitute 'section 23DA'. This amendment is consequential to the proposed repeal of existing section 23D and insertion of new proposed section 23DA (item 15).

Item 12: Paragraph 23C(6)(b)

This item will omit reference to 'section 23CA' and substitute 'section 23DB'. This amendment is consequential to the proposed repeal of existing section 23CA and insertion of new section 23DB (item 16).

Item 13: Subsection 23C(7)

This item will repeal subsection 23C(7) and substitute a reformulated version of subsection 23C(7).

Existing and proposed new section 23C sets out the period of time that a person, who has been arrested for a Commonwealth non-terrorism offence, can be detained for investigation purposes. The investigation period begins when the person is arrested and can last for a reasonable time, up to a maximum of four hours. If the person has been arrested for a serious Commonwealth non-terrorism offence, the investigation period may be extended for a period not exceeding 8 hours and must not be extended more than once. This amounts to a total maximum investigation period of 12 hours.

However, subsection 23C(7) currently provides for periods of time (often referred to as 'dead time' or 'disregarded time') that are disregarded in the calculation of the investigation period. Generally, the purpose of disregarded time is to suspend or delay questioning to ensure that a proper pre-charge interview can take place. The provisions recognise that there needs to be some flexibility in the maximum time limit for the investigation period to balance two competing considerations – the reasonable requirements of law enforcement and the protection of civil liberties of people who have been arrested for, but not yet charged with, a criminal offence. The types of time that can be disregarded from the investigation period fall into two general categories.

The first category is where questioning of the person is suspended or delayed because it cannot occur, or should not occur, for the benefit of the suspect. For example, a person must not be questioned during a forensic procedure. This time is excluded from the investigation period to prevent a situation where a forensic procedure is conducted early in the investigation period and the investigators lose all of their remaining questioning time. Questioning also cannot occur for a reasonable time if the arrested person has requested and arranged for a legal practitioner to attend, but the legal practitioner has not yet arrived at the place of questioning. Questioning of a suspect may also be suspended or delayed to allow for the suspect to rest, recuperate or receive medical attention. This takes away any incentive for investigating officials to rush the suspect in exercising these rights if they were not excluded from the investigation period.

The second category relates to complying with requirements of the legislation or procedural aspects of the investigation. For example, the time taken to make an application to extend the investigation period can be excluded from the investigation period. This is intended to prevent a situation where the investigation period runs out while a judicial officer is considering whether to grant an extension of the investigation period. There may also be situations where it is impractical to question a person when dealing with the logistical or procedural aspects of the investigation. For example, the time that is spent arranging and conducting an identification parade, or the time that is reasonably required to transport the suspect from the place they are arrested to the place where they are questioned. If these events affect the ability to properly question a person, it would be unfair if the investigation period were to include the time it took for these events to occur.

Overall, the fixed investigation period, coupled with the time that can be excluded from that period, provides a statutory framework for what is reasonable conduct in the course of investigating a person for a Commonwealth offence.

Proposed new subsection 23C(7) will replicate all the existing categories of time that may be disregarded from the investigation period and reinforce that the time may only be disregarded if it is a reasonable period during which questioning of the person is suspended or delayed.

However, the amendments will clarify two issues identified in the Clarke Report about how disregarded time may be calculated.

First, there is some uncertainty about how disregarded time should be calculated if more than one event under subsection 23C(7) occurs at the same time. Proposed new subsection 23C(7) will clarify that questioning of the person may be suspended or delayed for *one or more of the reasons* outlined in paragraphs (a) through (l). This will put beyond doubt that the events outlined in paragraphs (a) through (l) may occur at the same time. However, if periods of disregarded time occur simultaneously, any overlapping time can only be disregarded once from the investigation period.

Second, there is some uncertainty about whether it is possible for investigating officials to resume questioning during a period of disregarded time. Many of the events listed in existing and proposed subsection 23C(7) are circumstances when it would simply not be possible to question a person. For example, it is not possible to question a person while a forensic procedure is taking place. However, there may be times when an event under subsection 23C(7) occurs, but there is no reason to suspend or delay the questioning of the person. For example, a magistrate may decide to take several hours before making a determination as to whether to extend a period of investigation. Under proposed paragraph 23C(7)(h) this time could be disregarded. However, there may be no reason why questioning could not occur during this time. Proposed subsection 23C(7A) will clarify that it is only when the questioning of the person is suspended or delayed that the time can be disregarded from the investigation period. Proposed subsection 23C(7A) will provide that subsection 23C(7) does not prevent the person being questioned during a time covered by the events listed in subsection 23C(7). However, if the person is questioned during such an event, the time must count as part of the investigation period. The proposed amendment could not be used as a way to extend the period of investigation time. For example, if investigators question a suspect during a time that falls under paragraph 23C(7)(h), then that questioning time counts towards the four hour investigation time allowed under section 23C or as extended.

However, proposed subsection 23C(7A) is not intended to affect the rights of individuals or obligations of investigating officials. Proposed section 23C(7A) does not suggest, for example, that the prohibition against questioning a person during a forensic procedure should be overridden. Nor does it override the requirement to delay questioning until a person's legal representative arrives. It simply clarifies that when questioning is able to occur, the investigation period should continue to run.

Item 14: Subsection 23C(9)

This item will repeal subsection 23C(9) which currently defines 'judicial officer' for the purpose of section 23C. Item 4 will relocate the definition of a 'judicial officer' to the beginning of Part 1C so that the term is centrally located with other definitions specific to Part 1C.

Item 15: Sections 23CA to 23E

This item will repeal sections 23CA, 23CB, 23D, 23DA and 23E.

Existing sections 23CA, 23CB and 23DA relate to the investigation of terrorism offences and will be reformulated into new Subdivision B (see item 16).

Existing section 23E is an evidentiary provision that will be reformulated into Subdivision C (see item 16).

Existing section 23D sets out the process for how the investigation period may be extended if the person has been arrested for a non-terrorism offence. Item 15 will repeal this section and replace it with new subsections 23D and 23DA. There will be two key differences between the existing and new process. The first is that only a magistrate will be able to grant an extension of the investigation period. The second is several amendments to ensure that sufficient procedural safeguards are in place when an investigating official makes an application to extend the investigation period.

Subsection 23D – Application to extend the investigation period

Proposed subsection 23D(1)

Currently, an application for an extension of the investigation period for non-terrorism offences must be made to and granted by a magistrate, any justice of the peace or a bail justice.

Historically, justices of the peace and bail justices were included in the category of persons who could perform this function on the basis that it may be difficult to secure the services of a magistrate in urgent circumstances. This is less of a concern in today's society. Whilst magistrates have expertise in dealing with a large portion of criminal issues and are therefore well suited to this role, the arguments for a justice of the peace or bail justice to perform this role are less compelling.

Proposed subsection 23D(1) will provide that an application for an extension of the investigation period can only be made to, and granted by, a magistrate. Although magistrates are the only category of persons who will be able to perform this role, this function is not judicial or incidental to a judicial function. Magistrates perform this role in their personal capacity.

Proposed subsection 23D(2)

Proposed subsection 23D(2) reflects existing subsection 23D(3) which provides for the application to extend the investigation period to be made before the magistrate, by telephone or in writing.

Proposed subsection 23D(3)

Currently, there is no requirement for an application to extend the investigation period to include any particular statements or information. Proposed new subsection 23D(3) will require the application to include certain information to ensure the magistrate is able to appropriately consider whether to grant the extension or not. For example, the application will need to include the reasons why the investigating official believes the investigation period should be extended.

Proposed subsection 23D(4)

Proposed subsection 23D(4) is an avoidance of doubt provision that will clarify that proposed subsection 23D(3) does not require information to be included in the application if disclosure of that information would be likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act* 2004 (NSI Act)), be protected by public interest immunity, put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community, law enforcement or intelligence officers.

Proposed subsections 23D(5) and 23D(6)

Currently, there is no requirement for an investigating official to provide a copy of the application, or information pertaining to it, to the arrested person or their legal representative. Proposed subsection 23D(5) will require that before an application for an extension of the investigation period is considered by a magistrate, the investigating official must, if the application is made in writing, provide a copy of the application to the person or their legal representative. If the application is not made in writing (i.e. by telephone or in person before the magistrate), then the investigating official must inform the person or their legal representative of all matters or information in the application (other than information of a kind mentioned in subsection 23D(4)).

Proposed subsection 23D(6) will also provide that if the application contains any information of the kind listed in subsection 23D(4), the investigating official may remove it from any copy of the application that is provided to the person or to their legal representative. This is consistent with provisions contained within subsections 104.12A(3) and 104.23(3A) of the Criminal Code which relate to information that must be given to a person in relation to a control order.

Proposed subsection 23D(7)

Proposed subsection 23D(7) will provide that the arrested person or their legal representative may make representations to the magistrate about the application (and proposed paragraph 23D(5)(b) requires the investigating official to so inform the person).

Collectively, the purpose of these amendments is to ensure that the arrested person and or their legal representative are able to make appropriate representations to the magistrate about the application, should they wish to do so.

<u>Proposed section 23DA - Extension of the investigation period</u>

Proposed section 23DA will set out how a magistrate may extend the investigation period. It is based on the process set out in existing section 23D.

Proposed subsection 23DA(1)

Proposed subsection 23DA will apply if a person is arrested for a serious Commonwealth offence (other than a terrorism offence) and an application to extend the investigation period has been made to a magistrate in respect of the person.

Proposed subsection 23DA(2)

Proposed subsection 23DA(2) will replicate existing subsection 23D(4) to make it clear that an application for the extension of the investigation period in relation to non-terrorism offences can only be granted by a magistrate by signed written instrument if the magistrate is satisfied that the factors listed in paragraphs (a) through (d) have been met.

Proposed subsection 23DA(3)

Proposed subsection 23DA(3) is based on existing subsection 23D(4A). The subsection will, subject to proposed new subsection 23DA(4), continue to provide for what the instrument must set out.

Proposed subsection 23DA(4)

Proposed subsection 23DA(4) will clarify that proposed subsection 23DA(3) does not require information to be included in the instrument if disclosure of that information would be likely to prejudice national security (within the meaning of the NSI Act), be protected by public interest immunity, put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community, law enforcement or intelligence officers.

Proposed subsection 23DA(5)

Proposed paragraph 23DA(5)(a) is based on existing subsection 23D(4B) and will continue to require the magistrate to provide the investigating official with a copy of the written instrument as soon as practicable after signing it. Proposed paragraph 23DA(5)(b) will provide that if the instrument was made as a result of an application made by telephone, telex, fax or other electronic means, the magistrate must inform the investigating official of the matters included in the instrument. The proposed note at the end of subsection 23DA(5) will note that the provisions in proposed section 23E will apply if the magistrate informs the investigating official under paragraph 23DA(5)(b) (see item 16).

Proposed subsection 23DA(6)

Currently, there is no specific requirement for an investigating official to provide a copy of the instrument granting the extension of the investigation period for a non-terrorism offence to an arrested person or their legal representative. Proposed paragraph 23DA(6)(a) will provide that an investigating official must provide the detained person or their legal representative with a copy of the instrument under proposed paragraph (5)(a) as soon as practicable after receiving it from the magistrate. Proposed paragraph 23DA(6)(b) will provide that if the instrument was made as a result of an application made by telephone, telex, fax or other electronic means, the investigating official must inform the detained person or their legal representative of the matters included in the instrument as soon as practicable after being informed of them under proposed paragraph 23DA(5)(b).

Proposed subsection 23DA(7)

Proposed subsection 23DA(7) will replicate existing subsection 23D(5), which provides that the investigation period may be extended for a period not exceeding 8 hours and must not be extended more than once.

Item 16: At the end of Division 2 of Part 1C

This item will insert a new Subdivision B (Terrorism offences) into Division 2 of Part 1C.

Currently, Division 2 of Part 1C (Powers of detention) includes provisions relating to the investigation of both terrorism and non-terrorism offences. This is because the terrorism provisions were built into the existing Part 1C provisions. To facilitate a clearer understanding of the provisions, the terrorism and non-terrorism provisions in Division 2 of Part 1C will be separated into two separate subdivisions. Subdivision A will deal with the investigation of non-terrorism offences and Subdivision B will deal with the investigation of terrorism offences.

Item 15 will repeal existing sections 23CA, 23CB and 23DA. They relate to the investigation of terrorism offences and will be reformulated and inserted into new Subdivision B.

Proposed subsection 23DB – period of investigation

Item 16 will insert proposed new section 23DB. It is based on existing section 23CA with some modifications.

Proposed subsection 23DB(1)

The note at the end of proposed subsection 23DB(1) is designed to clarify that a person must be under a valid state of arrest for a terrorism offence for the section to apply. Existing subsection 23CA(1) provides that the provisions in section 23CA, which allow a person to be detained, only apply if a person is arrested for a terrorism offence. There has been some uncertainty as to how the power of arrest under existing section 3W interacts with section 23C.

Subsection 3W(1) provides that a constable may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds that the person has committed or is committing a Commonwealth offence and that proceedings by summons against the person would not achieve one or more specified purposes, including ensuring the appearance of the person before a court in respect of the offence. Subsection 3W(2) provides that if the constable in charge of the investigation ceases to hold this belief, then the person must be released.

The note under proposed subsection 23DB(1) will reinforce that a person is not arrested for a terrorism offence if the person has been released under subsection 3W(2). This will make it clear that a person cannot be detained under section 23DB if the person has been released under subsection 3W(2). This proposed amendment is part of a broader set of amendments that will clarify the relationship between section 3W and Part 1C (see items 9 and 10).

Proposed subsection 23DB(2)

Currently, subsection 23CA(2) provides that if a person is arrested for a terrorism offence, the person may be detained for the purpose of investigating:

- whether the person committed the terrorism offence for which they were arrested, and/or

- whether the person committed another terrorism offence that an investigating official reasonably suspects the person to have committed.

If a person has been arrested under subsection 3W(1) for a Commonwealth offence, subsection 3W(2) provides that if the constable in charge of the investigation ceases to hold a reasonable belief that the person has committed the offence then the person must be released.

The Clarke Report suggested it is possible for some to misinterpret the second limb in subsection 23CA(2) to mean that once a person is arrested, the person can be detained under the second limb regardless of whether the requisite belief under section 3W is maintained.

Proposed new subsection 23DB(2) is modelled on existing subsection 23CA(2) but is designed to make it clear that a person may only be detained under that subsection *while arrested for the terrorism offence*. If a person is released under subsection 3W(2) the person may not be detained under subsection 23DB(2) because they will no longer be arrested (see the revised definition of 'arrested' at item 1).

Proposed paragraph 23DB(2)(a) will provide that the person may, while arrested for the Commonwealth offence, be detained for the purpose of investigating whether the person committed the offence.

Proposed paragraph 23DB(2)(b) will provide that the person may, while arrested for the terrorism offence, be detained for the purpose of investigating whether the person committed another Commonwealth offence that an investigating official reasonably suspects the person has committed. This differs from the existing paragraph 23CA(2)(b), which is limited to terrorism offences. Terrorist activity can often be linked to or overlap with other criminal activity including, for example, identity and credit card fraud offences. It is likely that future counter-terrorism investigations will involve an overlap of both terrorism and non-terrorism offences. Proposed paragraph 23DB(2)(b) will enable investigators to pursue the investigation of both the terrorism and non-terrorism offences together under the one regime. However, the person will only be able to be investigated for a non-terrorism offence under the terrorism offence regime if the person is under a valid state of arrest for a terrorism offence. The proposed amendment will not enable the suspect to be detained, or an extension of the investigation period sought, only on the basis of investigating the non-terrorism offence. The amendment is simply designed to remove an arbitrary distinction that prevents the simultaneous investigation of terrorism and related non-terrorism offences while a person is arrested for a terrorism offence.

Proposed subsection 23DB(3)

Proposed subsection 23DB(3) provides that the person must not be detained under subsection 23DB(2) once the investigation period has ceased. To avoid doubt, it will also specify that this provision will not affect any other power to detain the person under other legislative regimes. This may include, for example, provisions which allow a person to be detained under State or Territory legislation.

Proposed subsections 23DB(4) to (8)

Proposed subsections 23DB(4) to (8) are based on the existing subsections 23CA(3) to (7). They will set out how the investigation period is calculated. The investigation period begins

when the person is arrested and can last for a reasonable time, up to a maximum of four hours. The investigation period may be extended any number of times, but the total length of the periods of extension cannot be more than 20 hours. This amounts to a total maximum investigation period of 24 hours if a person is arrested for a terrorism offence.

Proposed subsection 23DB(9)

Proposed subsection 23DB(9) will reformulate what is currently contained in existing subsection 23CA(8). Proposed subsection 23DB(9) will set out the periods of time that may be disregarded from the calculation of the investigation period.

Generally, the purpose of disregarded time is to suspend or delay questioning to ensure that a proper pre-charge interview can take place. The provisions recognise that there needs to be some flexibility in the maximum time limit for the investigation period to balance two competing considerations – the reasonable requirements of law enforcement and the protection of civil liberties of people who have been arrested for, but not yet charged with, a criminal offence. The types of time that can be disregarded from the investigation period when a person is arrested for a terrorism offence fall into three general categories. The first two categories are the same as those that apply when a person has been arrested for a non-terrorism Commonwealth offence. An explanation of these categories is set out at item 13 in relation to proposed subsection 23C(7).

The third category of disregarded time that applies specifically to the terrorism provisions in Part 1C enables an investigating official to apply to a magistrate to specify an amount of time that should be disregarded from the investigation period. The rationale for this category of disregarded time is that it is not always possible to predict the circumstances where time should be disregarded from the investigation period to enable a proper pre-charge interview to take place. Currently, paragraph 23CA(8)(m) provides that any reasonable time that is within a period specified under existing section 23CB may be disregarded from the investigation period. This includes, for example, the time needed to collate information from an overseas country before presenting it to a suspect during questioning, or waiting for overseas jurisdictions to respond to requests for critical information from the AFP. While it would be impossible to accurately predict every event that may arise in a complex investigation, paragraph 23CB(5)(c) includes an indicative list of events that may come up in complex terrorism investigations giving rise to a legitimate need for time taken for these events to occur to be disregarded from the investigation period.

Proposed new subsection 23DB(9) will replicate all the existing categories of time that may be disregarded from the investigation period under existing subsection 23CA(8) and reinforce that the time may only be disregarded if it is a reasonable period during which questioning of the person is suspended or delayed. The amendments will also clarify two issues identified in the Clarke Report about how disregarded time may be calculated.

First, there is currently uncertainty about how disregarded time should be calculated if more than one event under proposed subsection 23DB(9) occurs at the same time. Proposed new subsection 23C(9) will clarify that questioning of the person may be suspended or delayed for *one or more of the reasons* outlined in paragraphs (a) through (m). This will put beyond doubt that the events outlined in paragraphs (a) through (m) may occur at the same time. However, if periods of disregarded time occur simultaneously, any overlapping time can only be disregarded once from the investigation period.

Second, there is currently uncertainty about whether it is possible for investigating officials to resume questioning during a period of disregarded time. Many of the events listed in proposed subsection 23DB(9) are circumstances when it would simply not be possible to question a person. For example, it is not possible to question a person while a forensic procedure is taking place.

However, there may be times when an event under subsection 23DB(9) occurs, but it becomes apparent that suspending or delaying the questioning of the person is not necessary during the entirety of that event. For example, proposed paragraph 23DB(9)(m) (which will replace current paragraph 23CA(8)(m)) provides that any reasonable time that is a time during which the questioning of the person is reasonably suspended or delayed and is within a period specified under proposed section 23DD should be disregarded. A period of time specified under proposed section 23DD could be used by investigators to, for example, collate information from an overseas country that has a time zone difference. However, it could still be useful for investigators to question the suspect at certain times while they are waiting for this information from the overseas country.

Proposed subsection 23DB(10)

Proposed paragraph 23DB(10)(a) will clarify that, to avoid doubt, proposed subsection 23DB(9) does not prevent the person being questioned during a time covered by a paragraph of that subsection. In the above example, proposed paragraph 23DB(9)(m) would not prevent police from resuming questioning during a period of time specified under proposed section 23DD. However, proposed paragraph 23DB(10)(b) will ensure that this amendment should not be used as a way to extend a period of disregarded time specified under proposed section 23DD. For example, if an investigator has four hours of time available in the investigation period and a magistrate specified a period of two days under proposed section 23DD, the investigator could conduct a three hour questioning session during those two days. The three hours of questioning would be deducted from the four hours of investigation time, leaving one hour of investigation time remaining. The three hours would also be deducted from the specified two days, leaving 45 hours in the specified period for other activities.

However, proposed paragraph 23DB(10)(a) is not intended to affect the rights of individuals or obligations of investigating officials. Proposed paragraph 23DB(10)(a) does not suggest, for example, that the prohibition against questioning a person during a forensic procedure should be overridden. It will simply clarify that when questioning is able to occur, the investigation period should continue to run.

Proposed subsection 23DB(11) – Limit on time that may be disregarded under paragraph 23DB(9)(m)

Proposed subsection 23DB(11) will set a cap of seven days on the amount of time that can be disregarded from the investigation period under proposed paragraph 23DB(9)(m). Currently, there is no such limit, and unlike other categories of disregarded time which may be naturally capped because of the nature of the event, the length of time that could be disregarded under proposed paragraph 23DB(9)(m) is not as naturally confined. The proposed cap of 7 days will provide certainty as to the amount of time that can be disregarded under proposed

paragraph 23DB(9)(m) and accordingly, greater certainty about the length of time a person may be detained under Part 1C when a person is arrested for a terrorism offence.

Proposed subsection 23DB(11) also has a safeguard so that if a suspect is arrested within 48 hours of a previous arrest relating to the same circumstances, the maximum 7 day cap on any time disregarded under proposed paragraph 23DB(9)(m) is reduced by any amount of time that was specified under proposed section 23DD and disregarded under paragraph 23DB(9)(m) in relation to the investigation period while the person was previously arrested.

Proposed subsection 23DB(12) – Evidentiary provision

Proposed subsection 23DB(12) provides that in any proceeding, the burden lies on the prosecution to prove that the person was brought before a judicial officer as soon as practicable and that any time that was disregarded from the investigation period was covered by one of the provisions in proposed subsection 23DB(9). This subsection replicates the evidentiary provisions contained in existing subsection 23CA(9).

Proposed sections 23DC and 23DD – application to and time specified by a magistrate

Item 16 will also insert proposed sections 23DC and 23DD. These proposed sections are based on existing section 23CB with some modifications. Proposed section 23DC will set out the process for making an application for a specified period of time that could then be disregarded under proposed paragraph 23DB(9)(m). Proposed section 23DD will set out the process by which a magistrate could specify a period of time that could then be disregarded under proposed paragraph 23DB(9)(m).

Proposed subsection 23DC(1)

Proposed subsection 23DC(1) will provide that proposed section 23DC will apply if a person is arrested for a terrorism offence and an investigation is being conducted into whether the person committed that terrorism offence or another terrorism offence. This subsection is based on existing subsection 23CB(1) and makes it clear that this kind of disregarded time can only apply if a person is arrested and being investigated for a terrorism offence. If a person who is arrested for a terrorism offence is also being investigated for a non-terrorism Commonwealth offence under proposed paragraph 23DB(2)(b), then the investigating official would not be prevented from applying for a specified period of time under proposed section 23DC, so long as an investigation is being conducted into whether the person committed the terrorism offence for which they were arrested or another terrorism offence.

Proposed subsection 23DC(2)

Proposed subsection 23DC(2) will provide that at or before the end of the investigation period an investigating official may apply, in writing, to a magistrate for a period of specified time that could be disregarded from the investigation period under proposed paragraph 23DB(9)(m).

This will differ from existing subsection 23CB(4) as proposed subsection 23DC(2) will require the application to be made in writing. Currently subsection 23CB(4) provides that an application for specified disregarded time may be made in person or in writing or by telephone, telex, fax or other electronic means.

An application under proposed section 23DC will also only be able to be made to and granted by a magistrate. Currently, subsection 23CB(4) enables an application to be made to and granted by a magistrate, a justice of the peace or a bail justice.

Proposed subsection 23DC(3)

Proposed subsection 23DC(3) will provide that an application for a specified period of disregarded time must not be made unless it is authorised, in writing, by an authorising officer. The proposed new definition of 'authorising officer' is set out at item 2.

Currently, an investigating official may apply for a specified period of time to be disregarded from the investigation period. There is no additional requirement for the investigating official to obtain the approval of a more senior officer prior to making the application. Proposed subsection 23DC(3) recognises that the task of settling the documents and making applications for this purpose should be overseen by a senior officer who is trained in the process and familiar with all the facts. It is an additional safeguard that will ensure that an application will be approved by a senior member of the AFP or senior member of a State or Territory police force before it can be made to a magistrate.

Proposed subsection 23DC(4)

Proposed subsection 23DC(4) will replicate existing subsection 23CB(5) and will continue to require applications for specified disregarded time to include all the statements that are listed in current subsection 23CB(5), including the reasons why the investigating official believes the period of time should be specified. However, given there will be a seven day cap on the amount of specified time that can be disregarded from the investigation period under proposed paragraph 23DB(9)(m), it will be important for the magistrate to have additional information before him or her. Accordingly, proposed subsection 23DC(4) will also require the application to include information on the outcome of any previous application under proposed section 23DC so that the magistrate can determine the amount of time that, at a maximum, could be specified. Proposed subsection 23DC(4) will also require the application to include the total amount of time that has already been disregarded from the investigation period under proposed subsection 23DB(9).

Proposed subsection 23DC(5)

Proposed subsection 23DC(5) is an avoidance of doubt provision that will clarify that proposed subsection 23DC(4) does not require information to be included in the application for disregarded time if disclosure of that information would be likely to prejudice national security (within the meaning of the NSI Act), be protected by public interest immunity, put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community, law enforcement or intelligence officers.

Proposed subsection 23D(6)

Proposed subsection 23D(6) will require an investigating official to inform the person or their legal representative that they may make representations to the magistrate about the application. This is consistent with existing paragraph 23CB(4)(c). Proposed subsection 23D(6) will also require the investigating official to provide a copy of the application for specified disregarded time to the person or to his or her legal representative,

prior to when the magistrate considers the application. This will be a new requirement to facilitate an arrested person and or their legal representative to make appropriate representations to the magistrate about the application, should they wish to do so.

Proposed subsection 23DC(7)

Proposed subsection 23DC(7) will provide that if the application for specified disregarded time contains information of a kind mentioned in proposed subsection 23DC(5), the investigating official may remove it from the copy of the application that is provided to the person and/or their legal representative.

Proposed subsection 23DC(8)

Proposed subsection 23DC(8) will replicate existing subsection 23CB(6) and provide that the arrested person, or his or her legal representative, may make representations to the magistrate about the application.

Proposed subsection 23DD(1)

Proposed section 23DD will apply if a person has been arrested for a terrorism offence and an application for specified disregarded time has been made under proposed subsection 23DC(2) to a magistrate in respect of the person.

Proposed subsection 23DD(2)

Proposed subsection 23DD(2) will replicate existing subsection 23CB(7). It will provide that a magistrate may, by signed instrument, specify a period of time for the purpose of proposed paragraph 23DB(9)(m) if it is appropriate to do so, the offence is a terrorism offence, detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence, the investigation into the offence is being conducted properly and without delay and the person or their legal representative has been given the opportunity to make representations about the application. It will also require the magistrate to be satisfied that the application has been authorised by an authorising officer (see proposed subsection 23DC(3)).

Proposed subsection 23DD(2) will only enable a magistrate to specify a period of time. Justices of the peace and bail justices will no longer be able to perform this function. Historically, justices of the peace and bail justices were included in the category of persons who could perform this function on the basis that it may be difficult to secure the services of a magistrate in urgent circumstances. This is less of a concern in today's society. Whilst magistrates have expertise in dealing with a large portion of criminal issues and are therefore well suited to this role, the arguments for a justice of the peace or bail justice to perform this role are less compelling. Although magistrates are the only category of persons who will be able to perform this role, this function is not judicial or incidental to a judicial function. Magistrates perform this role in their personal capacity.

Proposed subsection 23DD(3)

Proposed subsection 23DD(3) will replicate existing subsection 23CB(8) which provides that the instrument must specify the period of time, set out the day and time when it was signed and set out the reasons for specifying the period.

Proposed subsection 23DD(4)

Proposed subsection 23DD(4) will provide that proposed subsection 23DD(3) does not require information to be included in the instrument if disclosure of that information would be likely to prejudice national security (within the meaning of the NSI Act), be protected by public interest immunity, put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community, law enforcement or intelligence officers.

Proposed subsection 23DD(5)

Proposed subsection 23DD(5) mirrors existing subsection 23CB(9). It will require the magistrate to give the investigating official a copy of the instrument as soon as practicable after signing it. If the instrument was made as a result of an application made by electronic means, the magistrate will be required to inform the investigating official of the matters included in the instrument.

The proposed note at the end of subsection 23DD(5) will note that the provisions in proposed section 23E will apply if the magistrate informs the investigating official under proposed paragraph 23DD(5)(b).

Proposed subsection 23DD(6)

Currently, there is no requirement for an investigating official to provide a copy of the instrument specifying the period of disregarded time to the detained person or their legal representative.

Proposed paragraph 23DD(6)(a) will insert a provision that will require an investigating official to provide the person or their legal representative with a copy of the instrument under proposed paragraph (5)(a) as soon as practicable after receiving it from the magistrate.

Proposed paragraph 23DD(6)(b) will provide that if the instrument was made as a result of an application made by electronic means, the investigating official must inform the detained person or their legal representative of the matters included in the instrument as soon as practicable after being informed of them by the magistrate.

<u>Proposed sections 23DE and 23DF – application and extension of the investigation period</u>

Item 16 will also insert sections 23DE and 23DF to replace existing section 23DA. It will set out the process for making an application to extend the investigation period and the granting of an extension where a person is arrested for a terrorism offence. The process for making an application to extend the investigation period for a terrorism offence will be similar to the process for applying for an extension of the investigation period for a non-terrorism offence under proposed section 23D. However, there will be an additional requirement that an application to extend the investigation period must be approved by an authorising officer and

that the application must be in writing. These requirements will provide additional safeguards, given the investigation period where a person is arrested for a terrorism offence may be longer than if the person is arrested for a non-terrorism offence.

Proposed subsection 23DE(1)

Proposed subsection 23DE(1) will provide that if a person is arrested for a terrorism offence, an investigating official may, at or before the end of the investigation period, apply, in writing, to a magistrate for an extension of the investigation period. Only an investigating official that falls within paragraphs (a) and (b) of the definition in subsection 23B(1) will be able to make the application. This includes a member or special member of the AFP or a member of the police force of a State or Territory. A person that falls within paragraph (c) of the definition will not be able to make the application. This includes a person who holds an office the functions of which include the investigation of Commonwealth offences and who is empowered by a law of the Commonwealth because of the holding of that office to make arrests in respect of such offences.

Currently, an application for an extension of the investigation period when a person is arrested for a terrorism offence must be made to and granted by a magistrate, a justice of the peace or a bail justice. Historically, justices of the peace and bail justices were included in the category of persons who could perform this function on the basis that it may be difficult to secure the services of a magistrate in urgent circumstances. This is less of a concern in today's society. Whilst magistrates have expertise in dealing with a large portion of criminal issues and are therefore well suited to this role, the arguments for a justice of the peace or bail justice to perform this role are less compelling.

Proposed subsection 23DE(1) will provide that an application for an extension of the investigation period can only be made to a magistrate. Although magistrates are the only category of persons who will be able to perform this role, this function is not judicial or incidental to a judicial function. Magistrates perform this role in their personal capacity.

Currently under subsection 23DA(3), an application to extend the investigation period may be made in a number of ways, either before a judicial officer, in writing, by telephone or other electronic means. Proposed subsection 23DE(1) will require the application to be made in writing.

Proposed subsection 23DE(2)

Proposed subsection 23DE(2) will insert a new requirement that an application for an extension of the investigation period for a terrorism offence must not be made unless it is authorised, in writing, by an authorising officer. The proposed new definition of 'authorising officer' is set out at item 2. Proposed subsection 23DE(2) recognises that the task of settling the documents and making applications for this purpose should be overseen by a senior officer who is trained in the process and familiar with all the facts. It is an additional safeguard that will ensure that an application will be approved by a senior member of the AFP or senior member of a State or Territory police force before it can be made to a magistrate.

Proposed subsection 23DE(3)

Currently, there is no requirement for an application to extend the investigation period to include any particular statements or information. Proposed new subsection 23DE(3) will require the application to include certain information to ensure the magistrate is able to appropriately consider whether to grant the extension or not. For example, the application will need to include the reasons why the investigating official believes the investigation period should be extended.

Proposed subsection 23DE(4)

Proposed subsection 23D(4) is an avoidance of doubt provision that will clarify that proposed subsection 23DE(3) does not require information to be included in the application if disclosure of that information would be likely to prejudice national security (within the meaning of the NSI Act), be protected by public interest immunity, put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community, law enforcement or intelligence officers.

Proposed sections 23DE(5) and (6)

Currently, there is no requirement for an investigating official to provide a copy of the application to the arrested person or their legal representative. Proposed paragraph 23DE(5)(a) will require that before an application for an extension of the investigation period is considered by a magistrate, the investigating official must provide a copy of the application to the person or their legal representative. Proposed subsection 23DE(6) will also provide that if the application contains any information of the kind listed in subsection 23DE(4), the investigating official may remove it from any copy of the application that is provided to the person or to their legal representative. This is consistent with provisions contained within subsections 104.12A(3) and 104.23(3A) of the Criminal Code which relate to information that must be given to a person in relation to a control order.

In addition, proposed paragraph 23DE(5)(b) will provide that the investigating official must inform the person that they or their legal representative may make representations to the magistrate about the application.

Proposed subsection 23DE(7)

Proposed subsection 23DE(7) replicates existing subsection 23DA(3) and provides that the arrested person, or his or her legal representative, may make representations to the magistrate about the application.

Proposed subsection 23DF(1)

Proposed section 23DF will set out how a magistrate may extend the investigation period and is based on the process set out in existing section 23DA.

Proposed subsection 23DF will apply if a person has been arrested for a terrorism offence and an application to extend the investigation period has been made to a magistrate in respect of the person.

Proposed subsection 23DF(2)

Proposed subsection 23DF(2) is modelled on existing subsection 23DA(4). The proposed subsection will provide that the magistrate may extend the investigation period, by signed written instrument, if satisfied of the factors listed in paragraphs (a) through (e). The magistrate will need to be satisfied that the offence is a terrorism offence and that further detention of the person is necessary to either:

- preserve or obtain evidence related to the offence or to another terrorism, or
- complete the investigation into the offence or into another terrorism offence.

The magistrate will also need to be satisfied the investigation is being conducted properly and without delay, the application has been authorised by an authorising officer and the person or his or her legal representative has been given the opportunity to make representations about the application.

If a person who is arrested for a terrorism offence is also being investigated for a non-terrorism Commonwealth offence under proposed paragraph 23DB(2)(b), then the investigating official will not be able to use the investigation of the non-terrorism offence as a means to extend the investigation period under proposed subsection 23DF(2). This is because all of the factors that the magistrate must be satisfied of to grant an extension are linked to the investigation of a terrorism offence. However, if an extension is granted, it will not prevent the investigation of non-terrorism offences during this extended period under proposed paragraph 23DB(2)(b).

Proposed subsection 23DF(3)

Proposed subsection 23DF(3) replicates existing subsection 23DA(5). This subsection will, subject to proposed new subsection 23DF(4), continue to provide for what must be included in the instrument.

Proposed subsection 23DF(4)

Proposed subsection 23DF(4) will provide that proposed subsection 23DF(3) does not require information to be included in the instrument extending the investigation period if disclosure of that information would be likely to prejudice national security (within the meaning of the NSI Act), be protected by public interest immunity, put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community, law enforcement or intelligence officers.

Proposed subsection 23DF(5)

Proposed paragraph 23DF(5)(a) is based on existing subsection 23DA(6) and will continue to require the magistrate to provide the investigating official with a copy of the written instrument as soon as practicable after signing it. Proposed paragraph 23DF(5)(b) will provide that if the instrument was made as a result of an application made by electronic means, the magistrate must inform the investigating official of the matters included in the instrument. The proposed note at the end of subsection 23DF(5) will note that the provisions in proposed section 23E will apply if the magistrate informs the investigating official under proposed paragraph 23DF(5)(b).

Proposed subsection 23DF(6)

Currently, there is no specific requirement for an investigating official to provide a copy of the instrument extending the investigation period for a terrorism offence to a detained person or their legal representative. Proposed paragraph 23DF(6)(a) will provide that an investigating official must provide the detained person or their legal representative with a copy of the instrument under proposed paragraph (5)(a) as soon as practicable after receiving it from the magistrate. Proposed paragraph 23DF(6)(b) will provide that if the instrument was made as a result of an application made by electronic means, the investigating official must inform the detained person or their legal representative of the matters included in the instrument as soon as practicable after being informed of them under proposed paragraph 23DF(5)(b).

Proposed subsection 23DF(7)

Proposed subsection 23DF(7) will replicate existing subsection 23DA(7), which provides that the investigation period may be extended any number of times, but the total of the periods of extension cannot be more than 20 hours.

Subdivision C – Miscellaneous

Item 16 will also insert Subdivision C into Division 2 of Part 1C. It will contain proposed section 23E which is modelled on existing section 23E. It will apply in situations where a magistrate has, under proposed paragraphs 23DA(5)(b), 23DD(5)(b) or 23DF(5)(b), informed an investigating official of matters included in an instrument.

Proposed subsection 23E(2) will require the investigating official to, as soon as practicable after being informed of those matters, complete a form of the instrument and forward it to the magistrate. If the form of the instrument completed by the investigating official does not accord with the terms of the instrument signed by the magistrate, the instrument is taken to have had no effect.

Item 17: Paragraph 23XGD(2)(h)

This item is a consequential amendment so that the reference at paragraph 23XGD(2)(h) to existing subsection 23CA(8) corresponds with the appropriate reference to proposed new subsection 23DB(9).

Item 18: Application

Subitem 18(1) will provide that the proposed amendments to Part 1C will, subject to proposed subitem (2), apply in relation to a person who is arrested after the commencement of these provisions.

Subitem 18(2) will clarify that if a person has been arrested more than once within 48 hours and the first of those arrests was made before the commencement of these provisions, then the proposed amendments to Part 1C will not apply in relation to the person for any later arrest that is made within that 48 hour period. However, this subitem will not apply if a person is arrested a second time within 48 hours for conduct completely separate from their

conduct which led to the original arrest, or where the later arrest is for a Commonwealth offence that arose in different circumstances to those to which the original arrest applies for which new evidence has been obtained since that earlier arrest.

Schedule 4 – Powers to search premises in relation to terrorism offences

Overview

Division 3A of the *Crimes Act 1914* (Crimes Act) provides police with powers to stop, search and question in relation to terrorist acts. This Division was first inserted into the Crimes Act by the *Anti-Terrorism Act (No 2) 2005* to provide police with specific powers in relation to terrorist acts in addition to existing police powers. However, Division 3A does not provide police with a power to enter premises without a warrant in emergency circumstances relating to a terrorism offence where there is material that may pose a risk to the health or safety of the public.

Schedule 4 will amend Division 3A of the Crimes Act to include a new power for police to enter premises without a warrant in emergency circumstances.

Crimes Act 1914

Item 1: Division 3A of Part IAA (heading)

This item will substitute the heading 'Powers in relation to terrorist acts and terrorism offences' in place of the current Division 3A heading 'Powers to stop, question and search persons in relation to terrorist acts'.

Item 2: Section 3UB

This item is a minor amendment to the numbering of section 3UB. The number (1) will be inserted before the words 'A police officer'.

Item 3: at the end of section 3UB

Currently, Division 3A provides police with various powers in relation to terrorist acts, but only in a Commonwealth place and prescribed security zone. Item 3 will provide that this limitation will not apply to proposed new section 3UEA.

Item 4: Subsection 3UEA(1) – Emergency entry to premises without warrant

This item will insert new section 3UEA.

Proposed subsection 3UEA(1) – emergency entry to premises without warrant

Proposed section 3UEA will enable a police officer to enter premises without a warrant, but only if strict criteria are met. The police officer must suspect on reasonable grounds that it is necessary to use a power under subsection (2) to prevent a thing that is on the premises from being used in connection with a terrorism offence and it is necessary to exercise this power without the authority of a warrant because there is a serious and imminent threat to a person's life, health or safety.

Proposed subsection 3UEA(2) – powers of search and seizure

The powers available under proposed section 3UEA will be limited to searching the premises for the particular thing and seizing the particular thing in circumstances outlined in subsection (1). Subsections (3) to (5) will provide for some additional limited powers if certain criteria are met.

Proposed subsections 3UEA(3) and (4) – power to secure premises

If, in the course of searching for the thing, the police officer finds another thing that they reasonably suspect is relevant to an indictable offence or a summary offence, the police officer will be able to secure the premises for a period that is reasonably necessary so that they can make an application for a search warrant over the premises. This will ensure that evidence of criminal activity is preserved. The premises will not be able to be secured under proposed subsection (3) for longer than is reasonably necessary to obtain the warrant. If a warrant is not authorised the premises could then be handed over to the occupier.

Proposed subsection 3UEA(5) – power to seize any other thing or make premises safe in emergency circumstances

In the course of searching for the thing, the police officer may seize another thing, or do anything to make the premises safe, if the police officer suspects on reasonable grounds that it is necessary to do so:

- to protect a person's life, health or safety and
- without the authority of a search warrant because the circumstances are serious and urgent.

In certain circumstances, it may not be possible to seize the thing under proposed paragraph 3UEA(2)(b) without taking actions necessary to make it safe for removal. For example, where a live explosive device is on the premises, the device may need to be neutralised before it can be seized and removed from the premises. Proposed subsection 3UEA(5) will enable police to render the premises safe before removing the thing.

Proposed subsection 3UEA(6) – assistance and use of reasonable force

Proposed subsection 3UEA(6) will provide that the police officer may use assistance in exercising a power under this section. The police officer will be able to use force against persons and things. If another person, who is not a police officer, is assisting the police officer, that person will not be able to use force against persons and will only be able to use force against things if authorised by the police officer.

Proposed subsection 3UEA(7) – notification to occupier of premises

Proposed subsection 3UEA(7) will ensure that, if the occupier of the premises is not present at the time the police officer enters the premises, then a police officer must, within 24 hours of entering the premises, notify the occupier that the entry has taken place. However, if it is not practicable to notify the occupier, the police officer must leave a written notice of entry at the premises.

Item 5: Subsection 3UF(1)

Currently, section 3UF sets out how things seized under section 3UE must be dealt with. Subsection 3UF(1) requires a seizure notice to be served within 7 days after the day on which the thing was seized. Item 5 will insert a reference to proposed new section 3UEA in subsection 3UF(1) so that this requirement will apply to things seized under the proposed new section.

Schedule 5 – Re-entry of premises in emergency situation

Overview

Currently, section 3J of the *Crimes Act 1914* (Crimes Act) allows the police to re-enter a premises under a search warrant within one hour of leaving the premises. This time limitation does not provide sufficient scope for police to re-enter premises if they need to evacuate the premises because they have discovered a threat which could endanger the safety of police officers or the public. For example, under the current section 3J, if a police officer, upon executing a search warrant in the investigation of a Commonwealth offence, discovered a large stockpile of volatile chemicals on the premises requiring the immediate evacuation of all persons from the premises, the police officer would not have enough time to secure the premises and render the chemicals safe before re-entering to commence a search in accordance with the search warrant.

Schedule 5 contains proposed amendments that will modify the search warrant provisions in Part 1AA of the Crimes Act so that, in emergency situations, the time available for law enforcement officers to re-enter premises under a search warrant can be extended to 12 hours, or, where authorised by an issuing authority in exceptional circumstances, a longer time not exceeding the life of the warrant.

Crimes Act 1914

Item 1: Subsection 3C(1)

This item will insert a new definition of 'emergency situation' into subsection 3C(1).

'Emergency situation' will be defined to mean a situation where there are reasonable grounds to believe that there is a serious and imminent threat to a person's life, health or safety that requires officers to leave the premises. For example, upon executing a search warrant, officers may discover explosive material that requires the emergency exit of all personnel.

Item 2: Subsections 3E(1) and (2)

Existing subsections 3E(1) and (2) provide for an issuing officer to issue a warrant to search premises, or to issue a warrant authorising an ordinary search or frisk search of a person, if satisfied by information on oath of certain criteria.

This item will update subsections 3E(1) and (2) to include an option for a person to 'affirm' information or give it on oath when applying for these warrants. Currently, there is not an option for a person to 'affirm' information when giving it to an issuing officer. These proposed amendments will update the provisions to conform to the standardised drafting convention.

Item 3: After paragraph 3J(2)(a)

This item will add a new paragraph to the list of situations for when officers are permitted to re-enter premises while a warrant is being executed.

Proposed paragraph 3J(2)(aa) will provide that, if there is an emergency situation, the executing officer and the constables assisting may resume executing the warrant after they have temporarily ceased its execution and left the premises for no more than 12 hours or, where authorised by an issuing officer, a longer time not exceeding the life of the warrant. An issuing officer is defined in section 3C as a magistrate or a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants. 'Emergency situation' will be defined in section 3C (see item 1).

Item 4: proposed new section 3JA – Extension of time to re-enter premises in emergency situations

This item will insert proposed new section 3JA.

If the executing officer or constable assisting requires longer than 12 hours to re-enter the premises and there is an emergency situation, proposed section 3JA will set out the process for how they may apply to an issuing officer for an extension of that period.

An issuing officer will only be able to extend the period during which the executing officer and constables assisting may be away from the premises if the issuing officer is satisfied that there are exceptional circumstances that justify the extension and the extension would not result in the period ending after the expiry of the warrant.

Item 5: Subsection 3L(7)

Current subsections 3L(4) to (9) deal with the lock down of electronic equipment at premises when executing a search warrant. Under subsection 3L(4), the executing officer or constable assisting can secure equipment for 24 hours in order to get expert assistance. Subsection 3L(7) provides for an executing officer or constable assisting to go to the original issuing officer to get an extension of that 24 hour period.

The current situation is too restrictive if, for example, the original issuing officer is not available when the extension of time is required. For example, it is problematic in circumstances where the issuing officer who issued the warrant is on leave, ill or otherwise unavailable. The proposed amendment in this item will allow the executing officer or constable assisting to go to any issuing officer, rather than the issuing officer that issued the search warrant.

Schedule 6 – Amendments relating to bail

Overview

Section 15AA was first inserted into the *Crimes Act 1914* (Crimes Act) as part of the *Anti-Terrorism Act 2004* to ensure a consistent approach to bail proceedings for serious national security offences. The purpose of this section is to ensure public safety in the case of people charged with these serious offences and to provide the bail authority with the discretion to consider whether there are exceptional circumstances to justify granting bail. The proposed amendments in Schedule 6 will ensure that both the prosecution and the defendant have a right to appeal the decision to grant or refuse bail.

Crimes Act 1914

Item 1: After subsection 15AA(3)

Section 15AA of the Crimes Act contains specific provisions relating to granting bail for persons charged with terrorism and national security offences. It provides that a person charged or convicted of a serious security or violent offence (including terrorism) must not be granted bail except in exceptional circumstances.

Usually with Commonwealth offences, through the application of the *Judiciary Act 1903*, the relevant State and Territory law governing bail proceedings applies in Commonwealth criminal matters. As section 15AA of the Crimes Act does not currently include an appeal right, the State and Territory legislation is relied upon to provide appeal rights to the prosecution or defendant. This can result in confusion and in some cases there may be no scope to appeal decisions made under section 15AA.

This item will insert a specific right of appeal for both the prosecution and defendant in section 15AA of the Crimes Act.

Proposed subsection 15AA(3A)

Proposed subsection 15AA(3A) will provide that the prosecution or defendant may appeal against a decision of a bail authority to either grant, or refuse to grant, bail to a person charged with or convicted of an offence covered by existing subsection 15AA(2). This will establish a nationally consistent right of appeal against bail decisions in relation to the specified Commonwealth offences, overcoming limitations and inconsistencies under State and Territory bail laws.

Proposed subsection 15AA(3B)

The proposed appeal right is intended to operate alongside relevant State and Territory laws, unless these laws are inconsistent. An appeal will be able to be heard by a court which has jurisdiction to hear appeals or reviews of decisions or orders generally made by the decision maker in question, and follow the same procedures that generally apply in relation to the exercise of that appellate jurisdiction.

Proposed subsection 15AA(3B) will provide that an appeal under subsection (3A) may be made to a court that would ordinarily have jurisdiction to hear and determine appeals from directions, orders or judgments of the bail authority referred to in subsection (3A).

Proposed subsection 15AA(3B) will specify that an appeal under subsection (3A) is to be made in accordance with the rules and procedures (if any) applicable under a law of the Commonwealth, a State or a Territory in relation to the exercise of such jurisdiction.

Proposed subsections 15AA(3C) and (3D)

If a bail authority decides to grant bail, proposed subsection 15AA(3C) will provide for a stay of the court order. The stay is not automatic. It will depend on the prosecution formally indicating an intention to appeal the bail decision immediately after the decision is made.

Proposed subsection 15AA(3D) will provide that the stay will only last until a decision on the appeal is made, or the prosecution notifies the court they do not intend to pursue an appeal, or until 72 hours has passed – whichever is the least period of time.

These proposed provisions are similar to existing State provisions, for example section 25A of the *Bail Act 1978* (NSW) and section 16 of the *Bail Act 1985* (SA). However, not all States and Territories have such provisions and it is desirable to have a consistent approach, particularly given that some investigations concern activity that spans state borders.

Items 2 and 3: Subsection 15AA(4) and (note)

These items will amend existing subsection 15AA(4) to make it clear that proposed new subsections 15AA(3A), (3B), (3C) and (3D) are not intended to affect state and territory laws, except indirectly through the *Judiciary Act 1903*.

Item 4: Application

This item sets out the intended application of the proposed amendments in this schedule. The amendments will commence the day after the Act receives Royal Assent, and will apply to any bail proceedings initiated on or after that commencement day. The amendments will also apply to bail proceedings which were initiated prior to their commencement, but only to those parts of the proceeding which occur after that commencement.

Schedule 7 – Listings under the Charter of the United Nations Act 1945

Overview

Part 4 of the *Charter of the United Nations Act 1945* (the Charter Act) gives effect to Australia's obligations under paragraphs 1(c) and (d) of the United Nations Security Council Resolution 1373 of 28 September 2001. These paragraphs oblige Australia to:

- freeze, without delay, funds and other financial assets or economic resources of: persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; entities owned or controlled directly or indirectly by such persons; and of persons acting on behalf of, or at the direction of, such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities, and

- prohibit its nationals or any persons and entities within its territory from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of such persons or entities.

Schedule 7 will amend the Charter Act to implement the Australian Government's response to recommendation 22(b) of the Parliamentary Joint Committee on Intelligence and Security Report *Review of Security and Counter-Terrorism Legislation*, tabled in Parliament in December 2006 (2006 PJCIS Report) to improve the standard for listing a person, entity, asset or class of assets. The Schedule will also amend the Charter Act to provide for the regular review of listings under the Charter Act.

Charter of the United Nations Act 1945

Item 1: Subsections 15(1) and (3) - Improving the standard for listing under the Charter Act

Under Part 4 of the Charter Act the Minister for Foreign Affairs must list, by notice in the *Gazette*, a person or an entity (subsection 15(1)), or may list an asset or class of assets (subsection 15(3)), if he or she is satisfied of the 'prescribed matters'. It is an offence for an individual (subsection 20(1)) or a body corporate (subsection 20(3C)) to use or deal with a listed asset or with an asset that is owned or controlled by a listed person or entity, or to allow or facilitate such using or dealing, without the written authorisation of the Minister for Foreign Affairs. It is also an offence for an individual (subsection 21(1)) or a body corporate (subsection 21(2C)) to make an asset available to a listed person or entity, without the written authorisation of the Minister for Foreign Affairs.

Item 1 will amend subsections 15(1) and (3) to require that the Minister for Foreign Affairs list a person, entity, asset or class of assets if he or she is satisfied 'on reasonable grounds' of the prescribed matters. This will implement recommendation 22(b) of the 2006 PJCIS Report. It will also bring Australia into line with the international standard for terrorist asset freezing established by the Financial Action Task Force (FATF) in its Special Recommendation III and detailed in the FATF Guidance Document "International Best Practices – Freezing of Terrorist Assets" released on 23 June 2009.

Item 2: Proposed new subsection 15A – Duration of listing

This item will insert proposed new section 15A to provide that a listing under section 15 ceases to have effect on the third anniversary of the day on which the listing took effect, unless the Minister for Foreign Affairs has, prior to this date, declared, in writing, that the listing continues to have effect under proposed subsection 15A(2). A listing that continues to have effect because the Minister for Foreign Affairs has made a declaration under proposed subsection 15A(2), will in turn cease to have effect on the third anniversary of the day of the making of the declaration, unless the Minister for Foreign Affairs makes a further declaration, in writing, that the listing continues to have effect.

The Minister for Foreign Affairs will not be able to make a declaration unless satisfied on reasonable grounds of the prescribed matters for the original listing. Proposed subsection 15A(5) will provide that a declaration will not constitute a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This provision is merely declaratory and is included for the avoidance of doubt.

Item 3: Before paragraph 19(3)(a)

This item is a consequential amendment to clarify that nothing in existing section 19 prevents a listing ceasing to have effect under proposed section 15A.

Item 4: Transitional – listings under section 15 of the Charter Act

This item will provide that, for the purposes only of section 15A, listings made under subsection 15(1) or (3) and in effect before the commencement of the amendments will be treated as if they had been made immediately after that commencement.

Schedule 8 – Amendments relating to the disclosure of national security information in criminal and civil proceedings

Overview

Schedule 8 will amend the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act) to improve its practical application and ensure the appropriate protection and disclosure of national security information in criminal and civil proceedings.

The proposed amendments fall within the following five general categories:

1. Application of the NSI Act to legal representatives

Several of the proposed amendments seek to clarify the application of the Act to the defendant's legal representative in criminal proceedings and a party's legal representative in civil proceedings, including:

- amendments to ensure that the requirement to give notice to the Attorney-General about the possible disclosure of national security information in a proceeding applies to a defendant's or party's legal representative, and

- amendments to clarify the application of the Act to a defendant's or party's legal representative.

These amendments are necessary to ensure that there is no confusion about when the defendant's or party's legal representative is subject to the obligations under the Act. These proposed amendments do not impose further obligations on defence representatives. The sole purpose of the proposed amendments is to clarify when certain obligations or requirements apply to legal representatives.

2. Role of the Attorney-General under the Act

The Attorney-General has a responsibility to protect national security information during court, tribunal and other proceedings. The proposed amendments make it clear that the Attorney-General, or representative of the Attorney-General, has the ability to attend and be heard during federal criminal or civil proceedings. It is also proposed that the Attorney-General be able to be a party to consent arrangements made in relation to the protection of national security material. Permitting the Attorney-General to be a party to these arrangements ensures the Attorney-General is involved in the formation of such arrangements and can effectively represent the interests of the Government in protecting national security.

3. Flexibility and efficiency in the conduct of court proceedings

A number of the proposed amendments seek to clarify court procedures to ensure processes are flexible and efficient. Some of the proposed amendments include:

- clarifying that the NSI Act does not exclude or modify the general power of a court to uphold a claim of public interest immunity, to make an order under section 93.2 of the

Criminal Code Act 1995 (Cth) or to make other protective orders such as closed hearings and non-publication orders

- clarifying that pre-trial hearings may be held at any stage of a proceeding, and that pre-trial hearings may be used to consider issues relating to the disclosure, protection, storage, handling or destruction of national security information

- clarifying the application of the NSI Act to proceedings once the NSI Act has been invoked, and

- defining 'court official' to clarify who can be present as a court official in closed hearings under sections 29 and 38I of the NSI Act.

4. Facilitate agreements under sections 22 and 38B

Agreements under section 22 and section 38B of the NSI Act as to arrangements about the disclosure of national security information in the proceedings assist with progressing court cases efficiently. The proposed amendments will facilitate better agreement-making by:

- clarifying that the policy intention behind the NSI Act is that, if possible, it is preferable that parties enter into a section 22 arrangement, compared to the court issuing a certificate

- clarifying who is permitted to enter into a section 22 arrangement, and

- clarifying that section 22 arrangements not only cover the disclosure of national security information, but may also cover the protection, storage, handling and destruction of national security information.

5. Avoid unnecessary procedures

A number of amendments are designed to streamline procedures and minimise unnecessary processes. Some of the amendments include:

- clarifying that, for the purposes of the NSI Act, re-trials should be considered to be part of the same proceeding as the trial

- clarifying that once the Attorney-General is aware of a potential disclosure of national security information, it is not necessary to provide notice again through other processes, and

- clarifying that it is only necessary to adjourn those parts of the proceedings which may involve a disclosure of national security information.

Part 1 – Amendments

National Security Information (Criminal and Civil Proceedings) Act 2004

Item 1: Subsection 6(1)

Item 1 will insert a reference to a defendant's legal representative in subsection 6(1) to clarify that when a prosecutor gives notice of the application of the NSI Act to a federal criminal proceeding under subsection 6(1), the prosecutor must notify the defendant's legal representative, as well as the defendant themselves and the court.

Currently, subsection 6(1) requires the prosecutor to notify the defendant and the court that the NSI Act applies to the federal criminal proceeding. There is no express obligation on the prosecutor to notify the defendant's legal representative. It is unclear whether the term 'defendant' implicitly includes the defendant's legal representative. The amendment will clarify that when a prosecutor gives notice of the application of the NSI Act to a federal criminal proceeding, the prosecutor must also notify the defendant's legal representative. Although such notification occurs in practice, including an express reference to 'legal representative' ensures that there is no technical impediment to the defendant being adequately put on notice that the NSI Act applies.

Item 2: Subsection 6(2)

Item 2 will amend subsection 6(2) to provide that the NSI Act applies to parts of a federal criminal proceeding that occur after notice is given 'whether or not those parts [of the proceeding] began before that time'.

Currently, subsection 6(2) provides that if a prosecutor gives notice that the NSI Act applies to the proceeding after a proceeding has commenced, the Act applies only to those parts of the proceeding that occur after the notice is given. As currently drafted, it is unclear whether the NSI Act applies to parts of the proceeding which start prior to the notice but continue after the notice is given.

This item will clarify that where the prosecutor has given notice of the application of the NSI Act to the proceeding after the proceeding has begun, the Act applies to parts of the proceeding that occur after the notice is given, notwithstanding that these parts may have commenced before the notice was given. For example, if the prosecutor gives notice that the NSI Act applies to a federal criminal proceeding and that notice is given when the committal process is underway, the NSI Act will apply to the remainder of the committal process as well as all other parts of the federal criminal proceeding which take place after the committal process. This will ensure that information is protected from disclosure where a committal may be part-heard.

Item 3: Paragraphs 6A(1)(b) and (2)(b)

This item will amend subsections 6A(1) and (2) by inserting a reference to 'the legal representatives of the parties to the proceeding'. The proposed amendment mirrors that made to subsection 6(1) (item 1), but will apply in the context of civil proceedings.

The procedure for invoking the NSI Act in the civil regime requires the Attorney-General (or, where the Attorney-General is a party to the proceedings, another appointed Minister) to notify the parties and the court that the Act applies. The amendment will ensure that the Attorney-General or his/her appointed Minister is required to give notice to parties' legal representatives as well as the parties themselves and the court that the NSI Act applies to the proceeding.

Items 4 and 5: Paragraph 6A(2)(d) and subparagraph 6A(2)(e)(ii)

These items are consequential amendments arising out of the amendments contained in item 20. These consequential amendments are necessary to ensure that the powers provided in proposed new Division 1A (inserted by item 20) and Division 1 of Part 3A of the Act can be exercised, in accordance with section 6A, by the Minister appointed by the Attorney-General under subsection 6A(3) where the Attorney-General is a party to a civil proceeding.

Item 6: Subsection 6A(5)

This item will amend subsection 6A(5) by omitting the words 'take place after the notice is given' and substituting the words 'occur after the notice is given (whether or not those parts began before that time)'. The proposed amendment mirrors that made to subsection 6(2) (item 2), but will apply in the context of civil proceedings.

As subsection 6A(5) is currently drafted, it is unclear whether the NSI Act can apply to parts of a civil proceeding which start prior to the notice but continue after the notice is given.

This item will clarify that where the Attorney-General, or the Minister appointed by the Attorney-General under subsection 6A(3), gives notice of the application of the NSI Act to the civil proceeding under subsection 6A(1), the NSI Act applies to those parts of the proceeding that occur after the notice is given, whether or not those parts began before the notice was given. For example, if the Attorney-General gives notice that the NSI Act applies to a civil proceeding and that notice is given during the discovery phase of the proceeding, the NSI Act will apply to the remainder of that discovery phase as well as all other parts of the civil proceeding which take place after the discovery phase.

Item 7: Section 7 (definition of 'court official')

Item 7 will insert a definition of *court official* into section 7.

The NSI Act does not presently contain a definition of 'court official'. This has created uncertainty as to which court staff are able to be present during closed hearings under sections 29 and 38I of the Act.

Paragraph (a) of the proposed definition will apply to individuals employed or engaged by the court to perform services in the court in relation to a proceeding, such as a judge's associate, court reporter or an interpreter.

Paragraph (b) of the definition will apply in relation to a federal criminal proceeding, to an individual who supervises the defendant in court. This will include, for example, a correction officer who is required to be present in the court room to supervise and accompany the defendant. It will also include a medical officer, such as a doctor, who is required to be in the

court room to attend to the medical needs of the defendant if necessary. Such individuals may not be employed directly by the court, but their presence is in an official capacity for the purpose of facilitating federal criminal proceedings.

Persons captured by this definition will be permitted to remain in the court room during closed court hearings under sections 29 and 38I of the NSI Act.

Item 8: Section 7 (definition of 'national security information')

Item 8 will insert a new definition of 'national security information' into section 7 of the NSI Act. There is presently no definition of 'national security information' in the Act.

Under sections 24, 25, 38D and 38E the prosecutor, defendants and parties must notify the Attorney-General of any expected disclosure of information that relates to national security or information the disclosure of which may affect national security. These sections are proposed to be amended so that notification will need to be given of an expected disclosure of 'national security information.'

'National security information' will be defined as information that relates to national security or the disclosure of which may affect national security. 'National security' is already further defined in section 8 of the NSI Act to include 'Australia's defence, security, international relations or law enforcement interests'. 'Security' is defined in section 9 to have the same meaning as in the *Australian Security Intelligence Organisation Act 1979*.

The inclusion of the definition will simply provide greater clarity and streamline the provisions, rather than change the substance of the notification requirements.

Item 9: Paragraph 13(2)(c)

Item 9 will omit the phrase 'documents and reports of persons intended to be called by a party to give evidence' from paragraph 13(2)(c) and substitute it with the phrase 'documents *or* reports'.

Paragraph 13(2)(c) currently defines a criminal proceeding to include the discovery, exchange, production, inspection or disclosure of intended evidence, documents and reports *of persons intended to be called by a party to give evidence*. This specific qualification could result in the definition being interpreted narrowly to only cover discovery procedures that relate to *persons* intended to be called by a party to give evidence, rather than documents, evidence and reports in general. This limits the breadth of the definition of criminal proceedings.

The proposed amendment will clarify this uncertainty by omitting the phrase 'of persons intended to be called by a party to give evidence' to clarify that when the NSI Act has been invoked in a federal criminal proceeding, discovery procedures relate to documents as well as to persons who are intended to be called by a party to give evidence. The term 'intended evidence' will continue to cover the disclosure of evidence of an individual who could be called to give evidence. For example, the amendment will ensure that subpoenas requesting the production of documents or appearance of persons to give evidence are captured by the revised definition under paragraph 13(2)(c).

As currently drafted, it is unclear whether 'documents and reports' forming part of a federal criminal proceeding are mutually exclusive. Substituting the phrase 'documents or reports' in proposed paragraph 13(2)(c) will confirm that documents and reports each constitute separate categories within the definition of federal criminal proceedings.

Item 10: Section 13

Item 10 will insert subsection 13(3) to clarify that the NSI Act applies to re-trials and proceedings relating to the re-trial.

Under existing section 13, it is unclear whether a re-trial is considered a separate federal criminal proceeding from the trial. If the prosecution gives notice under section 24 that the Act will apply to a trial, there is uncertainty about whether the prosecution needs to give another notice if there is a re-trial. Proposed subsection 13(3) will clarify that a re-trial and proceedings relating to a re-trial are considered, for the purposes of the Act, to be part of the same federal criminal proceeding as the trial. Accordingly, where the prosecution gives notice that the NSI Act will apply to the trial, there will be no requirement for the NSI Act to be invoked again for the purposes of a re-trial or proceedings relating to the re-trial.

Item 11: Section 14 (definition of 'federal criminal proceeding')

Item 11 will repeal and replace the definition of 'federal criminal proceeding' with a definition which excludes reference to 'proceedings under the *Extradition Act 1988.*'

Paragraph 14(b) of the current definition includes a reference to 'court proceedings arising under the *Extradition Act 1988'*. The terminology which applies to federal criminal proceedings in the NSI Act can be difficult to apply to extradition proceedings. For example, the terms 'prosecutor' and 'defendant' are not terms used in proceedings under the *Extradition Act 1988*.

Any future proceeding under, or in relation to, a matter arising under the *Extradition Act 1988* that involves national security information will be treated as a civil proceeding for the purposes of the NSI Act.

Item 12: Subsection 15(1)

This item is a consequential amendment arising from item 11. This item amends the definition of 'defendant' to remove the reference to a 'federal criminal proceeding mentioned in paragraph 14(b)' – that is, a proceeding under the *Extradition Act 1988* – as a consequence of the proposed repeal of paragraph 14(b).

Item 13: Paragraph 15A(2)(b)

This item will amend paragraph 15A(2)(b) to omit the phrase 'of persons intended to be called by a party to give evidence' and substitutes the phrase 'documents *or* reports'.

Similar to the proposed amendment to the definition of federal criminal proceedings under paragraph 13(2)(c) (item 9), paragraph 15A(2)(b) currently defines a civil proceeding to include the discovery, exchange, production, inspection or disclosure of intended evidence, documents and reports *of persons intended to be called by a party to give evidence*. This

definition could be interpreted narrowly to only cover discovery procedures that relate to *persons* intended to be called by a party to give evidence, rather than documents, evidence and reports in general. This amendment will ensure that subpoenas or other mechanisms requesting the production of documents or appearance of persons to give evidence (unaffiliated with persons intended to be called to give evidence) are captured by the definition of civil proceeding under paragraph 15A(2)(b). Further, as the subsection is currently drafted, it is unclear whether 'documents and reports' forming part of a civil proceeding are mutually exclusive. The proposed amendments will replace 'and' with 'or' in paragraph 15A(2)(b) to confirm that documents and reports each constitute separate categories within the definition of civil proceedings.

These amendments mirror proposed changes to the definition of federal criminal proceeding (item 9).

Item 14: Subsection 15A(3)

This item will insert a new subsection 15A(3) to clarify the application of the NSI Act to re-hearings and proceedings relating to the re-hearing. Proposed subsection 15A(3) will provide that a re-hearing, and proceedings relating to a re-hearing are considered, for the purposes of the Act, part of the same civil proceeding as the hearing.

Currently under section 15A, it is unclear whether a re-hearing and proceedings relating to a re-hearing are considered part of the original civil proceeding. The proposed addition of subsection 15A(3) will confirm that, where the Attorney-General gives notice under subsection 6A(1) that the NSI Act will apply to the proceeding and the proceeding eventuates in a court ordering the matter be re-heard, the re-hearing and any proceeding relating to a re-hearing will be considered for the purposes of the NSI Act to be part of the same proceeding. There will be no requirement for the NSI Act to be invoked again for the purposes of that re-hearing.

These amendments mirror proposed changes in relation to criminal proceedings (item 10).

Item 15: Paragraphs 16(aa), (ab), (ac), (ad) and (b)

This item will amend section 16 by repealing paragraphs 16(aa), (ab), (ac), (ad) and (b) and substituting a new paragraph 16(b).

Section 16 currently provides a list of permitted circumstances when information can be disclosed. For civil proceedings, the permitted circumstances differ depending on the category of person. A point of concern with the current section is that, in relation to civil proceedings, the definition of permitted circumstances is so wide that it potentially undermines the protection accorded to national security information by other provisions of the Act. For example, under existing paragraph 16(ab), an individual will be permitted to disclose information 'in the course of their duties'. This may result in an individual being permitted to disclose information in order to comply with an order for discovery or a notice to produce.

Proposed subsection 16(b) will give the Attorney-General greater flexibility to prescribe the circumstances in which national security information could be disclosed. Proposed subsection 16(b) will clarify that disclosure of national security information is only permitted

as specified in a certificate or advice issued by the Attorney-General under sections 26, 28, 38F or 38H.

Item 16: Section 17

This item will amend the definition of 'likely to prejudice national security' in section 17 by removing the term 'national security information' and substituting it with the generic term 'information'. This item is a consequential amendment necessary because of the proposal to insert a definition of 'national security information' into the NSI Act under section 7 (item 8).

The amendment will ensure that there is no confusion between information which is 'likely to prejudice national security' and 'national security information' as defined in section 7.

Item 17: Subsection 17(2)

This item will repeal and substitute a new section 17, which provides for the definition of 'likely to prejudice national security' to apply to contravention of requirements under the NSI Act. This amendment is a consequence of the insertion of proposed new paragraphs 45A(1)(d) and 46FA(1)(d) which make it an offence to contravene the *National Security Information (Criminal and Civil Proceedings) Regulations 2005* (NSI Regulations) where the contravention is likely to prejudice national security (items 103 and 107).

As currently drafted, the definition of 'likely to prejudice national security' in section 17 applies only to disclosures of information and not to contraventions of the NSI Regulations. This amendment is consequential to the inclusion of the offence provisions which necessitate application of the definition of 'likely to prejudice national security'.

The definition of this expression as it applies to contraventions under sections 45A and 46FA is identical to that which currently applies to disclosures of national security information, namely, there needs to a real and not merely a remote possibility that the contravention will prejudice national security.

Item 18: New subsection 19(1A)

This item will insert a new subsection 19(1A) after subsection 19(1) to clarify that the court may make any orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction of national security information in a federal criminal proceeding provided such orders are in the interests of national security and not inconsistent with the provisions of the Act or the Regulations under the Act.

Section 19 of the Act currently provides that a court retains the power to control the conduct of a court proceeding. For example, a court retains the power to stay or dismiss a proceeding and to exclude persons from the court. The purpose of this provision is to ensure that the court's discretion is not unduly fettered. As presently drafted, section 19 may be interpreted to unduly restrain a court from making orders that relate to national security information that are not specifically provided for in the Act. Furthermore, lower level courts, such as the Magistrates Court, do not have inherent powers which allow them to make general orders relating to the protection of national security information. The proposed amendment will clarify that the powers of the court are not limited to those provided for by the Act.

Proposed subsection 19(1A) will provide that where a court is satisfied that it is in the interest of national security to make additional orders and those orders will not be inconsistent with the provisions of the NSI Act or Regulations made under the NSI Act, the court may make such orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction of national security information in a federal criminal proceeding. The proposed amendment will also enable such orders to be made by the lower courts. For example, during a committal hearing in a Magistrates Court, a magistrate may order that, in order to protect the identity of a witness because the identity of the witness is national security information, the witness may appear behind a screen.

This proposed amendment will reinforce a court's ability to control the conduct of a federal criminal proceeding under subsection 19(1) of the NSI Act.

Item 19: New subsection 19(3A)

Similarly to proposed subsection 19(1A) (item 18), this item will insert a new subsection 19(3A) after subsection 19(3). The proposed new subsection will ensure that where a court is satisfied that it is in the interest of national security to make additional orders and those orders will not be inconsistent with the provisions of the NSI Act or Regulations made under the NSI Act, the court may make such orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction of national security information in a civil proceeding.

The ability of the court to make these orders is in addition to any other power provided to the court under other provisions of the NSI Act. This amendment will confirm a court's ability to control the conduct of the civil proceeding under subsection 19(3) of the Act.

Item 20: Divisions 1A and 1B

This item will insert Divisions 1A and 1B into Part 3 of the NSI Act. Proposed new sections 20A and 20B will be inserted by this item under new Divisions 1A and 1B respectively.

Proposed section 20A

Currently, there is limited scope for intervention by the Attorney-General in federal criminal proceedings. Under section 30 of the NSI Act, the Attorney-General may only intervene in federal criminal proceedings when closed hearing requirements apply. Furthermore, a representative of the Attorney-General is not permitted to intervene.

Proposed section 20A will provide for the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General (such as an officer from the Department or a law enforcement or intelligence and security agency who is responsible for the information) to attend and be heard at any stage of a federal criminal proceeding where an issue relating to disclosure, protection, storage, handling or destruction of national security information in the proceeding arises.

Section 20A will replace the existing, more limited scope for intervention by the Attorney-General in closed court hearings under section 30 which will be repealed by item 50.

Proposed section 20B

Currently under the NSI Act, if an issue relating to the disclosure, protection, storage, handling or destruction of national security information is raised, the only mechanism to protect the information, while dealing with the issue, is through a closed hearing under section 30. The requirement to hold a closed hearing whenever there is an issue relating to the treatment of national security information arises, can result in unnecessary delays in the proceeding. The higher courts have inherent powers to make general orders relating to national security information and are therefore not required to utilise the closed hearing provisions of the Act. However, the lower courts, operating without such inherent powers, are required to use the closed hearing requirements without the ability to moderate these requirements using their inherent jurisdiction.

Proposed section 20B will require the court in a federal criminal proceeding to consider, before hearing an issue relating to the disclosure, protection, storage, handling or destruction of national security information in the proceeding, making an order under section 93.2 of the Criminal Code for the hearing to be heard in camera or another appropriate order to protect national security information under proposed new subsection 19(1A) (item 18). Under section 93.2 of the Criminal Code, a person presiding over the court may make orders, if satisfied they are in the interest of the security or defence of the Commonwealth, to do any or all of the following: exclude members of the public, place restrictions on reporting of proceedings and place restrictions on access to physical evidence.

This requirement will not apply if the issue is the subject of an order that is in force under section 22. In those circumstances, protections agreed as sufficient by the parties and the court will already be in place.

Item 21: Subsection 21(1)

This item will repeal existing subsection 21(1), substitute a new subsection 21(1) and insert a new subsection 21(1A) after subsection 21(1).

Section 21 of the NSI Act currently gives parties the option to engage in a pre-trial conference to consider issues relating to national security information. Conferences can only occur before the trial in a federal criminal proceeding commences. However, at any time during a federal criminal proceeding, the prosecutor and defendant may agree to an arrangement about the disclosure of national security information in the proceeding. Accordingly, it makes sense to be able to hold a hearing to consider issues relating to the making of these arrangements at any point of the proceeding.

Proposed subsection 21(1) will clarify that at any stage of a federal criminal proceeding a hearing may be held to consider issues relating to disclosure, protection, storage, handling and destruction of national security information. For example, a hearing may be held to consider disclosure which is expected to occur during discovery, interrogatories, committal hearing or during the trial. Such hearings will be conducted in a way which is similar to a directions hearing in a proceeding. Proposed paragraph 21(1)(b) will acknowledge that these hearings can be held in closed court if it is likely that national security information will be disclosed.

The use of the term ‘pre-trial conference’ in existing section 21 implies that such discussions are restricted to the pre-trial phase of the proceedings. Consistent with the intent of proposed subsection 21(1), this phrase will be replaced with the phrase ‘national security hearing’ for the purposes of section 21 to clarify that such hearings will no longer be limited to being held at the pre-trial phase.

Another limitation with existing section 21 is that the Attorney-General is unable to apply to the court to hold a hearing. He or she also is not required to be notified when either the prosecutor or defendant applies to the court to hold a hearing. This fails to recognise the Attorney-General’s role in protecting national security information in accordance with the Act.

Proposed subsection 21(1A) will clarify the obligation imposed on an applicant for a hearing under this section to notify all other relevant parties. The Attorney-General, the Attorney-General’s legal representative, the prosecutor, the defendant or the defendant’s legal representative will be able to apply to the court to hold a hearing. Proposed subsection 21(1A) will also outline that the applicant must give notice to all parties involved (including the Attorney-General where the applicant is the prosecutor or the defendant) in the proceeding that such an application has been made.

Furthermore, conferences are presently limited to a consideration of issues associated with the disclosure of national security information. Confining the subject matter of the conference to issues relating to disclosure does not aptly recognise the broader range of issues that may arise in relation to national security information during a proceeding.

Proposed subsection 21(1A) will also clarify that a hearing may be held not only to consider disclosure, in the proceeding, of national security information, but also its protection, storage, handling or destruction.

Item 22: Subsection 21(2)

This item is a consequential amendment which is necessary because of the amendments made in item 21. This item will ensure consistency of language between all subsections of section 21.

Item 23: Subsection 22(1)

This item will repeal subsection 22(1) and substitute a new subsection 22(1).

Section 22 currently allows parties, during a federal criminal proceeding, to enter into an arrangement about any disclosure of information that relates to national security or that may affect national security. Presently, neither a defendant’s legal representative nor the Attorney-General are specified as being able to enter a section 22 arrangement. The proposed amendment will provide that the Attorney-General may be a party to a section 22 arrangement in a federal criminal proceeding, thereby ensuring that the Attorney-General will be able to fulfil his or her responsibility for the protection of national security information in accordance with the Act. The substituted provision will also clarify that a defendant’s legal representative, on behalf of a defendant, can also be a party to such consensual arrangements.

Scope of arrangements

The proposed amendment will also ensure that an arrangement under section 22 may cover not only the disclosure of national security information, but also the protection, storage, handling and destruction of national security information. This proposed amendment will recognise the broader range of issues that may arise in relation to national security information during a proceeding. The heading to section 22 will also be altered to reflect this expansion.

Item 24: Paragraph 23(1)(a)

This item will amend paragraph 23(1)(a) to ensure that the regulations made under subsection 23(1) of the NSI Act can be made in relation to the storage, handling or destruction of national security information which is disclosed, not only in the court, but also to relevant parties outside the court.

Paragraph 23(1)(a) of the NSI Act currently enables the Regulations to prescribe how to access, prepare, store, handle or destroy 'information' that is disclosed during proceedings. The regulation-making power is currently too broad, covering all information. The proposed amendment will appropriately limit the regulation-making power to 'national security information'.

The regulation-making power currently only covers information which is to be disclosed to the court. Accordingly, it does not account for information that may be disclosed outside the court. The proposed amendment will extend the regulation-making power to allow for the protection of all national security information arising in a proceeding, not just that which is to be disclosed to the court. This will ensure that where disclosure is or will be made to the defendant's legal representative or relevant parties out of court, the Regulations can prescribe ways in which that national security information should be handled, stored and destroyed by the defendant's legal representative. In this way, national security information is afforded consistent protection notwithstanding the forum in which it is disclosed.

The heading to section 23 will be altered to reflect the extension of the regulation power to all national security information and not just certain information which is or is to be disclosed to the court.

Item 25: Subsections 23(2) and 23(3)

This item will repeal subsections 23(2) and (3) and substitute a new subsection 23(2). Existing subsection (2) will be repealed in light of proposed new subsection 19(1A) (item 18) which will make it clear that the court retains discretion during a federal criminal proceeding to make appropriate orders in the interests of national security relating to the disclosure, protection, storage, handling and destruction of national security information. Existing subsection (3) will be repealed as a consequence of the insertion of proposed paragraph 19(1A)(b) (item 18).

Proposed subsection 23(2) will clarify that the Regulations made pursuant to section 23 do not apply to information that is subject to an order that is in force under a section 22 arrangement. The policy intention behind the Act is that, if possible, it is preferable that the parties agree to an arrangement under section 22. Arriving at an arrangement assists with

ensuring court cases progress efficiently. Therefore, throughout the Act it is the aim that the provisions support the formation of section 22 arrangements.

Item 26: Subsection 24(1)

This item will amend section 24 by repealing subsection 24(1) (including the note), substituting a new subsection 24(1), and inserting a new subsection 24(1A).

Currently under the NSI Act, if the prosecutor or defendant knows or believes that national security information will be disclosed during a proceeding, he or she must notify the Attorney-General and advise the court, the other party and any relevant witness that the Attorney-General has been notified. Notice must also be given if the prosecutor or defendant knows or believes that a person whom he or she intends to call as a witness in a federal criminal proceeding will disclose national security information in giving evidence or by that person's mere presence national security information will be disclosed. For example, notice must be given where an officer of an intelligence or security agency is to be called as a witness in a proceeding and not only will that officer be giving evidence about that agency's operations but the officer's identity itself is national security information. These notice requirements are important as they trigger the Attorney-General's consideration of whether to issue a criminal non-disclosure or witness exclusion certification under sections 26 and 28 of the Act.

Proposed subsection 24(1) will clarify that the obligation to notify the Attorney-General of a prospective disclosure of national security information is imposed not only on the prosecutor and defendant in federal criminal proceedings, but also on the defendant's legal representative.

Further, existing subsection 24(1) does not impose notice obligations in respect of subpoenas which may cause national security information to be disclosed. Proposed paragraph 24(1)(c) will provide that notification obligations placed on the prosecutor, defendant or defendant's legal representative in federal criminal proceedings include where that person has applied to the court for a subpoena and the issuing of that subpoena will require a third party to disclose national security information in a criminal proceeding. For example, if a security or intelligence agency is subpoenaed for documents by the defendant's legal representative, where that defendant's legal representative knows or believes that those documents contain national security information, the legal representative must notify the Attorney-General of that knowledge or belief in accordance with subsection 24(1).

Proposed subsection 24(1) will also clarify that the type of information to which the disclosure obligations relate is 'national security information' as defined in section 7 (item 8). The revised section title will confirm that the notification obligations are not restricted to the prosecutor and defendant, but rather also extend to the defendant's legal representative.

Note 1 to proposed subsection 24(1) will provide that a failure to give notice as required under subsection 24(1) is an offence under section 42 of the Act. The offence is punishable by up to 2 years imprisonment.

Proposed subsection 24(1A)

Existing subsection 24(1) specifies when notice of a prospective disclosure of national security information is necessary, but does not specify when such notification is unnecessary.

Proposed subsection 24(1A) will set out the circumstances when it is not necessary to give notice to the Attorney-General. Generally, these circumstances are where the Attorney-General has become aware of any potential disclosure of national security information through other mechanisms in the Act. For example, where particular national security information is the subject of court orders made under section 22, it will not be necessary to comply with the notification requirements under subsection 24(1) in relation to that information. Notification is not required because, once section 22 orders are created, it is not necessary for the Attorney-General to issue a criminal non-disclosure or witness exclusion certification. However, if the orders under section 22 were varied or terminated or if a legal representative wishes to ask a question of a witness, knowing that the answer will disclose national security information not covered by the section 22 orders, notice would need to be given in compliance with section 24.

This proposed amendment will ensure that parties in a proceeding are not unnecessarily required to comply with multiple disclosure procedures that may delay the proceedings, while still guaranteeing adequate protection for national security information.

Item 27: Subsections 24(3) and (4)

This item will repeal existing subsections 24(3) and (4) of the Act and substitute new subsections 24(3), (4) and (5).

Proposed new subsection 24(3) will require the person who gives notice of a potential disclosure under subsection 24(1) to advise all other relevant parties that notice has been given to the Attorney-General. In cases where the defendant's legal representative or the defendant gives notice, there is no legislative requirement to advise each other of the notice. It is assumed that this will occur in the normal course of lawyer/client communications.

Existing subsection 24(3) currently requires that this advice must be provided in writing and must include a description of the information. This provision may potentially compel the defence to disclose aspects of their defence. Proposed subsection 24(4) will exclude a defendant or the defendant's legal representative from the requirement to include a description of the information in the advice to the prosecutor. This will ensure that, to the extent possible, the defendant and the defendant's legal representative are not unnecessarily required to disclose aspects of their defence contrary to normal practice in the conduct of criminal prosecutions.

Once notice has been given to the Attorney-General, subsection 24(4) currently requires the court to adjourn the proceeding. Having to adjourn the whole proceeding can cause unnecessary delays. Proposed subsection 24(5) will ensure that the court must only adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed, i.e. that part of the proceeding which relates to the national security information which is the subject of the notice to the Attorney-General. This will ensure that there is no unnecessary delay in a federal criminal proceeding as a result of the protection of national security information through the procedures of the Act.

Item 28: Paragraph 25(1)(b)

This item will amend subsection 25(1) by repealing and substituting paragraph 25(1)(b). This proposed amendment will clarify that the obligation set out in section 25 is borne not only by the prosecutor and defendant, but also the defendant's legal representative.

Paragraph 25(1)(b) will also be amended by this item as a consequence of the proposal to define national security information in item 8.

Item 29: Subsection 25(2)

This item will clarify that the obligation to notify the court of the knowledge or belief that a witness will disclose national security information set out in subsection 25(2) is borne not only by the prosecutor and the defendant, but also by the defendant's legal representative.

Item 30: New subsection 25(2A)

This item will amend section 25 by inserting a new subsection 25(2A).

Section 25 currently requires that, if a witness is asked a question in the course of giving evidence and the prosecutor or the defendant knows or believes that the witness's answer may disclose national security information, the prosecutor or the defendant must advise the court.

In the interests of minimising delays associated with multiple disclosure procedures, proposed subsection 25(2A) will set out circumstances where the requirement to provide notice of the knowledge or belief of the disclosure of national security information under subsections 25(1) and (2) does not apply.

This amendment will confirm that the intention of the notification provisions under the Act is to ensure the Attorney-General is aware of any potential disclosure of national security information. Where the Attorney-General has become aware of any potential disclosure of national security information under other mechanisms in the Act, notice is not required to be given. This amendment will clarify that parties in a proceeding do not need to comply with multiple procedures unnecessarily and proceedings are not unduly delayed through the operation of the Act.

Item 31: Subsections 25(3) to (7)

This item will amend section 25 by repealing subsections 25(3) to (7) and substituting new subsections.

Subsections 25(3) to (7) currently set out stringent procedures for protecting national security information in cases where a witness is expected to disclose such information. After the court has been advised of a prospective disclosure, the proceedings must be adjourned and a closed court hearing held. During the course of the closed hearing, the witness must provide a written answer to the court which must, in turn, show the answer to the prosecutor. If the prosecutor knows or believes that the answer discloses national security information, the court must be advised and the Attorney-General notified, at which point the Court must again adjourn the proceedings until the Attorney-General determines whether a certificate should

be issued. This process has the propensity to result in unnecessary delays associated with compounded adjournments.

Proposed subsections 25(3), (4) and (5) are designed to streamline the procedure which is required to be followed where a witness's testimony may disclose national security information. The automatic requirement for a closed hearing to be held will be removed, thereby limiting delays associated with invoking closed hearing requirements. Instead, the witness will be required to provide a written answer to the court, which the court in turn shows to the prosecutor and, if present, the Attorney-General or the Attorney-General's representative. An obligation will then be placed on the Attorney-General's representative, if present, to advise the prosecutor if they believe the answer would disclose national security information should it be given in evidence. If the Attorney-General's representative is not present, the prosecutor would make the assessment in relation to national security information in the witness's answer. Proposed subsection 25(6) will mirror the disclosure requirements contained in existing subsection 25(6) but reflect the insertion of the new definition of 'national security information' by item 8.

Proposed subsection 25(7) will clarify that the obligations imposed on the prosecutor by subsection 25(6) do not apply where the national security information is:

- already the subject of a criminal non-disclosure certificate issued by the Attorney-General,
- the subject of court orders (and an arrangement between the parties) under section 22, or
- the subject of court orders under section 31.

This amendment will ensure that parties in a proceeding do not need to comply with multiple procedures unnecessarily and proceedings are not unduly delayed through the operation of the Act.

While it may still be necessary to adjourn proceedings following advice from the prosecutor and notification to the Attorney-General of a potential disclosure of national security information, proposed subsection 25(8) will provide that a court will only be required to adjourn as much of the proceeding as may involve a disclosure of national security information. Those parts of the proceeding unaffected by the disclosure may continue in the normal course. The ability to limit the scope of the adjournment will assist in countering undue delays.

Items 32 and 33: Subparagraphs 26(1)(a)(i) and (ii)

These items are consequential amendments resulting from item 26 which clarifies that the obligation under section 24 to notify the Attorney-General of the potential disclosure of national security information is also borne by the defendant's legal representative.

Item 34: Subparagraph 26(1)(a)(iii)

This item is a consequential amendment resulting from item 31 which reflects the process whereby the prosecutor notifies the Attorney-General of the potential disclosure of national security information under proposed subsection 25(6) after making an assessment of the

witness's answer or being advised by the Attorney-General's representative under proposed subsections 25(4) and (5).

Item 35: Subsection 26(8)

This item will amend section 26 by repealing subsection 26(8) and substituting a new subsection 26(8).

Subsection 26(8) currently specifies persons who may be 'potential disclosers' of information in a proceeding. However, it does not account for the possibility of the defendant's legal representative being a potential discloser.

Proposed subsection 26(8) will clarify that the defendant's legal representative, along with the defendant and prosecutor will, in all instances, be classified as a potential discloser of the information.

Items 36 and 37: Subsections 27(1), (2) and (3)

These items will repeal and replace subsections 27(1) and (2) and partially repeal and replace subsection 27(3).

These amendments are consequential to the proposed repeal and replacement of the definition of 'federal criminal proceedings' within section 14 (Item 11).

Item 38: Paragraph 27(3)(b)

This item is a consequential amendment to paragraph 27(3)(b) as a result of the renumbering of the subsections in section 24 (item 27) and section 25 (item 31).

Items 39 and 40: Subparagraphs 28(1)(a)(i) and (ii)

These items are consequential amendments arising out of item 26, which clarifies that the notification obligations under section 24 are also borne by the defendant's legal representative.

Items 41 and 44: Subsections 28(2), 28(9) and 28(10)

These items will insert amendments to cover the defendant's legal representative, consistent with other proposed amendments.

Items 42 and 43: Subsections 28(5) and 28(6)

These items make consequential amendments to subsection 28(5) and repeal subsection 28(6) as a result of removing extradition proceedings from the definition of a federal criminal proceeding (item 11).

Item 45: Subsection 29(1)

This is a consequential amendment to subsection 29(1) reflecting that a closed court hearing will no longer be provided for under subsection 25(3) (item 31).

Item 46: Paragraph 29(2)(f)

This item will amend subsection 29(2) by repealing paragraph 29(2)(f) and substituting a new paragraph 29(2)(f).

Currently, the Attorney-General and his or her legal representative may be present at a closed hearing in a federal criminal proceeding if the Attorney-General has intervened in the proceedings under section 30.

Proposed substituted paragraph 29(2)(f) will clarify that any other representative of the Attorney-General, in addition to the Attorney-General and the Attorney-General's legal representative, may also be present. This will allow, for example, officers of the relevant law enforcement, security or intelligence agencies or Attorney-General's Department to be present in order to assist the Attorney-General fulfil his or her role of protecting national security information. This amendment will complement the proposed section 20A (item 20), which will create a broader power for the Attorney-General, the Attorney-General's legal representative and any other representative to attend and be heard at any stage of a federal criminal proceeding.

Items 47 and 48: Subparagraph 29(5)(c)(iii) and subsection 29(6)

These items are consequential amendments to subparagraph 29(5)(c)(iii) and subsection 29(6) to remove the reference to section 30. These consequential amendments are necessary as item 50 proposes to repeal section 30.

Item 49: Subsection 29(7)

This item is a consequential amendment resulting from the insertion of the definition of 'national security information' (item 8).

Item 50: Section 30

This item will repeal section 30 of the NSI Act.

Section 30 currently allows the Attorney-General to intervene in a federal criminal proceeding where closed court hearing requirements apply.

Section 30 is no longer necessary as proposed section 20A, inserted by item 20, will provide for the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General, to be present and to be heard at a federal criminal proceeding in relation to the disclosure, protection, storage, handling and destruction of national security information.

Item 51: Paragraphs 31(6)(a) and (b)

This item will amend paragraphs 31(6)(a) and (b) in order to clarify that a court may make orders under subsection 31(6) that apply to a defendant's legal representative as well as to the defendant.

Subsection 31(6) currently gives the court the power to order, after holding a witness exclusion certificate hearing, that the prosecutor or defendant may or must not call the person as a witness. However, it is unclear whether the court is empowered to extend such orders to the defendant's legal representative. The proposed amendment will clarify that the court can do so.

Items 52 and 53: Paragraph 32(1)(e) and subsection 32(2)

These items are consequential amendments to paragraph 32(1)(e) and subsection 32(2) to remove the reference to section 30. These consequential amendments are necessary as item 50 proposes to repeal section 30.

Item 54: Subsection 32(2)

This item is a consequential amendment which is necessary because of the insertion of the proposed definition of 'national security information' (item 8).

Item 55: Subsection 37(1)

This item is a consequential amendment to subsection 37(1) to remove the reference to 'intervention' under section 30 which is proposed to be repealed by item 50.

Item 56: Divisions 1A and 1B

This item will insert new Divisions 1A and 1B into Part 3A of the NSI Act. Proposed sections 38AA and 38AB will be inserted by this item under new Divisions 1A and 1B respectively.

Part 3A of the NSI Act, which will incorporate the proposed Divisions 1A and 1B, currently sets out a regime for civil proceedings similar to that which applies to federal criminal proceedings. The proposed amendments under this item are similar to those in item 20 for the criminal regime.

Proposed section 38AA

Proposed section 38AA will provide for the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General (such as an officer from the Department or a law enforcement or intelligence and security agency who is responsible for the information) to attend and be heard at any stage of a civil proceeding where an issue relating to disclosure, protection, storage, handling or destruction of national security information in the proceeding arises.

Proposed subsection 38AA will replace the existing, more limited scope for intervention by the Attorney-General in closed court hearings under section 38K (proposed to be repealed by item 83).

Proposed section 38AB

Consistent with proposed section 20B for criminal proceedings (item 20), proposed section 38AB will require the court in a civil proceeding to consider, before hearing an issue relating

to the disclosure, protection, storage, handling or destruction of national security information in the proceeding, making an order under section 93.2 of the Criminal Code for the hearing to be held in camera or another appropriate order to protect national security information under proposed new subsection 19(3A) (proposed to be inserted by item 19). Under section 93.2 of the Criminal Code, a person presiding over the court may make orders, if satisfied they are in the interest of the security or defence of the Commonwealth, to do any or all of the following: exclude members of the public, place restrictions on reporting of proceedings and place restrictions on access to physical evidence.

This requirement will not apply if the issue is the subject of an order that is in force under section 38B (that is, a consensual disclosure arrangement akin to a section 22 order in federal criminal proceedings). In those circumstances, protections agreed as sufficient by the parties and the court will already be in place.

Item 57: Subsections 38A(1), (2) and (3)

This item will repeal existing subsections 38A(1), (2) and (3) and insert new subsections 38A(1) and (2). It will make amendments similar to those for criminal proceedings in section 21 (item 21).

Section 38A currently provides for parties in civil proceedings to hold conferences before the substantive hearing to consider issues relating to the disclosure of national security information. These conferences are designed to facilitate the formation of section 38B agreements between the parties regarding the protection of national security information during the course of the proceeding.

Proposed subsection 38A(1) will clarify the availability of section 38A hearings at any stage of a civil proceeding, not only prior to the substantive proceeding. It will also provide that hearings may be conducted to consider issues relating not only to disclosure of national security information but also to the protection, storage, handling and destruction of such information.

Proposed subsection 38A(1) will also provide that the Attorney-General or the Attorney-General's legal representative may apply to the court to hold a section 38A hearing. The proposed subsection will also clarify that the parties' legal representatives, as well as the parties themselves, may apply to the court for a section 38A hearing.

Subsection 38A(2) currently specifies that if the Attorney-General is not party to the proceeding, there is an obligation on the party who applies for the conference to notify the Attorney-General of the conference. Proposed new subsection 38A(2) will extend this obligation by requiring an applicant to notify all relevant parties that an application has been made.

Subsection 38A(3) will be repealed by this item as items 4 and 5 propose to amend section 6A of the NSI Act to make it clear that references to the Attorney-General are to be read as references to the Minister appointed by the Attorney-General under subsection 6A(3), where the Attorney-General is a party to a civil proceeding and where the NSI Act has been invoked.

Item 58: Subsection 38A(4)

This item is an amendment consequential to the amendments made by item 57 and will ensure consistency of language between all subsections of section 38A.

This amendment reflects similar changes in terminology in the federal criminal proceeding context in proposed subsections 21(1) and (2) inserted by items 21 and 22.

Item 59: Subsection 38B(1)

This item will repeal and replace existing subsection 38B(1). It is consistent with the proposed amendment to section 22 in the criminal context (item 23). Proposed subsection 38B(1) will include a reference to legal representatives and clarify that they can also be part of a consensual section 38B arrangement. It will also clarify that arrangements between the parties and the subsequent court orders giving effect to those arrangements may cover not only the disclosure of national security information, but also the protection, storage, handling and destruction of that information. This item will also revise the heading to subsection 38B to reflect the insertion of a new definition of 'national security information' (item 8).

Item 60: Paragraph 38C(1)(a)

This item will amend paragraph 38C(1)(a) by omitting reference to 'information that is disclosed, or to be disclosed, to the court' and substituting it with 'national security information that is disclosed, or to be disclosed'. The proposed amendment is consistent with that proposed for section 23 in the criminal context (item 24).

Paragraph 38C(1)(a) currently enables the regulations to prescribe how to protect, store, handle and destroy 'information'. This could extend to all information that may be disclosed (without reference to its national security status). It is also limited to information which is to be disclosed to the court.

The proposed amendments will extend this regulation-making power to allow for the protection of all national security information arising in a proceeding, not just that which is to be disclosed to the court.

Item 61: Subsections 38C(2) and (3)

This item will amend section 38C by repealing subsections 38C(2) and (3) and substituting a proposed new subsection 38C(2).

Existing subsection 38C(2) will be repealed in light of proposed new subsection 19(3A) (item 19) which will make it clear that the court retains discretion during a civil proceeding to make appropriate orders in the interests of national security relating to the disclosure, protection, storage, handling and destruction of national security information.

Proposed subsection 38C(2) will clarify that the Regulations do not apply to information that is subject to an order that is in force under a section 38B arrangement. This is consistent with the policy intention of the NSI Act that, if possible, it is preferable that the parties agree to an arrangement under section 38B. Entry into consensual arrangements for the handling of national security information assists in ensuring proceedings are progressed efficiently.

Item 62: Subsection 38D(1)

This item will repeal subsection 38D(1) and substitute a new proposed subsection 38D(1). The proposed new provision will clarify the notice obligations under section 38D in a similar way to the proposed amendments to section 24 in the criminal context (item 26).

Proposed subsection 38D(1) will clarify that the obligation to notify the Attorney-General of a prospective disclosure of national security information is imposed not only on parties to a civil proceeding, but also on their legal representatives. It will also clarify that the information, the subject of the notification obligation, is national security information.

In a similar way to the proposed amendments to section 24 (item 26), proposed paragraph 38D(1)(c) will provide that the notification obligations placed on parties and parties' legal representatives in a civil proceeding extend to any potential disclosure of national security information resulting from their application to a court of a subpoena or other order which requires a person to produce a document or disclose national security information in the proceeding. For example, if a security or intelligence agency is subpoenaed for documents by the party's legal representative, where that party's legal representative knows or believes that those documents contain national security information, the party's legal representative must notify the Attorney-General of that knowledge or belief in accordance with subsection 38D(1).

Note 1 to proposed subsection 38D(1) will provide that a failure to give notice as required under subsection 38D(1) is an offence under section 46C of the Act. The offence is punishable by up to 2 years imprisonment.

Item 63: Subsection 38D(2)

This item is a consequential amendment to subsection 38D(2) arising out of the proposed amendment to subsection 38D(1) to provide that the obligations under that subsection are imposed not only on parties to a civil proceeding, but also on their legal representatives (item 62). This substitution will clarify that neither a party nor their legal representative would need to give notice under subsection 38D(1) in the circumstances listed in subsection 38D(2).

Items 64 to 66: Subsection 38D(2)

These items will make amendments to clarify the circumstances where a party or a party's legal representative is not required to give notice under subsection 38D(1). Generally, these circumstances are where the Attorney-General has become aware of any potential disclosure of national security information through other mechanisms in the Act.

Following the proposed amendments to subsection 38D(2) as provided by these items, a party or a party's legal representative will not be required to give notice about the information to be disclosed if:

- another person has already given notice about the information,
- the information is the subject of a certificate given to the parties or their legal representatives under section 38F or 38H,
- the information is the subject of arrangements between the parties and court orders under section 38B or 38L, or

- the Attorney-General has provided advice about the information under subsection 38F(7) or 38H(9).

These proposed amendments will ensure that parties in a proceeding are not unnecessarily required to comply with multiple disclosure procedures that may delay the proceedings.

Item 67: Subsections 38D(4) and (5)

This item will repeal existing subsections 38D(4) and (5) and insert new subsections 38D(4) and (5).

Proposed new subsection 38D(4) will require the person who gives notice of a potential disclosure under subsection 38D(1) to advise all other relevant parties, and their legal representatives, that notice has been given to the Attorney-General.

Once notice has been given to the Attorney-General, subsection 38D(5) currently requires the court to adjourn the whole proceeding (as opposed to the relevant part). Proposed new subsection 38D(5) will ensure that the court must only adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed; i.e. that part of the proceeding which relates to the national security information which is the subject of the notice to the Attorney-General. This will ensure that those parts of the proceeding that do not relate to the national security information in question can continue, thereby avoiding any unnecessary delay.

Proposed new subsection 38D(5) will also clarify that the adjournment of proceedings continues until the Attorney-General issues a civil non-disclosure certificate in accordance with subsection 38F(5), issues a civil witness exclusion certificate in accordance with subsection 38H(4) or provides advice to the court in accordance with subsections 38F(7) or 38H(9).

Items 68 and 69: Subparagraph 38E(1)(b) and subsection 38E(2)

These items repeal and replace paragraph 38E(1)(b) and amend subsection 38E(2).

The proposed amendments will clarify that the obligation to notify the court of the knowledge or belief that a witness will disclose national security information is borne not only by the party but also by the party's legal representative.

Item 70: Subsection 38E(2A)

This item will insert a proposed new subsection 38E(2A). The proposed subsection will provide that a person need not advise the court that a witness's answer may involve potential disclosure of national security information, in accordance with subsection 38E(2), when:

- another person has already notified the court,
- the Attorney-General has been notified subsection 38D(1),
- the information is the subject of a civil non-disclosure certificate under section 38F or the subject of an arrangement given effect by order of the court under section 38B,
- the information is the subject of other court orders under section 38L, or

- the information has been the subject of advice from the Attorney-General under subsection 38F(7).

The proposed amendments will clarify that the intention of notification provisions is to ensure the Attorney-General is aware of any potential disclosure of national security information. Where the Attorney-General has become aware of any potential disclosure of national security information under other mechanisms in the Act, notice is not required to be given. This ensures that parties in a proceeding do not need to comply with multiple disclosure procedures unnecessarily and proceedings are not unduly delayed through the operation of the Act.

Items 71 to 73: Subsection 38E(4), 38E(5) and 38E(6)

These items will make amendments to clarify that although the court is required to adjourn the proceedings under subsections 38E(4), (5) and (6) to allow the Attorney-General to consider the written answer of a witness, a court is to adjourn only so much of the proceeding that may involve the disclosure of national security information which is the subject of the notice under section 38E. These proposed amendments will ensure that even if the court considers that an adjournment is required, those parts of the proceeding that do not relate to the written answer in question can continue, thereby avoiding any undue delays.

Items 74 and 75: Subparagraphs 38F(1)(a)(i) and (ii)

These items are consequential amendments to subparagraphs 38F(1)(a)(i) and (ii) as a result of proposed amendments to section 38D which will extend the notification obligations to parties' legal representatives as well as to the parties themselves (item 67).

Item 76: Subsection 38F(9) (new definition of 'potential discloser')

This item will amend section 38F by repealing subsection 38F(9) and substituting proposed new subsection 38F(9).

The definition of 'potential discloser' in existing subsection 38F(9) does not cover parties' legal representatives being potential disclosers.

The proposed amendment will ensure that parties' legal representatives are included in the definition.

Items 77 and 78: Subparagraphs 38H(1)(a)(i) and 38H(1)(a)(ii)

These items are consequential amendments to subparagraphs 38H(1)(a)(i) and (ii) as a result of the proposed amendments to section 38D(1) to include legal representatives (item 62).

Items 79 and 80: Subsections 38H(2) and 38H(9)

These items will repeal existing subsections 38H(2) and 38H(9) and replace them with new subsections 38H(2) and 38H(9).

The items are consistent with other amendments that extend coverage to legal representatives. They will make it clear that the obligation not to call a witness extends to legal

representatives in addition to relevant parties and that the Attorney-General must advise the relevant legal representative, as well as the parties, of a decision not to issue a certificate under subsection 38H(2).

Item 81: Subparagraph 38I(2)(e)

This item will amend subsection 38I(2) by repealing subparagraph 38I(2)(e) and substituting proposed new subparagraph 38I(2)(e).

Under existing section 38I, only the Attorney-General or his or her legal representative may be present at a closed hearing in a civil proceeding. This precludes other representatives (for example, from law enforcement or security agencies) from being present and assisting the Attorney-General to fulfil his or her role of appropriately protecting national security information.

The proposed new subparagraph will clarify that other representatives of the Attorney-General are allowed to be present during closed court civil hearings. The proposed amendment will complement the proposed new section 38AA (item 56) which will create a broader power for the Attorney-General and representatives to be present and be heard at civil proceedings.

Items 82 and 87: Subsections 38I(7) and 38M(3)

These items are consequential amendments to subsections 38I(7) and 38M(3) which are necessary because of the insertion of the definition of 'national security information' at item 8.

Item 83: Section 38K

This item will repeal section 38K. Section 38K currently allows the Attorney-General to intervene in a civil proceeding where closed court hearing requirements apply. Section 38K will no longer be necessary as proposed section 38AA (proposed to be inserted by item 56) will provide for a wider ability for the Attorney-General's interests to be represented and heard at civil proceedings.

Item 84: Paragraphs 38L(6)(a) and (b)

This item will insert the term 'legal representative' in paragraphs 38L(6)(a) and (b). These proposed amendments will clarify that the court can order the parties, as well as the parties' legal representatives, not to call (or may call) a witness in a civil proceeding in accordance with subsection 38L(6).

Items 85, 86 and 88: Paragraph 38M(1)(d), subsection 38M(2) and subsection 38R(1)

These items make consequential amendments to subsections 38M(1), 38M(2) and 38R(1) to remove references to section 38K (which is proposed to be repealed by item 83).

Item 89: Subsection 39(1A)

This item will insert proposed new subsection 39(1A). This item will clarify that when the Secretary of the Attorney-General's Department is considering whether to give notice to a legal representative that it would be appropriate for the legal representative or a person assisting the legal representative to seek an appropriate security clearance, the Secretary should consider the nature of the information likely to be disclosed and not the character of the legal representative in question. This reflects the protective objects of the NSI Act, which are directed towards the characteristics of the information itself.

Items 90, 92, and 93: Subsection 39(2), paragraph 39(3)(a), subparagraph 39(5)(b)(i)

These items will amend various parts of section 39 to omit the phrase 'by the Department'. These amendments will clarify that while persons must apply to the Secretary of the Attorney-General's Department for a security clearance if national security information is likely to be disclosed in a federal criminal proceeding, the source from which such clearances are obtained does not need to be the Attorney-General's Department.

Item 91: Subsection 39(3)

This item will insert the words 'or the defendant's legal representative (on the defendant's behalf)' after the word 'defendant' in subsection 39(3).

Under existing subsection 39(3), it is unclear whether a legal representative could apply, on the defendant's behalf, for a deferral or adjournment of the proceedings pending receipt of their security clearance. The proposed amendment will clarify that a defendant's legal representative, on behalf of the defendant, may apply for a deferral or adjournment.

Item 94: Subsection 39A(1A)

This item will insert a new subsection 39A(1A) to clarify that the Secretary should consider the nature of the information likely to be disclosed and not the character of the legal representative in question when deciding on the need for a security clearance.

This proposed amendment serves the same purpose as proposed new subsection 39(1A) (item 89).

Items 95, 97 98: Subsection 39A(2), paragraphs 39A(3)(a) and (5)(d) and subparagraph 39A(6)(d)(i)

These items reflect amendments made by items 90, 92 and 93 but are applicable to civil proceedings. These items will amend various parts of subsection 39A to omit the phrase 'by the Department'. These amendments will clarify that while persons must apply to the Secretary of the Attorney-General's Department for a security clearance if national security information is likely to be disclosed in a civil proceeding, the source from which such clearances are obtained does not need to be the Attorney-General's Department.

Item 96: Subsection 39A(3)

This item will amend subsection 39A(3) to clarify that a party's legal representative, on behalf of the party, may apply for a deferral or adjournment under subsection 39A(3) to allow security clearances to be issued.

Item 99: Subsections 40(1) and 40(1A)

This item will amend section 40 by repealing subsection 40(1) and substituting new subsections 40(1) and 40(1A).

Under existing section 40, it is an offence for the prosecutor, the defendant or another person to disclose information after notice is given to the Attorney-General under subsection 24(1) but before the Attorney-General gives a certificate or advice under section 26. The proposed amendments will divide this offence into two separate offences contained within proposed new subsections 40(1) and 40(1A). The proposed changes will reflect that the notification obligations provided by section 24 are imposed not only on a defendant in a federal criminal proceeding, but also on a defendant's legal representative (item 26).

The offence in proposed new subsection 40(1) will be limited to the prosecutor, defendant and the defendant's legal representative, omitting the previous reference to other persons making a disclosure. This will ensure that only persons who have given notification of expected disclosure, and can therefore be assumed to be aware of their obligations under the Act, satisfy the elements of the offence contained in this subsection.

Proposed new subsection 40(1A) will provide for an offence where a person other than the prosecutor, defendant and the defendant's legal representative makes a disclosure, where they have been advised under subsection 24(3) that the Attorney-General has been notified that the evidence they are to provide may involve disclosure of national security information. This similarly ensures that only persons who have been advised of the notification, and can therefore be assumed to be aware of their obligations under the Act, satisfy the elements of the offence contained in this subsection.

A maximum penalty of imprisonment for two years will apply for both offences.

Item 100: Paragraph 40(2)(a)

This item will amend paragraph 40(2)(a) by omitting reference to 'or believes' and substituting 'believes or is advised'.

This amendment is a consequential amendment to the insertion of a new subsection 25(6) by item 31. Proposed new subsection 25(6) will provide that if the prosecutor knows, believes, or is advised that the written answer provided by the witness will disclose national security information in a proceeding, the prosecutor must advise the court and the Attorney-General of that knowledge, belief or advice as soon as practicable. This proposed amendment will ensure that it is an offence to disclose information from a witness's answer prior to a certificate being issued if the prosecutor has been advised that a witness's answer involves national security information, and he or she has notified the Attorney-General.

Item 101: Section 41

This item will repeal existing section 41 and replace it with a proposed new section 41.

Existing section 41 provides that it is an offence to disclose information after the prosecutor or defendant notifies the Attorney-General that a witness may be called who will disclose information that may affect national security but before the Attorney-General has given a certificate.

The proposed amendments to section 24 (item 26) will place an obligation on a defendant's legal representative to notify the Attorney-General of any potential disclosure of national security information by a witness.

Proposed new section 41 will clarify that it is an offence for a defendant's legal representative, in addition to the defendant themselves and the prosecutor, to call a witness after they have notified the Attorney-General that they may disclose national security information.

A maximum penalty of imprisonment for two years will apply.

Item 102: Paragraph 42(a)

This item is a consequential amendment arising out of the inclusion of new subsections 24(3) and (4) inserted by item 27.

Items 103 and 107: Sections 45A and 46FA

These items will insert two new offences into Part 5 of the NSI Act, in proposed new sections 45A and 46FA.

The proposed new sections will create a new offence relating to federal criminal proceedings (proposed section 45A) and a similar new offence relating to civil proceedings (proposed section 46FA).

These new offences will make it an offence to contravene the NSI Regulations made under sections 23 and 38C.

The proposed new offences will attract a maximum penalty of 6 months imprisonment. Although the substantial components of the offences are contained within the Regulations, a penalty of imprisonment is reasonable, given the type of classified and sensitive information in question and the serious consequences of failing to comply with the requirements relating to the storage, handling or destruction of national security information. Furthermore, without a sufficient penalty the offence will not act as a sufficient deterrent against failing to comply with the requirements in the Regulations.

Item 105 – Subsections 46A(1) and 46A(1A)

This item will amend section 46A by repealing subsection 46A(1) and substituting proposed new subsections 46A(1) and (1A).

Existing section 46A provides that it is an offence if a party to a civil proceeding or a person other than the party discloses information after the party notifies the Attorney-General about the potential disclosure of national security information but before the Attorney-General has given a certificate.

The proposed amendments to section 38D (item 62) will place an obligation on the legal representatives of parties to notify the Attorney-General of any potential disclosure of national security information. Proposed new subsection 46A(1) will clarify that it is an offence for a legal representative of a party, in addition to the party themselves, to disclose the information.

Proposed new subsection 46(1A) will provide for an offence where a person other than the parties and their legal representatives makes a disclosure, where they have been advised under subsection 38D(4) that the Attorney-General has been notified that the evidence they are to provide may involve disclosure of national security information.

A maximum penalty of imprisonment for two years will apply.

Item 106: Sections 46B and 46C

This item will amend Part 5 of the NSI Act by repealing sections 46B and 46C and substituting proposed new sections 46B and 46C.

Under existing section 46B a party to a civil proceeding commits an offence if they call a witness, after they have notified the Attorney-General that the witness may disclose national security information, but before the Attorney-General has given a civil witness exclusion certificate or advice.

Proposed new section 46B will reflect that the notification obligations provided by section 38D are imposed not only on parties to civil proceedings, but also on their legal representatives (item 62).

The offence contained in proposed section 46B will be committed where a party or a party's legal representative notifies the Attorney-General under section 38D and that party calls the relevant person as a witness before the Attorney-General gives a certificate or advice under section 38H, and the disclosure of information by the mere presence of that person is likely to prejudice national security. A maximum penalty of imprisonment for two years will apply.

Proposed section 46C similarly reflects that notification obligations provided by sections 38D and 38E will be imposed not only on parties to civil proceedings but also their legal representatives. The offence contained in proposed section 46C will be committed where a party or a party's legal representative contravenes subsections 38D(1), 38D(3), 38D(4) or 38E(2), all of which contain notification requirements, and the disclosure of information referred to in the applicable subsection is likely to prejudice national security. A maximum penalty of imprisonment for two years will apply.

Part 2 – Application of amendments and saving

Part 2 to Schedule 8 of the Bill outlines the application of the proposed amendments contained in Part 1 to Schedule 8 of the Bill.

Item 109: Application of amendments

This item sets out the how the amendments contained in Part 1 to Schedule 1 of the Bill will apply to proceedings.

The amendments will apply to federal criminal proceedings and civil proceedings where notice under sections 6 and 6A respectively have been given on or after the commencement of the amendments. For proceedings where notice has been given before commencement, the amendments will apply only to those parts of the proceedings that take place on or after commencement. Further, any certificates, orders, notices or advices which were given before commencement will continue to have effect. This will ensure that proceedings currently taking place or starting prior to commencement can still move forward in compliance with the Act.

Item 110: Savings provision

This item will insert a savings provision which provides that Regulations made under sections 23 and 38C of the Act will remain in force and continue as such, notwithstanding that sections 23 and 38C will be amended. The amendments to these sections will not affect the substantive content or operation of the Regulations. By allowing them to continue, the ongoing effectiveness of the protective regime under the NSI Act will be ensured.

Schedule 9 – Functions of Inspector-General of Intelligence and Security

Overview

Schedule 9 will amend the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) to allow the Prime Minister to request the Inspector-General of Intelligence and Security (IGIS) to inquire into an intelligence or security matter relating to any Commonwealth department or agency. Currently, the IGIS may only inquire into matters relating to the six Australian Intelligence Community (AIC) agencies: the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), the Defence Imagery and Geospatial Organisation (DIGO), the Defence Intelligence Organisation (DIO), the Defence Signals Directorate (DSD) and the Office of National Assessments (ONA).

Increasingly, a range of Commonwealth departments and agencies work with the AIC agencies on intelligence and security matters. To fully consider an intelligence or security matter, it may sometimes be necessary for the IGIS to consider the role played by a non-AIC department or agency in relation to that matter.

The proposed amendments to the IGIS Act will provide legislative flexibility for the IGIS to inquire into an intelligence or security matter relating to any Commonwealth department or agency at the request of the Prime Minister. This will ensure such enquiries are conducted only where the Prime Minister considers that this is necessary to enable the IGIS to fully consider an intelligence or security matter. It will also ensure the IGIS is not unnecessarily diverted from his or her core role of oversight of the AIC agencies.

Item 1: Subsection 3(1) (definition of 'agency')

This item will repeal the definition of 'agency'.

The IGIS Act currently defines agency to mean an AIC agency. As the proposed amendments will enable the IGIS to consider, on request of the Prime Minister, not just AIC agencies but any Commonwealth agency, this definition of agency is no longer appropriate for the purposes of the IGIS Act.

Instead of using the term agency, the Act will refer to either an 'intelligence agency' when referring to the AIC agencies, or 'Commonwealth agency' when referring to both AIC agencies and other Commonwealth agencies (see items 2 and 5).

Item 2: Subsection 3(1) (definition of 'Commonwealth agency')

This item will repeal the existing definition of 'Commonwealth agency' and substitute a new definition.

The current definition provides that 'Commonwealth agency' has the same meaning as in Part IV of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act), which defines 'Commonwealth agency' as 'a Minister or an authority of the Commonwealth'. As the proposed amendments will enable the IGIS to consider, on request of the Prime Minister, non-AIC Commonwealth agencies, but not Ministers, this definition of 'Commonwealth agency' is no longer appropriate for the purposes of the IGIS Act.

Item 2 will replace the current definition of 'Commonwealth agency' with a new definition that will include both AIC agencies and non-AIC Commonwealth agencies, but does not include Ministers of the Commonwealth. The definition is intended to cover a wide range of Commonwealth agencies to ensure that if a non-AIC Commonwealth agency is involved in a security or intelligence issue, the IGIS will be able to inquire into that agency. The new definition will cover:

- Commonwealth Departments, such as the Attorney-General's Department;
- Commonwealth agencies (which will generally be established by an Act), such as the Australian Federal Police and the Australian Customs and Border Protection Service;
- the Australian Defence Force;
- Commonwealth statutory bodies and office holders; and
- other bodies declared by legislative instrument to be a Commonwealth agency (see item 9).

Item 3: Subsection 3(1) (definition of 'employee')

This item will amend the definition of 'employee' to refer to a 'Commonwealth agency' rather than an 'agency'.

This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that the definition of employee applies in relation to any Commonwealth agency.

Item 4: Subsection 3(1) (definition of 'head')

This item will repeal the definition of 'head' and substitute a new definition.

The current definition of 'head' only covers the heads of AIC agencies. The new definition of 'head' will also cover heads of non-AIC Commonwealth agencies. For AIC agencies, the head is the Director or Director-General of that agency. For departments, the head is the Secretary of the department. For other Commonwealth agencies, the head is the principal officer of that agency, however this is described.

Item 5: Subsection 3(1)

This item will insert a definition of 'intelligence agency', which is defined as the six AIC agencies: ASIO, ASIS, DIGO, DIO, DSD or ONA.

Item 6: Subsection 3(1) (definition of 'member')

This item will amend the definition of 'member' to refer to a 'Commonwealth agency' rather than an 'agency'.

This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that the definition of member applies in relation to any Commonwealth agency.

Item 7: Subsection 3(1) (definition of 'responsible Minister')

This item will amend the definition of 'responsible Minister' to refer to a 'Commonwealth agency' rather than an 'agency'.

This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that the definition of responsible Minister applies in relation to any Commonwealth agency.

Item 8: Subsection 3(3)

This item will amend subsection 3(3) to refer to a 'Commonwealth agency' rather than an 'agency'.

This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that subsection 3(3) applies in relation to any Commonwealth agency.

Item 9: At the end of section 3

This item will insert a new subsection (4) at the end of section 3 to enable the Minister to declare, by legislative instrument, that a body is a Commonwealth agency for the purposes of the new definition of 'Commonwealth agency' (see item 2).

Item 10: Subparagraph 4(a)(i)

This item will amend the objects clause in subparagraph 4(a)(i) by removing the words 'or security' from 'Australian intelligence or security agencies'.

This is a consequential amendment to make the wording of subparagraph 4(a)(i) consistent with the new definition of 'intelligence agency'. It is not intended to change the meaning of this provision.

Item 11: At the end of subparagraphs 4(a)(i) and (iii)

This item will insert the word 'and' at the end of subparagraphs 4(a)(i) and (iii).

This amendment reflects modern drafting practice. It is not intended to change the meaning of these provisions.

Item 12: After paragraph 4(b)

This item will insert a new paragraph (ba) in the objects clause in section 4.

Paragraph (ba) will provide that it is also an object of the IGIS Act to assist Ministers in investigating intelligence or security matters relating to Commonwealth agencies, including agencies other than intelligence agencies. This amendment will ensure that the objects of the IGIS Act also reflect the extended mandate of the IGIS to investigate intelligence or security matters relating to Commonwealth agencies at the request of the Prime Minister.

Item 13: Subparagraph 8(1)(c)(i)

This item will amend subparagraph 8(1)(c)(i) to clarify that the reference to 'Commonwealth agency' in this subparagraph has a different meaning to Commonwealth agency as defined in section 3.

Paragraph 8(1)(c)(i) refers to the situation where ASIO has furnished a report to a Commonwealth agency that may result in the taking of action that is adverse to the interests of the person. Item 13 will clarify that, in this context, 'Commonwealth agency' has the same meaning as in Part IV of the ASIO Act.

This item will also amend the heading to section 8 by omitting 'Inquiry' and substituting 'Intelligence agency inquiry'. This amendment will clarify that section 8 applies only to inquiries relating to intelligence agencies.

Item 14: Subparagraph 8(1)(c)(ii)

This item will amend subparagraph 8(1)(c)(ii) to replace the reference to 'the Security Appeals Tribunal' with the 'Security Appeals Division of the Administrative Appeals Tribunal'.

This amendment will correct a technical error in the IGIS Act.

Item 15: Subsection 8(5)

This item will amend subsection 8(5) to refer to an 'intelligence agency' rather than an 'agency'.

This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that subsection 8(5) applies only in relation to intelligence agencies.

Item 16: Subsection 8(8)

This item will repeal subsection 8(8).

Subsection 8(8) contains limitations on the IGIS's inquiry functions. As these limitations are proposed to also apply to the IGIS's new inquiry function, subsection 8(8) will be replaced by subsection 9AA. Subsection 9AA will largely replicate subsection 8(8) but will apply to IGIS inquiries under both section 8 and proposed section 9 (see item 17).

Item 17: Section 9

This item will repeal section 9 and replace it with a new section. It will also insert a new section 9AA to replace repealed subsection 8(8).

Section 9

Section 9 currently provides that the Prime Minister may request the IGIS to inquire into a matter relating to an intelligence agency. Where such a request is made, the IGIS must inquire into that matter if it is within the IGIS's functions, as set out in section 8.

Section 9 will be repealed and replaced with an expanded provision. The new subsections 9(1) and (2) will mirror the existing section 9, but will reflect modern drafting style.

Subsections 9(3) and (4) will provide that the Prime Minister may also request the IGIS to inquire into an intelligence or security matter relating to a Commonwealth agency and the IGIS must comply with such a request. These amendments will extend the IGIS's mandate to enable the IGIS to fully investigate an intelligence or security matter relating to any Commonwealth agency, which includes, but is not limited to, an intelligence agency. The IGIS will only be able to carry out this extended mandate on the request of the Prime Minister.

It is intended that the Prime Minister could request the IGIS to consider an entirely new security or intelligence matter that relates to Commonwealth agencies under subsection 9(3), and could also rely on subsection 9(3) to request that the IGIS extend a current inquiry into a security or intelligence matter to cover Commonwealth agencies outside the AIC. For example, if the IGIS were conducting an inquiry of his or her own motion under section 8, the Prime Minister could request, under subsection 9(3), that the IGIS extend that inquiry to cover other Commonwealth agencies.

Section 9AA

Item 17 will also insert a new section 9AA to replace subsection 8(8), which will be repealed by item 16.

Subsection 8(8) contains a number of limitations on the IGIS's existing inquiry functions under section 8. The limitations in subsection 8(8) are limitations that would be appropriate for an inquiry into Commonwealth agencies under section 9, so section 9AA will largely mirror the existing limitations in subsection 8(8) and ensure those limitations apply to inquiries under both section 8 and 9.

Paragraph 8(8)(a) currently provides that the IGIS must not inquire into a matter relating to an agency that occurred outside Australia, or before the commencement of the IGIS Act, without the approval of the responsible Minister. Proposed subparagraph 9AA(a)(ii) will mirror this requirement for all IGIS inquiries which do not start as a result of a request by the Prime Minister under section 9. Proposed subparagraph 9AA(a)(i) will provide that, where an inquiry starts or is extended as a result of a request by the Prime Minister under section 9, the IGIS must not inquire into a matter relating to an agency that occurred outside Australia, or before the commencement of the IGIS Act, without the approval of the Prime Minister.

Proposed paragraphs 9AA(b) and (c) will mirror existing paragraphs 8(8)(b) and (c) respectively.

Item 18: Section 9A

This item will amend section 9A to clarify that the IGIS's inspection function under section 9A only applies to intelligence agencies.

Item 19: Section 9A

This item will delete the word ‘relevant’ from section 9A, as the meaning of the provision is clear without needing to refer to ‘relevant agency’.

Item 20: Paragraph 11(1)(a)

This item amends paragraph 11(1)(a) to refer to an ‘intelligence agency’ rather than an ‘agency’.

This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that this paragraph only applies to an intelligence agency.

Item 21: Subsections 11(2) and (5)

This item amends subsections 11(2) and (5) to refer to an ‘intelligence agency’ rather than an ‘agency’.

These amendments are necessary as a consequence of other amendments in this Schedule, to clarify that these subsections only apply to an intelligence agency.

Item 22: Sections 12 and 14

This item amends sections 12 and 14 to refer to an ‘intelligence agency’ rather than an ‘agency’.

These amendments are necessary as a consequence of other amendments in this Schedule, to clarify that these sections only apply to an intelligence agency.

Item 23: Subsections 15(1), (2) and (3)

This item will amend subsections 15 (1), (2) and (3) to refer to a ‘Commonwealth agency’ rather than an ‘agency’.

These amendments are necessary as a consequence of other amendments in this Schedule, to clarify that the requirements to inform certain persons before commencing an inquiry apply to all IGIS inquiries.

Item 24: At the end of subsection 15(3)

This item will amend subsection 15(3) to insert a new paragraph (c).

The new paragraph will provide that if the IGIS inquires into a matter relating to a Commonwealth agency and does not advise the head of that agency, the IGIS must advise the responsible Minister for that agency. This is consistent with the requirements for other inquiries under the IGIS Act.

Item 25: Section 16

This item will amend section 16 to refer to a 'Commonwealth agency' rather than an 'agency'.

This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that the requirement to have regard to the functions of the Auditor-General and the Ombudsman, and the discretion to consult with these offices, applies to all IGIS inquiries.

Item 26: Subsections 17 (4), (6), (7), (8), (9) and (10)

This item will make a number of amendments to section 17 to refer to a 'Commonwealth agency' rather than an 'agency'.

These amendments are necessary as a consequence of other amendments in this Schedule, to clarify that the provisions relating to the conduct of inquiries apply to all IGIS inquiries.

Item 27: Paragraph 18(6)(b)

This item will amend paragraph 18(6)(b) to refer to a 'Commonwealth agency' rather than an Agency within the meaning of the *Public Service Act 1999* or an authority of the Commonwealth. The proposed definition of 'Commonwealth agency' will cover the same range of agencies as covered by the current reference to Agency within the meaning of the Public Service Act or authority of the Commonwealth. Therefore, this change will mean that consistent terminology is used throughout the IGIS Act.

Item 28: Section 19

This item will amend section 19 to refer to a 'Commonwealth agency' rather than an 'agency'. This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that section 19 applies to all Commonwealth agencies. Section 19 provides that the IGIS may, after notifying the head of an agency, at any reasonable time, enter any place occupied by the agency for the purposes of an inquiry under the IGIS Act.

Item 29: Paragraph 20(a)

This item will amend paragraph 20(a) to refer to a 'Commonwealth agency' rather than an 'agency'.

This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that provisions relating to the protection of national security classified documents during the course of an inquiry by the IGIS applies in relation to an inquiry by the IGIS into any Commonwealth agency.

Item 30: Paragraph 20(b)

This item will amend paragraph 20(b).

Section 20 currently provides for the protection of documents that have a national security classification, where these documents are in the possession of an agency and the IGIS

requires access to these documents during the course of an inquiry by the IGIS under the IGIS Act. Item 30 will apply this requirement to documents that have a national security classification (Top Secret, Secret, Confidential or Restricted) as well as documents that have a non-national security classification (such as Highly Protected or Protected). Some non-AIC Commonwealth agencies may possess documents that do not have a national security classification but have another protective security classification and contain sensitive information. For example, documents relating to sensitive law enforcement operations or containing criminal intelligence may be classified Protected or Highly Protected. This item will ensure that other sensitive classified documents are given the same protection as national security classified documents.

Item 31: Subsection 21(1)

This item will repeal subsection 21(1) and substitute a new subsection 21(1). It will also insert a new subsection 21(1AA).

Subsection 21(1)

Subsection 21(1) currently provides that, where the IGIS completes an inquiry into a matter relating to an agency, the IGIS must prepare a draft report setting out the IGIS's conclusions and recommendations as a result of the inquiry. Subject to subsections (1A) and (1B), the IGIS must give a copy of the draft report to the head of the relevant agency.

The proposed new subsection 21(1) will essentially mirror the existing subsection 21(1) but will clarify that this provision applies in relation to an inquiry by the IGIS into any Commonwealth agency. It also updates the wording of the existing provision to reflect modern drafting practice.

Subsection 21(1AA)

The proposed new subsection 21(1AA) will clarify that, before giving the head of a Commonwealth agency a copy of the draft report, the IGIS may remove from the draft report any matters that do not relate to that Commonwealth agency. For example, if a Commonwealth agency has only a marginal involvement in an intelligence or security matter, the IGIS may decide that it would not be appropriate for that agency to receive a copy of the entire draft report. In those circumstances, the IGIS could decide to give to that agency only the parts of the draft report that are relevant to that agency.

Item 32: Subsections 21(1A) and (1B)

This item will make amendments to subsections 21(1A) and (1B).

These amendments will omit the words 'an agency a copy of a draft report' and substitute 'a Commonwealth agency a draft agency copy'. These amendments are necessary as a consequence of other amendments in this Schedule, which will repeal the definition of 'agency' and substitute new definitions of 'Commonwealth agency' and 'intelligence agency'. The amendments will clarify that subsections 21(1A) and (1B) apply in relation to any Commonwealth agency. These amendments will also ensure that the wording of subsections 21(1A) and (1B) is consistent with the wording of the proposed new subsection 21(1), which also refers to 'a draft agency copy'.

Item 33: Subsection 21(1B)

This item will amend subsection 21(1B) to omit the words 'copy of that report' and substitute 'the draft agency copy'.

This amendment will make the wording of subsection 21(1B) is consistent with the wording of the proposed new subsection 21(1), which also refers to 'draft agency copy'.

Item 34: At the end of subsection 21(1B)

This item will amend subsection 21(1B) to include a new paragraph (c).

Subsection 21(1B) currently provides that, if the IGIS does not give to the head of an agency a copy of the draft report in respect of a matter that relates directly to the head of that agency, the IGIS must give a copy of the report to the Minister in relation to ASIO, ASIS or ONA (if the matter relates to the head of one of those agencies) or to the Secretary of the Department of Defence (if the matter relates to the head of DIGO, DIO or DSD).

Paragraph (c) will provide that, if the matter relates to the head of any other Commonwealth agency, the IGIS must give a copy of the report to the responsible Minister for that agency. This amendment is necessary to reflect the extended mandate of the IGIS to inquire into an intelligence or security matter relating to any Commonwealth agency on the request of the Prime Minister.

Item 35: Paragraph 21(2)(a)

This item will amend paragraph 21(2)(a) to omit the words 'a copy of a draft report to the head of an agency' and substitute 'a draft agency copy to the head of a Commonwealth agency'.

This amendment will ensure that the wording of paragraph 21(2)(a) is consistent with the wording of the proposed new subsection 21(1), which also refers to 'a draft agency copy'. This amendment will also replace the words 'an agency' with 'a Commonwealth agency'. This amendment is necessary as a consequence of other amendments in this Schedule, which will repeal the definition of agency and substitute new definitions of Commonwealth agency and intelligence agency. This amendment will clarify that paragraph 21(2)(a) will apply in relation to any Commonwealth agency.

Item 36: Paragraph 21(2)(b)

This item will amend paragraph 21(2)(b) to omit the words 'a copy of a draft report' and substitute 'the draft agency copy'.

This amendment will ensure that the wording of paragraph 21(2)(b) is consistent with the wording of the proposed new subsection 21(1), which also refers to 'a draft agency copy'.

Item 37: Subsection 22(1)

This item will repeal the existing subsection 22(1) and substitute new subsections 22(1) and (1A).

Subsection 22(1) currently provides that, where the IGIS completes an inquiry into a matter relating to an agency, the IGIS must prepare a report setting out the IGIS's conclusions and recommendations as a result of the inquiry. If a copy of the draft report was given to the head of the relevant agency under subsection 21(1), the IGIS must give a copy of the final report to the head of that agency. If a copy of the draft report was not given to the head of the relevant agency, then the IGIS must give a copy of the report to the person to whom a copy of the draft report was given under subsection 21(1B) (that is, the responsible Minister in relation to ASIO, ASIS or ONA or the Secretary of the Department of Defence).

The proposed new subsection 22(1) will essentially mirror the existing subsection 22(1) but will reflect modern drafting practice. It will also clarify that this provision applies in relation to the head of any Commonwealth agency. This amendment is necessary to reflect the extended mandate of the IGIS to inquire into an intelligence or security matter relating to any Commonwealth agency.

The proposed new subsection 22(1A) will clarify that the IGIS may remove from a final agency copy of the report any matters that do not relate to the Commonwealth agency concerned. For example, if a Commonwealth agency has only a marginal involvement in an intelligence or security matter, the IGIS may decide that it would not be appropriate for that agency to receive a copy of the entire report. In those circumstances, the IGIS could decide to give to that agency only the parts of the report that are relevant to that agency.

Item 38: Paragraph 22(2)(b)

This item will amend paragraph 22(2)(b) to refer to a 'Commonwealth agency' rather than an 'agency'.

This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that paragraph 22(2)(b) will apply in relation to any Commonwealth agency.

Item 39: Subsection 22(3)

This item will amend subsection 22(3) to omit the words 'If the report' and substitute 'If the report, or a final agency copy of the report'.

This is a consequential amendment to ensure the wording of subsection 22(3) is consistent with other amendments in this Schedule, which also refer to a 'final agency copy'.

Item 40: Subsection 22(3)

This item will amend subsection 22(3) to insert, after the words 'of the report', 'or the final agency copy'.

This is a consequential amendment to ensure the wording of subsection 22(3) is consistent with other amendments in this Schedule, which also refer to a 'final agency copy'.

Item 41: Subsection 22(4)

This item will repeal subsection 22(4) and substitute new subsections 22(4) and (5).

New subsections 22(4) and 22(5) will largely mirror the existing subsection 22(4) but will reflect modern drafting practice. Subsection 22(4) will provide that the IGIS must give the responsible Minister a copy of the final agency copy or, if subsection (3) applies and the report contains tax information, a copy of the version of the report that does not disclose the tax information. Subsection 22(5) will provide that, in addition, if the inquiry was conducted as a result of a request by the Prime Minister under section 9, the IGIS must also give the Prime Minister a copy of the final agency copy or a copy with tax information deleted if subsection (3) applies.

Item 42: Subsection 23(1)

This item will amend subsection 23(1).

Subsection 23(1) currently provides that, where the IGIS has conducted an inquiry under the Act following a complaint, the IGIS must give the complainant a written response relating to the inquiry.

This item will amend subsection 23(1) to clarify that this provision only applies to intelligence agencies, as there is no capacity for the IGIS to conduct an inquiry into non-intelligence agencies of his or her own motion.

Item 43: Subsection 24(1)

This item will amend subsection 24(1) to omit the words ‘an agency and has given a copy’ and substitute ‘a Commonwealth agency and has, under section 22, given a final agency copy’.

This amendment is necessary as a consequence of other amendments in this Schedule, which will repeal the definition of ‘agency’ and substitute new definitions of ‘Commonwealth agency’ and ‘intelligence agency’. This amendment will clarify that subsection 24(1) will apply in relation to any Commonwealth agency. It will also update the wording of subsection 24(1) to ensure consistency with other amendments in this Schedule, which also refer to a ‘final agency copy’.

Item 44: Subsection 24(2)

This item will amend subsection 24(2) to refer to a ‘Commonwealth agency’ rather than an ‘agency’.

This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that subsection 24(2) will apply in relation to any Commonwealth agency.

Item 45: Paragraph 24A(1)(a)

This item will amend paragraph 24A(1)(a) to refer to a 'Commonwealth agency' rather than an 'agency'.

This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that paragraph 24A(1)(a) will apply in relation to any Commonwealth agency.

Item 46: Paragraph 24A(1)(b)

This item will repeal paragraph 24A(1)(b) and substitute a new paragraph.

The new paragraph 24A(1)(b) mirrors the existing paragraph 24A(1)(b) but makes a number of consequential amendments to ensure that the wording is consistent with other amendments contained in this Schedule.

Item 47: Section 25A

This item will amend section 25A to refer to an 'intelligence agency' rather than an 'agency'.

This amendment is necessary as a consequence of other amendments in this Schedule. As section 9A will continue to apply only in relation to inspections of intelligence agencies, this amendment will clarify that section 25A will also continue to apply only in relation to intelligence agencies.

Item 48: Subsection 32A(2)

This item will amend subsection 32A(2) to refer to an 'intelligence agency' rather than an 'agency'.

This amendment is necessary as a consequence of other amendments in this Schedule, to clarify that subsection 32A(2) will continue to apply only in relation to intelligence agencies.

Item 49: Subsection 32B(2)

This item will amend subsection 32B(2) to omit the words 'the agency' and substitute 'that agency'.

This amendment will clarify that subsection 32B(2) refers to a particular agency mentioned in subsection 32B(1), rather than any agency.

Item 50: Subsection 35(5)

This item will amend subsection 35(5).

Section 35 requires the IGIS to provide an annual report to the Prime Minister. The Prime Minister is required to table that report, subject to subsection 35(5). Subsection 35(5) provides that the Prime Minister may make such deletions from an annual report that the

Prime Minister considers necessary in order to avoid prejudice to security, the defence of Australia, Australia's relations with other countries or the privacy of individuals.

The proposed amendment will provide that the Prime Minister may also make deletions from a report if the Prime Minister considers it necessary to avoid prejudice to law enforcement operations. Under the IGIS's extended mandate, the IGIS could potentially consider the involvement of a Commonwealth law enforcement agency in an intelligence or security matter. It is therefore appropriate that subsection 35(5) be amended to allow the Prime Minister to also take into account potential prejudice to law enforcement operations when deciding whether to make deletions from a report of the IGIS. This could include details of a particular operation, or general information about law enforcement capabilities, sources and methods that could, if disclosed, prejudice current and future law enforcement operations.

Schedule 10: Consequential amendments relating to the establishment of the Parliamentary Joint Committee on law Enforcement

Overview

Schedule 10 sets out consequential amendments that arise as a consequence of the *Parliamentary Joint Committee on Law Enforcement Bill 2010* (PJC-LE Bill). The PJC-LE Bill will establish the Parliamentary Joint Committee on Law Enforcement (PJC-LE). The PJC-LE will replace the current Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC). It will have the same functions as the PJC-ACC in relation to the Australian Crime Commission (ACC), but will also have additional functions relating to review of the Australian Federal Police (AFP).

The consequential amendments will repeal the provisions in the *Australian Crime Commission Act 2002* (ACC Act) that relate to the current PJC-ACC, and update any references to the PJC-ACC in other legislation to refer to the PJC-LE.

Schedule 10 also includes transitional provisions that will detail arrangements relating to the transition of the PJC-ACC to the PJC-LE.

Administrative Decisions (Judicial Review) Act 1977

Item 1: After paragraph (db) of Schedule 2

Section 13 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) provides that reasons for a decision may be obtained in certain circumstances, upon application to the Federal Court or the Federal Magistrates Court. Schedule 2 of the ADJR Act outlines the classes of decisions that are not decisions to which section 13 applies.

This item will insert a new paragraph (dc) of Schedule 2 to the ADJR Act, which will provide that decisions under subsection 8(4) or 9(4) of the *Parliamentary Joint Committee on Law Enforcement Act 2010* (PJC-LE Act) are not decisions to which section 13 applies. The effect of this item is that the Minister will not be required to provide reasons for decisions in relation to a determination under subsections 8(4) or 9(4) of the PJC-LE Act.

Anti Money-Laundering and Counter-Terrorism Financing Act 2006

Item 2: Paragraph 128(14)(c)

Section 128 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Anti-Money Laundering Act) outlines the circumstances when AUSTRAC information can be passed on by an official of a designated agency. Under section 5 of the Anti-Money Laundering Act, the ACC is included in the definition of a 'designated agency'.

This item will amend paragraph 128(14)(c) of the Anti-Money Laundering Act by substituting the reference in this paragraph to 'the Chair of the Board' with 'the Chief Executive Officer' (CEO). This change is necessary as the PJC-LE Bill places the obligation to comply with a request for information on the CEO of the ACC rather than the Chair of the Board of the ACC.

Item 3: Paragraph 128(14)(c)

This item will replace the reference to the PJC-ACC and subsection 59(6A) of the ACC Act with reference to the PJC-LE and subsection 8(1) of the PJC-LE Act. The effect of items 2 and 3 will be that under paragraph 128(14)(c), the CEO of the ACC may communicate AUSTRAC information to the PJC-LE, providing it is in a manner that does not enable the person to whom the AUSTRAC information relates to be identified.

Australian Crime Commission Act 2002

Item 4: Subsection 51(4) (at the end of the definition of 'relevant Act')

This item will amend the definition of 'relevant Act' in subsection 51(4) by adding the PJC-LE Act for the purpose of the secrecy provision in section 51 of the ACC Act. The effect of this new paragraph will be to ensure that the secrecy offence will not prevent the CEO of the ACC, the Chair of the ACC, a staff member of the ACC or an ACC examiner from providing information to the PJC-LE.

Item 5: Part III

This item will repeal Part III of the ACC Act, which sets out the legislative basis for the PJCACC. As the PJC-LE will replace the PJC-ACC, Part III of the ACC Act will no longer be necessary.

Item 6: Subsections 59(6A), (6B), (6C) and (6D)

Subsections 59(6A) to (6D) of the ACC Act provide for the furnishing of reports and information to the PJC-ACC. This item will repeal subsections 59(6A) to (6D), as similar provisions in relation to providing information to the PJC-LE are included in the PJC-LE Bill.

Item 7: Transitional – Committee on the Australian Crime Commission

This item will provide that the current PJC-ACC will continue in existence but be known, after the commencement of this item, as the PJC-LE. Members of Parliament who were elected to the PJC-ACC before the commencement of this item continue to be members of the PJC-LE. Similarly, any reviews being conducted by the PJC-ACC may continue to be conducted by the PJC-LE.

The transitional provisions will also provide that the Ombudsman is not required to give the PJC-LE a briefing about the AFP or the ACC's involvement in controlled operations under Part IAB of the *Crimes Act 1914* before 31 December 2010, if the Ombudsman has already provided a briefing immediately before the commencement of the item. However, this will not preclude the Ombudsman from delivering such a briefing. This is intended to ensure the Ombudsman is not required to duplicate briefings to the Committee if the Ombudsman has already provided a briefing to the PJC-ACC on the ACC's involvement in controlled operations in the current calendar year. However, there remains flexibility for the Ombudsman and the PJC-LE to make arrangements for the Ombudsman to provide such a briefing if this would be appropriate.

Australian Federal Police Act 1979

Item 8: After paragraph 60A(2)(e)

Section 60A of the *Australian Federal Police Act 1979* (AFP Act) provides that certain persons must not directly or indirectly make a record of or divulge or communicate any prescribed information to any other person except for certain persons provided for in subsection 60A(2).

This item will amend subsection 60A(2) of the AFP Act by adding a reference to the PJC-LE Act or regulations under that Act. This will ensure that the secrecy offence will not prevent AFP officers and others to whom the secrecy offence applies from providing information to the PJC-LE in accordance with its functions.

Item 9: Paragraph 60A(2)(f)

This item will amend subsection 60A(2) of the AFP Act to ensure that paragraph 60A(2)(f) covers the PJC-LE Act. This will ensure that the secrecy offence in section 60A of the AFP Act does not cover acts that are permitted or required by the PJC-LE Act or Regulations under the Act.

Proceeds of Crime Act 2002

Item 10: Subsection 179U(1)

This item will replace the reference to the PJC-ACC with a reference to the PJC-LE.