

**CRIMES LEGISLATION AMENDMENT (INTERNATIONAL CRIME
COOPERATION AND OTHER MEASURES) REGULATIONS 2018**

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

PURPOSE AND OPERATION OF THE INSTRUMENT

The *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Regulations 2018* (the Regulations) amends six Regulations, consequential to amendments made by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018*, the *Crimes Legislation Amendment Act (No.2) 2011* and the *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011*.

The purpose of these amendments is to: (a) ensure Australia can effectively respond to requests for assistance from foreign countries, the International Criminal Court and international war crimes tribunals for their criminal investigations and proceedings, (b) extend the application of foreign evidence rules to certain criminal and related civil proceedings in the external territories and the Jervis Bay Territory so that evidence obtained from foreign countries may be adduced in such proceedings, and (c) ensure that judicial officers have sufficient powers to make custody orders necessary in extradition matters when a person is to be surrendered to another country.

The following Regulations are amended, under their respective Acts:

- the *Foreign Evidence (Foreign Material—Criminal and Related Civil Proceedings) Regulations 2018*, made under the *Foreign Evidence Act 1994*;
- the *International Criminal Court Regulations 2008*, made under the *International Criminal Court Act 2002*;
- the *International War Crimes Tribunals Regulations 1995*, made under the *International War Crimes Tribunals Act 1995*;
- the *Mutual Assistance in Criminal Matters Regulations 1988*, made under the *Mutual Assistance in Criminal Matters Act 1987*;

- the *Telecommunications (Interception and Access) Regulations 2017*, made under the *Telecommunications (Interception and Access) Act 1979*; and
- the *Extradition Regulations 1988*, made under the *Extradition Act 1988*.

The effect of the amendments to these Regulations is as follows:

- Schedule 1, Part 1 – Assistance to international courts and tribunals: The amendments facilitate the provision of assistance to foreign countries, international war crimes tribunals (IWCTs) and the International Criminal Court (ICC) for investigations and proceedings relating to criminal matters. The amendments do three things:
 - 1) Facilitate requests from IWCTs to conduct proceedings to take evidence in Australia for the purposes of their investigations and proceedings. They clarify the role of magistrates in these proceedings. The amendments make it clear that the magistrate who sends for witnesses and documents in relation to such a request does not need to be the same magistrate before whom the witness must attend or documents are produced, thereby allowing flexibility in the process.
 - 2) Facilitate requests by the ICC for the enforcement of orders made by the ICC to forfeit proceeds of crime in Australia. They do this by prescribing a revised form for the Attorney-General to issue when he or she authorises an application to an Australian court for registration of a forfeiture order of the ICC.
 - 3) Facilitate requests from foreign countries, IWCTs and the ICC for stored communications (such as SMS messages and emails that are stored by a carrier or carriage service provider so they can be accessed by the recipient) for the purposes of their investigations and proceedings. They do this by prescribing two forms for the issue of a stored communications warrant.

These amendments give effect to amendments to the *International War Crimes Tribunals Act 1995*, the *International Criminal Court Act 2002* and the *Telecommunications (Interception and Access) Act 1979* made by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018*, the *Crimes Legislation Amendment Act (No.2) 2011* and the *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011*.

- Schedule 1, Part 2 – Mutual assistance in criminal matters: The amendments facilitate requests from foreign countries to conduct proceedings to take evidence in Australia. They clarify the role of magistrates in these proceedings. The amendments make it clear that the

judicial officer who sends for witnesses and documents in relation to a request from a foreign country does not need to be the same judicial officer before whom the witness must attend or documents are produced, or who can make orders in relation to service and issue a warrant for apprehension. This allows flexibility in the process. Revised forms are prescribed for a Summons and a Warrant of Apprehension in relation to these proceedings. These amendments give effect to recent amendments to the *Mutual Assistance in Criminal Matters Act 1987* made by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018*.

- **Schedule 1, Part 3 – Foreign evidence:** The amendments enable the adducing of foreign evidence in certain proceedings in courts of the Jervis Bay Territory and the external territories. The amendments do this by specifying certain territories, laws and proceedings. This ensures the consistent use of foreign evidence throughout all Australian jurisdictions. These amendments give effect to recent amendments to the *Foreign Evidence Act 1994* made by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018*.
- **Schedule 2, Extradition:** The amendments insert two new Forms in the *Extradition Regulations 1988* to enable judicial officers to commit persons to prison in certain circumstances where they are awaiting extradition. The circumstances are where a surrender warrant or temporary surrender warrant has been issued for the extradition of a person on bail, or where a court has made an order on review that a person be surrendered to New Zealand. In these circumstances, the judicial officer has the power to commit the person to prison to await their transfer to the foreign country. These amendments give effect to recent amendments to the *Extradition Act 1988* made by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018*.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

Details of the Regulations are set out in the Attachment.

CONSULTATION

The following stakeholders were consulted in 2018: the Department of Home Affairs, the Department of Foreign Affairs, the Department of Infrastructure and Regional Development, the Department of Environment, the Treasury, the Australian Federal Police, the Commonwealth Director of Public Prosecutions, the justice departments of Western Australia, the Australian Capital Territory and the Northern Territory and Norfolk Island. These stakeholders indicated support for the amendments.

The Regulations do not have direct, or substantial indirect, effects on business, nor do they restrict competition.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation advised that a regulation impact statement was not required for these amendments (23670).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of *the Human Rights (Parliamentary Scrutiny) Act 2011*.

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Regulations 2018

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that it may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate in achieving the intended outcomes of the Disallowable Legislative Instrument.

Overview of the Disallowable Legislative Instrument

The Disallowable Legislative Instrument improves and clarifies Australia's international crime cooperation framework by amending the following Regulations:

- the *Foreign Evidence (Foreign Material—Criminal and Related Civil Proceedings) Regulations 2018*;
- the *International Criminal Court Regulations 2008*;
- the *International War Crimes Tribunals Regulations 1995*;
- the *Mutual Assistance in Criminal Matters Regulations 1988*;
- the *Telecommunications (Interception and Access) Regulations 2017*; and
- the *Extradition Regulations 1988*.

The purpose of these amendments is to: (a) ensure Australia can effectively respond to requests for assistance from foreign countries, the International Criminal Court and international war crimes tribunals, (b) extend the application of foreign evidence rules to certain criminal and related civil proceedings in the external territories and the Jervis Bay Territory so that evidence obtained from

foreign countries may be adduced in such proceedings, and (c) ensure that judicial officers have sufficient powers to make custody orders necessary in extradition matters when a person is to be surrendered to another country.

Further details regarding the amendments and their human rights implications are set out below.

Schedule 1 – Courts and Tribunals

Outline of amendments

Schedule 1 – Part 1 (Assistance to international courts and tribunals)

The amendments in Part 1 of Schedule 1 facilitate the provision of assistance to foreign countries, international war crimes tribunals (IWCTs) and the International Criminal Court (ICC). Such assistance is provided under the *Mutual Assistance in Criminal Matters Act 1987* (MA Act), the *International War Crimes Tribunals Act 1995*, and the *International Criminal Court Act 2002* (ICC Act).

For the purposes of these amendments, this includes:

- Assisting the ICC to enforce a forfeiture order that it has made in relation to proceeds of crime in Australia following a conviction by the ICC. The Regulations make minor amendments to the Form issued by the Attorney-General to authorise an application to an Australian Court for the registration of a forfeiture order made by the ICC. Registration of the order in Australia allows it to be enforced in Australia.

For example, if the ICC has convicted a person and identified that the person holds proceeds of that crime in Australia (such as money in a bank account), it can make an order that the property be confiscated, and request Australia to register that order. If the order meets the criteria under the ICC Act, the Attorney-General can authorise the Australian Federal Police or Commonwealth DPP to apply to an Australian court to register the order. The ensuing court proceedings can then provide for the forfeiture of such property.

- Assisting IWCTs to take evidence from witnesses in Australia for the purposes of their criminal investigations and proceedings. The Regulations make amendments to clarify that the magistrate who sends for witnesses and documents does not need to be the same magistrate before whom the witness must attend or documents are produced.

For example, if an IWCT is investigating an offence of genocide and a witness in Australia can give evidence about this offence, the IWCT can request Australia to take evidence from

this witness. If the Attorney-General authorises the provision of such assistance, a magistrate can conduct proceedings to take such evidence and send it to the IWCT for use in its investigations or proceedings. The magistrate who issues the summons for the witness to attend court or provide documents does not need to be the same magistrate who conducts the proceedings.

- Assisting foreign countries, the ICC and IWCTs to access stored communications (such as SMS messages and emails that are stored by a carrier or carriage service provider) so they can be accessed by the recipient for the purposes of their investigations and proceedings. The Regulations prescribe two forms that facilitate the issuing of a stored communications warrant.

For example, if a foreign country requires access to certain email records in Australia to assist in their drug investigation, it may request that Australia provide such records. If the request meets the criteria of the MA Act, the Attorney-General may authorise certain police officers to apply for a stored communications warrant to obtain the material. If an issuing authority (such as a magistrate) issues a warrant, the warrant will be in the new form prescribed by these regulations. Material obtained under the warrant can ultimately be sent to the foreign country for the purposes of its investigation and proceedings.

Further context of these amendments is outlined under the relevant human rights obligations below.

Schedule 1 – Part 2 (Mutual Assistance in Criminal Matters)

The amendments in Part 2 of Schedule 1 facilitate the provision of assistance to foreign countries under the MA Act. Section 13 of the MA Act provides that the Attorney-General can authorise proceedings to be conducted to take evidence in Australia in response to a request from a foreign country for the purposes of a proceeding in relation to a criminal matter. If the Attorney-General makes such an authorisation, Magistrates and Federal Circuit Court Judges can do certain things to arrange this.

For example, if a foreign country requested Australia to take evidence from a witness in Victoria for the purposes of that country's criminal prosecution, the Attorney-General could authorise a Magistrate or Federal Circuit Court Judge in Victoria to do this, and the evidence taken in such proceedings can ultimately be sent to that foreign country for use in its trial.

The *Mutual Assistance in Criminal Matters Regulations 1988* facilitates this process by providing the power of a Magistrate or eligible Federal Circuit Court Judge to send for witnesses and documents and providing for the apprehension of a person failing to attend. The amendments clarify that the

Magistrate or Federal Circuit Court Judge who sends for witnesses or documents does not need to be the same Magistrate or Federal Circuit Court Judge before whom the witness must attend or documents are produced, or who can make orders in relation to service and issue a warrant for apprehension. They also repeal and replace the forms for the summons and warrant for apprehension to facilitate this.

Schedule 1 – Part 3 (Foreign Evidence)

The Attorney-General can request international assistance to gather evidence from other countries for the purposes of domestic proceedings. For example, Australia can make requests to other countries under the MA Act for evidence, such as business records or witness statements, during the course of an investigation into criminal conduct. Part 3 of the *Foreign Evidence Act 1994* enables foreign material obtained from other countries at the request of the Attorney-General to be adduced in certain criminal proceedings, related civil proceedings and proceeds of crime proceedings in Australian courts. For example, it can allow foreign material to be adduced in proceedings where a witness is not available to give evidence in person, subject to safeguards.

Adducing evidence means presenting it to the court for its consideration. The relevant evidentiary rules applicable in that jurisdiction regarding admissibility continue to apply to such evidence (other than the hearsay rule for business records in some jurisdictions as per subsection 24(3) of the Act). For example, if a witness statement that is adduced under section 24 of the Act in proceedings in ACT courts contains material that is not relevant, the court could find that that material is not admissible under subsection 56(2) of the *Evidence Act 2011* (ACT).

The *Foreign Evidence (Foreign Material—Criminal and Related Civil Proceedings) Regulations 2018* (the Regulations) enable Part 3 of the Act to apply to certain proceedings in States and Territories. The Regulations already covered all Australian States and the Northern Territory and Australian Capital Territory.

The amendments to the Regulations ensure that certain proceedings in the external territories and the Jervis Bay Territory are covered by Part 3 of the *Foreign Evidence Act 1994*, so that foreign material may be adduced in these proceedings under that Act. It does this by specifying certain territories, laws and proceedings. The territory proceedings covered are:

- a) Criminal proceedings for an offence against the law of a territory, such as a prosecution of a person for murder.
- b) Related civil proceedings of a kind specified in these regulations. ‘Related civil proceedings’ is defined in section 3 of the Act as ‘any civil proceeding arising from the same subject matter from which the criminal proceeding arose.’ For example, proceedings under a law of a

territory to confiscate proceeds of crime or recover tax or duties where there was a related criminal proceeding.

- c) Proceeds of crime proceedings where there were not necessarily related criminal proceedings. For example, proceedings under a law of a territory to confiscate the proceeds of crime where a person could not be prosecuted because they had died.

This will allow foreign material to be adduced in such proceedings, subject to judicial discretion.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- Right to protection against arbitrary and unlawful interferences with privacy – Article 17 of the International Covenant on Civil and Political Rights (ICCPR);
- Right to a fair trial and a fair hearing—Article 14 of the ICCPR;
- Minimum guarantees in criminal proceedings – Article 14(3) of the ICCPR; and
- Right to security of the person and freedom from arbitrary detention – Article 9 of the ICCPR.

This Disallowable Legislative Instrument does not engage the following right:

- Presumption of innocence – Proceeds of Crime – Article 14(2) of the ICCPR; and
- Prohibition on retrospective criminal laws – Article 15 of the ICCPR.

Right to Privacy – Stored communications warrants and take evidence proceedings

This Disallowable Legislative Instrument engages Article 17 of the ICCPR, which states that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. The right in Article 17 may be subject to permissible limitations, where the limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The Instrument engages with the right to privacy by facilitating the process by which, in limited circumstances, stored communications warrants can be issued and witnesses can be summoned to produce documents or other articles (Items 2 to 12 in Parts 1 and 2 of Schedule 1) for criminal investigations and proceedings, which may cover personal information. The collection and disclosure

of personal information without a person's consent will engage, and limit, the protection from arbitrary and unlawful interference with privacy in article 17 of the ICCPR.

To the extent that Items 2 to 12 limit the right in Article 17 of the ICCPR, this is lawful and non-arbitrary. Items 2 and 3 cover the process for taking evidence from witnesses in Australia on behalf of international war crimes tribunals under the *International War Crimes Tribunals Act 1995*. Items 4 and 5 cover the process for issuing stored communications warrants under the *Telecommunications (Interception and Access) Act 1979* following a request for assistance from a foreign country, an international war crimes tribunal or the International Criminal Court. Stored communications are communications such as SMS messages and emails that are stored by a carrier or carriage service provider so they can be accessed by the recipient. Items 6 to 12 cover the process for taking evidence from witnesses in Australia on behalf of foreign countries under the MA Act. Each of the powers require the authorisation of the Attorney-General and involvement of a judicial officer before being used.

The amendments are made for the purpose of international law enforcement in relation to serious crimes and are limited to interferences that are necessary to achieve this purpose. The legitimate objective of these Regulations is to facilitate government assistance in the investigation and prosecution of criminal offences; gathering and sharing of information is crucial to this. For example, taking evidence in Australia on behalf of an international war crimes tribunal may lead to a conviction for the crimes of genocide, war crimes or crimes against humanity. Similarly, executing a stored communications warrant to obtain email records may assist in identifying and disrupting transnational drug importation or child pornography syndicates. In criminal investigations, asking for a person's consent to release information would fundamentally undermine the criminal investigation purposes of the Instrument.

These interferences are subject to a range of appropriate safeguards, for example:

- they all require the Attorney-General's authorisation and judicial involvement. For example, in the case of stored communications, if a foreign country requests access to certain email records in Australia for the purposes of its investigation, the Attorney-General must be satisfied of certain things before authorising a police officer to apply for a stored communications warrant. This includes that (i) an investigation has commenced in that country, (ii) the offence to which the investigation relates is punishable by a certain serious penalty, and (iii) that there are reasonable grounds to believe that the material is held by a carrier. The police officer must then apply to an issuing authority (such as a magistrate) for a warrant. The issuing authority must also be satisfied of certain things before issuing a warrant.

This includes considering matters such as privacy, the gravity of the offence and the likelihood of the information assisting the investigation;

- assistance provided under the MA Act is subject to a range of grounds of refusal under section 8 of that Act and the Attorney-General may impose conditions on the assistance under section 9 of that Act;
- a request under the *International War Crimes Tribunals Act 1995* can not be granted if it would prejudice Australia's sovereignty, security or national interest or there are special circumstances justifying non-compliance; and
- the provision of stored communication information would be subject to the conditions set out in section 142A of the *Telecommunications (Interception and Access) Act 1979* regarding the use and destruction of material and any other conditions the Attorney-General may impose.

These are important safeguards that support the reasonableness and proportionality of the measures. While the amendments may limit the right to privacy, the limitation is reasonable, necessary and proportionate in order to achieve the legitimate objective of the Regulations noted above.

Right to a fair trial and a fair hearing – Foreign evidence and proceeds of crime

Article 14(1) of the ICCPR provides that all persons shall be equal before the courts and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. This provides a general guarantee of equality before courts for both criminal and civil proceedings. Article 14(2) provides for the presumption of innocence in criminal matters. Article 14(3) contains minimum procedural guarantees available to a person charged with a criminal offence.

The amendments regarding foreign evidence engage with and promote the right to a fair trial and a fair hearing. They do this by allowing both parties to adduce foreign material in proceedings in courts of territories which may otherwise not be able to be adduced, thereby facilitating trials and hearings.

The amendments regarding proceeds of crime do not engage Article 14(2) of the ICCPR as the proceeds of crime power can only be used where a person has been convicted of a crime.

These amendments are discussed in turn in detail below.

Article 14(1) Right to a fair trial in civil and criminal proceedings – foreign evidence

The amendments to the *Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings) Regulations 2018* engage with and promote the right to a fair trial and a fair hearing. Extending the application of Part 3 of the *Foreign Evidence Act 1994* to the external territories and the

Jervis Bay Territory allows foreign material that meets the criteria in Part 3 to be adduced in certain criminal proceedings, related civil proceedings and proceeds of crime proceedings in those territories. This includes things such as documents and witness statements. This facilitates the consistent adducing of foreign material throughout Australia and helps ensure a fair hearing by allowing all relevant evidence obtained to be adduced and then considered by a court.

Adducing evidence means presenting it to the court for its consideration. The relevant evidentiary rules applicable in that jurisdiction regarding admissibility continue to apply to such evidence (other than the hearsay rule for business records in some jurisdictions as per subsection 24(3) of the Act).

Adducing foreign material assists in a fair trial by ensuring that all relevant material can be considered by the court and ensures that parties are not disadvantaged if key evidence is located overseas. In addition, having a consistent framework for adducing foreign material across Australia ensures that parties are not disadvantaged in adducing foreign evidence depending on their location in Australia.

The right to fair trial is promoted for criminal proceedings in territory courts under paragraph 20(2)(a) of the Act. The MA Act enables foreign material to be requested by the Attorney-General on behalf of the prosecution and the defence. Both the defendant and the prosecutor would have the opportunity to adduce material obtained from a foreign country.

This is because, for example, if a witness is not present in Australia, their witness statement may instead be adduced however neither party will have the opportunity to question that person.

The justification for any such limitation, including how it achieves a legitimate objective, the rational connection between the limitation and objective and the limitation being reasonable, necessary and proportionate is set out below.

Article 14(3) Minimum guarantees available to a person charged with a criminal offence

Article 14(3) contains minimum guarantees for persons charged with criminal offences. Relevantly, Article 14(3)(e) protects the accused's right to cross-examine witnesses and to obtain the attendance and examination of witnesses on behalf of the accused on the same conditions as the prosecution.

The Regulations engage Article 14(3)(e) because Part 3 of the *Foreign Evidence Act 1994* (the Act) can facilitate the adducing by either the prosecution or the accused of foreign material in criminal proceedings (by paragraph 20(2)(a)) where the witness is not present in Australia, such as through witness statements. Although this could potentially limit a party's ability to examine and/or cross-examine witnesses as the Act allows for adducing their written witness statement instead (subject to

the Court's discretion), this applies equally to the prosecution and the accused and therefore is consistent with the 'equality of arms' principle under Article 14(3)(e).¹

Justification for limiting Article 14(1) and Article 14(3)(e) rights – foreign evidence

To the extent that there is any limitation on a party's ability to examine a witness which might be contrary to Article 14(1) or 14(3)(e), this is a reasonable and necessary and proportionate measure to address practicalities in adducing testimony from overseas witnesses in civil and criminal proceedings.

The measures are in pursuit of a legitimate objective, which is to facilitate the trial process in Australia in circumstances where evidence is located in a foreign country, given the difficulties associated with securing such evidence. There is a rational connection between the objective and the limitation; although a witness cannot be examined, a witness statement can still be considered by the court, subject to the safeguards outlined below, which can facilitate a fair trial by allowing the court to take into account all relevant evidence regardless of its location.

The measures are necessary due to the fact that not all relevant evidence will always be available in Australia. Practical issues can include where there is substantial delay or significant expense if the witness is required to attend court in Australia, the witness is unwilling or unable to travel to Australia (e.g. for health reasons) and/or it is not possible for the witness's evidence to be taken by video link (e.g. the foreign law does not allow for video link, or video link facilities are not available). In the event that evidence is located overseas and a witness is unable to give evidence in person, the Regulations provide a process by which a court can consider whether to allow a party to adduce the evidence.

The measures are reasonable and proportionate due to the following safeguards contained in the Act.

Firstly, sections 24 and 25 of the Act provide safeguards for adducing foreign material to ensure that the court can take into account any potential limitations on the right to a fair trial or fair hearing (including the right to examine witnesses). Section 24 of the Act provides that foreign material cannot be adduced if the person who gave the testimony is in Australia or able to attend or, the evidence would not have been admissible had it been adduced from the person at the hearing. Subsection 25(1) provides that a court can direct foreign material to not be adduced if having regard to the interests of the parties to the proceedings, justice would be better served if the foreign material were not adduced as evidence. In particular, paragraph 25(2)(c) provides that a matter which could be considered by the court in exercising this discretion to allow the evidence to be adduced is the extent

¹ Human Rights Committee, *General Comment No.32, Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 23 August 2007.

to which statements contained in the foreign material could, at the time they were made, be challenged by questioning the persons who made them.

Secondly, the testimony must be taken under oath, affirmation, or obligation or under such caution or admonition as would be accepted by courts in the relevant foreign country.

Finally, the relevant evidentiary rules applicable in the jurisdiction of the court proceeding regarding admissibility continue to apply to such evidence. For example, if a witness statement is adduced under section 24 of the Act in proceedings in a court in NSW and contain material that is not relevant, the court could find that the material is not admissible under subsection 56(2) of the *Evidence Act 1995* (NSW).

Article 14(2) presumption of innocence - proceeds of crime

The *International Criminal Court Act 2002* and the *International Criminal Court Regulations 2008* establish a framework to implement Australia's international obligations under the Rome Statute of the International Criminal Court (ICC). Under the Rome Statute, Australia is obliged to provide certain assistance to the ICC for its criminal investigations and proceedings, including proceedings to confiscate the proceeds of crime. For example, if the ICC has convicted a person of a crime and the proceeds of that crime are reasonably suspected of being in Australia, if the ICC requests, the Attorney-General can make arrangements for the enforcement of a forfeiture order made by the ICC over that property. The amendment in Item 1 relates to this process as it prescribes the form that the Attorney-General issues to authorise the application to an Australian court for registration of a forfeiture order issued by the ICC, so that it has effect in Australia.

The amendment in Item 1 does not engage Article 14(2) of the ICCPR as the proceeds of crime power can only be used where a person has been convicted of a crime. The presumption of innocence applies in ICC prosecutions. The owner of the property may contest the forfeiture of property during court proceedings.

Right to security of the person and freedom from arbitrary detention – Arrest power

Article 9 of the ICCPR requires that persons not be subject to arrest and detention except as provided for by law, and provided that neither the arrest nor the detention is arbitrary. The right applies to all forms of detention where people are deprived of their liberty.

The amendments to the *Mutual Assistance in Criminal Matters Regulations 1988* in Item 12 interact with the right to security of the person and freedom from arbitrary detention by facilitating the process by which a person may be arrested for failing to attend before a judicial officer in response to a summons to give evidence. Item 12 prescribes the form for the Warrant of Apprehension that a

judicial officer may issue, which allows a police officer to find the person and bring them before a judicial officer to give evidence and to detain them in custody for that purpose. The person will only be detained in custody until released by order of the judicial officer – it is not anticipated this would be a significant amount of time, if at all, given they can only be detained for the purposes of giving evidence. Interviewing witnesses is an essential part of criminal investigations, and further, Australia has international obligations to take evidence from witnesses. Where witnesses fail to attend before a judicial officer in response to a summons, additional measures are required to uphold the rule of law.

The Warrant can only be issued in circumstances where the person was served with a summons and was paid a reasonable sum for the expenses of attendance. To the extent that the Form at Item 12 facilitates the limitation of this right it is lawful and non-arbitrary as it is in accordance with the process set out in the MA Act and *Mutual Assistance in Criminal Matters Regulations 1988* and is required only when a person is not cooperating with the legitimate investigations of the State; where a summons has been breached this extra measure is reasonable, necessary and appropriate to ensure attendance. The Warrant is required for the legitimate purpose of law enforcement in relation to serious crimes.

Prohibition on retrospective criminal laws – Application provisions and penalty

Article 15 of the ICCPR prohibits the retrospective operation of criminal laws, including the imposition of a heavier penalty than was applicable at the time when a criminal offence was committed. The prohibition does not generally extend to retrospective changes to other measures, such as procedure, provided that they do not affect the punishment to which an offender is liable.

Items 12 and 15 contain application provisions for certain amendments to the *Mutual Assistance in Criminal Matters Regulations 1988* and the *Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings) Regulations 2018*. These application provisions apply to procedural matters in proceedings to take evidence and where foreign evidence may be admitted. They do not criminalise or penalise conduct which was otherwise lawful prior to the amendments. These application provisions do not therefore engage the prohibition on retrospective criminal laws.

The new Form 1 in Item 12 incorporates an increase in the penalty for failing to attend court in response to a summons. The change from a penalty of \$500 to a penalty of 5 penalty units currently represents an increase of \$550, however this penalty does not operate retrospectively so does not engage the prohibition on retrospective criminal laws.

Schedule 2 - Extradition

Outline of amendments

Extradition is the process by which one country sends a person to another country to face criminal charges or serve a sentence. The *Extradition Act 1988* (Extradition Act) provides the legislative basis for Australia's extradition processes.

The *Extradition Regulations 1988* (Extradition Regulations) provide the mechanisms necessary for the practical operation of the Extradition Act, such as giving magistrates the power to issue warrants of arrest and order the release of a person from custody. The Extradition Regulations also prescribe forms for matters required by the Extradition Act to be done in a particular way.

The *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* (Amendment Act) amended sections 26 and 35 of the Extradition Act to ensure that certain judicial officers have the power to commit a person to prison, for up to 2 months from the date of the surrender warrant (or 1 month in the case of NZ), to await their transfer to the foreign country. These amendments to the Extradition Regulations give effect to the amendments to the Extradition Act by prescribing two new forms to facilitate this.

New Form 13A – Surrender warrant for person on bail at time of surrender determination

New Form 13A is for the Attorney-General to issue a surrender warrant under section 23 of the Extradition Act where a person is on bail and the Attorney-General has determined they are to be surrendered to an extradition country. The Amendment Act inserted new subsection 26(2A) in the Extradition Act to ensure that, where the Attorney-General has issued a surrender or temporary surrender warrant in relation to a person who has been released on bail, and that person is subsequently brought before a magistrate, eligible Federal Circuit Court Judge or relevant court, the magistrate, judge or court can order the discharge of the recognisances on which bail was granted and commit the person to prison to await surrender.

The Extradition Act did not expressly provide for a person to be committed to prison following discharge of bail recognisances prior to subsection 26(2A). The Regulation creates a new Form 13A in the Extradition Regulations to cover the situation provided by subsection 26(2A), which is not provided for in Form 13 of the Extradition Regulation.

New Form 22A – Warrant of committal under subsection 35(7) – surrender to New Zealand

New Form 22A is for a Judge of the Federal Court, Judge of the Full Court of the Federal Court or Justice of the High Court to issue a warrant under new subsection 35(7) of the Extradition Act for a

person to be committed to prison to await the execution of a surrender warrant to New Zealand under subsection 34(1) of the Extradition Act.

The Amendment Act inserted new subsection 35(7) in the Extradition Act, relating to extradition from Australia to NZ which clarified that, following a review or an appeal which determines that a person is to be surrendered to NZ, the relevant court has the power to order the person be committed to prison to await the execution of a surrender warrant. Prior to this amendment there was no express provision for the court to make an order regarding the person's custody status. New Form 22A gives effect to this process.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- Right to security of the person and freedom from arbitrary detention – Article 9 of the ICCPR
- Right to freedom of movement – Article 12 of the ICCPR, and
- Right to humane treatment in detention – Article 7 of ICCPR.

This Disallowable Legislative Instrument does not engage the following right:

- Expulsion of aliens – Article 13 of the ICCPR.

Right to security of the person and freedom from arbitrary detention and right to freedom of movement

Article 9 of the ICCPR requires that persons not be subject to arrest and detention except as provided for by law, and provided that neither the arrest nor the detention is arbitrary. The right applies to all forms of detention where people are deprived of their liberty. The use of the term 'arbitrary' means that the detention, in all the circumstances, must be reasonable, necessary and proportionate to the end that is sought. Article 12 of the ICCPR provides that everyone shall have the right to liberty of movement. This right may be limited under article 12(3) where the limitation is provided by law, and is reasonable, proportionate and necessary for the legitimate purpose of protecting national security, public order, public health or morals or the rights and freedoms of others.

The amendments to the Extradition Regulation engage these rights as both forms concern the power of judicial officers to commit a person to prison to await transfer to the requesting country or await the execution of a surrender warrant ordering that a person be surrendered to New Zealand.

This process is only enabled once a decision has been made to extradite a person to a foreign country. In these circumstances the authorities in both countries are liaising and coordinating the logistics of

the transfer, which is done as quickly as possible (such as booking flights, organising foreign escorts, obtaining airline approvals demonstrating that the person is fit to fly and arranging travel documents such as visas). Transfers are facilitated by law enforcement officers who take the person from prison and accompany them throughout the transport process.

The Extradition Act provides that when a surrender warrant is issued, Australia has two months, or one month for extraditions to New Zealand, from the date of the warrant to transfer the person to the foreign country. This timeframe ensures that a person will not be held in custody indefinitely while awaiting transfer. The surrender warrant is the final determination that a person will be extradited to the foreign country.

The power to commit a person to prison while awaiting surrender to a foreign country is provided by law (the Extradition Act) and is necessary to protect national security or public order. It is reasonable, necessary and proportionate that any person released on bail will be taken into custody to await their transfer once the surrender warrant has been issued, given the serious offences to which extradition applies and on the basis that the person is subject to a minimal and definite period of detention.

In addition, it is required for the legitimate purpose of mitigating the possibility that the person will abscond given that they are likely to pose an increased and serious flight risk. Australia's ability to extradite would be seriously jeopardised if a person absconded during extradition proceedings.

Further, Australia's treaty obligations to return a person to the requesting country would be impeded and absconding could also lead to a state of impunity where a person disappears and continues to evade law enforcement authorities. The validity of Australia's process of remanding a person during extradition proceedings has been confirmed by the High Court in *Vasiljković v Commonwealth* [2006] HCA 40.

The evolving nature of, and increased threats posed by, transnational crime requires Australia to have a robust and responsive extradition system that assists in effectively combating domestic and transnational crime, while providing appropriate safeguards. It is important to ensure that criminals cannot evade justice simply by crossing borders.

It is noted that a person may challenge the surrender determination by way of judicial review and may make a bail application under section 49C of the Extradition Act to the relevant appellate court.

Right to humane treatment in detention

Article 7 of the ICCPR provides that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. The amendments to the Extradition Regulations positively promote this right.

New Forms 13A and 22A in the Extradition Regulations authorise a judicial officer to commit a person to prison to await surrender to a foreign country. Pursuant to sections 26(5) and 38(7) of the Extradition Act, Australia has two months and one month (in the case of extraditions to New Zealand) respectively to effect surrender. Correctional facilities are the only viable option for such periods of custody.

Without the power for a judicial officer to commit a person to prison while they await their surrender, the police may need to place the person in a remand centre in the custody of a police officer. Placing a person in a remand centre for a period up to two months is not appropriate and could interfere with a person's right to humane treatment in detention, as remand centres do not have adequate facilities to hold a person for longer than a few days. The new forms will ensure that a person is held in an appropriate prison facility to await surrender. This upholds the person's right to humane treatment in detention.

Expulsion of aliens – Article 13 of the ICCPR

Although the new forms in the *Extradition Regulations 1988* concern the arrangements surrounding the surrender of a person to a foreign country, Article 13 of the ICCPR regarding the expulsion of aliens is not engaged as the amendments comply with that Article. The Article states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Where a person is subject to the extradition process and a surrender warrant is issued in relation to the person, sections 21 and 35 of the Extradition Act provide that the person may apply for a review of that order. The amendments to the Extradition Regulations do not alter the ability of a person to seek a review of a decision to extradite them to a foreign country and therefore comply with Article 13.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because, to the extent that it may limit human rights, those limitations achieve a legitimate objective and are reasonable, necessary and proportionate.

NOTES ON SECTIONS

Preliminary

Section 1 – Name

Section 1 provides that the title of the instrument is the Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Regulations 2018.

Section 2 – Commencement

The instrument commenced the day after the instrument was registered, however various parts of the Schedule 1 commence at different times as follows:

- Schedule 1, Part 1 – At the same time as Schedule 1 to the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* commences.
- Schedule 1, Part 2 – At the same time as Part 2 of Schedule 2 to the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* commences.
- Schedule 1, Part 3 – At the same time as Schedule 4 to the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* commences.

The provisions in Schedule 1 do not commence at all if the relevant Schedule in the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* do not commence.

Section 3 – Authority

Section 3 provides that the instrument is made under the following Acts:

- a) the *Extradition Act 1988*;
- b) the *Foreign Evidence Act 1994*;
- c) the *International Criminal Court Act 2002*;
- d) the *International War Crimes Tribunals Act 1995*;
- e) the *Mutual Assistance in Criminal Matters Act 1987*;
- f) the *Telecommunications (Interception and Access) Act 1979*.

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Section 4 – Schedules

Section 4 provides for the amendment of instruments in accordance with the Schedules.

SCHEDULE 1 – Courts and tribunals

Part 1 – Assistance to international courts and tribunals

International Criminal Court Regulations 2008

The *International Criminal Court Act 2002* (ICC Act) and the *International Criminal Court Regulations 2008* establish a framework to implement Australia's international obligations under the Rome Statute of the International Criminal Court (ICC). Under the Rome Statute, Australia is obliged to provide certain assistance to the ICC for its criminal investigations and proceedings. This includes proceedings to confiscate the proceeds of crime.

For example, if the ICC has convicted a person of a crime and the proceeds of that crime are reasonably suspected of being in Australia (such as money in a bank account), if the ICC requests, the Attorney-General can authorise the making of arrangements for the enforcement in Australia of a forfeiture order made by the ICC over that property. If the order meets the criteria under the ICC Act, the Attorney-General can authorise the Australian Federal Police or Commonwealth Director of Public Prosecutions to apply to an Australian court to register the order. The ensuing court proceedings can then provide for the forfeiture of such property.

Item 1- Schedule 1 (Form 11)

Under section 155 of the ICC Act, the Attorney-General may authorise, by written notice in statutory form, a proceeds of crime authority to apply to a court for the registration of a forfeiture order made by the ICC in relation to property reasonably suspected of being in Australia. Form 11 of the *International Criminal Court Regulations 2008* is for a 'Notice authorising application for registration of forfeiture order'. Item 1 repeals and replaces Form 11. The new Form 11 replicates the former Form 11 other than in the following two ways.

Firstly, Item 1 removes the reference in the former Form 11 to specifying the court. This amendment is consequential to amendments to section 155 of the ICC Act made by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018*, which removed the

requirement for the Attorney-General to specify the court in which the application for the registration of a forfeiture order is to be made.

Section 335 of the *Proceeds of Crime Act 2002* (which is referred to in the definition of “proceeds jurisdiction” under section 4 of the ICC Act) specifies which courts have proceeds jurisdiction. Consequently, it is not necessary for the Attorney General to specify the court in which the application should be made. This amendment enables a proceeds of crime authority to make the application in the most appropriate jurisdiction and court, in accordance with the jurisdictional provisions in the *Proceeds of Crime Act 2002*.

Secondly, Item 1 removes the two references to the Commonwealth Director of Public Prosecutions in the former Form 11 and replaces them with references to a “proceeds of crime authority” in accordance with amendments made to section 155 of the *International Criminal Court Act 2002* by the *Crimes Legislation Amendment Act (No.2) 2011*. These 2011 amendments allowed either the Commonwealth Director of Public Prosecutions or the Commissioner of the Australian Federal Police to take proceeds of crime action under the Act in accordance with the definition of a “proceeds of crime authority” in the *Proceeds of Crime Act 2002*.

International War Crimes Tribunals Regulations 1995

The *International War Crimes Tribunals Act 1995* and the *International War Crimes Tribunals Regulations 1995* establish the legal framework for Australia to provide assistance to international war crimes tribunals (IWCTs) in their criminal investigations and proceedings. This includes conducting court proceedings in Australia to take evidence from a witness on behalf of an IWCT.

Items 2 and 3 – Paragraphs 6(1)(a) and (b)

Section 26 of the *International War Crimes Tribunals Act 1995* provides that the Attorney-General can authorise proceedings to be conducted to take evidence in Australia in response to a request from an IWCT. If the Attorney-General makes such an authorisation, magistrates can do certain things to facilitate this.

For example, if an IWCT is investigating an offence of genocide and a witness in Australia can give evidence about this offence, the IWCT can request Australia to take evidence from this witness. If the Attorney-General authorises the provision of such assistance, a magistrate can conduct proceedings to take such evidence and send it to the IWCT for use in its investigations or proceedings.

Items 2 and 3 amend regulation 6 of the *International War Crimes Tribunals Regulations 1995*. These amendments are consequential to amendments to section 28 of the *International War Crimes Tribunals Act 1995* made by the *Crimes Legislation Amendment (International Crime Cooperation*

and Other Measures) Act 2018. The amendments clarify that the magistrate who sends for witnesses and documents does not need to be the same magistrate before whom the witness must attend or documents are produced. Regulation 6 relies on the necessary and convenient power in paragraph 85(b) of the *International War Crimes Tribunals Act 1995*.

Telecommunications (Interception and Access) Regulations 2017

The *Mutual Assistance in Criminal Matters Act 1987*, *International War Crimes Tribunals Act 1995* and the *International Criminal Court Act 2002* provide that the Attorney-General may authorise an Australian law enforcement agency to apply for a stored communications warrant on behalf of a foreign country, an international war crimes tribunal or the International Criminal Court respectively. Stored communications are communications such as SMS messages and emails that are stored by a carrier or carriage service provider so they can be accessed by the recipient. The *Telecommunications (Interception and Access) Act 1979* and the *Telecommunications (Interception and Access) Regulations 2017* provide the framework for these warrants.

For example, if a foreign country requires access to certain email records in Australia to assist in their investigations, it may request that Australia provide such records. If the request meets the criteria of the *Mutual Assistance in Criminal Matters Act 1987*, the Attorney-General may authorise certain police officers to apply for a stored communications warrant to obtain the material. If an issuing authority (such as a magistrate) issues a warrant, the warrant will be in the new form prescribed by these regulations. Material obtained under the warrant can ultimately be sent to the foreign country for the purposes of its investigations and proceedings.

Items 4-5 – section 9 and schedule 1 (form 6)

Part 3.3 of the *Telecommunications (Interception and Access) Act 1979* provides that stored communications warrants can be issued in certain circumstances, in accordance with a prescribed form. The *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* and the *Telecommunications Interception and Intelligence Services Legislation Amendment Act 2011* modified the circumstances in which stored communications warrants can be issued. In particular, it broadened the circumstances to cover assistance to the ICC and IWCTs. Items 4 and 5 modify the prescription of forms as a consequence of these amendments.

Item 4 repeals and replaces section 9 of the *Telecommunications (Interception and Access) Regulations 2017* which covers the prescribed form for stored communications warrants in accordance with section 118 of the *Telecommunications (Interception and Access) Act 1979*. The new section 9 prescribes two forms – one for domestic warrants and one for international warrants.

Item 5 repeals Form 6 of the *Telecommunications (Interception and Access) Regulations 2017* which is the form prescribed for stored communications warrants and replaces it with Form 6 and Form 6A.

The new Form 6 replicates the former Form 6 with two exceptions. It now explicitly applies to domestic matters (indicated by the new heading) and it also includes a new optional paragraph 2(e) regarding victims in accordance with paragraph 116(1)(da) of the *Telecommunications (Interception and Access) Act 1979*. The new paragraph 2(e) covers the situation where the person is a victim of a serious contravention and is either unable to consent to the stored communications being accessed or it is impractical for the person to consent to the stored communications being accessed. If this situation is applicable the new paragraph will be included in the form that is issued, otherwise it will be omitted.

Form 6A is a new form for stored communications warrants in international matters. Form 6A facilitates the gathering of stored communications on behalf of a foreign country, the ICC or an IWCT, where authorised by the Attorney-General. The form is consistent with the new requirements under section 116 of the *Telecommunications (Interception and Access) Act 1979*. It covers the different criteria in subparagraph 116(1)(d)(ii) and subsection 116(2A) for international matters regarding the likely assistance to the investigation, investigative proceeding, or proceeding, and the gravity of the conduct constituting each serious foreign contravention.

Part 2 – Amendments relating to mutual assistance in criminal matters

Mutual Assistance in Criminal Matters Regulations 1988

Section 13 of the *Mutual Assistance in Criminal Matters Act 1987* provides that the Attorney-General can authorise proceedings to be conducted to take evidence in Australia in response to a request from a foreign country for the purposes of a proceeding in relation to a criminal matter. If the Attorney General makes such an authorisation, Magistrates and Federal Circuit Court Judges can do certain things to arrange this. Regulations 3 and 5 of the *Mutual Assistance in Criminal Matters Regulations 1988* facilitate this process. Regulation 3 provides the power of a Magistrate or eligible Federal Circuit Court Judge to send for witnesses and documents. Regulation 5 provides for the arrest of a person failing to attend.

Items 6-10 – regulations 3 and 5

Items 6 to 10 amend regulations 3 and 5 of the *Mutual Assistance in Criminal Matters Regulations 1988*. These amendments are consequential to amendments to section 13 of the *Mutual Assistance in Criminal Matters Act 1987* made by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* regarding requests by foreign countries for the taking of evidence or the production of documents. The amendments clarify that the Magistrate or Federal

Circuit Court Judge who sends for witnesses or documents does not need to be the same Magistrate or Federal Circuit Court Judge before whom the witness must attend or documents are produced, or who can make orders in relation to service and issue a warrant for apprehension.

Item 11 – After regulation 11

Item 11 inserts an application provision in the *Mutual Assistance in Criminal Matters Regulations 1988* in relation to amendments made by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Regulations 2018*. It provides that the amendments to subregulation 3(3) and regulation 5 made by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Regulations 2018* apply in relation to a summons issued before, on or after the commencement of this regulation. These amendments do not criminalise or penalise conduct which was otherwise lawful prior to the amendments, as the provisions in this Part are entirely procedural in nature.

Item 12 – Schedule (Forms 1 and 2)

Item 12 repeals and replaces Forms 1 and 2 of the *Mutual Assistance in Criminal Matters Regulations 1988*. Form 1 is a form for a Summons under the *Mutual Assistance in Criminal Matters Act 1987* for a person to attend as a witness or to produce certain documents. The new Form 1 replicates the former Form 1, however the penalty in paragraph (a) of the Note was modified in accordance with modern drafting practices to refer to 5 penalty units rather than \$500. The new Form 1 also now includes the year in the name of the regulations.

Form 2 is a form for a Warrant of Apprehension under the *Mutual Assistance in Criminal Matters Act 1987* where a person has failed to attend in response to a summons. The new Form 2 replicates the existing Form 2, with amendments to clarify that the judicial officer issuing the warrant is not necessarily the same judicial officer who issued the summons.

Part 3 – Amendments relating to foreign evidence

Foreign Evidence (Foreign Material—Criminal and Related Civil Proceedings) Regulations 2018

Part 3 of the *Foreign Evidence Act 1994* enables evidence obtained from other countries at the request of the Attorney-General to be adduced in certain criminal proceedings, related civil proceedings and proceeds of crime proceedings in Australian courts.

The Attorney-General can request international assistance to gather foreign evidence from other countries for the purposes of domestic proceedings. For example, Australia can make requests to other countries under the *Mutual Assistance in Criminal Matters Act 1987* for evidence, such as business records or witness statements, during the course of an investigation into criminal conduct. Part 3 of

the Act provides for the use of such evidence in certain Commonwealth, State and Territory proceedings. For example, it can allow foreign evidence to be adduced in proceedings where a witness is not available to give evidence in person, subject to key safeguards.

The *Foreign Evidence (Foreign Material—Criminal and Related Civil Proceedings) Regulations 2018* (the Regulations) ensure that certain proceedings in the external territories and the Jervis Bay Territory are covered by Part 3 of the *Foreign Evidence Act 1994*, so that foreign material may be adduced in these proceedings. It does this by specifying certain territories, laws and proceedings. The territory proceedings covered are:

- a) Criminal proceedings for an offence against the law of a territory, such as a prosecution of a person for murder.
- b) Related civil proceedings of a kind specified in these regulations. ‘Related civil proceedings’ is defined in section 3 of the Act as ‘any civil proceeding arising from the same subject matter from which the criminal proceeding arose.’ For example, proceedings under a law of a territory to confiscate proceeds of crime or recover tax or duties where there was a related criminal proceeding.
- c) Proceeds of crime proceedings where there were not necessarily related criminal proceedings. For example, proceedings under a law of a territory to confiscate the proceeds of crime where a person could not be prosecuted because they had died.

Item 13 – At the end of subsection 6(1)

Item 13 adds Norfolk Island to the list of States and Territories specified in subregulation 4(1) of the *Foreign Evidence (Foreign Material—Criminal and Related Civil Proceedings) Regulations 2018* in accordance with subsection 20(2) of the *Foreign Evidence Act 1994*. This amendment ensures that certain proceedings under the laws in force in Norfolk Island are covered by Part 3 of the *Foreign Evidence Act 1994*, so that foreign material may be adduced in such proceedings under that Act. Norfolk Island has its own court system. It is noted that proceedings under the laws in force in other external territories and the Jervis Bay Territory are conducted in courts of jurisdictions already specified. For example, proceedings under the laws in force in the Jervis Bay Territory are conducted in the ACT courts and proceedings under the laws in force in the Territory of Christmas Island are conducted in the courts of Western Australia. For this reason, the Jervis Bay Territory and each of the remaining external territories do not need to be specified.

Item 14 – At the end of section 6

Item 14 adds new subregulation 6(3) in the *Foreign Evidence (Foreign Material—Criminal and Related Civil Proceedings) Regulations 2018* regarding the application of Part 3 of the *Foreign Evidence Act 1994* to proceedings in a court of a State or Territory. The *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* inserted paragraph 20(2)(d) into the *Foreign Evidence Act 1994* which provides that Part 3 of the Act applies to proceedings under a law of a Territory (other than the Australian Capital Territory or the Northern Territory) that is prescribed by the regulations as a law that corresponds to a proceeds of crime law. The new subregulation 6(3) prescribes laws that correspond to a proceeds of crime law in force in seven of the territories. This enables foreign material to be adduced in certain proceeds of crime matters in certain territories.

Item 15 – After Part 2

Item 15 inserts an application provision in the *Foreign Evidence (Foreign Material—Criminal and Related Civil Proceedings) Regulations 2018* in relation to amendments made by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Regulations 2018*. It provides that the amendment of these regulations made by the *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Regulations 2018* apply in relation to a proceeding that commenced before, on or after the commencement of this regulation. These amendments did not criminalise or penalise conduct which was otherwise lawful prior to the amendments, as the provisions in this Part were entirely procedural in nature.

Item 16 – Clause 1 of Schedule 1 (at the end of the table)

Item 16 adds related civil proceedings for the Jervis Bay Territory and the external territories to the table in the Schedule to the *Foreign Evidence (Foreign Material—Criminal and Related Civil Proceedings) Regulations 2018*, for the purposes of paragraph 20(2)(b) of the *Foreign Evidence Act 1994*. This allows foreign material to be adduced in the specified proceedings. A related civil proceeding is one which arose from the same subject matter from which the criminal proceeding arose.

The effect of the amendments in items 14 and 16 is to apply Part 3 of the *Foreign Evidence Act 1994* to all proceeds of crime matters, including non-conviction based proceeds of crime matters. Proceeds of crime actions that are linked to a criminal proceeding could be captured by the amendments made by both items.

SCHEDULE 2—Extradition

Extradition Regulations 1988

Extradition is the process by which one country sends a person to another country to face criminal charges or serve a sentence. The *Extradition Act 1988* (Extradition Act) provides the legislative basis for Australia's extradition processes.

Section 55 of the Extradition Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

The *Extradition Regulations 1988* (Extradition Regulations) provide the mechanisms necessary for the practical operation of the Extradition Act, such as giving magistrates the power to issue warrants of arrest and order the release of a person from custody. The Extradition Regulations also prescribe forms for matters required by the Extradition Act to be done in a particular way.

The *Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Act 2018* (Amendment Act) amended sections 26 and 35 of the Extradition Act to ensure that certain judicial officers have the power to remand a person on bail into extradition custody in prison to await their transfer to the foreign country. These amendments to the Extradition Regulations give effect to this amendment to the Extradition Act by prescribing two new forms to facilitate this.

Item 1 – Schedule (after Form 13)

Item 1 inserts new Form 13A for the Attorney-General to issue a surrender warrant under section 23 of the Extradition Act where a person is on bail and the Attorney-General has determined they are to be surrendered to an extradition country.

The surrender warrant authorises any police officer to take the person on bail into custody to appear before a magistrate, eligible Federal Circuit Court Judge, or relevant court, for orders to be made to discharge the recognisances on which bail was granted and commit the person to prison to await surrender. Once orders are made, the surrender warrant authorises the person to be released into police custody to await transportation out of Australia.

The surrender warrant gives effect to new subsection 26(2A) of the Extradition Act which provides that, where a person has been released on bail and a warrant has been issued, magistrates, eligible Federal Circuit Court judges or other relevant courts can commit the person to prison following the discharge of bail recognisances.

Item 2 – Schedule (after Form 22A)

Item 2 inserts new Form 22A for a Judge of the Federal Court, Judge of the Full Court of the Federal Court or Justice of the High Court to issue a warrant under new subsection 35(7) of the Extradition Act for a person to be committed to prison to await the execution of a surrender warrant to New Zealand under subsection 34(1) of the Extradition Act.

Form 22A applies when the Federal Court, Full Federal Court or High Court has made an order on review under section 35 of the Extradition Act that a person is to be surrendered to New Zealand.

The form gives effect to new subsection 35(7) which provides that where the relevant court has made an order on review that a person is to be surrendered to New Zealand, the court must order that the person is committed to prison pending the execution of the surrender warrant.