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CRIMES LEGISLATION AMENDMENT BILL (No 2) 1991

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General, the
Honourable Michael Duffy MP)

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CRIMES LEGISLATION AMENDMENT BILL (No 2) 1991

GENERAL OUTLINE

The purpose of the Bill is to amend various Acts concerned with crime, law enforcement and criminal justice.

Part 2 of the Bill will make amendments to the *Australian Federal Police Act 1979* to extend the scope of the witness protection scheme and to make improvements to a provision concerning management initiated retirement.

Part 3 and Part 7 of the Bill amend the *Cash Transaction Reports Act 1988* and the *Mutual Assistance in Criminal Matters Act 1987* respectively. The amendments to the Cash Transaction Reports Act will clarify and improve the efficiency of the various statutory processes involved in the reporting of transactions under the Act. The amendments will permit access to information obtained under the Cash Transaction Reports Act to be granted to:

- . the Independent Commission Against Corruption of New South Wales;
- . the Criminal Justice Commission of Queensland; and
- . the Attorney-General for the purpose of responding to a request for assistance from a foreign country to which the *Mutual Assistance in Criminal Matters Act 1987* applies.

The amendments proposed by Part 3 will also provide that the Director of the Cash Transaction Reports Agency shall furnish to the Minister an annual report on the operations of the Agency.

Part 4 and Part 9 of the Bill amend the *Crimes Act 1914* and the *Passports Act 1938* respectively. The amendments will introduce a procedure to ensure the effective operation of the existing power of the Minister under the *Passports Act 1938* to cancel or refuse passports to persons charged with, or convicted of, serious offences, particularly drug offences.

Parts 5 and 6 amend provisions of the *Crimes (Superannuation Benefits) Act 1989* and the *Customs Act 1901* respectively which correspond to those provisions of the *Proceeds of Crime Act 1987* which are amended by Part 10 of the Bill.

Part 8 of the Bill proposes amendments to the *National Crime Authority Act 1984* to give the ACT Government the same recognition as the Northern Territory and the States. It will allow the ACT Government to participate in the activities of the Inter-Governmental Committee.

The ACT Government is currently preparing related underpinning legislation.

Part 10 makes minor amendments to the *Proceeds of Crime Act 1987* in the light of a number of recent decisions by various courts. The amendments are of a minor policy nature.

FINANCIAL IMPACT

None of the measures proposed in the Bill will occasion any increased costs to the Commonwealth.

NOTES ON CLAUSES**PART 1 - INTRODUCTORY****Clause 1 - Short title**

Formal.

Clause 2 - Commencement

Subclause 2(1) provides that, subject to the provisions of subclauses 2(2), (3), (4) and (5), the provisions of the Bill will commence upon Royal Assent. Subclause 2(2) specifies a number of provisions which will commence twenty-eight days after Royal Assent. This delay will provide time for the communication of the amendments to Courts and other persons who will have responsibilities or functions conferred, or altered, by the provisions specified in subclause 2(2).

Under subclause 2(3), Part 8, which makes amendments to the *National Crime Authority Act 1984*, will commence on a day to be proclaimed. Under subclause 2(4), if Part 8 does not commence within 6 months of the Act receiving Royal Assent then it is repealed. The amendments in Part 8 should not commence until the passage of related ACT legislation because the National Crime Authority would otherwise lose its powers in relation to local ACT matters. While at present there is nothing to suggest the ACT legislation will not be passed in time, this clause has been inserted to ensure important NCA operations in the ACT are not prejudiced.

Subclauses 2(3) and 2(5) provide that clause 51, which amends section 98 of the *Proceeds of Crime Act 1987*, commences on a date to be fixed by proclamation. If not proclaimed within 6 months after Royal Assent, clause 50 will commence on the next following day. The 6 month delay will provide time for the making of regulations which are required by proposed paragraph 98(5)(b) which is to be inserted by subclause 51(c) of the Bill.

PART 2 - AMENDMENTS OF THE AUSTRALIAN FEDERAL POLICE ACT 1979**Clause 3 - Principal Act**

This is a formal provision identifying the *Australian Federal Police Act 1979* as the Principal Act.

Clause 4 - Functions

This clause will amend the AFP Act to widen the scope of the witness protection scheme. "Witness" is used in this section in its widest sense and includes people who have witnessed a relevant event, but who were not, or will not be, required to give evidence. In some circumstances these people will be in danger. The amendment will also

enable those associated with witnesses or perceived witnesses, such as relatives or friends, or anyone else who may need it, to be given protection if necessary.

Subclause 4(c) will insert a new subsection 8(2C) into the Principal Act which recognises the Constitutional limits of the scheme.

Clause 5 - End of appointments

Clause 5 will amend section 26E of the AFP Act to improve the management initiated retirement scheme.

Under subsection 26E(1) of the Principal Act, when a member or staff member is appointed to the AFP, the person making the appointment may determine the compensation to which the member or staff member will be entitled if s/he is retired before the end of his/her term of appointment. If the determination was not made on appointment, or was not validly made, under the current provision it is not possible to make a determination of compensation later to correct the problem. The amendment will allow the Commissioner, rather than the person who made the original appointment, to make these determinations. Section 26E still protects the rights of members and staff members by ensuring that a validly made determination cannot be changed.

Under subsection 26E(2), it is only the person who makes an appointment who may end it before the term of the appointment expires. This could result in practical problems bearing in mind that the Australian Federal Police employs over 3,000 people with terms of appointment varying from 5 to 10 years. At the relevant time the person who made the appointment may have left the Australian Federal Police. The amendment will allow the Commissioner to make these determinations and will make the provision more workable.

Clause 6 - Application for superannuation order: evidence

Clause 6 proposes an amendment of section 45A of the Principal Act. Subsection 45A(1) corresponds with subsection 18(1) of the Proceeds Act, amendment of which is proposed by clause 41 of the Bill. At present subsection 45A of the Principal Act provides that where an application is made for a confiscation order in respect of a person's conviction for an offence the Court may have regard to the transcript of the relevant criminal proceeding against the person. This leaves in doubt the ability of the Court to have regard to all the evidence in the proceedings, including exhibits and possibly formal admissions. These were intended to be included under the original wording as the purpose of the provision is to expedite confiscation proceedings by avoiding the need to rehear evidence which was adduced in the associated criminal proceedings.

Clause 7 - Notice of application for restraining order
Clause 8 - Insertion of new section 49EA - Extension of certain restraining orders

Clause 7 proposes an amendment of section 49E of the AFP Act. The amendments are consequential upon the inserting of a new section 49EA, which is proposed by clause 8 of the Bill. The amendments proposed by clauses 7 and 8 conform with the amendments proposed by clauses 45 and 46 of the Bill to the corresponding sections of the Proceeds Act. The effect of the proposed amendments is that the considerations involved in extending a restraining order made without notice under subsection 49E(2) are the same as those applying in relation to the making of a restraining order under subsections 49B(1).

Generally, as provided by subsection 49E(1) of the Principal Act, an application for a restraining order shall be made upon notice. Subsection 49E(2) enables an application to be made without notice but the restraining order made in such cases can apply for no longer than 14 days. The intention was that such orders would be made readily, with the rights of the respondent being protected by limiting the life of the order to no more than 14 days and by requiring (in subsections 49E(3) and (4)) that applications for an extension be made on notice. (It is often necessary to seek an order without notice so that steps can be taken to secure the property before the respondent conceals the property. For example, it may be necessary to lodge a caveat, or to freeze a bank account.)

Clause 9 - Transitional

Clause 9 contains the transitional arrangements for the amendments to the Principal Act proposed by clauses 7 and 8 of the Bill. The result is that the amendments will apply only to an application for an extension of a restraining order which is filed after commencement of clauses 7 and 8. If an application under subsection 49E(3) is on foot at the commencement date then that application will be dealt with as if subsections 49E(3) and (4) had not been repealed and the other amendments made by clauses 7 and 8 had not been made.

Clause 10 - Ancillary orders

Section 49J of the Principal Act, which is amended by clause 10 of the Bill, broadly corresponds with section 48 of the Proceeds Act, which is amended by clause 48 of the Bill. It is proposed to make a number of amendments to section 49J of the Principal Act 10(1) will omit paragraph 49J(1)(c) and replace it with a new provision. The new provision will extend the range of matters which may be investigated during an examination on oath; and

subclause 10(2) which deals with the application of the new provision.

**PART 3 - AMENDMENTS OF THE CASH TRANSACTION REPORTS ACT
1988**

Clause 11 - Principal Act

This clause is a formal provision identifying the *Cash Transaction Reports Act 1988* as the Principal Act.

Clause 12 - Reports of suspect transactions

This clause amends section 16 of the CTR Act as follows:

- . subsection (5) by specifying that the protection against legal action given by subsection (5) to cash dealers reporting suspect transactions under section 16 includes any action by the cash dealer taken in the mistaken belief that such action was required under section 16. It was always intended that cash dealers who file reports in good faith believing the action to be required by the section would be protected from suit. However, there has been some doubt cast on the ambit of the original provision and hence clarification is desirable;
- . adds subsection (5A) which provides that where a cash dealer reports a suspect transaction to the CTRA under subsection 16(1) the cash dealer must not disclose to anyone else, other than a court under new subsection (5C), that the suspicion has been formed or that the report has been made. Such a prohibition on disclosure has been recommended by the Group of 7 Industrialised Nations (G7) Financial Action Task Force on Money-laundering as part of its package of recommendations dealing with the reporting of suspect transactions. This amendment will bring Australia into line with these recommendations; and
- . adds subsection (5B) which provides that a cash dealer who contravenes subsection (5A) by disclosing information about a suspect transaction report commits an offence punishable by a fine not exceeding \$5,000 or 2 years imprisonment or both.

Clause 13 - Insertion of new section 17A - Inspection of identifying systems etc

This clause inserts a new section 17A into the CTR Act which empowers the Director of the CTRA, on written notice, to require a cash dealer to allow a member of the staff of the CTRA access to the cash dealer's premises to inspect the cash dealer's systems for identifying and recording suspect transactions under section 16 of the CTR Act. The Director already has the power to monitor

cash dealer compliance with the other requirements of the Act.

Clause 14 - Cash dealer to keep documents

This clause amends section 23 of the CTR Act so that a cash dealer may retain copies (including microfiche) rather than original records of information required to be retained in relation to the signatory verification procedure or of any disclosure by a person of a different name by which the person is commonly known as required under the false name account provisions of the CTR Act (section 24). The proposed amendments will make the record retention provisions of the CTR Act consistent with those of the Proceeds Act and will not prejudice law enforcement interests as the documents in question are unlikely to require forensic analysis and their general evidentiary value remains.

Clause 15 - Access to CTR information

This clause amends section 27 of the CTR Act as follows:

- (a) by providing that the Attorney-General is entitled to access to CTR information for the purpose of consider a request for that information by a foreign country to which the *Mutual Assistance in Criminal Matters 1987* applies and if adequate undertakings as to confidentiality have been given may communicate that information to the requesting country.

As a result of the recommendations of the G7 Financial Action Task Force on Money-laundering most OECD members are introducing suspect transaction reporting and considering the introduction of export/import reporting and possible significant cash transaction reporting. Therefore, there is a growing body of CTR type information available internationally to assist in the fight against drug trafficking and the laundering of the proceeds of such offences. The G7 recommendations include the international sharing of CTR type information, subject to appropriate confidentiality.

and

- (b) by extending the reference in subsection 27(16) to a "law enforcement agency" to include the Independent Commission Against Corruption of NSW and the Criminal Justice Commission of Queensland to permit these bodies to have access to CTR information under subsection 27(1). A consequential amendment is made to the definition of "law enforcement officer" in subsection 27(17).

Clause 16 - Failure to provide information

This clause amends section 28 of the CTR Act to create an offence where the cash dealer refuses, or fails, to comply with a notice under proposed subsection 17A(1) requiring the cash dealer to give access to premises for the purpose of monitoring the cash dealer's compliance with the suspect transaction reporting provisions of section 16.

Clause 17 - Questioning and search powers

This clause amends subsection 33(3A) of the CTR Act and is consequential upon amendments to the *Customs Act 1901* made by the *Customs (Detention and Search) Act 1990* which came into force on 24 April 1991. The proposed amendment to the CTR Act omits a reference to the now repealed section of the *Customs Act 1901* which provided for the qualification of customs officers to detain and search suspects and substitutes a reference to the new section. This amendment will ensure that customs officers continue to be empowered to search any person reasonably suspected of carrying currency into or out of Australia without reporting to the CTRA as required under section 15.

Clause 18 - Functions of Director

This clause amends section 38 of the CTR Act to confer upon the Director the function of issuing guide-lines to cash dealers to assist them in the discharge of their obligations under the CTR Act and the regulations. It provides a statutory basis for an existing practice.

Clause 19 - Insertion of new section 40B - Annual Report

This clause inserts a new section into the CTR Act which requires the Director of the CTRA, as soon as practicable after 30 June in each year, to prepare and furnish to the Minister a report of the operations of the Agency during the year. Under section 34C of the *Acts Interpretation Act 1901* the Minister is required to table the report in Parliament within 15 sitting days after the report is received by him.

PART 4 - AMENDMENTS OF THE *CRIMES ACT 1914***Clause 20 - Principal Act**

This clause is a formal provision identifying the *Crimes Act 1914* as the Principal Act

Clause 21 - Insertion of new section 22 - Conditions etc that a court may impose on certain offenders

Subsection 22(1) provides that where a court makes a relevant order, or passes a relevant sentence, in respect of a person charged with, or convicted of, a serious narcotics offence or a prescribed offence against the law

of the Commonwealth or a Territory, the Court may order the person to remain in Australia, to refrain from applying for, or obtaining, an Australian passport or to surrender any Australian passport.

Subsection 22(2) provides that, subject to subsection (3), an order made under subsection (1) has effect during such reasonable period as is specified in the order.

Subsection 22(3) empowers the court to revoke or vary an order made under subsection (1), eg where the person is acquitted or is given permission to travel overseas while on parole or licence or is transferred overseas to give evidence under the MA Act.

Subsection 22(4) provides that if a court makes an order under subsection (1) or (3) the Registrar or other appropriate officer of the court must give to the Secretary of the Department administering the *Passports Act 1938* a copy of the order.

Subsection 22(5) provides that if the court makes an order under paragraph (1)(e) requiring a person to surrender any Australian passport, the passport must be given to the Registrar or other appropriate officer to be kept until the passport is required to be released under subsection (6) or until the passport is cancelled or expires which ever happens first.

Subsection 22(6) provides that where a passport, surrendered under an order under paragraph (1)(e), remains in force when that order ceases to have effect, the passport must be returned to the person to whom it was issued on application by that person.

Subsection 22(7) is definitional and provides that in section 22:

- . 'relevant order' means an order remanding a person on bail or in custody or suspending a sentence upon a person entering a recognizance or releasing a person on conditions under subsection 20(1);
- . 'relevant sentence' means a sentence of imprisonment other than a suspended sentence, a community service order, work order, periodic detention, attendance centre order, weekend detention or similar sentence under section 20AB;
- . 'serious narcotics offence' has the same meaning as in section 7 of the Proceeds Act.

Clause 21 - Insertion of new section 22A - State orders relating to passports

Proposed subsection 22A(1) provides that if, under a law of a State, a court makes an order requiring a person charged with, or convicted of, a serious narcotics

offence or other serious offence against a law of a State to surrender an Australian passport, the person must surrender the passport to the court to be dealt with in accordance with that law. Proposed subsection 22A(2) is definitional and provides that in section 22A "serious narcotics offence" has the same meaning as in section 7 of the Proceeds Act. This clause is intended to pave the way for State legislation which may otherwise be considered beyond State legislative competence as it deals with the subject of passports.

Clause 22 - Further amendments

Clause 22 provides for further amendments, as set out in the Schedule, to the Principal Act. These amendments relate to the sentencing provisions in the Principal Act.

PART 5 - AMENDMENTS OF THE *CRIMES (SUPERANNUATION BENEFITS) ACT 1989*

Clause 23 - Principal Act

Clause 23 identifies the *Crimes (Superannuation Benefits) Act 1989* as the Principal Act amended by Part 5 of the Bill.

Clause 24 - Application for superannuation order: evidence

Clause 24 proposes an amendment of section 18 of the Principal Act. At present subsection 18(1) provides that where an application is made for a superannuation order in respect of a person, the court may have regard to the transcript of any criminal proceedings against the person for the offence to which the application for the superannuation order relates. The use of the word "transcript" leaves in doubt the right of the court to have regard to all of the evidence in the proceedings, including exhibits and possibly formal admissions. The amendment will make clear the right of the court to look at the totality of the evidence which was before the court in the criminal proceedings.

Clause 25 - Notice of application for restraining order

The amendment of subsection 28(3), and the repeal of subsections 28(3) and (4), are consequential upon the inserting of new section 28A by clause 26.

Clause 26 - Insertion of new section 28A - Extension of certain restraining orders

Proposed section 28A will replace subsections 28(3) and (4), and will make more elaborate provision for the extension of restraining orders that were originally made without notice.

Generally, as provided by subsection 28(1), an application for a restraining order shall be made upon notice. Subsection 28(2) enables an application to be made without notice, but the restraining order can only apply for no longer than 14 days. The intention was that orders made without notice would be made readily, with the rights of the respondent being protected by limiting the life of the order to 14 days and by requiring (in subsections 28(3) and (4)) that applications for an extension be made on notice. (It is often necessary to seek an order without notice so that steps can be taken to secure the property before the respondent conceals the property. For example, it may be necessary to lodge a caveat, or to freeze a bank account.)

It has been held that the discretion conferred by the corresponding provision of the Proceeds of Crime Act, subsection 45(3), is different from, and wider than, the discretion conferred by section 44 of that Act. This may also cast doubt upon the proper interpretation of the discretion conferred upon the court by existing subsections 28(3) and (4) of the Principal Act to extend a restraining order which was originally made without notice.

Proposed section 28A will make clear that the discretion conferred in relation to an application for an extension of a restraining order made without notice is the same as that applying to the making of a restraining order on notice under section 27.

Clause 27 - Transitional

Clause 27 specifies the transitional arrangements for the amendments which are proposed by clauses 25 and 26 of the Bill. As a result, the provisions of proposed section 28A of the Principal Act will apply only to applications for an extension which are filed after the commencement date. If an application under subsection 28(3) of the Principal Act were on foot at the commencement date, subsections 28(2) and (3) of the Principal Act would continue to apply to the application as if they had not been repealed.

Clause 28 - Ancillary orders

Subclause 28(1) omits paragraph 32(1)(c) of the Principal Act and inserts a new paragraph in its stead. Proposed paragraph 32(1)(c) enables the Court to order an examination on oath of a person whose property is subject to the restraining order (called "the owner") or of another person.

The subject matter of the examination is linked to the affairs of "the owner". This enables, for example, the respondent to the restraining order to be examined concerning his or her affairs. If the property of a third person has been restrained as well as the property

of the defendant (under subsection 24(1)) then the third person could be examined concerning the affairs of the respondent as well as his or her own affairs (since both the third person and the respondent would fit the description of "the owner"). However, it occasionally occurs that the only restraining order sought is in relation to the property of a third person (where all of the defendant's property is in the hands of a third person but is alleged to be under "effective control" of the defendant). In such a case the existing provision does not allow the third person to be examined concerning the affairs of the defendant to the criminal proceedings since his or her property is not the subject of a restraining order.

Clause 28 proposes an amendment to paragraph 32(1)(c) of the Principal Act so that a person may be examined concerning the affairs of "the owner" or of the defendant to the criminal proceedings in relation to which the restraining order was granted.

PART 6 - AMENDMENT OF THE CUSTOMS ACT 1901

Clause 29 - Principal Act

Clause 29 identifies the *Customs Act 1901* as the Principal Act amended by Part 6 of the Bill.

Clause 30 - Court may make restraining order against property

The amendment proposed to subsection 243E(1) will ensure that the court is able to make an order which is a combination of the various types of order specified at paragraphs 243E(1)(a)-(e). This is achieved by inserting the words "one or more of the following" in subsection (1). A consequential amendment is the omission of paragraph 243E(1)(c) which is already a combination of the orders under paragraphs (a) and (b).

Clause 31 - Court may make further orders

Paragraph 31(1)(b) of the Bill replaces subparagraph 243F(1)(d)(ii) of the Principal Act with new subparagraphs (1)(d)(ii) and (iii). This proposed amendment, and the further proposed amendment to paragraph (1)(d) of the Principal Act made by paragraph (c) of the Bill, clarify and extend the power of the court to order a person to provide a sworn statement setting out particulars of the person's property. At present, if the restraining order is limited to an order against the property of a person other than the defendant, the Act permits the court to order that a statement be provided by the third person (who would be "the owner" for the purposes of the provision) but not by the defendant. This will be corrected by the amendment proposed in the Bill.

Paragraph 31(1)(d) of the Bill omits paragraph (1)(e) of the Principal Act and inserts a new paragraph in its stead. The purpose of the proposed provision is to ensure that, where a restraining order is obtained only against the property of a third person, the court may order the examination on oath of any person concerning the affairs of both the defendant and the owner.

Paragraph 31(1)(e) of the Bill adds a new subsection 243F(5). The subsection provides immunity to a witness in proceedings for an order under subsection (1) (being a further order to a restraining order), from answering questions which may prejudice the investigation or prosecution of a person for an offence. This will be supplement the immunity available under subsection 243E(11) which applies only to proceedings seeking the original restraining order and not to those relating to variations and further orders in relation to that order.

PART 7 - AMENDMENTS OF THE MUTUAL ASSISTANCE IN CRIMINAL MATTERS ACT 1987

Clause 32 - Principal Act

This clause is a formal provision identifying the *Mutual Assistance in Criminal Matters Act 1987* as the Principal Act.

Clause 33 - Application of Act

Paragraph 33(a) of the Bill proposes the insertion of a new subsection 7(2A) in the principal act which provides that regulations may be made to the effect that the MA Act applies to a specific foreign country for the purpose of assistance in relation to CTR type information. Under the proposed amendments to the CTR Act contained in clause 15 of the Bill the Attorney-General is entitled to have CTR information for the purpose of considering a request from a foreign country for that information and, if appropriate, the Attorney-General may provide that information to the requesting country.

Paragraph 33(b) of the Bill proposes an amendment to subsection 7(3) of the Principal Act to extend the operation of that provision by providing that where the regulations state that the MA Act applies as mentioned in subsection (2A) the MA Act, inter alia, applies accordingly.

Paragraph 33(c) of the Bill adds a new subsection 7(4) to the principal act. It is definitional and provides that in section 7 of the principal act "CTR information" has the same meaning as in the CTR Act.

Clause 34 - Insertion of new Part:

Part VIA - CTR INFORMATION

Clause 34 proposes the insertion of a new Part VIA, which consists of proposed section 37A "Requests for CTR information". The new section will provide that where a foreign country to which the MA Act applies (because of regulations made under new subsection 7(2A)) requests the Attorney-General to give information, the Attorney-General may direct the Director of the CTRA to give him (or her) access to CTR information for the purpose of enabling the Attorney-General to deal with the request.

PART 8 - AMENDMENTS OF THE NATIONAL CRIME AUTHORITY ACT 1984

Clause 35 - Principal Act

This is a formal provision defining the Principal Act to mean the *National Crime Authority Act 1984*.

Clause 36 - Interpretation

This clause will make a number of amendments to section 4, the definition section of the Principal Act.

Subclause 36(a) will include the ACT in the definition of "State".

Subclause 36(b) will amend the definition of "Territory" so that it does not include the ACT.

Subclause 36(c) will substitute a new subsection 4(3) to ensure the ACT is covered by references in the Principal Act to "the Parliament of a State", "the Governor of a State", "Premier of a State" and "a Minister of the Crown of a State".

These amendments are consistent with the approach taken with the Northern Territory.

Clause 37 - Establishment and Constitution of Authority

Clause 37 will amend subsection 7(8) of the Principal Act by substituting a new subparagraph (8)(b)(ii). Subsection 7(8) concerns the appointment of a person to fill a vacancy in the office of a member. Currently, subparagraph (8)(b)(ii) allows the Minister of a State who is responsible for the police force of that State to recommend appointment of a person to that office. The amendment recognises that the ACT does not have its own police force. It will allow the Minister responsible for matters relating to police affairs in the ACT to make the recommendation. Again this amendment ensures that the ACT has the same status as the Northern Territory (which does have its own police force).

PART 9 - AMENDMENT OF THE PASSPORTS ACT 1938

Clause 38 - Principal Act

This clause is a formal provision identifying the *Passports Act 1938* as the Principal Act.

Clause 39 - Passports not to be issued to certain persons

This clause amends section 7B of the *Passports Act 1938* by omitting paragraph (b) and substituting a new paragraph (b) which precludes an officer, unless directed by the Minister, from issuing an Australian passport to a person who, the officer has reason to believe, is required to remain in Australia or to refrain from applying for, or obtaining, an Australian passport:

- (i) by order of a court made under Commonwealth, State or Territory law; or
- (ii) under a condition of parole or of a recognizance, surety or bail bond; or
- (iii) under a condition specified in a licence granted under section 19AP of the *Crimes Act 1914* or of a similar conditional release from prison prior to the expiration of the sentence which may be granted under State or Territory law.

The only substantive change effected by the amendment is the inclusion by paragraph (iii), of conditional release granted other than by parole - ie for Commonwealth purposes by a licence granted under section 19AP of the *Crimes Act 1914* which came into force on 17 July 1990.

PART 10 - AMENDMENTS OF THE PROCEEDS OF CRIME ACT 1987

Clause 40 - Principal Act

Clause 40 identifies the *Proceeds of Crime Act 1987* as the Principal Act amended by Part 10 of the Bill.

Clause 41 - Procedure on application

Clause 41 proposes an amendment of section 18 of the Principal Act. At present subsection 18(1) provides that where an application is made for a confiscation order in respect of a person's conviction for an offence the Court may have regard to the transcript of any proceeding against the person for the offence. This leaves in doubt the ability of the Court to have regard to all the evidence in the proceedings, including exhibits and possibly formal admissions. These were intended to be included under the original wording, as the purpose of the provision is to expedite confiscation proceedings by avoiding the need to rehear evidence which was adduced in the associated criminal proceedings.

Clause 42 - Assessment of pecuniary penalty

Clause 42 proposes to amend section 27 of the Principal Act as follows:

- (a) paragraph 42(1)(a) will amend subsection 27(1) by inserting a definition of the expression "insolvency trustee". This expression is used in subsection 27(9) as amended by paragraph 42(1)(e) of the Bill;
- (b) paragraph 42(1)(b) will amend subparagraphs 27(2)(d)(i) and (2)(e)(i) by altering the words "before and after" to "before, during and after";
- (c) paragraphs 42(1)(c) and (1)(d) will amend paragraph 27(4)(a) by inserting the words "during or" before the word "after" and adding the word "greatest" before the word "excess";
- (d) paragraph 42(1)(e) will amend subsection 27(9) so that the range of possible administrations under the Bankruptcy Act is covered.

Section 27 of the Principal Act provides for assessment of the pecuniary penalty which may be imposed on a person convicted of an offence(s). Essentially, the process involves assessing the benefit derived from the commission of the offence and imposing a pecuniary penalty of a corresponding amount. Paragraphs 27(2)(d) and (e) permit the Court to adopt a "betterment test" in the assessment. Most commonly for a single offence the comparison will be between the person's property or income before and after the offence. However, some offences, such as conspiracy, may take place over an extended period. Disposal and acquisition of property may occur during this period and be relevant to the determination of benefits derived from the commission of the offence. The amendments to section 27 proposed by paragraphs 42(1)(b), (c) and (d) of the Bill will ensure that, where property has been acquired and disposed of

during the offence period, the betterment test can be applied throughout the offence period, not merely before and after as at present.

These amendments will bring the provision into line with s. 243C of Part XIII Division 3 of the *Customs Act 1901* which contains a provision similar to section 27. (Part XIII Division 3 of the *Customs Act* provides for the imposition of pecuniary penalties where a person has been involved in a "prescribed narcotics offence".)

The amendment will commence twenty-eight days after Royal Assent. The amendments will apply to applications for a pecuniary penalty filed after commencement.

Subsection 27(9) of the Principal Act provides that where the property of a bankrupt vests in the Official Trustee in Bankruptcy, the property continues to be treated as property of the person. This provision was inserted to prevent a person defeating the betterment assessment by becoming bankrupt and artificially reducing the value of his/her property at the time the assessment is made. It was also anticipated that a defendant might create large debts, eg to family members or to companies controlled by the defendant, which would compete with the penalty owed to the Commonwealth in a subsequent bankruptcy.

However, the only bankruptcy administration provided for is where a person becomes bankrupt and property vests in the Official Trustee. The Bankruptcy Act provides for a number of other forms of insolvency administration apart from bankruptcy. In addition, it is possible for the trustee of a bankrupt to be a private trustee in bankruptcy rather than the Official Trustee in Bankruptcy. The other forms of administration which are provided for under the Bankruptcy Act are as follows:

- . a deed of assignment, a deed of arrangement or a composition under Part X of the Act. These are insolvency administrations which are alternatives to bankruptcy and do not involve the debtor becoming bankrupt;
- . the administration of an insolvent deceased estate under Part XI of the Bankruptcy Act. This involves the debtor concerned dying and his/her estate being administered under the Bankruptcy Act. Although this would not be a deliberate method of avoidance, the automatic vesting in the trustee of the deceased estate would still prevent the betterment procedure from being employed as intended and should therefore be covered by the amendment to subsection 27(9);
- . a composition or scheme of arrangement under Part IV Division 6 of the Bankruptcy Act. This occurs where a person who is already bankrupt offers a composition or scheme of arrangement to his/her creditors which is then accepted by the creditors and approved by the

Court. The bankruptcy is usually annulled or the bankrupt is discharged.

Finally, as mentioned above, where a person becomes bankrupt the person's divisible property vests in his or her trustee in bankruptcy, who will be either the Official Trustee in Bankruptcy or, where a private trustee has filed a consent to act, in that private trustee in bankruptcy.

The proposed amendments to subsections 27(1) and (9) correspond to amendments which have already been made to s. 243C of Part XIII Division 3 of the Customs Act.

The proposed amendment of subsections 27(1) and (9) will commence twenty-eight days after Royal Assent. They will apply to assessments made after commencement irrespective of whether the application was filed before or after commencement.

Clause 43 - Forfeiture of all restrained property if person convicted of serious offence

Subsection 30(8A) was inserted into the Proceeds of Crime Act principally to facilitate the enforcement overseas of statutory forfeiture under the provisions of the *Mutual Assistance in Criminal Matters Act 1987*. The definition of "Australian forfeiture order" in subsection 3(1) of the MA Act includes a reference to a declaration under subsection 30(8A) of the Proceeds Act. It is essential that there be some judicial order identifying the forfeited property before seeking to enforce statutory forfeiture overseas under a Mutual Assistance arrangement. The declaration also assists the domestic enforcement of statutory forfeiture particularly against registrable property.

Subsection 30(8A) currently allows the bringing of an application for a declaration. However the subsection is expressed to apply "where a court makes a restraining order in reliance on a person's conviction of a serious offence". A restraining order may be made under section 43 if a person has been convicted of an indictable offence or if s/he has been, or is about to be, charged with such an offence. Most commonly such orders are obtained at the time, or shortly before, the person is charged. It is quite rare for a restraining order to be obtained post-conviction. Accordingly, the application of subsection 30(8A) is very restricted and is being widened.

The amendment made by clause 43 of the Bill will commence 28 days after Royal Assent. The amendment will apply to restraining orders and forfeitures which occur before or after commencement.

Clause 44- Restraining orders

Clause 44 of the Bill proposes an amendment to section 43 of the Principal Act. It is arguable that the current wording of subsection 43(1), especially given the appearance of the word "or" at the end of paragraph (f), means that the DPP can apply for an order against only one of the specified categories of property. The fact that paragraph 43(1)(da) is a combination of the orders available under paragraphs (1)(c) and (d) reinforces this interpretation. It is appropriate that the DPP be able to apply for a single order against a combination of one or more of the categories contained in paragraphs (e) to (f). A consequence of empowering the court to make an order which is a combination of one or more of the paragraphs is the omission of paragraph 43(1)(da).

The proposed amendment will commence twenty-eight days after the date of Royal Assent.

Clause 45 - Notice of application for restraining order Clause 46 - Insertion of new section 45A - Extension of certain restraining orders

Clauses 45 and 46 of the Bill clarify the considerations which apply where a restraining order, originally made without notice, is to be extended. The effect of the proposed amendments is that the considerations involved in extending a restraining order made without notice under subsection 45(1) are the same as those applying to the making of a restraining order under subsections 44(1) and (2).

Generally, as provided by subsection 45(1) of the Principal Act, an application for a restraining order is to be made upon notice. Subsection 45(2) enables an application to be made without notice, but the restraining order can apply for no longer than 14 days. The intention was that such orders would be made readily, with the rights of the respondent being protected by limiting the life of the order to no more than 14 days and by requiring (in subsections 45(3) and (4)) that applications for an extension be made on notice. (It is often necessary to seek an order without notice so that steps can be taken to secure the property before the respondent conceals the property. For example, it may be necessary to lodge a caveat, to freeze a bank account or to register the order overseas under the MA Act.)

Two Courts have now held that the discretion conferred by subsection 45(3) is different from, and wider than, the discretion conferred by subsections 44(1) and (2). This view was expressed by Matthews J in DPP -v- Saffron (1989) 93 FLR 338 and has been followed in the recent case of DPP -v- Markovski (unreported, Teague J, Supreme Court of Victoria, 19 October 1990).

This interpretation differs from that which was intended. It is therefore proposed to omit subsections 45(3) and (4) of the Principal Act and replace them with a new section 45A which makes it clear that the discretion conferred in relation to an application for an extension of a restraining order made without notice is the same as that applying to the making of a restraining order on notice under either subsection 44(1) or (2).

The proposed amendment will commence 28 days after Royal Assent.

Clause 47 - Transitional

Clause 47 of the Bill contains the transitional arrangements for the amendments proposed by clauses 45 and 46 of the Bill. The amendments will apply to applications filed after commencement. The repealed provisions will continue to apply to applications which were filed before commencement of the amendment.

Clause 48 - Court may make further orders

It is proposed to make a number of amendments to section 48 of the Principal Act as follows:

- (a) paragraph 48(1)(a) will omit paragraph 48(1)(c) and replace it with a new provision. The new provision will extend the range of matters which may be investigated during an examination on oath;
- (b) paragraph 48(1)(b) will insert a new paragraph 48(1)(da), which replaces the existing power in subparagraph 48(1)(e)(iii), so that the order to deliver a statement of property can be made in circumstances where the restraining order does not involve the Official Trustee being appointed to control the property;
- (c) paragraph 48(1)(c) will insert a new provision which will empower the court to direct the owner, or another person, to do any act or thing necessary or convenient to be done to enable the Official Trustee to take custody and control of the property in accordance with the restraining order;
- (d) paragraph 48(1)(d) inserts a new subsection 48(2A) which will ensure that an ancillary order made in connection with a restraining order does not expire when that restraining order ceases to be in force under either paragraph 57(2)(e) or (g); and
- (e) paragraphs 48(1)(e), (f), (g) and (h) of the Bill make other amendments to section 48 which are consequential upon the amendments above.

Comment (paragraph 48(1)(a)). Paragraph 48(1)(c) of the Principal Act enables the Court to order an examination on oath of a person whose property is subject to the restraining order (called "the owner") or of another person. The examination concerns the affairs of "the owner". Subparagraph 48(1)(e)(iii) enables the Court to direct that a sworn statement be provided by "the owner" setting out particulars of the property or dealings of "the owner".

In the case of each provision the subject matter of the examination or the sworn statement is linked to the affairs etc of "the owner". This enables, for example, the respondent to the restraining order to be examined concerning his/her affairs. If the property of a third person has been restrained, as well as the property of the defendant, (under paragraph 43(1)(f)) s/he could be examined concerning the affairs of the respondent as well as his/her affairs (since both the third person and the respondent would fit the description of "the owner"). However, it occasionally occurs that the only restraining order sought is in relation to the property of a third person (where all of the defendant's property is in the hands of a third person but is alleged to be under "effective control" of the defendant). In such a case the provision does not allow the third person to be examined concerning the affairs of the defendant since his/her property is not the subject of a restraining order. Similar considerations apply to the power of the court to order "the owner" to provide a sworn statement setting out particulars of the property of the owner, under existing subparagraph 48(1)(e)(iii).

The amendment proposed to paragraph 48(1)(c) of the Principal Act by paragraph (1)(a) of the Bill will ensure that a person may be examined concerning the affairs of the "the owner" or of the defendant to the criminal proceedings in relation to which the restraining order was granted and that the sworn statement is to be in relation to the property or dealings of "the owner" or the defendant.

Comment (paragraph 48(1)(b)). Paragraph 48(1)(b) of the Bill proposes to insert a new paragraph 48(1)(da) into the Principal Act. Subsection 43(2) of the Principal Act empowers the making of two types of restraining order, either an order that the Official Trustee take custody and control of the property (paragraph (2)(b)) or a general order that the property is not to be disposed of. Section 48 then provides for the making of ancillary orders where a restraining order has been made. In particular, subparagraph 48(1)(e)(iii) provides that the Court may order a person to furnish to the Official Trustee a sworn statement of property. (This is to help in the locating and securing of property restrained under the principal order.)

However, the preliminary words of paragraph 48(1)(e) limit the availability of such orders to circumstances where the restraining order "directed the Official Trustee to take custody and control of the property." Accordingly, this order can not be made where the restraining order is a general direction that the property not be dealt with pursuant to paragraph 43(2)(a). Clause 48 proposes to omit subparagraph 48(1)(e)(iii) of the Principal Act and to insert a new paragraph 48(1)(da) so that the order for the delivery of a sworn statement may be made in connection with any restraining order, not merely an order involving the taking of custody and control by the Official Trustee. The statement will be delivered to the Official Trustee where the order involves the Official Trustee taking custody and control of property. In other cases the statement will be given to the applicant for the ancillary order or to such other person as the court directs.

Comment (paragraph 48(1)(c)). Paragraph 243F(1)(ea) was inserted into the Customs Act in 1989 by the *Crimes Legislation Amendment Act 1989* (Act number 108/1989). It enables the Court to direct a person to assist the Official Trustee in its duties under the restraining order. No corresponding power exists in the Proceeds of Crime Act. Paragraph 48(1)(c) of the Bill proposes to insert a corresponding provision, subparagraph 48(1)(e)(iii), in section 48.

Comment (paragraph 48(1)(d)). Section 48 empowers the granting of ancillary orders where there is a restraining order in existence. Paragraph 57(2)(g) goes on to provide that the restraining order ceases to be in force if the property subject to the restraining order is forfeited under section 30 (which deals with the forfeiture of all restrained property after a person is convicted of a "serious offence".) It has been held (DPP -v- Chidiac unreported, Supreme Court of New South Wales per Smart J, 13 July 1990.) that, once statutory forfeiture occurs, the ancillary orders made in connection with the restraining order lapse. This is not always appropriate. It will be necessary in some circumstances, for example, to examine the defendant after the restraining order has expired to locate property which is the subject of forfeiture. This gap will be corrected by inserting new subsection 48(2A) proposed by paragraph 48(1)(d) of the Bill.

The amendments will commence twenty-eight days after Royal Assent.

Clause 49 - Time when restraining order ceases to be in force

Paragraphs 49(1)(a), (b) and (c) of the Bill will amend paragraph 57(2)(e) of the Principal Act so that, where two restraining orders have been obtained under separate

paragraphs of section 43 in reliance upon a person being charged, the only restraining order which ceases to be in force upon the satisfaction of a confiscation order is that restraining order to which the confiscation order relates.

It is quite common for two restraining orders to exist, usually one over the property of the accused and one over the property of a third party. Thus the situation may arise where a confiscation order has been made in relation to property covered by one of the restraining orders but not the other. The satisfaction of that confiscation order would cause the expiry of both restraining orders and not just the order covering the property confiscated. Alternatively only one restraining order may exist. The confiscation order may only forfeit part of the property restrained under the restraining order. Despite there remaining some additional property liable to confiscation, the restraining order would cease to exist.

The proposed amendment will commence twenty-eight days after Royal Assent. The amended provisions will apply to restraining orders made before commencement which have not terminated or otherwise ceased to be in force at commencement.

Clause 50 - Production orders

Clause 50 will amend section 66 by omitting paragraph (e) which refers to a person referred to in paragraph 66(1)(b). Paragraph (b) refers both to a person who has committed an indictable offence and to a person who has possession or control of a property-tracking document(s) in relation to the offence. These persons need not be the same person. Paragraph (d) empowers a police officer to apply for an order against "the person suspected of having possession or control of the document.....". Paragraph (e) also empowers the police officer to obtain an order "...against the person referred to in paragraph (b).". There is an apparent overlap of paragraphs (d) and (e) which is removed by clause 50.

The proposed amendment will commence twenty-eight days after Royal Assent.

Clause 51 - State and Territory courts to have jurisdiction

Paragraph 98(3)(b) of the Principal Act provides that a court may not make a forfeiture order if it does not have monetary jurisdiction equivalent to the value of the property for which forfeiture is sought. Thus, where a court convicts a person of an offence, it has no power to make a forfeiture order under section 19 unless the monetary limit on its jurisdiction is not less than the value of the property. This causes waste of time and resources. Subsection 98(5) contains a similar

limitation in relation to the power of a court to make a pecuniary penalty order.

An alternative approach is that contained in section 82G of the *Taxation Administration Act 1953*. Under that section the Court may impose a pecuniary penalty upon a person convicted of a taxation offence irrespective of any monetary limit upon the jurisdiction of the Court. The Court may impose the penalty and a certificate of the penalty is issued. The certificate may then be registered in a Court having the requisite monetary jurisdiction and is enforceable as a final judgment of that Court. The proposed amendments made to section 98 by clause 51 of the Bill will introduce a similar procedure into the *Proceeds Act*. The amendment will commence on proclamation or if not proclaimed within 6 months, on the next following day. Commencement is delayed to permit the making of regulations.

**SCHEDULE
FURTHER AMENDMENTS OF THE *CRIMES ACT 1914***

The Schedule makes amendments to Part 1B of the *Crimes Act 1914*.

Subsection 16(1)

This amendment inserts a definition of "aggregate".

Paragraph 16B(b)

This amendment is a technical one.

Subsection 19(1)

This amendment is a drafting change.

Paragraph 19(3)(c)

This amendment is a drafting change.

Sections 19AB, 19AC, 19AD and 19AE

The above sections of the Principal Act are repealed and the following sections are substituted.

Proposed section 19AB - When court must fix a non-parole period or make a recognizance order.

Subsection (1) is subject to subsection (3) and deals with the fixing by a court of a non-parole period or recognizance release order where the person, at the time of sentence, is not already serving or subject to a federal sentence. The subsection applies where the aggregate federal sentence exceeds 3 years.

Subsection (2) is subject to subsection (3) and deals with the fixing by a court of a non-parole period or the

making of a recognizance release order where the person, at the time of sentence is already serving or subject to a federal sentence. In such a case if a further sentence is imposed and the aggregate of those federal sentences exceeds 3 years but there is no prior non-parole period or recognizance release order, subsection (2) applies. eg Person sentenced to 6 months imprisonment on "y date" and a recognizance release order had not been fixed in relation to that sentence and the person is then sentenced on "x date" to a 4 year cumulative federal sentence. The court must either fix a non-parole period or make a recognizance release order unless the court declines to make such an order under subsection (3).

Subsection (3) enables a court to decline to fix either a non-parole period or to make a recognizance release order having regard to the nature and circumstances of the offence or offences and to the antecedents of the person.

Subsection (4) requires the court to state its reasons and for those reasons to be entered in the court records if it decides to neither fix a non-parole period or make a recognizance release order under this section.

Proposed subsection 19AC - When court must fix a recognizance release order.

Subsection (1) is subject to subsections (3) and (4) and deals with the making by a court of a recognizance release order where the person, at the time of sentence, is not already serving or subject to a federal sentence. The subsection applies where the aggregate federal sentence does not exceed 3 years. In such cases the court must not fix a non-parole period.

Subsection (2) is subject to subsections (3) and (4) and deals with the making by a court of a recognizance release order where the person, at the time of sentence, is already serving or subject to a federal sentence and the aggregate federal sentences do not exceed 3 years but there is no prior recognizance release order. eg Person sentenced to 6 months imprisonment on "y date" and a recognizance release order had not been fixed in relation to that sentence and the person is then sentenced on "x date" to a 2 year cumulative federal sentence.

Subsection (3) provides that the court is not required to make a recognizance release order if the aggregate federal sentence does not exceed 6 months.

Subsection (4) enables a court to decline to make a recognizance release order having regard to the nature and circumstances of the offence or offences and to the antecedents of the person.

Subsection (5) requires the court to state its reasons for declining to make a recognizance release order and for those reasons to be entered into the court records.

Proposed section 19AD - Persons already subject to non-parole period

Subsection (1) provides that this section applies where a person is to be sentenced to a term of imprisonment for a further federal offence or offences and there is an existing federal non-parole period

Subsection (2) sets out the options for the court when dealing with a person who already has an earlier non-parole period for a federal offence. The court must take into account the existing non-parole period, the nature and circumstances of the new offence and the antecedents of the person. The court then must either:

- . make an order confirming the earlier non-parole period (paragraph (d));
- . fix a new non-parole period in respect of all the federal sentences (paragraph (e));
- . cancel the earlier non-parole period and decline to fix a non-parole period, if the court decides that in the circumstances a new non-parole period is not appropriate. (paragraph (f)).

Subsection (3) provides that when a court fixes a new non-parole period under paragraph (2)(e) it supersedes the earlier non-parole period. The new non-parole period must not permit the person's release from custody earlier than the former non-parole period.

Subsection (4) precludes the court from making a recognizance release order where this section applies.

Subsection (5) provides that where a court declines to fix a non-parole period under subsection (2)(f) it must state its reasons for deciding that a non-parole period is not appropriate and cause those reasons to be entered into the court record.

Section 19AE - Persons already subject to recognizance release order

Subsection (1) provides that this section applies where a person is to be sentenced to a term of imprisonment for a further federal offence or offences and there is an existing federal recognizance release order.

Subsection (2) sets out the options to the court when dealing with a person who already has an earlier recognizance release order for a federal offence.

The court must take into account relevant circumstances including the existing recognizance release order, the nature and circumstances of the new offence and the antecedents of the person. The court must then:

- . make an order confirming the earlier recognizance release order (paragraph (d));
- . make a new recognizance release order in respect of all the federal sentences the person is to serve or complete (paragraph (e));
- . if the new sentence is a life sentence or the aggregate of the old and new sentences is greater than 3 years, if the court considers it appropriate to fix a non-parole period it must fix a non-parole period in respect of all the federal sentences the person is to serve or complete ((2)(f));or
- . cancel the earlier recognizance release order, if the court decides that in the circumstances a new recognizance is not appropriate. The court must then cancel the earlier recognizance release order (paragraph (2)(g)).

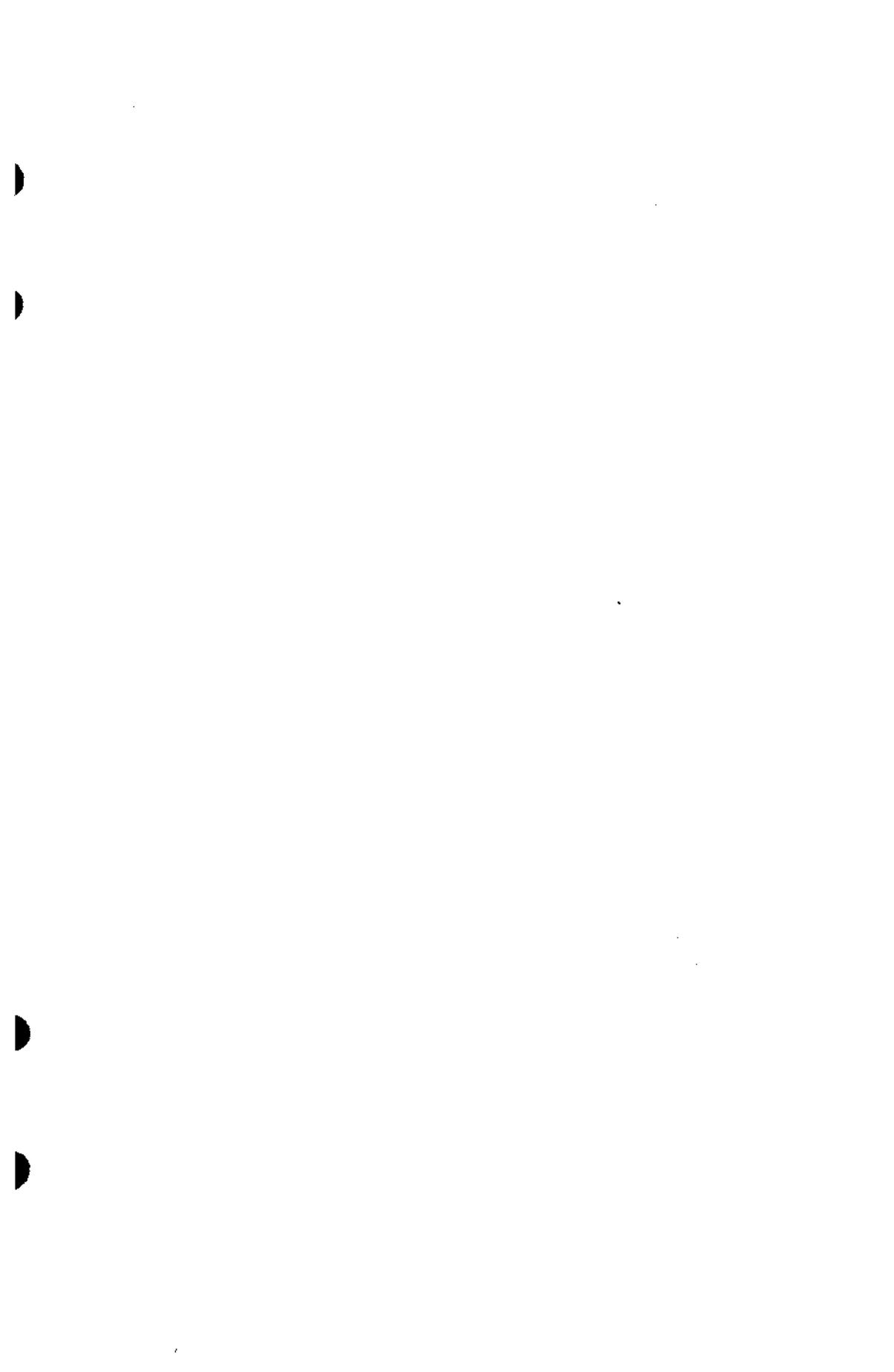
Subsection (3) provides that where a court makes a new recognizance release order under paragraph (2)(e) it supersedes the earlier order and must not be such as to allow the person to be released earlier than if the further sentence had not been imposed.

Subsection (4) provides that where under paragraph (2)(f) the court fixes a non-parole period it supersedes the existing recognizance release order and must not be such as to allow the person to be released earlier than if the further sentence had not been imposed.

Subsection (5) provides that when a court under paragraph (2)(g) declines to make a recognizance release order it must state its reasons for so deciding that neither a recognizance release order nor a non-parole period is appropriate and cause those reasons to be entered into the court records.

Paragraph 19AH(1)(a)

The amendment to this paragraph is a drafting change.





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