

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CRIMES AND OTHER LEGISLATION AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice,
the Honourable Duncan Kerr MP)

CRIMES AND OTHER LEGISLATION AMENDMENT BILL 1994

GENERAL OUTLINE

The purpose of the Bill is to amend certain Acts relating to criminal or law enforcement matters and for related purposes.

Part 2 of the Bill amends the *Australian Security Intelligence Organization Act 1979*. The amendments will:

- (a) include specified offences in the *Crimes (Ships and Fixed Platforms) Act 1992* within the category of offences which are to be regarded as acts of politically motivated violence;
- (b) allow the Director-General of Security to give a standing authorisation to an officer of ASIO to approve persons who are to be able to exercise the authority of warrants issued by the Attorney-General; and
- (c) allow officers of ASIO to apply for vacant positions in the Australian Public Service even though the positions have not been advertised as being open to the public.

Part 3 of the Bill makes a number of amendments to the *Crimes Act 1914* to:

- (a) enable courts to take cultural background into account when sentencing federal offenders;
- (b) make some minor drafting amendments to the provisions concerning action to be taken in the event of breach of certain court orders;
- (c) exclude ACT prisoners from the Commonwealth provisions on escape from lawful custody, ensure that the sentence of federal prisoners convicted of escape under State provisions ceases to run for the length of the escape, and to replace outdated references to detention at the Governor-General's pleasure;
- (d) remove radio scanning devices from the scope of the offence created by section 85ZKB which prohibits the manufacture, advertising, display, offering for sale, sale or possession of equipment which is capable of being used to intercept a communication contrary to the *Telecommunications (Interception) Act 1979*;
- (e) reflect the change of name of the Cash Transaction Reports Agency to the Australian Transaction Reports and Analysis Centre; and

Part 4 of the Bill makes amendments to the *Transfer of Prisoners Act 1983* to:

- (a) bring the ACT into the national transfer of prisoners scheme on the same footing as a participating State; and
- (b) correct some minor drafting errors.

Part 5 of the Bill, by Schedule, makes a number of amendments to the Acts listed below:

the *Australian Federal Police Act 1979*;
the *Crimes (Aviation) Act 1991*;
the *Crimes (Hostages) Act 1989*;
the *Crimes (Internationally Protected Persons) Act 1976*;
the *Crimes Legislation Amendment Act 1992*;
the *Crimes (Overseas) Act 1964*;
the *Crimes (Superannuation Benefits) Act 1989*;
the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*;
the *Customs Act 1901*;
the *Director of Public Prosecutions Act 1983*;
the *Extradition Act 1988*;
the *Financial Transaction Reports Act 1988*;
the *Mutual Assistance in Criminal Matters Act 1987*; and
the *Proceeds of Crime Act 1987*.

FINANCIAL IMPACT

It is not anticipated that any of the provisions of the Bill will have a financial impact on the Commonwealth.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short Title

This is a formal clause.

Clause 2 - Commencement

Subclause (1) provides that unless otherwise specified, the Bill commences on the day of Royal Assent. A number of amendments listed in subclauses (2) and (3) are exceptions to this and will commence 28 days after the date of Royal Assent.

Subclause (5) provides that the amendment made to Schedule 5 of the *Crimes (Aviation) Act 1991* will be taken to commence retrospectively on 16 March 1992. The amendment corrects a drafting error and is back-dated to the day on which the original amendment came into force, so that, to all intents and purposes, the drafting error might never have been made.

Subclause (6) provides that the amendment made to the *Crime Legislation Amendment Act 1992* will be taken to commence retrospectively on 8 January 1993. The amendment corrects a minor drafting error and will not adversely affect any person. The *Crime Legislation Amendment Act 1992* amended a paragraph of the *Crimes (Superannuation Benefits) Act 1989* but slightly misquoted the words being omitted from that paragraph ("being charged with *an* offence" rather than "being charged with *the* offence"). The amendment will correct this error from the date on which the original amendment came into force.

Subclause (6) provides that Part 4 of the Bill commences on the day of Royal Assent, with the exception of clauses 25 and 28. For a limited purpose, clauses 25 and 28 commence on the day of Royal Assent. That limited purpose is to allow the Minister to declare the *Prisoners (Interstate Transfer) Act 1994* (ACT) to be the State transfer law of the ACT under section 5 of the *Transfer of Prisoners Act 1983*.

PART 2 - AMENDMENTS OF THE AUSTRALIAN SECURITY INTELLIGENCE ORGANIZATION ACT 1979

Clause 3 – Principal Act

This provision is formal. It defines the *Australian Security Intelligence Organization Act 1979* as the Principal Act for this Part.

Clause 4 – Objects of Part

This clause describes the objects of the proposed amendments of the Principal Act. These objects are detailed in the general outline above.

Clause 5 – Definitions

This clause amends section 4 of the Principal Act to include specified offences under the *Crimes (Ships and Fixed Platforms) Act 1992* within the definition of 'politically

motivated violence'. The offences in question cover the unlawful seizure of a ship or a fixed platform, acts of violence on board a ship or fixed platform endangering safe navigation of the ship or the safety of the platform respectively, destroying or damaging a ship, fixed platform or navigational facilities and threats to endanger a ship or fixed platform. This will ensure that ASIO's statutory functions will encompass investigating and collecting intelligence on any activities prejudicial to security which may involve the commission of those offences.

Clause 6 – Repeal of section and substitution of new section

Clause 6 repeals section 24 under which the authority of a warrant issued by the Attorney-General could only be exercised by the Director-General of Security or by persons approved by the Director-General for the purposes of that warrant.

The amendment substitutes a new provision which allows the Director-General to appoint authorising officers of an appropriately senior level to approve persons who are who can exercising the authority of all warrants issued by the Attorney-General. Such warrants can be issued under sections 25 (search warrants), 26 (listening devices), 27 (mail interception), 27A (collection of foreign intelligence in Australia) or by the Director-General of Security under section 29 (emergency warrants). The amendment does not affect the Director-General's existing power to personally execute warrants or to authorise others for that purpose, nor will it change ASIO's existing powers to use those investigative methods. The amendment will enhance administrative efficiency without in any way diminishing ASIO's existing accountability in the exercise of its powers under warrant.

Subclause 6(2) continues in force any approval existing at the time the new provision comes into force. The purpose of this provision is to avoid any doubt about the continuing validity of authorisations made under the repealed provision.

Clause 7 – Insertion of new section

Clause 7 inserts new section 90A to give officers of ASIO the same rights to apply for and be appointed to vacancies in the Australian Public Service as public servants employed under the *Public Service Act 1922*.

New subsection 90A(1)

This provision defines certain words used in the section.

New subsections 90A(2) and (3)

These provisions entitle officers appointed under paragraph 84(1)(a) of the Principal Act to apply for vacancies in the Australian Public Service which are advertised in the *Gazette*, and to be appointed to such positions if found to be suitable candidates.

New subsection 90A(4)

This provision ensures that an ASIO officer who is to be appointed to a Public Service position does not have to serve an additional probationary period if he or she has already served a probationary period in ASIO or was originally appointed to a position in ASIO where no probationary period had to be served. Section 47 of

the Public Service Act normally requires new appointments to the Public Service to be on probation.

New subsections 90A(5) and (6)

These provisions deem all appointments of ASIO officers to the Public Service to be promotions to ensure that the rights of appeal under Subdivision D of Division 4 of Part III of the Public Service Act apply in appropriate cases.

New subsections 90A(7), (8), (9) and (10)

These subsections specify when an appointment of an ASIO officer to a position in the Public Service formally takes effect.

New subsection 90A(11)

This provision specifies that an ASIO officer appointed to a position in the Public Service is to be treated as if on leave without pay until he or she takes up the duties of the position. This will ensure that the person appointed will not risk forfeiting his or her office under section 66A of the Public Service Act if there is a delay between his/her being formally appointed and actually starting to perform the duties of the office.

New subsection 90A(12)

This provision allows the Public Service Commissioner or the relevant departmental Secretary to cancel an appointment if the ASIO officer appointed does not take up his or her position within a reasonable time.

PART 3 - AMENDMENTS OF THE CRIMES ACT 1914

Clause 8 - Principal Act

This is a formal clause. It defines the *Crimes Act 1914* as the Principal Act for this Part.

Clause 9 - Objects of the Part

This clause sets out the objects of each of the amendments in this Part.

Clause 10 - Matters to which a court to have regard when passing sentence etc.

This provision implements a recommendation of the Australian Law Reform Commission report number 57 entitled *Multiculturalism and the Law*. Section 16A of the Principal Act lists a number of matters that the court must take into account when passing sentence or making an order in respect of a person convicted of a federal offence. This clause amends section 16A by inserting the words "cultural background" in paragraph 16A(2)(m) of the Principal Act. This will ensure that the offender's cultural background is not overlooked when it is relevant to the sentence or order that court should make.

Clause 11 - Discharge of offenders without proceeding to conviction

Under section 19B of the Principal Act, if a charge for a federal offence is proved, the a court may nevertheless dismiss the charge or discharge the offender on conditions, without recording a conviction, if it considers that it is expedient to do so, having regard to the matters listed in the section. As with section 16A, the Australian Law Reform Commission report on Multiculturalism and the Law recommended that an offender's "cultural background" be included in the list of the matters which the court should take into account in determining whether to proceed to a conviction. This clause implements that recommendation.

Clause 12 - Conditional release of offenders after conviction

This clause provides that a person is not to be imprisoned for failure, under an order made under subsection 20(1), to pay an amount by way of reparation, restitution or compensation or an amount in respect of costs. Paragraph 20(1)(a) of the Principal Act permits a court to impose recognizance release order (bonds), where a person is convicted of a federal offence. Paragraph 20(1)(b) of the Principal Act enables a court sentencing a person to place the person on a bond and either partially suspend or wholly suspend a sentence of imprisonment. The current subsection 20(2A) only refers to orders made under paragraph 20(1)(a)(ii). The purpose of clause 12 is to ensure that in cases of all orders made under subsection 20(1) that the person is not imprisoned for failure to pay a monetary amount.

Clause 13 - Failure to comply with condition of discharge or release

Subclauses 13(a) and (b)

Paragraph 13(a) deletes the references in subsection 20A(1) that refer to the periods of recognizances made under s19B and 20(1)(a) or the sentences of imprisonment under paragraph 20(1)(b) of the Principal Act.

Subclause 13(b) requires that breach action must be taken before the expiry of the order, unless the failure to comply with the order arises from an offence committed during the period of the order. Where a person is charged with an offence committed during the period of a recognizance made under either s19B or section 20 of the Principal Act, the court proceedings for the new offence may not be completed prior to the expiry of the order. The amendment will permit breach action to be taken after the order has expired, provided the new offence was committed during the period of the order.

Subclause 13(c)

The purpose of this subclause is to extend the range of options available to a court when dealing with a person who has breached an order made under paragraph 20(1)(b) of the Principal Act (a recognizance with a suspended or partially suspended sentence of imprisonment). Under the current provision the court has only two options, namely to take no action, or revoke the order and order that the person serve that part of the sentence which he/she has not served at the time of his/her release from custody. This subclause will enable the court to impose a monetary penalty not exceeding \$1000 (subparagraph 13(c)(ia)), amend an order to extend the period of the supervision (subparagraph 13(c)(ib)), or revoke the order and make an order under section 20AB - community service orders and other alternatives to imprisonment available under that section (subparagraph 13(c)(ic)).

Subclause 13(d)

This subclause provides that where a court extends the period of the order under paragraph (5)(c)(ib), the period of the order must not exceed 5 years. Again, if the period of an order is extended any surety required to be given extends for the period of the amended order.

Clause 14 - Aiding prisoner to escape

There are two amendments made by this clause to section 46 of the Principal Act. The first will replace the outdated reference in this provision to detention at the Governor-General's pleasure with the relevant parts of the Principal Act which have replaced it. (Detention at the Governor-General's pleasure was abolished by section 15 of the *Crimes Legislation Amendment No 2 Act 1990*).

The second amendment will remove the ACT from the ambit of these provisions. The Commonwealth is no longer responsible for ACT criminal law, and the ACT has now enacted its own "escape" provisions. Accordingly, the Commonwealth provisions no longer need to cover ACT prisoners.

Clause 15 - Escaping

This clause amends section 47 of the Principal Act to change the reference to detention at the Governor-General's pleasure and to remove the ACT from the ambit of this provision.

Clause 16 - Rescuing a prisoner from custody etc.

This clause amends section 47A of the Principal Act to change the reference to detention at the Governor-General's pleasure and to remove the ACT from the ambit of this provision.

Clause 17 - Person unlawfully at large

This clause amends section 47B of the Principal Act to change the reference to detention at the Governor-General's pleasure and to remove the ACT from the ambit of this provision.

Clause 18 - Permitting escape

This clause amends section 47C of the Principal Act to change the reference to detention at the Governor-General's pleasure and to remove the ACT from the ambit of this provision.

Clause 19 - Harbouring etc. an escapee

This clause amends section 48 of the Principal Act to remove the ACT from the ambit of this provision.

Clause 20 - Sentence ceasing to run while escaped prisoner at large

This clause makes two amendments to section 48A of the Principal Act.

The first inserts a reference to section 47B, concerning persons unlawfully at large, into section 48A as is it necessary that the sentence ceases to run in this situation as well as where a prisoner has escaped under section 47.

The second amendment is intended to cover federal prisoners who are convicted of the State escape offences which correspond with the section 47 escape and section 47A unlawfully at large offences. The amendment will ensure that their federal sentence also ceases to run in this situation.

Clause 21 - Interception devices prohibited

Section 85ZKB of the Principal Act prohibits the manufacture, advertising, display, offering for sale, sale or possession of equipment which is capable of being used to intercept a communication contrary to the *Telecommunications (Interception) Act 1979*. Clause 21 inserts new subsection 85ZKB(1A) into the Principal Act to remove from the scope of the offence an apparatus or device designed principally to receive radiocommunications. This amendment is aimed at scanners which are radio receivers which can automatically scan all broadcast radiocommunications and tune into whatever may interest the operator. They are capable of receiving, contrary to the *Telecommunications (Interception) Act 1979*, telecommunications which are in part transmitted by radio signals: for example, cellular mobile telephones.

Scanners have many legitimate uses apart from unauthorised interception of telecommunications. The proposed amendment of section 85ZKB will remove them from the scope of the offence. It will, however, remain an offence under the *Telecommunications (Interception) Act 1979* to use a scanner to intercept telecommunications without authority or to disclose or use without authority material obtained from such an interception.

Clause 22 - Exceptions

This clause replaces paragraph (h) of section 85ZZH of the Principal Act which concerns exclusions to the Spent Convictions Scheme established by Part VIIC of the Principal Act. The amendment is to reflect the change of name of the Cash Transaction Reports Agency to the Australian Transaction Reports and Analysis Centre. It does not change the substance of the provision.

PART 4 - AMENDMENTS OF THE TRANSFER OF PRISONERS ACT 1983

Clause 23 - Principal Act

This clause is a formal provision. It defines the *Transfer of Prisoners Act 1983* as the Principal Act for this Part.

Clause 24 - Objects of Part

This clause sets out the 2 objects of Part 4:

- (a) to bring the ACT into the national transfer of prisoners scheme on the same footing as a participating State; and
- (b) to correct some minor drafting mistakes.

Clause 25 - Interpretation

This clause amends definitions in section 3 of the Principal Act. The amendments are of a technical nature.

Paragraph (a) amends the definition of “appropriate Minister” to reflect the entry of the ACT into the national interstate transfer of prisoners scheme.

Paragraph (b) defines, for the purposes of the Principal Act, the ACT “appropriate Minister”.

Paragraph (c) is a change necessitated by the inclusion of the ACT in the national interstate transfer of prisoners scheme.

Paragraph (d) is a change necessitated by the inclusion of the ACT in the national interstate transfer of prisoners scheme.

Paragraph (e) defines, for the purposes of the Principal Act, the ACT Parliament. It also inserts a new definition of “Territory” to reflect the inclusion of the ACT in the national interstate transfer of prisoners scheme.

Clause 26 - Return of prisoner

This clause amends section 14 of the Principal Act.

Paragraph (a) gives the Attorney-General a discretionary power to make an order for the return transfer of a prisoner to the State or Territory from which they were initially transferred pursuant to a trial transfer order or order of transfer.

Paragraph (b) is a consequential amendment to take into account the amendment made by paragraph (c) and to reflect the fact that the ACT does not have a prison for sentenced prisoners.

Paragraph (c) inserts a new subsection into section 14 of the Principal Act. This new subsection gives the Minister the discretion not to sign a return transfer order in relation to an ACT prisoner, who is serving an ACT sentence in NSW pursuant to section 4 of the *Removal of Prisoners (Australian Capital Territory) Act 1968*. This discretion would be exercised where the facts were such that the interests of justice are best served by the prisoner remaining in a NSW prison.

Clause 27 - Federal sentences - reductions and remissions

This clause corrects a drafting error in section 23 of the Principal Act. It is unrelated to the inclusion of the ACT as a participant in the transfer of prisoners scheme.

Clause 28 - Royal prerogative of mercy

This clause inserts a new subsection into section 24 of the Principal Act. It clarifies who may exercise the Royal prerogative of mercy in relation to a prisoner who becomes an ACT prisoner as the result of a transfer.

Currently, where a prisoner is transferred to a State, the State Governor of the receiving State may exercise the Royal prerogative of mercy in relation to such convictions or sentences of the transferred prisoner that relate to Territory offences. Similarly, where a prisoner is transferred to a Territory the Governor-General exercises the Royal prerogative of mercy in relation to such convictions or sentences of the transferred prisoner that relate to State or Territory (other than the receiving Territory) offences.

However, one of the amendments made by the Bill is to insert a new definition of "Territory" (see clause 25 paragraph (e)). The amendment made by clause 28 is a consequential amendment resulting from the ACT becoming a participant in the national transfer of prisoners scheme. Clause 28 equates the Governor-General to a State Governor for the purposes of determining who may exercise the Royal prerogative of mercy under subsection 24 (2) of the Principal Act.

Clause 29 - Application

Subclause (1)

Subclause (1) contains definitions used in this clause. These definitions include: ACT; ACT Act; ACT prisoner; first step; joint prisoner; State; and transfer.

Subclause (2)

Subclause (2) extends the definition of transfer made by subclause (1) to include the transfer of a prisoner from NSW to a State where the prisoner being transferred is serving a sentence of imprisonment in NSW under section 4 of the *Removal of Prisoners (Australian Capital Territory) Act 1968*. This reflects the fact that ACT prisoners serve sentences of imprisonment in NSW prisons

Subclause (3)

Subclause (3) provides that the amendments made by Part 4 to the Principal Act will not apply to the transfer of a prisoner if, when the first step occurs:

- (a) the Minister has not declared the *Prisoners (Interstate Transfer) Act 1983* (ACT) to be the interstate transfer law of the ACT; or
- (b) the relevant State Governor has not declared the *Prisoners (Interstate Transfer) Act 1983* (ACT) to be an interstate transfer law for the purposes of that State's law; or
- (c) the ACT Minister has not declared that a law of the relevant State is the relevant interstate transfer law.

This amendment relates to the ACT becoming a participant in the national transfer of prisoners scheme. If any of the conditions in paragraph (a), (b) or (c) are not met, the law as it was prior to the commencement of this Part applies to an application for the transfer of a prisoner.

PART 5 - AMENDMENTS OF OTHER ACTS

Clause 31 - Object of Part

This clause sets out the objects of the amendments in this Part.

Clause 32 - Minor amendments of other Acts

This clause provides that the various Acts set out in the Schedule are amended as provided in the Schedule.

SCHEDULE

MINOR AMENDMENTS OF OTHER ACTS

Australian Federal Police Act 1979

Subsection 46(5)

This subsection is contained in Part VA of the *Australian Federal Police Act 1979* which provides for the loss of certain superannuation rights and benefits where a member or staff member of the Australian Federal Police has been convicted of a "corruption offence" as defined. Subsection 46(5) provides for the calculation of the present value of employer superannuation contributions for the purposes of working out the amount of a superannuation order. Subsection 46(5) currently refers to the calculation being made in two circumstances: where the benefits have been already been paid to the defendant (subsection 46(4)), or where the benefits are still held in the superannuation scheme (subsection 46(3)). However, it is only necessary to calculate the present value of benefits for the purpose of a superannuation order if the benefit has already been paid to the defendant. It is not necessary to make such a calculation if the benefit remains in the fund as the value is simply the amount of employer contributions held in the fund. Accordingly, this subsection is amended to delete the reference to subsection 46(3).

Subsection 64(1)

The amendment updates the penalty provision for this offence. Currently this provision (assault etc of Australian Federal Police members in the execution of their duty) provides penalties in relation to either conviction on indictment or summary conviction. This distinction makes little sense since the repeal by the *Australian Federal Police Legislation Amendment Act (No 2) 1989* of section 65 of the Act which provided that offences against the Act could be tried either summarily or on indictment but that an offender was not liable to be tried more than once for the same offence. It is also rendered unnecessary by more recent provisions of the *Crimes Act 1914* discussed below.

The amended penalty section for this provision will provide that the maximum period of imprisonment remain at 2 years. It will remain possible to try this offence summarily under section 4J of the *Crimes Act 1914* with the consent of the prosecutor and defendant. If the offence is tried summarily, the maximum penalty is to 12 months imprisonment or a fine of \$6,000 by operation of subsection 4J(3). While this sentence of imprisonment is the same as the current penalty, the fine is increased. However, this increase brings the fine into line with all new Commonwealth offences.

Crimes (Aviation) Act 1991

Subsection 3(1)

Paragraph (d) of the definition of "authorised person" is amended by the Bill. The amendment will transfer the Attorney-General's power to appoint authorised persons under this provision to the Minister administering the *Air Navigation Act 1920*. Such

persons are appointed for the purposes of section 49 of the Act, which empowers an authorised person to conduct searches of aircraft, persons, luggage, freight and aerodromes in certain circumstances.

Subparagraph 15(1)(b)(ii)

This clause amends subparagraph 15(1)(b)(ii) of the *Crimes (Aviation) Act 1991* to reflect the change made by the *Crimes Legislation (Status and Citation) Act 1992* (ACT). That Act modified the status of the Crimes Act 1900 from an Act of New South Wales to an Act of the Australian Capital Territory. That change in status means that it is no longer correct to refer to the Crimes Act applied in Jervis Bay as 'the Crimes Act, 1900 of the State of New South Wales in its application to the Jervis Bay Territory'. The amendment deletes the incorrect reference and inserts the correct citation, namely, 'the Crimes Act 1900 of the Australian Capital Territory, in its application to the Jervis Bay Territory'.

Section 43

The proposed amendments to section 43 will transfer the power to issue instruments under this provision from the Attorney-General to the Minister for Foreign Affairs. Those certificates relate to the entering into force and operation of certain multilateral treaties. The provision has been made consistent with a similar provision in the Crimes (Hostages) Act by removing the requirement that the relevant instruments be gazetted. The requirement for gazettal was originally designed to enable the use of copies of the Gazette in court proceedings. This is not necessary in practice, since a new instrument may be issued each time a certificate is required.

Section 44

This amendment will transfer the Attorney-General's power under this provisions to the Minister administering the *Air Navigation Act 1920*. Section 44 relates to certificates concerning notices given to the International Civil Aviation Organisation. Paragraph (d) of the definition relates to the power to appoint persons to be 'authorised persons' for the purposes of section 49 of the Act, which empowers an authorised person to conduct searches of aircraft, persons, luggage, freight and aerodromes in certain circumstances.

Schedule 5

This amendment will put it beyond doubt that offences punishable under the *Crimes (Hostages) Act 1989* are politically motivated violence for the purposes of the *Australian Security Intelligence Organization Act 1979*. The doubts have arisen because the principal Act takes no account of the fact that the *Law and Justice Legislation Amendment Act 1991*, which was before the Parliament at about the same time, had already made such offences politically motivated violence. The amendment is purely technical.

Crimes (Hostages) Act 1989

Section 13

The proposed amendments to section 13 will transfer the power to issue instruments under this provision to the Minister for Foreign Affairs. These certificates relate to the entering into force and operation of certain multilateral treaties.

Crimes (Internationally Protected Persons) Act 1976

Sections 13

The proposed amendment to section 13 will transfer the power to issue instruments under this provision from the Attorney-General to the Minister for Foreign Affairs. These certificates relate to the entering into force and operation of the Convention on the Prevention and Punishment of Crimes against Internationally Protected persons, including Diplomatic Agents. The amended provision has also been made consistent with a similar provision in the Crimes (Hostages) Act by removing the requirement that the relevant instruments be gazetted. The requirement for gazettal was originally designed to enable the use of copies of the Gazette in court proceedings. This is not necessary in practice, since a new instrument may be issued each time a certificate is required.

Section 14

The proposed amendment to section 14 will transfer the power to issue certificates under this provision to the Minister for Foreign Affairs. These certificates relate to any fact relevant to the question of whether a person is or was an internationally protected person.

Crimes Legislation Amendment Act 1992

Paragraph 34(b)

This amendment corrects a minor error discovered in the *Crimes Legislation Amendment Act 1992*. Subsection 34(b) of that Act amended paragraph 21(5) of the *Crimes (Superannuation Benefits) Act 1989* but slightly misquoted the words being omitted ("being charged with *an* offence" rather than "being charged with *the* offence"). Although a court interpreting the legislation would probably give the original amendment its intended meaning, this amendment will prevent any possible uncertainty. This amendment will commence retrospectively on the date that the original amendment commenced.

Crimes (Overseas) Act 1964

Subparagraph (4)(c)(ii)

This clause amends subparagraph 4(c) of the *Crimes (Overseas) Act* to reflect the change made by the *Crimes Legislation (Status and Citation) Act 1992* (ACT). That Act modified the status of the Crimes Act 1900 from an Act of New South Wales to an Act of the Australian Capital Territory. This change in status means that it is no longer correct to refer to the Crimes Act applied in Jervis Bay as 'the Crimes Act, 1900 of the State of New South Wales in its application to the Jervis Bay Territory'. The amendment deletes the incorrect reference and inserts the correct citation, namely, 'the Crimes Act 1900 of the Australian Capital Territory, in its application to the Jervis Bay Territory'.

Crimes (Superannuation Benefits) Act 1989

Subsection 19(5)

Amendments are made to subsection 19(5) which provides for the calculation of the present value of employer contributions to superannuation for the purposes of making superannuation orders if benefits have been paid to the defendant under subsection 19(4), or are still held in the superannuation scheme under subsection 19(3). It is in fact only necessary to calculate the present value of benefits for the purpose of a superannuation order if the benefit has already been paid to the defendant. It is not necessary to make any calculation if the benefit remains in the fund as the amount of the superannuation order will be what is actually in the fund. Accordingly, this subsection is amended so that a court does not have to work out the present value if the contributions have been paid into and are still held in the superannuation fund.

Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990

Section 20

The proposed amendments to section 20 will transfer the power to issue instruments under this provision from the Attorney-General to the Minister for Foreign Affairs. These certificates relate to the entering into force and operation of certain multilateral treaties.

Customs Act 1901

Subsection 208A(2)

This clause amends subsection 208A(2) of the Act. Under subsection 208A(1), if an owner makes a claim for the return of goods seized under the Customs Act, she or he is required to commence an action for the recovery of these goods. Under subsection 208A(2), if no action is commenced within four months of this claim, the goods are deemed to be condemned as forfeited to the Commonwealth. Before this amendment the subsection did not deal with the situation where action for recovery of goods is commenced, but is subsequently withdrawn, or dismissed for want of prosecution. Separate proceedings had to be commenced to condemn the goods. The subsection is amended so that if action for recovery is commenced, but is withdrawn or dismissed for want of prosecution, seized goods are deemed to be automatically condemned as forfeited to the Commonwealth.

Director Of Public Prosecutions Act 1983

Subsection 6(1)

Section 6, which lists the functions of the Director of Public Prosecutions, is amended to allow the Director to appear in proceedings under sections 37, 38 and 39 of the *Crimes (Aviation) Act 1991*. These sections deal with:

Section 37 preliminary inquiries to record evidence to enable Australian authorities to consider whether they should prosecute in particular cases, and foreign authorities to consider whether they should apply to Australia for extradition.

Section 38 execution of warrants in relation to criminal or extradition proceedings.

Section 39 remand proceedings pending production of warrants.

This will enable the Director, or one of his officers, to assist magistrates who have to deal with proceedings or inquiries under the Crimes (Aviation) Act.

Subsection 9(6A)

Subsection 9(6) of the *Director of Public Prosecutions Act 1983* allows the Director to give indemnities to certain witnesses in 'specified proceedings' Subsection 9(6A) is amended to include proceedings and inquiries under the Crimes (Aviation) Act as 'specified proceedings'.

Section 16A

This provision adds a new subsection (1B) to section 16A of the *Director of Public Prosecutions Act 1983*. Section 16A allows the court to prohibit publication of particular evidence or information in certain proceedings brought by the Director if it appears to the court to be necessary to prevent prejudice to the administration of justice. Subsection 16A(1B) will allow courts to protect information which may be obtained in the course of an application for a restraining order under subsection 43(1), or for an extension of restraining orders under subsection 57(3) of the *Proceeds of Crime Act 1987* ("the POC Act").

Under section 44(3) of the *Proceeds of Crime Act*, where the defendant has not been convicted of an offence, the court must be satisfied before it makes the restraining order, that a police officer has reasonable grounds for believing that the defendant committed the offence. Further, the court cannot extend the operation of a restraining order under section 57(3) unless it is satisfied of a number of matters listed in that subsection. Evidence presented to the court in the course of these applications may contain information which could prejudice an investigation, or the safety of a witness. In these cases the court will be able to make an order under this provision if it appears necessary to prevent prejudice to the administration of justice.

Subsection 16A(2)

A consequential amendment is made to subsection 16A(2) to insert a reference to the new subsection 16A(1B).

Extradition Act 1988

Section 5

The purpose of this amendment is to ensure that Australia can fulfil its international obligations under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the Convention) and the related Protocol for the Suppression of

Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (the Protocol). Australia's accession to the Convention and Protocol took effect on 20 May 1993.

The Convention and Protocol are designed to prevent and suppress maritime terrorism. They list offences in relation to acts likely to endanger the safe navigation of a ship or the safety of a fixed platform. Those offences are extraditable within the terms of the Convention and Protocol, and Australia must therefore be able to extradite for such offence.

If such offences came within the definition of 'political offence' in the *Extradition Act 1988* then an alleged offender could claim that extradition should be refused (under sections 7 and 16(2)(b) of the Extradition Act) on the basis that the alleged offence (which is an offence under the Convention or Protocol) is an offence of a political character.

Therefore, the amendment excludes offences within the terms of the Convention and Protocol from the definition of 'political offence' for the purposes of the Extradition Act. The 'political offence' definition has been limited in this way for a number of other multilateral Conventions in paragraph 5(a) of the Extradition Act.

Financial Transaction Reports Act 1988

Subsection 15(9)

Under section 15 reports must be made of transfers into or out of Australia of amounts of currency over \$5000. Under subsection 15(7) these reports must be made to a customs officer (or to the Director of AUSTRAC if the transfer is made other than by a person physically taking the currency out of or bringing it into Australia). On Christmas Island and Cocos Island, the Australian Federal Police carry out customs functions, but they are not 'customs officers' for the purposes of the *Financial Transaction Reports Act 1988* as that Act defines 'customs officers' by reference to the *Customs Act 1901*. The Australian Federal Police officers on these islands are appointed under Customs Ordinances, and so do not fall within this definition. This amendment defines 'customs officer' to include a police officer for the purposes of this section, and so will enable Australian Federal Police officers who carry out customs functions on Christmas Island to receive these reports.

Paragraph 28(1)(c)

The amendment to paragraph 28(1)(c) corrects the accidental repetition of 'fails'.

CORRECTION

CRIMES AND OTHER LEGISLATION AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

PAGE 17

SCHEDULE - MINOR AMENDMENTS OF OTHER ACTS

Mutual Assistance in Criminal Matters Act 1987 - Subsection 7(2)

Fourth line – omit (2A) and (2B), substitute (2AA) and(2AB).

Tenth line – omit (2A) and (2B), substitute (2AA) and(2AB).

Eleventh line – omit (2A), substitute (2AA).

Thirteenth line – omit (2A), substitute (2AA).

Sixteenth line – omit (2A), substitute (2AA).

Nineteenth line – omit (2A), substitute (2AA).

Twentieth line – omit (2A), substitute (2AA).

Twenty first line – omit (2A) [twice occurring], substitute (2AA) in both places.

Twenty second line – omit (2B), substitute (2AB).

These amendments all reflect formal amendments which have been made to the Crimes and Other Legislation Amendment Bill 1994.

(Circulated by authority of the Minister for Justice,
the Honourable Duncan Kerr MP)

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Mutual Assistance in Criminal Matters Act 1987

Subsection 7(2)

The amendment omits the existing subsection (2) and substitutes replacement subsections (2), (2A) and (2B).

The existing form of subsection 2 precluded the Act from being applied by regulation to a country both by regulations to give effect to a bilateral treaty and by regulations to give effect to mutual assistance obligations contained in a multilateral convention or treaty.

Subsection (2) provides that the Act may be applied by regulations to a foreign country subject to modifications which accord with subsections (2A) and (2B).

Subsection (2A) provides that the modifications (limitations, conditions, exceptions or qualifications) in regulations applying the Act to a foreign country may be one or more of the 3 types referred to in subsections (2A)(a), (b) and (c).

The 3 types are as follows:

- modifications necessary to give effect to a bilateral mutual assistance treaty with a foreign country [(2A)(a)],
- modifications necessary to apply the Act to a foreign country to give effect to mutual assistance obligations in a multilateral treaty or convention to which that country is party [(2A)(b)],
- modifications as identified in the regulations, other than those set out in (2A)(a) and (2A)(b), which apply the Act to a foreign country [(2A)(c)].

Subsection (2B) is designed to facilitate the drafting of concise regulations. It is designed to ensure that the phrase "...this Act applies to that country subject to a treaty..." means exactly the same as the phrase "...this Act applies in relation to a foreign country subject to limitations, conditions, exceptions or qualifications ... that are necessary to give effect to a treaty in relation to that country...".

Proceeds Of Crime Act 1987

Subsection 4(1)

The amendment to paragraph (d) of the definition of 'proceeds of confiscated assets' is intended to make it clear that the subsection 243(4) referred to in that paragraph is contained in the *Customs Act 1901*.

Subsection 23(1)

Section 23 of the *Proceeds of Crime Act* (the POC Act) applies the sections of that Act which deal with forfeiture orders to foreign forfeiture orders which are registered in Australia under the *Mutual Assistance in Criminal Matters Act 1987* (the MA Act). Not all of these provisions are applied to foreign forfeiture orders. This amendment

adds subsection 20(3A) to the list of provisions which do not apply to foreign forfeiture orders.

Subsection 20(3A) gives the Attorney-General the power to direct that property which is subject to a forfeiture order under the POC Act be disposed of or dealt with as specified in the direction. As foreign forfeiture orders are not orders under the Act, subsection 20(3A) does not apply to them.

Paragraph 59(4)(f)

Under section 59 of the POC Act, interim restraining orders may be made in respect of a foreign serious offence. A foreign serious offence is defined as one which is punishable by a term of imprisonment greater than 12 months. Not all the provisions of the Act which deal with restraining orders are applied to foreign forfeiture orders. This amendment adds section 56 to the list of provisions which do not apply to foreign forfeiture orders.

Section 56 states when a court may revoke restraining orders. Subsection 56(a) allows the court to revoke an order if the defendant has given security for the payment of any pecuniary penalty order which may be made under the Act. In the case of a foreign forfeiture order, no pecuniary penalty order would be made under the Act, and so it is not necessary for this subsection to be applied. Subsection 56(b) allows the court to revoke a restraining order if the defendant gives undertakings satisfactory to the court concerning their property. This also is not relevant to a foreign order, as the restraining order is only made pending the foreign country making its own restraining order.

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