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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

CRIMES LEGISLATION AMENDMENT  
(PEOPLE SMUGGLING, FIREARMS TRAFFICKING  
AND OTHER MEASURES) BILL 2002

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice and Customs  
Senator the Honourable Chris Ellison)

## **Crimes Legislation Amendment (People Smuggling, Firearms Trafficking And Other Measures) Bill 2002**

### **General Outline**

This Bill inserts new provisions into the *Criminal Code Act 1995* criminalising the smuggling of persons from Australia to another country, or from a country other than Australia to a third country, with or without transit through Australia. Where there is no transit through Australia, the offences will apply where the person who organised or facilitated the smuggling either engaged in that conduct in Australia or is an Australian citizen or resident.

The Bill also contains offences prohibiting making, providing or possessing false travel or identity documents intended for use in securing the unlawful entry of a person into a foreign country. An offence of taking possession of or destroying another person's travel or identity documents is also included.

The people smuggling offences and all but one of the associated document offences are based on the Protocol Against The Smuggling Of Migrants By Land, Sea And Air, Supplementing The United Nations Convention Against Transnational Organized Crime, to which Australia is a signatory.

This Bill also inserts into the *Criminal Code* two cross-border firearms trafficking offences. The first offence makes it unlawful, in the course of trade and commerce between the States and Territories to dispose of or acquire a firearm, where the disposal or acquisition of that firearm is an offence under a State or Territory law.

A related provision also makes it an offence, in the course of trade and commerce between the States and Territories, to take or send a firearm from one State or Territory to another, intending that the firearm will be disposed of in the other State or Territory in circumstances that would constitute an offence against the firearm law of that other State or Territory.

The Bill also amends existing criminal law and justice legislation. Schedule 3 makes a number of minor amendments to the theft and fraud offences in the *Criminal Code*, which have now been in operation for over a year. Those amendments resolve some problems with the offences which have emerged during that time. Schedule 3 also amends the sentencing provisions in the *Crimes Act 1914*, includes the substance 'fantasy' as a psychotropic drug in the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*, amends the *International Transfer of Prisoners Act 1997* to clearly define the role of the Minister for Immigration and Multicultural and Indigenous Affairs and amends the *Financial Transaction Reports Act 1988* to ensure that remittance dealers are covered by the definition of 'cash dealer' in that Act. Schedule 3 also fixes a cross-reference in that Act.

### **Financial Impact**

There is no financial impact flowing directly from the offence provisions of this Bill.

## Abbreviations used in the Explanatory Memorandum

AFP Act	<i>Australian Federal Police Act 1979</i>
Crimes Act	<i>Crimes Act 1914</i>
<i>Criminal Code</i>	<i>Criminal Code Act 1995</i>
'fantasy'	gamma-hydroxybutyric acid
FTR Act	<i>Financial Transaction Reports Act 1988</i>
ITP Act	<i>International Transfer of Prisoners Act 1997</i>
Migration Act	<i>Migration Act 1958</i>
Smuggling Protocol	Protocol Against The Smuggling Of Migrants By Land, Sea And Air, Supplementing The United Nations Convention Against Transnational Organized Crime
TINDAPS Act	<i>Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990</i>
Trafficking Protocol	Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime

## NOTES ON CLAUSES

### Clause 1 Short title

This is a formal clause which provides for the citation of the Bill.

### Clause 2 Commencement

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

Sections 1-4 of the Bill (the short title, the commencement, the schedules provision and the transitional provision for the *Crimes Act 1914* amendments in Schedule 3) will commence on the day that the Bill receives Royal Assent.

Schedules 1 and 2 of the of the Bill, which insert people smuggling and firearms trafficking offences into the *Criminal Code Act 1995*, will commence on the 28<sup>th</sup> day after the Bill receives Royal Assent.

Schedule 3 of the Bill contains amendments to a number of Acts. All of those items except one (Item 23 of Schedule 3) will commence on the 28<sup>th</sup> day after the Bill receives Royal Assent.

Item 23 of Schedule 3 amends a cross-reference in the *Financial Transaction Reports Act 1988* (FTR Act) to the Commonwealth's money laundering legislation. The existing cross-reference is to sections 81 and 82 of the *Proceeds of Crime Act 1987*, which will be repealed when the new money laundering legislation (Division 400 of the *Criminal Code*) comes into effect on 1 January 2003. To ensure that there is no gap in the application of the relevant provision in the FTR Act, the amendment is scheduled to commence on 1 January 2003, consistent with the new money laundering legislation to which it refers. This early application of the provision is justified because the amendment will not take away a person's rights, but will actually ensure that a protection currently in the FTR Act will continue to apply.

### 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.

### Clause 4 Transitional – items 1, 2, and 3 of Schedule 3

Clause 4 is a transitional provision. Items 1 and 2 of Schedule 3 operate to repeal sections 16G and 19AG from the *Crimes Act 1914* ('Crimes Act'). Item 3 removes a cross-reference in subsection 19AR(6) of the Crimes Act to section 19AG.

The effect of repealing sections 16G and 19AG of the Crimes Act is that when sentencing federal offenders, courts will no longer have to take into account whether or not remissions are available in the particular State or Territory in which the person is being sentenced.

Clause 4 provides that the amendments will only apply to a sentence which is imposed after the provisions commence.

## **SCHEDULE 1 – PEOPLE SMUGGLING**

### ***Criminal Code Act 1995***

#### **Item 1 The Schedule**

The offences in the *Criminal Code Act 1995* are contained in a Schedule (the *Criminal Code*). This Item amends that Schedule by adding new Division 73 which is headed ‘People smuggling and related offences’. Subdivision A of Division 73 contains offences criminalising the smuggling of persons from Australia to another country, or from a country other than Australia to a third country, with or without transit through Australia. Two aggravated people smuggling offences are also included in Subdivision A.

Subdivision B of Division 73 contains four offences relating to the falsification, destruction or misuse of travel or identity documents for the purposes of securing the unlawful entry of a person into a foreign country.

The people smuggling offences and most of the document offences in this Schedule are based on the Protocol Against The Smuggling Of Migrants By Land, Sea And Air, Supplementing The United Nations Convention Against Transnational Organized Crime (‘Smuggling Protocol’).

All serious offence provisions are included in the *Criminal Code* for convenience. The *Criminal Code* contains the general principles by which offences are interpreted, as well as ancillary offences (such as conspiracy and common purpose) which will apply alongside the new offences in Division 73. The policy of placing the serious offences together this way is not only a feature of the Commonwealth *Criminal Code*, but also the legislation of most jurisdictions throughout the world. It is also a feature of the Model Criminal Code which was developed by the Commonwealth, States and Territories.

#### **Subdivision A – People smuggling offences**

##### **Proposed section 73.1 Offence of people smuggling**

The people smuggling offence in proposed section 73.1 is based on the offence articulated in Article 6 of the Smuggling Protocol.

Article 6 relevantly provides that

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit....the smuggling of migrants

‘Smuggling of migrants’ is in turn defined in Article 3 of the Smuggling Protocol to mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

‘Illegal entry’ is defined in Article 3 to mean crossing borders without complying with the necessary requirements for legal entry into the receiving State.

As far as practicable and appropriate, the people smuggling offence in proposed section 73.1 follows the offence and definitions set out in the Smuggling Protocol.

Proposed paragraph 73.1(1)(a) sets out the physical element of conduct for the people smuggling offence.

The conduct element in the Smuggling Protocol definition of ‘smuggling of migrants’ is the ‘procurement’ of the illegal entry of a person. Whilst ‘procure’ is not defined in the Smuggling Protocol, it has a broad meaning at common law, and includes all aspects of activity associated with people smuggling. However, to make the scope of the offence clear on its face, proposed section 73.1 does not use the term ‘procure’, but instead uses ‘organises or facilitates’. As well as clearly covering all conduct associated with people smuggling, using ‘organises or facilitates’ is consistent with the use of that term in the relevant *Migration Act 1958* (‘Migration Act’) people smuggling offences (sections 232A and 233A).

Where the person has already obtained a benefit for organising or facilitating the entry of a person into a foreign country, the fault element of intention will attach to the physical element of organising or facilitating, by operation of the default fault elements in section 5.6 of the *Criminal Code*. Where the person organises or facilitates the entry of another person with the intention of obtaining a benefit, subparagraph 73.1(1)(d)(ii) will supply the applicable fault element.

Proposed paragraph 73.1(1)(b) sets out one of the physical elements of circumstance that must be present for the offence to be committed – that the entry of the person into the foreign country does not comply with the entry requirements under that country’s law.

This element is derived from the definitions in the Smuggling Protocol of ‘smuggling of migrants’ and ‘illegal entry’. By application of the default fault elements in section 5.6 of the *Criminal Code*, the fault element of recklessness will attach to that physical element. This means that the person who organises or facilitates the entry of the other person into a foreign country must be reckless as to the fact that that entry did not comply with the requirements of the country being entered. A person is reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist, and having regard to the circumstances known to him or her it is unjustifiable to take that risk.

The definition of ‘smuggling of migrants’ also refers to the illegal entry of a person into a country of which the person is not a national or a permanent resident. The fact that a person is not a national (citizen) or a permanent resident is not included in

proposed paragraph 73.1(1)(b), but it set out as a separate element at proposed paragraph 73.1(1)(c).

That the person is not a citizen or permanent resident does not effect the culpability of the people smuggler, but is an important limit on the scope of the offence, and ensures that only people smuggling activity covered by the Smuggling Protocol is prosecuted under this provision. Other activity involving the unlawful entry of a person into a country of which she or he is a citizen or permanent resident is more appropriately dealt with under other the relevant laws of the country being unlawfully entered.

Because of the nature of this element of the offence, it has been separated out from those in paragraph 73.1(1)(b) and absolute liability has been applied to it by subsection 73.1(2). The application of absolute liability means that it will not be necessary for the prosecution to prove a fault element in relation to that particular physical element, and that the defence of mistake of fact will not be available to the defence. It will still be necessary to show that the person was not a citizen or permanent resident of the particular country at that time.

Proposed paragraph 73.1(1)(d) sets out the third circumstance which must be present for the people smuggling offence to occur.

Both Article 6 and the definition of ‘smuggling of migrants’ in the Smuggling Protocol require that the people smuggling be carried out in order to obtain, directly or indirectly, a financial or other material benefit.

Proposed paragraph 73.1(1)(d) refers only to obtaining or having obtained a ‘benefit’. ‘Benefit’ is defined in the Dictionary of the *Criminal Code* to include any advantage and is not limited to property. This will cover both financial and other material benefits, as well as favours, services and other advantages

The term ‘directly or indirectly’ is wide enough to capture situations where the people smuggler does not physically receive the money or benefit, but organises for the money or benefit to go elsewhere – for example, to a spouse, or to another person to pay off a debt.

The people smuggling offences in Division 73 apply to a broader range of countries than the offences set out in the Smuggling Protocol. The Smuggling Protocol defines ‘smuggling in migrants’ as activity which occurs in respect of a State Party. The offences in Division 73 will apply where a person is smuggled into any foreign country, regardless of whether that country is a State Party or not. To limit the countries to which this offence applies would be to limit its effectiveness. Although the offences in Division 71 are in places broader than the Smuggling Protocol, they are within Constitutional power.

The offence in proposed section 73.1 is punishable by a maximum penalty of 10 years imprisonment or 1000 penalty units (\$110,000), or both. This penalty is consistent with consistent with the maximum penalty for the offence of smuggling people into Australia (section 233 of the Migration Act).

Proposed subsection 73.1(3) establishes that a reference in the *Criminal Code* to the offence of people smuggling is a reference to the offence set out in proposed subsection 73.1(1). This makes it clear that the offence referred to in the aggravated people smuggling offence in proposed subsection 73.2(1) is the offence in proposed subsection 73.1(1).

### **Proposed section 73.2 Aggravated offence of people smuggling (exploitation etc.)**

Proposed section 73.2 provides for an aggravated people smuggling offence. The aggravated offence will exist where the elements of the people smuggling offence in proposed subsection 73.1(1) are present, and where that offence occurred in prescribed aggravating circumstances.

Those circumstances are derived from Article 6 of the Smuggling Protocol, which relevantly provides that aggravating circumstances to the offence of people smuggling should include circumstances that endanger, or are likely to endanger, the lives or safety of the migrants concerned, or that entail inhuman or degrading treatment, including for exploitation, of such migrants.

The aggravating circumstances are set out in paragraphs 73.2(1)(a)-(c).

Proposed paragraph 73.2(1)(a) covers where the perpetrator of the people smuggling offence commits that offence intending that the person being smuggled will be exploited after that person enters the foreign country.

‘Exploitation’ is not defined in the Smuggling Protocol. The Bill does not give an exhaustive list of what may constitute exploitation, but does set out a number of circumstances which constitute exploitation. The examples of exploitation provided for in this Bill are derived from the definition in Article 3 of the Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime (‘Trafficking Protocol’).

Article 3 of the Trafficking Protocol provides that ‘exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs’.

The definition of ‘exploitation’ in proposed subsection 73.2(2) includes slavery, sexual servitude, forced labour and the removal of organs. Slavery is already an offence under the *Criminal Code*, and is defined broadly enough to capture both slavery and debt bondage, which is a practice similar to slavery. Sexual servitude is likewise already an offence under the *Criminal Code*.

The definition of ‘forced labour’ in the aggravated offence is modelled on the definition of sexual servitude.

‘Threat’ is defined to mean a threat of force, a threat to cause a person’s deportation and a threat of any other detrimental action. The definition provides that a threat of detrimental action is only a threat for the purposes of the provision if there are no



reasonable grounds for the threat of that action in connection with the provisions of labour or services by a person. What constitutes reasonable grounds will be a matter of fact to be determined by the trier of fact.

The definition of 'threat' is based on the definition in the sexual servitude offence in Division 270. As with the definition in Division 270, 'threat' is intended to cover threats to other persons as well as the person who is subject to the condition of forced labour.

The second aggravating circumstance is set out in proposed paragraph 73.2(1)(b). That paragraph covers where, during the commission of the people smuggling offence, the perpetrator of that offence subjects the smuggled person to cruel, inhuman or degrading treatment.

As with proposed paragraph 73.2(1)(a), the aggravating elements in this paragraph are derived from the Smuggling Protocol.

'Cruel, inhuman or degrading treatment' is not defined. Whether or not certain conduct constitutes cruel, inhuman or degrading treatment will be a matter determined by the trier of fact on the facts of the relevant case.

The third aggravating circumstances is set out in proposed paragraph 73.2(1)(c). That paragraph covers where during the commission of the people smuggling offence, the perpetrator of that offence engages in conduct which gives rise to a danger of death or serious harm occurring to the smuggled person. The definition used in paragraph 73.2(1)(c) is derived from the recommendations of the Model Criminal Code Officers Committee in its 1998 Report on Non Fatal Offences Against the Person.

The offence in proposed section 73.2 is punishable by a maximum penalty of 20 years imprisonment or 2000 (\$220,000) penalty units, or both.

### **Proposed section 73.3 Aggravated offence of people smuggling (at least 5 people)**

The aggravated offence in 73.2 is not derived from the Smuggling Protocol, but is consistent with the Migration Act offences relating to the smuggling of groups of five or more people.

The offence mirrors the physical and fault elements of the primary offence in proposed section 73.1, the only difference being that the smuggling involves at least five people.

This means that the perpetrator will need to organise or facilitate the entry of at least 5 persons into a foreign country, and be reckless as to whether or not each of the 5 persons is entitled to enter that foreign country. Further, the smuggler will have to obtain or have obtained a benefit for that particular act of smuggling.

If in a trial for this aggravated offence the trier of fact (the jury) is not satisfied that the person committed the aggravated offence but is satisfied that the person committed the people smuggling offence in section 73.1, proposed subsection 73.3(3) provides that the trier of fact may give an alternative verdict. This is included

because it is possible that although charged with smuggling five persons, the trier of fact may only be satisfied that the defendant intended to smuggle a lesser amount of people.

The offence in proposed section 73.3 is punishable by a maximum penalty of 20 years imprisonment or 2000 penalty units (\$220,000), or both. This penalty is consistent with consistent with the maximum penalty for the aggravated people smuggling offence in the Migration Act (sections 232A and 233A).

#### **Proposed section 73.4 Jurisdictional requirement**

Part 2.7 of the *Criminal Code* provides general jurisdictional provisions, including provision for extraterritorial application of offences in the *Criminal Code*. Part 2.7 also provides for specific categories of extended geographical jurisdiction (see sections 15.1 to 15.4).

The offences in Subdivision A of Division 73 apply a modified form of the extended jurisdiction provided for in section 15.2 ('Category B' jurisdiction). Category B jurisdiction is determined according to where the conduct and result elements of the offence occurs. In addition to the standard jurisdiction (conduct occurring entirely in Australia or on an Australian ship or aircraft), Category B extends the operation of offences to cover conduct which occurs wholly outside Australia where either a result of the conduct occurs wholly or partly in Australia (or wholly or partly on board an Australian aircraft or ship), or where the perpetrator of the offence is an Australian citizen, a resident of Australia or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

The proposed people smuggling offences are designed to capture certain instances of people smuggling – that is, smuggling from Australia or from one foreign country to another foreign country, either via Australia or not. The offences are not designed to also cover entry into Australia, as that situation is dealt with under the Migration Act.

By modifying the application of Category B jurisdiction, the scope of the offences can be appropriately limited. As the jurisdiction is modified, it would not be sufficient for the provision to simply state that Category B jurisdiction applies. Proposed section 73.4 sets out the modified extended jurisdiction and how it applies to both the primary and ancillary offence provisions.

Under the modified Category B jurisdiction, a person will only commit a people smuggling offence if:

- (1) the person is an Australian citizen or a resident of Australia and the conduct constituting the offence occurs wholly outside Australia, or
- (2) both the conduct constituting the alleged offence occurs wholly or partly inside Australia and a result of the conduct occurs, or is intended to occur, outside of Australia.

Unlike regular Category B jurisdiction, the modified jurisdiction does not cover conduct which occurs entirely in Australia with no result occurring overseas. This is because the people smuggling offences require there to be a result occurring overseas

(ie, illegal entry into a foreign country). Thus, there is no need for that part of the Category B jurisdiction. Other parts of the Category B jurisdiction have been excluded for similar reasons.

### **Proposed section 73.5 Attorney-General's consent required**

Proposed subsection 73.5(1) provides that prosecution proceedings for an offence against one of the provisions in Subdivision A of Division 73 may only be taken with the written consent of the Attorney-General. The consent of the Attorney-General is an important safeguard, and ensures that all relevant factors are taken into account before the step of prosecuting an offence which is concerned with the breach of another country's borders.

Proposed subsection 73.5(2) makes it clear that whilst prosecution proceedings may not proceed without the consent of the Attorney-General, preliminary measures such as arresting and charging the person may still occur. This subsection ensures that arrest, charge and remand, which may require urgent action, are not prevented because of the need to gain the Attorney-General's written consent. It is clear from this section that an investigation may be instituted or continue even if the consent of the Attorney-General for the prosecution proceedings has not yet been obtained.

### **Subdivision B – Document offences related to people smuggling and unlawful entry into foreign countries.**

The document offences in proposed sections 73.8, 73.9 and 73.10 are based on the offences prescribed in Article 6 of the Smuggling Protocol. The offence in 73.11 is not based on the Smuggling Protocol, but complements the other document offences.

Article 6 of the Smuggling Protocol relevantly provides that countries should criminalise the activity of producing, procuring, providing or possessing a fraudulent travel or identity document where that activity is carried out for the purpose of enabling the smuggling of migrants and in order to obtain, directly or indirectly, a financial or other material benefit.

Article 3 of the Smuggling Protocol defines 'fraudulent travel or identity document' to mean any travel or identity document that

- a) has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State
- b) has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner, or
- c) is being used by a person other than the rightful holder

The offences are framed so that they may capture both the person who makes or provides the document, and the person who will use the document to obtain the unlawful entry of another person into a foreign country (eg, the people smuggler), but

not the person whose unlawful entry into a foreign country would be facilitated by the document.

### **Proposed section 73.6 Meaning of *travel or identity document***

All of the offences in Subdivision B of Division 73 are about travel or identity documents. Proposed section 73.6 sets out the types of documents which are included as identity and travel documents, but does not provide an exhaustive list. Whether or not a document will be a travel or identity document will be a matter of fact determined by the court.

### **Proposed section 73.7 Meaning of *false travel or identity document***

Proposed subsection 73.7(1) contains a detailed definition of what is a ‘false travel or identity document’. A document is a false travel or identity document regardless of whether the entire document or just a part of it is false.

The definition in proposed subsection 73.7(1) is based on the existing definition of ‘false documents’ in Part 7.7 of the *Criminal Code* (Forgery and related offences), and also incorporates the first paragraph of the definition of ‘fraudulent travel or identity document’ contained in Article 3 of the Smuggling Protocol.

The definition covers documents or parts of documents which suggest that they were made by a person, or on the authority of a person, when they were not. Similarly, it covers a document or part of document which purports to have been made in particular terms when it was not, or made in particular terms on the authority of a person, when it was not.

The definition also covers a document or part of a document which purports to have been altered by a person, or on the authority of a person, when the document was not so altered. Further, the definition covers a document or part of document which purports to have been made by a person, or on the authority of a person, who never existed. The definition also covers documents or parts of documents which falsely purport to have been made or altered on a particular date, at a particular time, in a particular place or in other circumstances.

Proposed subsections 73.7(2) and (3) make it clear that ‘making’ can include ‘altering’ and that ‘document’ includes purported copies of documents. It is necessary to carefully define all the possible ways of manipulating documents.

### **Proposed section 73.8 Making, providing or possessing a false travel or identity document**

The offence in proposed section 73.8 is based on the offence articulated in Article 6 of the Smuggling Protocol, and the definition of ‘false travel or identity’ document set out in proposed subsection 73.7. The offence criminalises the activity of a person who, to obtain a benefit, makes, provides or possesses a false travel or identity document, intending that it will be used to facilitate the unlawful entry of another person into a foreign country.

This offence is punishable by 10 years imprisonment, a fine of 1000 penalty units (\$100,000), or both. This penalty is consistent with maximum penalties for comparable forgery offences in the *Criminal Code* and document offences in the Migration Act.

**Proposed section 73.9 Providing or possessing a travel or identity document issued or altered dishonestly or as a result of threats**

The offence in proposed section 73.9 is also based on the Smuggling Protocol, and picks up the second paragraph of the definition of ‘fraudulent travel or identity document’ contained in Article 3 of that Protocol.

The offence criminalises the activity of a person who, to obtain a benefit, provides or possesses a travel or identity document, knowing that the issue of that document or the alteration of that document was obtained dishonestly or by threats, and intending that it will be used to facilitate the unlawful entry of another person into a foreign country.

‘Threat’ is not defined, but proposed subsection 73.9(2) provides that a threat may be express or implied, conditional or unconditional. Not defining ‘threat’ is consistent with the approach in the *Criminal Code*. ‘Threat’ is only defined in relation to the sexual servitude offence in Division 270, and the sexual slavery offences in Division 268 (war crimes and offences against humanity) because of the nature of those particular offences. Elsewhere, threat is not defined but there are examples of what a threat may be - see for example the postal offence at section 471.11 and the threatening to cause harm to a Commonwealth officer offence at section 147.2.

The definition of ‘dishonest’ provided in proposed subsection 73.9(3) is also based on existing definitions within the *Criminal Code* – see for example sections 130.3 and 470.2. Whether or not the issue or alteration of the document was dishonest will be a matter to be determined by the trier of fact (proposed subsection 73.9(4)).

This offence is punishable by 10 years imprisonment, a fine of 1000 penalty units (\$100,000), or both. This penalty is consistent with maximum penalties for comparable forgery offences in the *Criminal Code* and document offences in the Migration Act.

**Proposed section 73.10 Providing or possessing a travel or identity document to be used by a person who is not the rightful user**

The offence in proposed section 73.10 is also based on the Smuggling Protocol, and picks up the third paragraph of the definition of ‘fraudulent travel or identity document’ contained in Article 3 of that Protocol.

The offence criminalises the activity of a person who, to obtain a benefit, provides or possesses a travel or identity document, intending that the document will be used to facilitate the unlawful entry of another person into a foreign country, in circumstances where the person knows that the document does not apply to the person who is entering the foreign country.

This offence is punishable by 10 years imprisonment, a fine of 1000 penalty units (\$100,000), or both. This penalty is consistent with maximum penalties for comparable forgery offences in the *Criminal Code* and document offences in the Migration Act.

### **Proposed section 73.11 Taking possession of or destroying another person's travel or identity document**

The offence in proposed section 73.11 is not based on the Smuggling Protocol, but the need for such an offence has arisen in the operational context.

The provision makes it an offence to take possession of or destroy a genuine travel or identity document with the intention of concealing the identity or nationality of a person who is to be or is being smuggled. The offence is aimed at those involved in people smuggling, who routinely remove the travel and identity documents of those persons being smuggled.

The ancillary offence provisions in Division 11 of the *Criminal Code* will apply to this offence, as they apply to the other offences in the *Criminal Code*, and will cover the situation where the smuggler instructs another person to destroy the documents.

As with the other document offences in this Subdivision, this offence is punishable by 10 years imprisonment, a fine of 1000 penalty units (\$100,000), or both.

### **Proposed section 73.12 Jurisdictional requirement**

The offences in Subdivision B of Division 73 apply the extended jurisdiction provided for in section 15.2 ('Category B' jurisdiction). Category B jurisdiction is determined according to where the conduct and result elements of the offence occurs. In addition to the standard jurisdiction (conduct occurring entirely in Australia or on an Australian ship or aircraft), Category B extends the operation of offences to cover conduct which occurs wholly outside Australia where either a result of the conduct occurs wholly or partly in Australia (or wholly or partly on board an Australian aircraft or ship), or where the perpetrator of the offence is an Australian citizen, a resident of Australia or a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

## **SCHEDULE 2 – CROSS-BORDER FIREARMS TRAFFICKING**

### ***Criminal Code Act 1995***

#### **Item 1 The Schedule**

The offences in the *Criminal Code Act 1995* are contained in a Schedule (the *Criminal Code*). This Item amends that Schedule by inserting Chapter 9 of the *Criminal Code*, titled 'Dangers to the community'. Item 1 inserts into Chapter 9 Part 9.4, headed 'Dangerous weapons' which in turn contains Division 360, headed 'Cross-border firearms trafficking'. This Division includes offences, in the context of trade or commerce among or between the States and Territories, criminalising the disposal and acquisition of a firearm where an offence has been committed against an

existing State or Territory firearms law. In the longer term Chapter 9 is likely to include serious drug and other community harm offences.

### **Proposed section 360.1 Disposal and acquisition of a firearm**

The cross-border firearm offences inserted into Division 360 regulate the unlawful disposal or acquisition of a firearm where that activity occurs in the context of interstate trade or commerce. The offences rely on the existing State and Territory offences governing the disposal and acquisition of a firearm.

Whilst the objectives of each State and Territory's legislation are generally common there is considerable variation in the legislation when describing what constitutes the sale or disposal of a firearm or the purchase or acquisition of a firearm. For example some Acts refer to 'sale' of a firearm whereas others refer to 'disposal' of a firearm and others include commercial arrangements which, by virtue of their temporary nature, fall short of a sale.

Proposed section 360.1 defines what is meant by 'disposes of a firearm' and 'acquires a firearm'.

In order to encompass circumstances constituting all sorts of disposal of a firearm, subsection 360.1(1) defines 'disposes of a firearm' to include:

- straightforward sale transactions (paragraph 360.1(1)(a))
- commercial transactions which fall short of a permanent sale, such as leasing (paragraph 360.1(1)(b)), and
- the transfer of a firearm to another where whilst ownership may not permanently transfer, the receiver does have, at least, temporary use of the firearm (paragraph 360.1(1)(c)).

Similarly, in order to encompass all sorts of acquisition of a firearm subsection 360.1(2) defines 'acquires a firearm' to include:

- straightforward purchase transactions (paragraph 360.1(2)(a))
- commercial transactions which fall short of a permanent sale, such as renting (paragraph 360.1(2)(b)), and
- the transfer of a firearm to another where whilst ownership may not permanently transfer, the receiver does have, at least, temporary use of the firearm (paragraph 360.1(2)(c)).

The definitions in proposed section 360.1 are not exhaustive. The examples provided are intended to encompass all possible disposal and acquisition offences that currently occur in State and Territory law and are designed to include the widest range of instances where a transfer in a proprietary interest in a firearm occurs.

In the event that States or Territories subsequently amend what is covered in their acquisition or disposal offences the Commonwealth definition is designed to be flexible enough to encompass those changes.

## **Proposed subsection 360.2 Cross-border offence of disposal or acquisition of a firearm**

Proposed section 360.2 makes it a Commonwealth offence to engage in conduct in the course of interstate trade and commerce which contravenes a State or Territory firearms law about the disposal or acquisition of a firearm.

The disposal and acquisition of firearms is governed by State and Territory legislation. The offence in proposed section 360.2 relies on importing elements of those State and Territory offences to ensure that the Commonwealth does not create offences with different or conflicting requirements.

Proposed subsection 360.2(1) sets out the elements of the offence.

Pursuant to proposed paragraph 360.2(1)(a), there must be three things present for the offence to be committed:

- a person must engage in conduct,
- that conduct must occur in the course of trade or commerce among the States between the Territories or between a Territory and a State, and
- that conduct must constitute an offence against a firearm law.

‘Firearm law’ is defined in proposed subsection 360.2(3) to mean a law of a State or Territory which is prescribed by Regulations.

Conduct that is an offence but that does not take place in the context of trade or commerce among the States between the Territories or between a Territory and a State will not be covered by proposed section 360.2 (but may still be prosecuted under relevant State or Territory legislation). Whether a disposal or acquisition is within the context of trade or commerce will be established by the circumstances surrounding the disposal or acquisition

The scope of the firearm law which must be breached is regulated by proposed paragraph 360.2(1)(b). That paragraph provides that the ‘primary element’ of the firearm offence must be either the disposal of a firearm or the acquisition of a firearm. Disposal and acquisition of a firearm are defined in proposed section 360.1)

The term ‘primary element’ is used in proposed paragraph 360.2(1)(b) because there may be some offences committed against State and Territory firearm laws in the course of interstate trade or commerce which would not necessarily involve behaviour that the cross-border trafficking offences are designed to target. For example, an offence against a State or Territory firearm law where a bona fide seller fails to safely convey a firearm across a State or Territory border should not attract the same penalties that a purchaser in illicit cross-border trafficking should incur.

The maximum penalty for this offence is 10 years imprisonment or a fine of 2,500 penalty units (\$275,000), or both.



Absolute liability has been applied to the elements contained in paragraph 360.2(1)(a). However, in establishing that the person engaged in conduct which constituted a State or Territory firearm law, the physical and fault elements of the particular State or Territory offence will be imported into the Commonwealth offence, and accordingly each of those elements must be established. Absolute liability has been applied to that element to prevent a default fault element applying by application of section 5.6 of the *Criminal Code*, which would in effect be a superfluous fault element to be proved on top of those already existing in the State or Territory offence.

The application of absolute liability to the fact that that conduct must occur in the course of trade or commerce among the States between the Territories or between a Territory and a State is consistent with the application of absolute liability to similar 'jurisdictional' provisions in other parts of the Criminal Code. That part of the offence provides the connection to Commonwealth power, and does not affect the offender's culpability.

### **Proposed section 360.3 Taking or sending a firearm across borders**

There are 3 physical elements which must be present for the cross border offence of disposal or acquisition of a firearm in proposed section 360.2 to be committed.

Paragraph 360.3(1)(b) requires that the offender do so intending that the firearm will be disposed of in the other State or Territory. The disposal in the other State or Territory may be by the taker or sender or the disposal may be undertaken by an associate or accomplice of the taker or sender. In the event of the disposal being undertaken by someone other than the taker or sender, the disposal may occur sometime after the taking or sending. This provision also targets illegal couriers who are agents in the illegal firearms trafficking who may not be subject to various disposal or acquisition offences, yet are paid a premium to convey the illegal firearms.

Paragraph 360.3(1)(c) requires that an offender must either know or be reckless as to whether any disposal of a firearm or acquisition subsequent to the disposal will contravene the relevant State or Territory law in the receiving State or Territory. State and Territory laws impose a high standard of regulation on bona fide sellers or disposers of firearms. These requirements include a seller or disposer conveying any weapon in a safe fashion and requiring evidence from any purchaser or acquirer that that purchaser or acquirer is also bona fide.

The maximum penalty for this offence is 10 years imprisonment or a fine of 2,500 penalty units (\$275,000), or both.

### **Proposed section 360.4 Concurrent operation intended**

Proposed section 360.4 ensures that any State or Territory law which would otherwise apply still has application. This is important, as firearms offences are generally the responsibility of the States and Territories. Unlike the State and Territories the Commonwealth does not operate a firearm licensing regime. The breach of a State or Territory law in the course of interstate trade or commerce is necessary to trigger the Commonwealth offences.

### **SCHEDULE 3 – OTHER MEASURES**

Schedule 3 amends a number of law and justice Acts. The Schedule makes a number of minor amendments to the theft and fraud offences in the *Criminal Code*, which have now been in operation for over a year. The amendments resolve some issues which have emerged during that time. Schedule 3 also amends the sentencing provisions in the *Crimes Act 1914*, includes the substance ‘fantasy’ as a psychotropic drug in the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*, amends the *International Transfer of Prisoners Act 1997* to clearly define the role of the Minister for Immigration and Multicultural and Indigenous Affairs and amends the *Financial Transaction Reports Act 1988* to ensure that remittance dealers are covered by the definition of ‘cash dealer’ in that Act. Schedule 3 also fixes a cross-reference in that Act.

#### ***Crimes Act 1914***

##### **Item 1 Section 16G**

This Item repeals section 16G of the *Crimes Act 1914* (‘Crimes Act’)

Section 16G provides that where a federal sentence is to be served in a State or Territory prison where State or Territory sentences cannot be remitted or reduced, the court must take that matter into account in determining the length of sentence and adjust the sentence accordingly. Section 19AG of the Crimes Act has the same effect with regard to the determination of non-parole periods. Item 2 of this Schedule repeals section 19AG.

The provisions were introduced in 1989 following the abolition of remissions in New South Wales. The inclusion of sections 16G and 19AG was intended to address concerns that New South Wales’ abolition of remissions would result in higher sentences being imposed on federal prisoners in that state than any other jurisdiction. However, as more jurisdictions have abolished remissions (only Western Australia and Tasmania still have some form of remission), sections 16G and 19AG have had the effect of reducing the maximum applicable prison term for all Commonwealth offences by one third. Further, West Australian legislation abolishing remissions is intended to commence in 2003, and the Tasmanian Attorney-General has signalled an intent to remove automatic remissions. In any event, remissions in Tasmania have already been reduced from one third of most sentences to a maximum of three months.

In addition, the provisions have created intra-state disparity between Commonwealth and State prisoners in jurisdictions where there are no state remissions. This is contrary to Commonwealth sentencing policy which promotes the maintenance of intra-state parity of sentences.

There has been considerable judicial consideration and criticism of the application of 16G and 19AG on the grounds outlined above, and it is undesirable that the maximum prison terms which appear on the statute books are discounted in this way. Given the abolition of remissions in most jurisdictions, and their limited application in Tasmania at the present time, it is appropriate that sections 16G and 19AG now be repealed.

Clause 2 of this Bill provides that the amendments will come into effect 28 days after the Bill receives Royal Assent. Clause 4 of this Bill provides that the amendments will only apply to a sentence which is imposed after the provisions commence.

## **Item 2 Section 19AG**

Item 2 repeals section 19AG of the Crimes Act, for the reasons set out under Item 1 of this Schedule.

## **Item 3 Subsection 19AR(6)**

Item 3 removes a cross-reference in subsection 19AR(6) of the Crimes Act to section 19AG (which is repealed by Item 2 of this Schedule).

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

### **Item 4 Part 1 of Schedule 3 (after table item dealing with Fenetylline)**

Under the *Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990* ('TINDAPS Act') 'psychotropic substance' is defined to mean those substances listed in Schedule 3 of that Act. At present gamma-hydroxybutyric acid ('fantasy') is not included in the list of psychotropic substances. As 'fantasy' is not contained in that Schedule, law enforcement agencies are unable to obtain a warrant under the *Telecommunications (Interception) Act 1979* in relation to an investigation into trafficking in fantasy which does not involve importation. As 'fantasy' is able to be manufactured within Australia, this poses a significant and on-going problem to relevant investigations.

The substances listed in Schedule 3 of the TINDAPS Act are taken from Schedules I, II, III and IV of the UN Convention on Psychotropic Substances 1971. As 'fantasy' is now on Schedule IV of that convention, it is appropriate that it be included in Schedule 3 of the TINDAPS Act.

Schedule 3 of the TINDAPS Act is divided into two parts. Part 1 lists psychotropic substances with the minimum weights constituting trafficable and commercial quantities in each case. Part 2 lists those psychotropic substances which are legally available for certain purposes and for which, therefore, there are not trafficable and commercial quantities. Offences involving substances in Part 2 carry lower penalties.

Item 4 includes 'fantasy' in Part 1 of Schedule 3, and lists minimum weights constituting trafficable and commercial quantities of that substance. It is appropriate to include 'fantasy' in Part 1 as it is already listed as a narcotic substance under the Customs (Narcotic Substances) Regulations. The explanatory statement accompanying those Regulations notes that 'fantasy' has no approved therapeutic use in Australia. The commercial and trafficable amounts of 'fantasy' are also listed in those Regulations.

The minimum weights constituting trafficable and commercial quantities of ‘fantasy’ are the same as those amounts set out in the Customs (Narcotic Substances) Regulations. Those amounts are as follows:

- Commercial, 1 kilogram.
- Trafficable, 2 grams.

It is important to maintain consistency between the amounts prescribed in the TINDAPS Act and the Customs (Narcotic Substances) Regulations.

### ***Criminal Code Act 1995***

#### **Item 5 The Schedule (paragraph 131.7(1)(b) of the *Criminal Code*)**

Item 5 amends section 131.7 of the *Criminal Code*.

The effect of section 131.7 is that a person who receives property by another’s fundamental mistake may commit the offence of theft under section 131.1 of the *Criminal Code* if (i) the person is under a legal obligation to make restoration (in whole or in part) of the property or its proceeds and (ii) they decide not to restore that property.

Item 5 amends the provision so that it will apply where the person is under a legal obligation to make restoration (in whole or in part) of the property, its proceeds or value. This amendment is necessary because currently the section does not apply where the person is only under a legal obligation to make restoration of the value of the property. As property may not always be tangible, and thus able to be restored, this gap is problematic.

For example, two persons may operate a joint bank account into which one person’s social security payments are made. Where that person dies, but Centrelink is not informed of the person’s death, it may continue to make payments into that bank account. The surviving account holder will not commit theft under section 131.1 if he or she decides to “keep the money” knowing that it has been paid by mistake. This is because the property (the payments) received by the surviving account holder is strictly speaking not money but a chose in action, being a right to sue on the debt now owed to the account holder by the bank for the amount of the payments made by Centrelink.

That property – the chose in action – is intangible property, and thus is unable to be restored. Further, until money is withdrawn from the account there could be no question of there being an obligation to restore that money as the proceeds of the chose in action. In any event, where money is withdrawn from the account it may be unclear whether a legal obligation would arise to restore the actual money withdrawn. For example, the amount of the payments credited to the account may have been mixed with payments from other sources.

However, the account holder would be under a legal obligation from the outset to restore to Centrelink the value of that chose in action.

Comparable provisions refer to an obligation to restore either the property obtained by another's mistake, its proceeds or the *value* of that property (*Crimes Act 1958* (Victoria); *Theft Act 1968* (UK)). This amendment brings section 131.7 into line with comparable legislation.

#### **Item 6 The Schedule (paragraph 135.2(1) of the *Criminal Code*)**

Subsection 135.2(1) of the *Criminal Code* makes it an offence to obtain a financial advantage from a Commonwealth entity where the person knows or believes that he or she is not eligible to receive that financial advantage.

Item 6 amends the structure of subsection 135.2(1) to separate the physical element that the financial advantage is gained from a Commonwealth entity from the other elements of the offence, and to apply absolute liability to that element.

That the advantage is gained from a Commonwealth entity is a jurisdictional element in that it limits the ambit of the relevant offence to fraud committed against the Commonwealth. It is not a substantive element of the offence which should affect the culpability of the offender.

Currently under subsection 135.2(1), the prosecution must prove that the alleged offender was aware that he or she was obtaining an advantage from a Commonwealth entity. The difficulty with that requirement is that although the person may be aware he or she is obtaining an advantage from 'the Government', in many cases the person will not be aware that he or she is obtaining an advantage from the Commonwealth.

The effect of the amendment made by Item 6 is to remove any requirement that the alleged offender be aware that it was the Commonwealth they were dealing with in committing the offence. It will still be necessary for the prosecution to show that the financial advantage was in fact gained from a Commonwealth entity.

This application of absolute liability is consistent with its application in both the *Criminal Code* and other Commonwealth legislation and would ensure the effective and efficient enforcement of these offences.

#### **Item 7 The Schedule (paragraph 135.2(2) of the *Criminal Code*)**

Subsection 135.2(2) of the *Criminal Code* makes it an offence to obtain a financial advantage for another person from a Commonwealth entity where the person knows or believes that the other person is not eligible to receive that financial advantage.

Item 7 amends the structure of subsection 135.2(2) to separate the physical element that the financial advantage is gained from a Commonwealth entity from the other elements of the offence, and to apply absolute liability to that element.

That the advantage is gained from a Commonwealth entity is a jurisdictional element in that it limits the ambit of the relevant offence to fraud committed against the Commonwealth. It is not a substantive element of the offence which should affect the culpability of the offender.

Currently under subsection 135.2(2), the prosecution must prove that the alleged offender was aware that he or she was obtaining an advantage from a Commonwealth entity. The difficulty with that requirement is that, although the person may be aware he or she is obtaining an advantage from ‘the Government’, in many cases the person will not be aware that he or she is obtaining an advantage from the a Commonwealth entity as defined

The effect of the amendment made by Item 7 is to remove any requirement that the alleged offender be aware that it was the Commonwealth they were dealing with in committing the offence. It will still be necessary for the prosecution to show that the financial advantage was in fact gained from a Commonwealth entity.

This application of absolute liability is consistent with its application in both the *Criminal Code* and other Commonwealth legislation and would ensure the effective and efficient enforcement of these offences.

### **Item 8 The Schedule (after subsection 136.1(1) of the *Criminal Code*)**

Subsection 136.1(1) of the *Criminal Code* makes it an offence to provide a false or misleading statement in particular types of applications, knowing that the statement is false or misleading. The offence applies where the statement is made to a Commonwealth entity, a person exercising powers or performing functions under or in connection with a Commonwealth law, or in compliance or purported compliance with a law of the Commonwealth (subparagraphs 136.1(1)(d)(i)-(iii)).

That the statement be made to a Commonwealth entity, a person exercising powers or functions under Commonwealth law, or in compliance with a Commonwealth law serves to limit the application of the offence.

Item 8 inserts a new subsection, 136.1(1A), which applies absolute liability to the physical elements set out in subparagraphs 136.1(1)(d)(i)-(iii).

Currently under subsection 136.1(1), the prosecution must prove that the alleged offender was aware that he or she was making a false statement to a Commonwealth entity, person exercising powers or functions under Commonwealth law, or that the statement was being made in compliance with a Commonwealth law. The difficulty with that requirement is that although the person may be aware he or she is making a statement in connection with an application to ‘the Government’, in many cases the person will not be aware that the statement is being made to the Commonwealth.

The effect of the amendment made by Item 8 is to remove any requirement that the alleged offender be aware that it was the Commonwealth they were dealing with in committing the offence. It will still be necessary for the prosecution to show that the statement was made to the relevant Commonwealth entity etc.

This application of absolute liability is consistent with its application in both the *Criminal Code* and other Commonwealth legislation and would ensure the effective and efficient enforcement of these offences.

### **Item 9 The Schedule (after subsection 136.1(4) of the *Criminal Code*)**

Subsection 136.1(4) of the *Criminal Code* makes it an offence to provide a false or misleading statement in particular types of applications, reckless as to whether or not the statement is false or misleading. The offence applies where the statement is made to a Commonwealth entity, a person exercising powers or performing functions under or in connection with a Commonwealth law, or in compliance or purported compliance with a law of the Commonwealth (subparagraphs 136.1(4)(d)(i)-(iii)).

That the statement be made to a Commonwealth entity, a person exercising powers or functions under Commonwealth law, or in compliance with a Commonwealth law serves to limit the application of the offence.

Item 9 inserts a new subsection, 136.1(4A), which applies absolute liability to the physical elements set out in subparagraphs 136.1(4)(d)(i)-(iii).

Currently under subsection 136.1(4), the prosecution must prove that the alleged offender was aware that he or she was making a false statement to a Commonwealth entity, person exercising powers or functions under Commonwealth law, or that the statement was being made in compliance with a Commonwealth law. The difficulty with that requirement is that although the person may be aware he or she is making a statement in connection with an application to ‘the Government’, in many cases the person will not be aware that the statement is being made to the Commonwealth.

The effect of the amendment made by Item 9 is to remove any requirement that the alleged offender be aware that it was the Commonwealth they were dealing with in committing the offence. It will still be necessary for the prosecution to show that the statement was made to the relevant Commonwealth entity etc.

This application of absolute liability is consistent with its application in both the *Criminal Code* and other Commonwealth legislation and would ensure the effective and efficient enforcement of these offences.

### **Item 10 The Schedule (after subsection 137.1(1) of the *Criminal Code*)**

Subsection 137.1(1) of the *Criminal Code* makes it an offence to provide false or misleading information to a Commonwealth entity, a person exercising powers or performing functions under or in connection with a Commonwealth law, or where the information is given in compliance or purported compliance with a law of the Commonwealth.

That the information is given to a Commonwealth entity, a person exercising powers or functions under Commonwealth law, or in compliance with a Commonwealth law serves to limit the application of the offence. Those three alternate elements are set out in subparagraphs 137.1(1)(c)(i)-(iii).

Item 10 inserts a new provision, subsection 137.1(1A), which applies absolute liability to the physical elements set out in subparagraphs 137.1(1)(c)(i)-(iii).

Currently under subsection 137.1(1), the prosecution must prove that the alleged offender was aware that he or she was making giving false or misleading information to a Commonwealth entity, a person exercising powers or functions under Commonwealth law, or in compliance with a Commonwealth law. The difficulty with that requirement is that although the person may be aware he or she is providing information to a Government body or representative, in many cases the person will not be aware that the statement is being made to the Commonwealth.

The effect of the amendment made by Item 10 is to remove any requirement that the alleged offender be aware that it was the Commonwealth they were dealing with in committing the offence. It will still be necessary for the prosecution to show that the information was given to the relevant Commonwealth entity etc.

This application of absolute liability is consistent with its application in both the *Criminal Code* and other Commonwealth legislation and would ensure the effective and efficient enforcement of these offences.

#### **Item 11 The Schedule (subparagraph 145.2(3)(a)(i) of the *Criminal Code*)**

Item 11 amends subparagraph 145.2(3)(a)(i) so that a prosecution must show an alleged offender intended to dishonestly cause a computer or other device to respond to the false document.

The offence in subsection 145.2(3) concerns the possession of a false document with the intention that it be used to cause a computer or other device to respond to it as if it were a genuine document, for the purpose of dishonestly obtaining a gain or causing a loss. At present a prosecution does not have to show the alleged offender intended to dishonestly cause a computer or other device to respond to the false document, as is required under the counterpart offences in subsections 144.1(3) and 145.1(3) of the *Criminal Code*.

This amendment will fix subsection 145.2(3) so that it corresponds to subsections 144.1(3) and 145.1(3).

#### **Item 12 The Schedule (after subsection 147.1(1A) of the *Criminal Code*)**

Section 147.1 of the *Criminal Code* makes it an offence to cause harm to a Commonwealth public official, punishable by a maximum penalty of 10 years imprisonment. Where the official is a judicial officer or law enforcement officer, the maximum penalty for the offence is 13 years imprisonment. Section 147.1, in so far as it relates to causing harm to a law enforcement officer, replaces a similar provision in the *Australian Federal Police Act 1979* (AFP Act), which was punishable by a maximum term of two years imprisonment.

Section 4J of the *Crimes Act 1914* provides that (unless otherwise stated) only offences punishable by a maximum penalty of 10 years or less imprisonment are able to be dealt with summarily. Where a matter is dealt with summarily under section 4J, that section provides for a lesser sentence to be imposed. The maximum penalty that can be imposed is a sentence of 2 years imprisonment and/or a fine of 120 penalty units (paragraph 4J(3)(b) of the *Crimes Act* ).



Currently, an offence against 147.1 of the *Criminal Code* which is committed against a Commonwealth judicial officer or a Commonwealth law enforcement officer cannot be dealt with on a summary basis (as it has a penalty exceeding the 10 year maximum specified in section 4J of the Crimes Act). Such an offence can only be dealt with on a summary basis if it does not allege that the victim was a Commonwealth law enforcement or judicial officer, but just that the victim was a Commonwealth public official.

Where the prosecution does not believe the assault of a law enforcement officer should be dealt with in a higher court, but should be dealt with summarily, it has adopted the practice of charging the assault as causing harm to a Commonwealth public official (and not a Commonwealth law enforcement or judicial officer). Whilst this enables the offence to be dealt with summarily, it does not meet the policy objective that a higher penalty should apply where the harm was caused to a law enforcement officer.

Item 12 inserts proposed subsection 147.1(1A) which expressly provides that an offence against 147.1 which is committed against a Commonwealth judicial officer or a Commonwealth law enforcement officer may be dealt with on a summary basis. Both the defendant and the prosecution must consent to the offence being heard summarily, and the court of summary jurisdiction must be satisfied that it is appropriate for particular charge to be so dealt with.

Item 12 also inserts proposed subsection 147.1(1B), which provides for a lesser penalty to be imposed where a matter under section 147.1 is dealt with summarily. Proposed subsection 147.1(1) prescribes a maximum penalty of 2 years imprisonment and/or a fine of 120 penalty units, which is consistent with the maximum penalty able to be imposed for offences heard summarily by virtue of section 4J of the Crimes Act.

### **Item 13 The Schedule (paragraphs 148.1(2)(a) and (b) of the *Criminal Code*)**

Section 148.1 of the *Criminal Code* makes it an offence for a person other than a Commonwealth official to impersonate a Commonwealth public official (subsection 148.1(1)) or falsely represent himself or herself as a Commonwealth public official (subsection 148.1(2)).

The false representation offence is limited in its application by the requirement that the person falsely represent that they are another person in that person's capacity as a Commonwealth official. The effect of this requirement is that a person who falsely represents that they are a Commonwealth public official but does not state that they are someone else would not be guilty of an offence. This requirement also blurs the distinction between the impersonation offence in 148.1(1) and the false representation offence in 148.1(2).

Item 13 amends the false representation offence to provide that a person falsely represents himself or herself to be a Commonwealth public official in a particular capacity (when he or she is not a Commonwealth public official in that capacity), whether or not that person also falsely represents that he or she is another person.

**Item 14 The Schedule (subsection 148.1(2A) of the *Criminal Code*)**

The amendment made by Item 14 to subsection 148.1(2A) is consequential to the amendment in Item 13.

As the offence in subsection 148.1(2) no longer requires a person to represent himself or herself as another person, but only requires a person to represent himself or herself in another capacity, the references in paragraphs 148.1(2A)(a) and (b) to ‘the other person’ are no longer necessary.

**Item 15 The Schedule (subparagraph 148.1(3)(a)(ii) of the *Criminal Code*)**

Subsection 148.1(3) makes it an offence for a person other than a Commonwealth official to impersonate a Commonwealth public official (subparagraph 148.1(3)(a)(i)) or falsely represent himself or herself as a Commonwealth public official (subparagraph 148.1(3)(a)(ii), where that person does so with intention of obtaining a gain, causing a loss or influencing the exercise of a public duty or function.

Item 15 amends subparagraph 148.1(3)(a)(ii) on the same basis and in the same way as Item 13 amends subsection 148.1(2), by removing the requirement that the person committing the offence represents himself or herself to be another person. As amended, the offence requires only that the person falsely represent that he or she is a Commonwealth public official in a particular capacity

**Item 16 The Schedule (subsection 148.1(3A) of the *Criminal Code*)**

The amendment made by Item 16 to subsection 148.1(3A) is consequential to the amendment in Item 15.

As the offence in subparagraph 148.1(3)(a)(ii) no longer requires a person to represent him or her self as another person, but only requires a person to represent himself or herself in another capacity, the references in paragraphs 148.1(1)(3A)(a) and (b) to ‘the other person’ are no longer necessary.

**Item 17 The Schedule (paragraphs 148.2(2)(a) and (b) of the *Criminal Code*)**

Section 148.2 of the *Criminal Code* makes it an offence for a Commonwealth public official to impersonate a Commonwealth public official (subsection 148.2(1)) or falsely represent himself or herself as a Commonwealth public official (subsection 148.2(2)).

The false representation offence is limited in its application by the requirement that the Commonwealth public official falsely represent that they are another person in that person’s capacity as a Commonwealth official. The effect of this requirement is that a person who falsely represents that they are a Commonwealth public official but does not state that they are someone else would not be guilty of an offence. This requirement also blurs the distinction between the impersonation offence in 148.2(1) and the false representation offence in 148.2(2).

Item 17 amends the false representation offence to provide that a Commonwealth official falsely represents himself or herself to be a Commonwealth public official in a particular capacity (when he or she is not a Commonwealth public official in that capacity), whether or not that person also falsely represents that he or she is another person.

**Item 18 The Schedule (subsection 148.2(2A) of the *Criminal Code*)**

The amendment made by Item 18 to subsection 148.2(2A) is consequential to the amendment in Item 17.

As the offence in subsection 148.2(2) no longer requires a person to represent him or her self as another person, but only requires a person to represent himself or herself in another capacity, the references in paragraphs 148.2(2A)(a) and (b) to ‘the other person’ are no longer necessary.

**Item 19 The Schedule (subparagraph 148.2(3)(a)(ii) of the *Criminal Code*)**

Subsection 148.2(3) makes it an offence for a person other than a Commonwealth official to impersonate a Commonwealth public official (subparagraph 148.2(3)(a)(i)) or falsely represent himself or herself as a Commonwealth public official (subparagraph 148.2(3)(a)(ii), where that person does so with intention of obtaining a gain, causing a loss or influencing the exercise of a public duty or function.

Item 19 amends subparagraph 148.2(3)(a)(ii) on the same basis and in the same way as Item 17 amends subsection 148.2(2), by removing the requirement that the person committing the offence represents himself or herself to be another person. As amended, the offence requires only that the person falsely represent that he or she is a Commonwealth public official in a particular capacity

**Item 20 The Schedule (subsection 148.2(3A) of the *Criminal Code*)**

The amendment made by Item 20 to subsection 148.2(3A) is consequential to the amendment in Item 19.

As the offence in subparagraph 148.2(3)(a)(ii) no longer requires a person to represent himself or herself as another person, but only requires a person to represent himself or herself in another capacity, the references in paragraphs 148.2(1)(3A)(a) and (b) to ‘the other person’ are no longer necessary.

***Financial Transaction Reports Act 1988***

**Item 21 Subsection 3(1) (subparagraph (k)(ib) of the definition of *cash dealer*)**

Item 21 of Schedule 3 amends subparagraph (k)(ib) of the definition of "cash dealer" in subsection 3(1) of the *Financial Transaction Reports Act 1988* (FTR Act). The item inserts the words "or making electronic funds transfers" into the subparagraph to ensure that a person who carries on a business of remitting or transferring currency or prescribed commercial instruments or making electronic funds transfers into or out of Australia on behalf of other persons is included in the definition of cash dealer. This

amendment, together with the amendment at item 22 of Schedule 3, is intended to remove any doubt that the actual transfer of currency into or out of Australia is required for remittance dealers to be within the definition of "cash dealer".

**Item 22 Subsection 3(1) (after paragraph (k) of the definition of *cash dealer*)**

Item 22 of Schedule 3 inserts a new paragraph (l) into the definition of "cash dealer" in subsection 3(1) of the FTR Act. The new paragraph (l) is intended to ensure that persons who carry on a business in Australia on behalf of other persons of arranging for remittance of funds outside Australia or for remittance of funds into Australia are within the definition of "cash dealer". This amendment, together with the amendment at item 21 is intended to ensure that the term "cash dealer" includes "hawala" or "underground banking"; in other words that it covers a person who carries on a business of transmission of money or value including through informal money or value transfer systems or networks.

**Item 23 Section 17**

Item 23 of Schedule 3 is a technical amendment to section 17 FTR Act to ensure that the existing protection for cash dealers from money laundering offences in the Proceeds of Crime Act 1987 will carry over to the replacement money laundering offences in Division 400 of the *Criminal Code*.

***International Transfer of Prisoners Act 1997***

**Item 24 Subsection 4(1)**

This item inserts a definition of 'Immigration Minister' into the interpretation section of the *International Transfer of Prisoners Act 1997* (the ITP Act). This is required due to the amendment of sections 13 and 57 of the ITP Act.

**Item 25 At the end of section 13**

This item amends section 13 of the ITP Act to require consultation between the Attorney-General and the Immigration Minister as to whether a prisoner is eligible under subsection 13(1) of the ITP Act. Subsection 13(1) of the ITP Act requires a prisoner to be an Australian citizen or a permanent resident under the Migration Act to be eligible for transfer. The proposed subsection 13(2)(b) of the ITP Act is intended to allow consultation about whether the Immigration Minister is intending to revoke a prisoner's citizenship or visa, even though the prisoner may be eligible at the time he or she makes the request.

**Item 26 Section 57**

This item replaces the current section 57 of the ITP Act. The proposed section provides that the Attorney-General must obtain the consent of the Immigration Minister prior to consenting to the transfer of a Tribunal prisoner to Australia. The previous section 57 of the ITP Act required the consent of the Immigration Minister to be given before the Attorney-General could make any decision under the ITP Act, and required this consent for all incoming and outgoing prisoners who were not

Australian citizens. This was not administratively effective. The proposed section is limited to Tribunal prisoners, and the consent of the Immigration Minister is only required if the Attorney-General is proposing to consent to the transfer of a prisoner.