

1988

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1988

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Lionel Bowen, MP)

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LAW AND JUSTICE LEGISLATION AMENDMENT BILL 1988

OUTLINE

This Bill makes several amendments of a policy nature to legislation within the Attorney-General's portfolio. It also make some minor technical amendments to legislation. As well, a consequential amendment is made to a related Act, the Therapeutic Goods Act 1966.

The most significant amendments to be made by the Bill will -

- . provide in the Administrative Appeals Tribunal Act 1975 for term appointments of Deputy Presidents and senior members to the Administrative Appeals Tribunal, as an alternative to the system of tenured appointments;
- . give the States and the Northern Territory similar rights to the Commonwealth to claim public interest privilege before the Administrative Appeals Tribunal;
- . amend the Australian Federal Police Act 1979 to prohibit discrimination in employment in the Australian Federal Police and provide for review of non-appellable promotion decisions by the Merit Protection and Review Agency;
- . abrogate the privilege against self-incrimination in statements provided to the Official Trustee in Bankruptcy under the Customs Act 1901 and restrict the admissibility in proceedings of material disclosed in such a statement;

- . amend the Family Law Act 1975 to place the Northern Territory in the same position as the States by removing from the Family Court of Australia jurisdiction in certain matters arising under Territory law;
- . ensure that lawyers appointed by the Family Court as separate representatives for children in proceedings concerning their welfare are able to obtain a report by a psychologist or psychiatrist for use in the proceedings;
- . enable the Family Court to make orders relating to property that are binding on third parties;
- . amend the Law Officers Act 1964 to provide a deferred pension at age 60 for a person who has served as Solicitor-General for at least 7 years;
- . amend the Mutual Assistance in Criminal Matters Act 1987 to provide that the immunity from giving evidence specified in the Act shall not apply if inconsistent with the applicable mutual assistance treaty, and to remove the power to cancel or amend a registered foreign forfeiture order;
- . amend the Proceeds of Crime Act 1987 to protect bona fide third party interests in property affected by a registered foreign forfeiture order, clarify the position concerning penalties which may be levied against benefits derived from an offence; and provide that property under the effective control of the defendant is available to satisfy a pecuniary penalty;
- . make minor amendments to the Acts mentioned above and to the Acts Interpretation Act 1901, Commonwealth Places (Application of Laws) Act 1970, Crimes At Sea Act 1979, Crimes Legislation Amendment Act (No.2) 1988, Director of Public Prosecutions Act 1983, Extradition (Repeal and Consequential Provisions) Act

1988, Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988, Judiciary Act 1903, National Crime Authority Act 1984, Therapeutic Goods Act 1966.

FINANCIAL IMPACT STATEMENT

Only the amendments to the Law Officers Act 1966, which introduce a deferred pension for the Solicitor-General at age 60, will have any financial impact. A Solicitor-General who is not reappointed at the end of his or her term of 7 years, will be entitled to a pension equal to 0.5% of salary for each month of service up to a maximum of 60% of final salary, (that is 42% after 7 years), discounted by 2.5% of that entitlement for each year of the difference between his or her age at date of cessation of office and age 60. There will be an off-set against the cost of the new deferred pension, because the lump-sum payment of an amount equal to twice annual salary, which is currently payable to a Solicitor-General after 7 years service, will no longer be payable. A Solicitor-General who is reappointed at the end of 7 years and serves for a total of 10 years will continue to be entitled to receive a Judge's pension, as at present.

NOTES ON CLAUSES

PART I - PRELIMINARY

Clause 1 - Short title.

1. This clause provides for the Act to be cited as the Law and Justice Legislation Amendment Act 1988.

Clause 2 - Commencement

2. This clause provides for the commencement of the Act. Except where otherwise provided the Act commences on the day on which it receives the Royal Assent.

3. The amendments contained in Parts V, VI and XVIII (which are consequential upon certain amendments contained in the Crimes Legislation Amendment Act 1987) are to commence on the commencement of section 11 of that Act.

4. Parts VIII, IX and XVII (except sections 20, 47, 53, 54, 55, 59, 64 and 67) shall commence on the twenty-eighth day after the day on which the Act receives the Royal Assent.

5. Part VII shall be taken to have commenced on 15 June 1988 (which was the commencement date of the Crimes Legislation Amendment Act 1988).

6. If the Extradition Act 1988 comes into force before this Act receives the Royal Assent, Part X of this Act shall be deemed to have commenced immediately before the commencement of the Extradition Act 1988.

7. Part XI shall be taken to have commenced on 5 April 1988 (which was the commencement date of the Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988).

8. If section 15 of the Crimes Legislation Act (No.2) 1988 does not commence until after this Act receives the Royal Assent, section 45 of this Act shall commence immediately after the commencement of section 15 of that Act.

9. If section 16 of the Crimes Legislation Amendment Act (No.2) 1988 does not commence until after this Act receives the Royal Assent, section 46 of this Act shall commence immediately after the commencement of section 16 of that Act.

10. Sections 20, 47, 53, 54, 55, 59, 64 and 67 are to commence on a date to be fixed by Proclamation.

PART II - AMENDMENTS OF THE ACTS INTERPRETATION ACT 1901

Clause 3 - Principal Act

11. Formal.

Clause 4 - How Chairpersons and Deputy Chairpersons may be referred to.

12. This clause will insert subsection 18B(2) into the Acts Interpretation Act 1901 to provide that where an Act establishes an office of Deputy Chairperson, a Deputy Chairperson may be referred to as a Deputy Chairman or a Deputy Chairwoman .

Clause 5 - Acting Appointments.

13. This clause will amend subparagraph 33A(e)(ii) of the Principal Act so that all Acts, and not only the Act under which the acting appointee was appointed, will apply to the acting appointee as if he or she were the holder of the relevant office.

PART III - AMENDMENTS OF THE ADMINISTRATIVE APPEALS TRIBUNAL
ACT 1975

Clause 6 - Principal Act.

14. Formal

Clause 7 - Interpretation

15. This clause amends section 3 of the Administrative Appeals Tribunal Act 1975 to provide that, except where the Northern Territory is specifically referred to, references in the Act to a 'State' include the Northern Territory.

Clause 8 - Term of appointment

16. This clause repeals section 8 of the Principal Act and substitutes a new section 8. The effect of this substitution is to provide for term appointments (not exceeding 7 years) as an alternative to the existing tenured appointments of full-time Deputy Presidents and full-time senior members of the Administrative Appeals Tribunal. Under the existing section 8, full-time Deputy Presidents and full-time senior members hold office until attaining the age of 70 years and 65 years respectively, and term appointments are only available for part-time Deputy Presidents and senior members, and for ordinary members.

Clause 9 - Application of Judges' Pensions Act

17. This clause amends section 16 of the Principal Act in consequence of the insertion of new section 8 into the Act. Section 16 currently applies the Judges' Pensions Act 1968 to treat full-time Deputy Presidents as if they were Judges. It does not apply to part-time Deputy Presidents. The amendment will mean that the Judges' Pensions Act 1968 will not apply to full-time Deputy Presidents who are term appointees.

Clause 10 - Disclosure not required: Attorney-General's public interest certificate.

18. This clause omits subsections 36(4AA) to (8) inclusive of the Principal Act. The amendment is consequential upon the inclusion in the Act of new section 36B (by clause 12). The subsections omitted by this clause are relocated in new section 36D, inserted by clause 13.

Clause 11 - Answering questions where Attorney-General intervenes on public interest grounds.

19. This clause omits subsections 36A(2B) to (6) inclusive of the Principal Act. The amendment is consequential upon the inclusion in the Act of new section 36C (by clause 12). The subsections omitted by this clause are relocated in new section 36D, inserted by clause 13.

Clause 12 - Disclosure not required: State Attorney-General's public interest certificate. Answering questions where State Attorney-General intervenes on public interest grounds

20. This clause inserts sections 36B and 36C into the Principal Act. New section 36B will permit a State or Northern Territory Attorney-General to certify that the disclosure of information or documents to the Tribunal would be contrary to the public interest for the reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet or for any other reason that could form the basis for a claim of privilege by the Crown in a judicial proceeding. New section 36C will permit a State or Northern Territory Attorney-General to intervene in a proceeding before the Tribunal to inform the Tribunal that the answering of a question by a person would be contrary to the public interest for the same reasons.

21. The effect of sections 36B and 36C is to extend to State and Northern Territory Attorneys-General the same entitlement to claim public interest privilege in proceedings before the Tribunal as the Commonwealth Attorney-General currently has, except that the grounds available to the States and the Northern Territory will not include the ground of prejudice to the security, defence or international relations of Australia. The provisions of new sections 36B and 36C are similar to those in sections 36 and 36A respectively which relate to claims of privilege by the Commonwealth Attorney-General.

22. The opportunity has also been taken to make some changes of drafting style in sections 36B and 36C as compared with sections 36 and 36A but these changes are not intended to effect any change in meaning.

Clause 13 - Public interest questions under sections 36, 36A, 36B and 36C.

23. This clause will insert a new section 36D into the Principal Act. The amendment is consequential upon the insertion of sections 36B and 36C. The amendment relocates and extends to sections 36B and 36C the operation of subsections 36(4AA) to (8) (inclusive) and subsections 36A(2B) to (6) (inclusive). These provisions regulate the procedure of the Tribunal where a claim of privilege has been made by an Attorney-General.

Clause 14 - Appeals to the Federal Court of Australia from decisions of the Tribunal

24. This clause amends subsection 44(3) of the Principal Act to provide that the requirement that the Federal Court be constituted as a Full Court to hear appeals from the Tribunal constituted by or including a presidential member will be at the discretion of the Federal Court, except where the presidential member was a judge. Where the presidential member was not a judge, the Chief Justice will direct a Full

Court to hear the appeal, if after consulting with the President of the Tribunal, the Chief Justice considers that it is an appropriate appeal to be heard by a Full Court. This amendment will relieve the strain on the resources of the Federal Court imposed by the present mandatory requirement for a Full Court to hear appeals from all decisions of the Tribunal constituted by or including a presidential member.

Clause 15 - Confidential information not to be disclosed

25. This clause amends section 66 of the Principal Act in consequence of the insertion of new section 36B into the Act. In substance, the amendments delete references to the Commonwealth Attorney-General and include references to section 36B. The amendments ensure that the confidentiality provisions of the Act apply equally to circumstances of a claim of privilege by the Commonwealth and a State or Northern Territory Attorney-General.

Clause 16 - Consequential amendments of Principal Act

26. This clause provides that the Principal Act is also amended as set out in the Schedule.

PART IV - AMENDMENTS OF THE AUSTRALIAN FEDERAL POLICE ACT
1979

Clause 17 - Principal Act.

27. Formal.

Clause 18 - Members' powers and duties

28. This clause amends section 9 of the Principal Act to insert a new subsection (3) which defines 'constable' for the purposes of paragraph 9(1)(a) as including a member of the police force of a State or Territory. The amendment is to

remove doubts about Australian Federal Police members' powers where the Commonwealth Places (Application of Laws) Act 1970 is the relevant law of the Commonwealth, and ensures that a member of the Australian Federal Police has the powers of a State or Territory police officer in a Commonwealth place.

Clause 19 - Determination of numbers by Commissioner

29. This clause repeals section 24 of the Principal Act and substitutes a new section 24 which enables the Commissioner of Police, rather than the responsible Minister, to determine the number of persons who may be appointed to each rank of the Australian Federal Police.

Clause 20 - Application of merit principle, prohibition on patronage etc. Review by the Merit Protection and Review Agency of non-appellable promotion decisions

30. This clause inserts new sections 36A and 36B into the Principal Act to make similar provision with respect to the Australian Federal Police as applies with respect to the Australian Public Service, in relation to appointments, transfers and promotions under the Principal Act.

31. Section 36A is in similar terms to section 33 of the Public Service Act 1922. It provides that all persons eligible for appointment to the Australian Federal Police have so far as is possible, a reasonable opportunity to apply for appointment to the Australian Federal Police and applies the merit principle in the appointment of suitable applicants. The amendment prohibits patronage, favouritism, discrimination on specified grounds, unlawful or any other unjustified discrimination.

32. Section 36B is in similar terms to section 50DAA of the Public Service Act and provides for the review of non-appellable promotion decisions by the Merit Protection and Review Agency on the ground of either a breach of the new section 36A or a serious defect in the selection process. The

amendment enables the Governor-General or the Commissioner, as the case may be, to cancel a promotion, where the Merit Protection and Review Agency recommends to the Commissioner that a promotion be cancelled.

PART V - AMENDMENTS OF THE COMMONWEALTH PLACES (APPLICATION OF LAWS) ACT 1970

Clause 21 - Principal Act

33. Formal.

Clause 22 - Certain provisions not to apply to applied provisions

34. Section 5 of the Principal Act contains a reference to a provision of the Acts Interpretation Act 1901 which will be relocated in the Crimes Act 1914 on proclamation of the Crimes Legislation Amendment Act 1987. This amendment deletes that reference and inserts a reference to the new Crimes Act provision.

PART VI - AMENDMENTS OF THE CRIMES AT SEA ACT 1979

Clause 23 - Principal Act

35. Formal.

Clause 24 - Certain Commonwealth laws excluded

36. Section 5 of the Principal Act contains a reference to a provision of the Acts Interpretation Act 1901 which will be relocated in the Crimes Act 1914 on proclamation of the Crimes Legislation Amendment Act 1987. The amendment deletes that reference and inserts a reference to the new Crimes Act provision.

PART VII - AMENDMENTS OF THE CRIMES LEGISLATION AMENDMENT ACT
(NO 2) 1988

Clause 25 - Principal Act

37. Formal

Clause 26 - Commencement

38. This clause amends subsection 2(4) of the Principal Act to make explicit that section 24 of that Act commenced on 15 June 1988 (the date on which it came into operation).

Clause 27 - Reports to be made to the Minister concerning use of listening devices.

39. This clause removes punctuation marks which had been incorrectly inserted in two places.

PART VIII - AMENDMENT OF THE CUSTOMS ACT 1901

Clause 28 - Principal Act

40. Formal

Clause 29 - Court may make further orders.

41. This clause amends section 243F of the Principal Act to expressly abrogate the privilege against self-incrimination in respect of a verified statement furnished to the Official Trustee in Bankruptcy pursuant to paragraph 243F(1)(d). It also provides an indemnity under which evidence obtained as a direct or indirect consequence of furnishing the statement is not admissible in any civil or criminal proceeding, other than proceedings in respect of falsity of the statement, or proceedings for the recovery of a pecuniary penalty, and then only for the purpose of facilitating the assessment of the pecuniary penalty. This is similar to the position under the

Principal Act concerning the privilege against self-incrimination with respect to information obtained as a result of a court-ordered examination of a person.

PART IX - AMENDMENT OF THE DIRECTOR OF PUBLIC PROSECUTIONS
ACT 1983

Clause 30 - Principal Act

42. Formal

Clause 31 - Powers of Director

43. The amendment amends section 9 of the Principal Act to remove any doubt that the Director has a right to seek review of a bail decision.

PART X - AMENDMENT OF THE EXTRADITION (REPEAL AND
CONSEQUENTIAL PROVISIONS) ACT 1988

Clause 32 - Principal Act.

44. Formal

Clause 33 - Schedule

45. This clause corrects a typographical error in the Schedule to the Act referring to subsection 9(6) of the Director of Public Prosecutions Act 1983.

PART XI - AMENDMENT OF THE FAMILY COURT OF AUSTRALIA
(ADDITIONAL JURISDICTION AND EXERCISE OF POWERS) ACT 1988

Clause 34 - Principal Act.

46. Formal

Clause 35 - Commencement

47. This clause makes a drafting change to the Family Court of Australia (Additional Jurisdiction and Exercise of Powers) Act 1988 to remove any possible doubt about the date of commencement of paragraphs 12(a) and (d) of that Act, namely 1 January 1990.

PART XII - AMENDMENTS OF THE FAMILY LAW ACT 1975

Clause 36 - Principal Act.

48. Formal.

Clause 37 - Original jurisdiction of the Family Court.

49. This clause amends paragraph 31(1)(c) of the Principal Act to confine to Territories other than the Northern Territory the jurisdiction conferred by that paragraph on the Family Court of Australia in relation to matters arising under a Territory law concerning adoption of children, the property of parties to a marriage (where the matter is not a "matrimonial cause") and the rights and status of ex-nuptial children and their relationship to their parents. The Supreme Court of the Northern Territory will have the same exclusive jurisdiction in relation to those matters as State Supreme Courts have in relation to those matters under State law.

Clause 38 - Order that child be made available for examination.

50. This clause inserts section 65A into the Principal Act to enable a separate representative of a child appointed by the Court under section 65 of the Act to obtain a court order requiring the guardian or custodian of the child to make the child available for examination by a psychiatrist or psychologist, so that a report may be prepared for use by the separate representative in connection with the proceedings.

51. A separate representative will be able to obtain an order under the section whether the separate representative was appointed before or after commencement of the section.

Subsection 65A(2) provides a definition of "custodian" for the purposes of section 65A. A custodian is a person who has, or shares, the daily care and control of the child.

Clause 39 - Declaration of interests in property.

52. This clause repeals subsection 78(3) of the Principal Act. Section 78 empowers the court to make declarations concerning the title or rights of a party in respect of property and to make consequential orders to give effect to such declarations. Subsection 78(3) provides that an order made under section 78 is binding on the parties to a marriage but not on any other person. The repeal of subsection 78(3) will enable the court, in appropriate cases, to make orders that are binding on third parties as well as the parties to a marriage. Subsection 78(3) will continue to apply in relation to proceedings instituted before the commencement of this section.

53. The repeal of subsection 78(3) will also ensure that the Commonwealth and State cross-vesting legislation which came into force on 1 July 1988 has full effect in relation to the Family Court by enabling that Court to determine the rights and liabilities of third parties in proceedings before it where it is appropriate and convenient for it to do so.

54. The repeal of subsection 78(3) gives effect to a recommendation of the Law Reform Commission in its report on Matrimonial Property and comments by the Chief Justice of the High Court of Australia and the Chief Justice of the Family Court of Australia.

PART XIII - AMENDMENTS OF THE JUDICIARY ACT 1903

Clause 40 - Principal Act

55. Formal.

Clause 41 - Common law to govern

56. Section 80 of the Judiciary Act 1901 deals with what law is to be applied by courts exercising federal jurisdiction. One effect of the section is that, if there is no relevant constitutional provision or Commonwealth, State or Territory statutory law, the 'common law of England' is to be applied.

57. The reference to the 'common law of England' is no longer appropriate because in some respects the common law in Australia has diverged from the common law of England. Accordingly, section 80 is amended by changing the reference to the common law in Australia.

PART XIV - AMENDMENT OF THE LAW OFFICERS ACT 1964

Clause 42 - Principal Act

58. Formal.

Clause 43 - Pension of Solicitor-General

59. This clause repeals subsections 16(4) to 16(9) and inserts new subsections 16(4) to 16(13).

60. The new subsections provide for a pension to be payable to a person who has served as Solicitor-General for at least 7 years, is not reappointed and is not eligible for a judicial pension);

61. The pension is to be calculated at 0.5% of salary for each completed month of service up to a maximum of 60% of salary and provides for the rate of that pension to be discounted where the person ceases to hold office prior to attaining the age of 60 years.

62. The pension is to be paid where the Attorney-General certifies that the person has become permanently disabled or infirm prior to attaining the age of 60 years. There is to be a right of review by the Administrative Appeals Tribunal where the Attorney-General refuses to give a certificate of permanent disability or infirmity.

63. The new subsections also provide for the pension to be paid to the dependants of the person where the person dies before attaining the age of 60 years and, through an extension of certain provisions of the Judges' Pensions Act 1968, for the payment of a pension where the person attains the age of 60 years and is not already in receipt of a pension;

PART XV - AMENDMENTS OF THE MUTUAL ASSISTANCE IN CRIMINAL MATTERS ACT 1987

Clause 44 - Principal Act

64. Formal.

Clause 45 - Requests by foreign countries

65. Subsection 13(8) of the Principal Act confers upon a witness who gives evidence in Australia in response to a request made by a foreign country a right to refuse to answer any questions or produce any document or thing which he or she would not have been required to answer or produce in that foreign country. The clause inserts new subsection 13(10) to ensure that subsection 13(8) will not apply in any case where its application would be inconsistent with a mutual assistance treaty between Australia and the foreign country concerned.

Clause 46 - Immunities

66. Paragraphs 19(1)(f) and (g) of the Principal Act confer upon persons who come to Australia in response to a request made by Australia of a foreign country, a right to refuse to answer any questions or produce any document or thing which he or she would not have been required to answer or produce in that foreign country. This clause inserts new subsection 19(2A) which will ensure that paragraphs 19(1)(f) and 19(1)(g) do not apply in any case where their application would be inconsistent with a mutual assistance treaty between Australia and that country.

Clause 47 - Requests for enforcement of orders.

67. Section 34 of the Act empowers the Attorney-General to authorise or direct the Director of Public Prosecutions to apply for registration or cancellation of foreign forfeiture orders, foreign pecuniary penalty orders and foreign restraining orders. A foreign forfeiture order is an order or declaration made in a foreign country for or in relation to the forfeiture of property in Australia resulting from an offence against the law of that foreign country.

68. This clause amends subsection 34(4) to require the court registering a foreign forfeiture order to comply with the proposed new provision of the Proceeds of Crime Act 1987 (see clause 55) concerning notice to third parties.

69. The registration of a foreign forfeiture order operates to immediately vest forfeited property in the Commonwealth. Experience has shown that there is no need to retain the power to cancel or amend these orders. The clause amends subsections 34(8) and 34(11) to remove registered foreign forfeiture orders from the list of orders which can be amended or cancelled.

**PART XVI - AMENDMENTS OF THE NATIONAL CRIME AUTHORITY ACT
1984**

Clause 48 - Principal Act.

70. Formal.

Clause 49 - Establishment and constitution of Authority

71. This clause amends paragraph 7(7)(b) of the Principal Act to allow recommendations for the appointment of members to the National Crime Authority by the Attorney-General of the Commonwealth and the Attorneys-General of the participating States to be made during the period beginning 3 months before and ending 3 months after the vacancy occurs.

72. The clause also replaces the reference in paragraph 7(8)(b) to 'the Special Minister of State of the Commonwealth' (a title which no longer exists) with a reference to the Minister of State of the Commonwealth who administers the Australian Federal Police Act 1979. This is in accordance with the modern drafting practice of not referring to portfolios wherever possible.

PART XVII - AMENDMENTS OF THE PROCEEDS OF CRIME ACT 1987

Clause 50 - Principal Act.

73. Formal.

Clause 51 - Effective control of property

74. The main purpose of the Proceeds of Crime Act is to deprive persons of the proceeds of, and benefits derived from, the commission of offences. This clause inserts a new section 9A into the Principal Act defining the term, "effective control of property" as not being dependant upon whether or

not the person has a legal or equitable estate or interest in the property. The section also sets out some of the matters to be taken into account in determining whether the property is subject to effective control (see clause 57).

Clause 52 - Effect of forfeiture order on third parties

75. This clause amends subsection 21(6) of the Principal Act to allow a claim by a third party who was not involved in the commission of the relevant offence to recover property which has been made the subject of a forfeiture order. As the section now stands such an application can only be made prior to the making of the forfeiture order.

Clause 53 -

76. This clause inserts a new heading to create a new "Division 2A" in Part II of the Act.

Clause 54 - Registered foreign forfeiture orders

77. This clause makes amendments to section 23 of the Principal Act that are consequential on the creation of the new Division 2A. They provide that the Attorney-General's power under subsection 23(2) to give directions as to the dealing with or disposal of forfeited property is subject to the provisions of section 23A relating to bona fide third-party interests in the property.

Clause 55 - Effect on third parties of registration of foreign forfeiture order.

78. This clause inserts a new section 23A into the Act. The new section provides broadly similar protection to third parties whose property interests are affected by a registered foreign forfeiture order as is available under section 23 in relation to a domestic forfeiture order.

79. The new third party provisions relating to registered foreign forfeiture orders will:

- . apply in respect of orders registered after the commencement of the section (subsection 23A(1));
- . require the court registering an order to direct the Director of Public Prosecutions to give or publish notice of the registration to third parties whom the court has reason to believe may have an interest in the property concerned (subsection 23A(2));
- . provide that a person claiming an interest in forfeited property (other than a person convicted of a foreign serious offence in respect of which the foreign forfeiture order was made) may apply for return of the property or for compensation;
- . preclude a person who was given notice of, or appeared at the hearing held in connection with the making of the foreign forfeiture order from applying without the leave of the court (subsection 23A(4));
- . enable the court to grant leave to such a person only if it is satisfied that there are special grounds for doing so (subsection 23A(5));
- . provide that special grounds exist where the court is satisfied that the person had good reason for not appearing at the foreign hearing, or that evidence proposed to be produced by the person was not available when the foreign hearing was held (subsection 23A(6));

enable the court to revoke the operation of the registered foreign forfeiture order in respect of the applicant's interest in property, if it is satisfied that the applicant was not involved in the commission of the foreign serious offence and that, where the interest was acquired at or after the commission of the offence, it was acquired for sufficient consideration and without knowledge, or cause for reasonable suspicion, that the property was tainted property. In such a case, the court must declare the nature, extent and value of the applicant's interest and either direct the Commonwealth to transfer the interest back to the applicant or pay to the applicant an amount equal to the value of the applicant's interest (subsection 23A(7)).

Clause 56 - Assessment of pecuniary penalty

80. This clause amends section 27 of the Principal Act. That section prevents a person from being deprived of benefits derived from an offence where a pecuniary penalty order has previously been made to confiscate that benefit under a law of the Commonwealth or of a State or Territory. Replacing a reference to "another law of the Commonwealth" with a reference to "Division 3 of Part XIII of the Customs Act" will remove any doubt that fines or other pecuniary penalties which do not purport to confiscate a specific benefit are not caught by this prohibition.

Clause 57 - Court may lift corporate veil etc

81. This clause omits subsections 28(2) and (3) of the Principal Act and inserts a new subsection 28(3). Section 28 currently enables the court to treat as property of the defendant, any property that is subject to that person's effective control, and sets out some matters to which the court may have regard in determining that issue. The

amendment removes those matters from the section (and they are now dealt with in new section 9A). The new subsection 28(3) will enable the court to order that the whole or part of property subject to the effective control of a person (as provided in section 9A) is available to satisfy a pecuniary penalty order.

Clause 58 - Recovery of property to which section 30 applies

82. This clause corrects a drafting error.

Clause 59 - Buying out other interests in forfeited property.

83. This clause amends section 34 of the Principal Act to enable a third party, who has had an interest in property affected by a registered foreign forfeiture order returned to him or her by order of the court to buy out the interests of other persons in the property.

Clause 60 - Restraining orders

84. This clause amends section 43 of the Principal Act to allow the Court to make a composite restraining order relating to all property of the defendant including specified property, to remove any doubt that the court can make the orders listed in the section either in combination or alone, and to entitle the Official Trustee to exercise rights attaching to shares which are in its custody and control pursuant to a court order, as if it were the registered owner.

Clause 61 - Grounds for making restraining order

85. This clause amends section 44 of the Principal Act in consequence of the amendments in clauses 51 and 60. It also corrects a drafting error in subsection 44(1).

Clause 62 - Court may make further orders

86. This clause amends section 48 of the Principal Act to provide that persons are not excused from furnishing a statement to the Official Trustee, when ordered to do so on the ground that the statement may tend to incriminate them. Evidence obtained as a direct or indirect consequence of furnishing such a statement will not be admissible in civil or criminal proceedings, except a proceeding in respect of falsity of the statement, or a proceeding for the recovery of a pecuniary penalty and then only for the purpose of facilitating the assessment of the amount of the penalty. The clause also corrects drafting errors:

Clause 63 - Order for taxation of legal expenses to be met out of restrained property

87. This clause inserts a new section 48A into the Principal Act providing that the Official Trustee may apply to the court for the legal expenses of a defendant to be taxed where the defendant's property has been restrained, and the court has ordered that the person's reasonable legal expenses be met from the restrained property.

Clause 64 - Official Trustee to discharge pecuniary penalty

88. This clause amends section 49 of the Principal Act. These amendments are consequential upon amendments to section 55 of the Principal Act. Subsection (2) is a transitional clause so as to preserve the Official Trustee's right to recover, should such costs become payable before commencement of the provision.

Clause 65 - Registration of restraining orders

89. This clause omits the word "prescribed" from section 51 of the Principal Act. The amendment will remove any doubt that the particulars of the restraining order to be recorded on a land titles register are not required to be prescribed by regulation.

Clause 66 - Duties of Official Trustee

90. Subsection 53(3) deals with the situation where property of a person is in the custody and control of the Official Trustee and the person becomes a bankrupt. Currently, such property is deemed to be held by the Official Trustee as, or on behalf of, the trustee of the bankrupt's estate. A new paragraph 53(3)(b) is inserted to make it clear that the deeming provision only takes effect where the property vests in the Official Trustee or a registered trustee by virtue of section 58 of the Bankruptcy Act 1966.

Clause 67 - Costs etc. payable to Official Trustee

91. Subsection 55(1) of the Principal Act currently provides that where the Official Trustee takes custody or control of property in accordance with a restraining order, it is entitled to receive costs equal to the costs it would receive had it exercised powers or performed duties in consequence of taking custody or control of the property pursuant to a direction under section 50 of the Bankruptcy Act 1966. Subsection 55(3) provides that the regulations may make provision for the Official Trustee's remuneration and expenses for the performance of its functions under the Act. An amendment repeals section 55 and inserts a new section 55, to make it clear that the regulations may make provision for the costs and charges of the Official Trustee, as well as for its remuneration and expenses.

Clause 68 - When restraining order ceases to be in force

92. This clause amends section 57 of the Principal Act. Minor amendments are made to correct drafting errors in paragraphs 57(2)(h) and 57(3)(a).

93. An amendment to paragraph 57(2)(j) will ensure that an order extending the period of operation of a restraining order will cease to be in force at the same time and in the same circumstances that the original restraining order ceases to be in force.

94. A further amendment inserts paragraph 53(3)(aa) to remove any doubts that an order may be made extending the operation of a restraining order where the court is satisfied that the property may be forfeited by force of the Act as well as by Court order.

95. An amendment inserts in subparagraph 57(3)(b)(ii)(A), a reference to subparagraph 44(7A)(a)(ii) as a consequence of amendments to section 47 made by the Crimes Legislation Amendment Act 1987.

96. Finally, the clause repeals subsection 6 and inserts a new subsection clarifying the time within which a restraining order continues to operate - referred to in the section as "the relevant period".

Clause 69 - Production orders

97. This clause amends subsection 66(2) of the Principal Act to provide that in an application for a production order in the case of a serious offence it will not be necessary for a police officer to have reasonable grounds to believe that the person derived a benefit, before an order can be made under the section. The amendment has been made because, in cases of serious offences, it is not necessary to establish benefit for the purposes of obtaining a restraining order and, to be consistent, it should not be a requirement for obtaining a production order in the case of a serious offence. Subsection 66(3) is amended as a consequence of the insertion of new section 9A into the Act.

Clause 70 - Search warrant for location etc. of property

98. This clause amends subsection 71(2) of the Principal Act to provide that in an application for a search warrant in the case of a serious offence it will not be necessary for the police officer to have reasonable grounds to believe that the person derived a benefit. This amendment has been made to maintain consistency with the criteria for seeking a restraining order or a production order in the case of a serious offence. Subsection 71(3) is amended as a consequence of the insertion of new section 9A into the Act.

Clause 71 - Conduct by directors, servants or agents.

99. This clause amends paragraph 85(2)(b) of the Principal Act to correct a drafting error.

PART XVIII - AMENDMENT OF THE THERAPEUTIC GOODS ACT 1966

Clause 72 - Principal Act.

100. Formal.

Clause 73 - Offences: general

101. Section 25 of the Principal Act contains a reference to a provision of the Acts Interpretation Act 1901 which will be relocated in the Crimes Act 1914 on proclamation of the Crimes Legislation Amendment Act 1987. The amendment deletes that reference and inserts a reference to the new Crimes Act provision.

SCHEDULE

**CONSEQUENTIAL AMENDMENTS OF THE ADMINISTRATIVE APPEALS
TRIBUNAL ACT 1975**

102. The amendment to paragraph 28(3A)(b) is consequential upon the omission of subsections 36(4AA) to (8) inclusive from the Act and the insertion of section 36D into the Act.

103. The amendments to section 39 paragraph 46(1)(a), subsection 46(2) and paragraph 46(3)(a) are consequential upon the insertion of section 36B into the Act.

104. The amendment to subsection 43(2) is consequential upon the insertion of section 36D into the Act.

