PARLIAMENT OF AUSTRALIA
DEPARTMENT OF PARLIAMENTARY SERVICES

PARLIAMENTARY LIBRARY
INFORMATION ANALYSIS ADVICE
BILLS DIGEST

BILLS DIGEST NO. 72, 2014–15
10 FEBRUARY 2015

Civil Law and Justice Legislation Amendment Bill 2014

Moira Coombs
Law and Bills Digest Section

Contents

Date introduced: 29 October 2014

House: Senate

Portfolio: Attorney-General

Commencement: Sections 1 to 3 commence on the day of Royal Assent. Schedules 1 to 6 commence on the day after Royal Assent. Schedule 7 commences on the day after a six month period has elapsed beginning on the day of Royal Assent.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill's home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website.

ISSN 1328-8091

Purpose of the Bill

As an omnibus Bill, the Civil Law and Justice Legislation Amendment Bill 2014 (the Bill) has a number of purposes. These include:

- amending the *Bankruptcy Act 1966*[1] to:
  - allow the Official Trustee in Bankruptcy (Official Trustee) to act as a special trustee for a wider range of government agencies
  - provide that support (in the form of property or cash) provided by the National Disability Insurance Scheme is not divisible in bankruptcy
  - expand the offence of concealment to include electronic financial transactions
  - clarify the demarcation between indictable and summary offences (in line with the *Crimes Act 1914* (Cth)) and
  - clarify the locus or place where certain offences occur.
- amend the *International Arbitration Act 1974*[2] (the *Arbitration Act*) to clarify the retrospective application of that Act to certain arbitral agreements prior to 6 July 2010
- amend the *Family Law Act 1975*[3] (the *FLA*) to:
  - enable information provided as part of proceedings (in particular, experts reports) to be shared with state/territory child welfare authorities and
  - provide appeal rights in relation to court security orders.
- amend the *Court Security Act 2013*[4] (the *CSA*) to allow for applications to vary or revoke court security orders
- amend the *Evidence Act 1995*[5] (the *Commonwealth Evidence Act*) in relation to self-incrimination certificates, as well as making minor amendments that mirror provisions in the Model Uniform Evidence Bill
- amend the *Protection of Movable Cultural Heritage Act 1986*[6] (the *PMCH Act*) to allow the continued functioning of the National Cultural Heritage Committee despite falls in membership numbers and
- amend the *Copyright Act 1968*[7] to extend the existing legal deposit scheme to electronic formats.

Committee consideration

Senate Standing Committee for the Selection of Bills

The Committee decided at its meeting on 4 December 2014 not to refer this Bill to a Committee.[8]

Senate Standing Committee for the Scrutiny of Bills

The Committee had no comment to make on this Bill.[9]

Parliamentary Joint Committee on Human Rights

The Committee considers the Bill compatible with human rights.[10]

Financial implications

The Explanatory Memorandum notes that that there is no financial impact associated with this Bill.[11]

---

1. *Bankruptcy Act 1966*, accessed 2 February 2015.
2. *International Arbitration Act 1974*, accessed 2 February 2015.
3. *Family Law Act 1975*, accessed 2 February 2015.
4. *Court Security Act 2013*, accessed 2 February 2015.
5. *Evidence Act 1995*, accessed 2 February 2015.
6. *Protection of Movable Cultural Heritage Act 1986*, accessed 2 February 2015.
7. *Copyright Act 1968*, accessed 2 February 2015.
8. Senate Standing Committee for the Selection of Bills, *Report No. 16 of 2014*, The Senate, 4 December 2014, accessed 4 February 2015.
9. Senate Standing Committee on the Scrutiny of Bills, *Alert Digest No. 15 of 2014*, The Senate, 19 November 2014, p. 33, accessed 1 December 2014.
10. Parliamentary Joint Committee on Human Rights, *Sixteenth report of the 44th Parliament*, 25 November 2014, p. 6, accessed 1 December 2014.
11. Explanatory Memorandum, Civil Law and Justice Legislation Amendment Bill 2014, op. cit., p. 3.

Statement of Compatibility with Human Rights

As required under Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Government has assessed the Bill's compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible with human rights because it promotes rights, and to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.[12]

Key issues and provisions

Schedule 1—Bankruptcy

Australian Financial Security Authority

The Official Trustee is part of the Australian Financial Security Authority (AFSA). AFSA is responsible for the administration and regulation of the personal insolvency system, proceeds of crime, trustee services and the administration of the Personal Property Securities Register (PPSR).[13] One of the responsibilities of AFSA is to act as a special trustee for Australian Government agencies pursuant to court orders, particularly by locating, controlling and selling property under the proceeds of crime legislation.[14]

Official Trustee

The Official Trustee, a body corporate, administers bankruptcies and other personal insolvency arrangements when a private trustee or other administrator is not appointed. The Official Trustee also has responsibility under the *Proceeds of Crime Act 2002* and the *Customs Act 1901* to control and deal with property under court orders made under these statutes.[15]

AFSA provides personnel and resources to ensure the Official Trustee can fulfil its responsibilities. The Inspector-General of AFSA regulates the activities of the Official Trustee in the same way it regulates registered trustees and registered debt agreement administrators.

When is the Official Trustee appointed as an administrator?

Usually a debtor has the consent of a registered trustee when they petition to become bankrupt. The registered trustee is then appointed as administrator of their estate. When a debtor petitions to become bankrupt, but does not have the consent of a registered trustee, the Official Trustee is appointed to administer their estate.[16] The Official Trustee will also become the administrator of personal insolvencies where:

- a sequestration order makes a debtor bankrupt and the petitioning creditor has not obtained the consent of a registered trustee to administer the estate or
- a registered trustee or debt agreement administrator dies or ceases to be registered for any reason and no other practitioner is appointed.[17]

Key provisions

Section 18 of the *Bankruptcy Act* deals with the provisions relating to the Official Trustee in Bankruptcy (the Official Trustee).[18] The duties of a trustee are set out in section 19 and include the following:

(a) notifying the bankrupt's creditors of the bankruptcy;

(b) determining whether the estate includes property that can be realised to pay a dividend to creditors;

(c) reporting to creditors within three months of the date of the bankruptcy on the likelihood of creditors receiving a dividend before the end of the bankruptcy;

---

12. The Statement of Compatibility with Human Rights can be found at page four of the Explanatory Memorandum to the Bill.
13. Australian Financial Security Authority (AFSA), 'Introduction to AFSA', AFSA website, accessed 26 November 2014.
14. Australian Financial Security Authority, *Portfolio budget statement 2014–15*, AFSA, p. 169, accessed 26 November 2014.
15. Australian Financial Security Authority, 'Our roles', AFSA website, accessed 26 November 2014.
16. Australian Financial Security Authority, 'Official Trustee in Bankruptcy', AFSA website, accessed 15 December 2014.
17. Ibid.
18. *Bankruptcy Act 1966*, accessed 4 December 2014.

(d) giving information about the administration of the estate to a creditor who reasonably requests it;

(e) determining whether the bankrupt has made a transfer of property that is void against the trustee;

(f) taking appropriate steps to recover property for the benefit of the estate;

(g) taking whatever action is practicable to try to ensure that the bankrupt discharges all of the bankrupt's duties under this Act;

(h) considering whether the bankrupt has committed an offence against this Act;

(i) referring to the Inspector-General or to relevant law enforcement authorities any evidence of an offence by the bankrupt against this Act;

(j) administering the estate as efficiently as possible by avoiding unnecessary expense;

(k) exercising powers and performing functions in a commercially sound way.

The Official Trustee is a body corporate (subsection 18(1)) which has the following attributes (subsection 18(2)):

(a) perpetual succession[19]

(b) may acquire, hold or dispose of real and personal property, and

(c) may sue and be sued in its corporate name.

Item 2 of **Schedule 1** inserts **proposed subsection 18(3)** which includes an additional function for the Official Trustee. It will enable the Official Trustee to act in accordance with an order of a court in relation to the payment of a debt by a person to the Commonwealth or a Commonwealth authority. The example in the Note to **proposed subsection 18(3)** explains that the Official Trustee may:

(a) take custody of, control and own property as security for payment of such a debt

(b) sell the property and

(c) apply the proceeds of the sale wholly or partly towards the payment of the debt.

The Explanatory Memorandum explains the rationale for this amendment:

> In these matters it is necessary to transfer the title of real property before it can be sold. However in most States or Territories it is not legally possible for the Official Receiver[20] to be listed as the owner of record in relation to real property. As a result individual AFSA employees have been listed as the owner of record for property. This is undesirable as it means that AFSA employees become personally responsible for taxes associated with the property and may be liable if a person injures themselves while on the property.[21]

The Official Trustee, as a body corporate, already has the power to acquire, hold or dispose of real and personal property.

Under subsections 20B(2) and (3) of the *Bankruptcy Act*, all moneys received or held by the Official Trustee are paid into the Common Investment Fund, except for moneys covered by subsection 20B(8). The AFSA Portfolio Budget statement for 2014–15 notes:

> AFSA fulfils the Official Trustee role under both bankruptcy and proceeds of crime legislation. As a result, it controls assets in a trustee capacity. Assets held in a trustee capacity by the Official Trustee (a separate corporate body) are not public assets or public moneys nor does the expenditure of moneys held in that capacity amount to special

19. Perpetual succession is 'that characteristic of a company which makes it a continuing entity in law with its own identity regardless of changes in its membership. It demonstrates the ability of a company, as an independent entity, to live forever until deregistered', P Butt, *LexisNexis concise Australian legal dictionary*, fourth edn., LexisNexis Butterworths, Sydney, 2011, p. 437.
20. See discussion of the role of the Official Receiver immediately below.
21. Explanatory Memorandum, Civil Law and Justice Legislation Amendment Bill 2014, op. cit., p. 15.

appropriations. Where those assets are realised as part of the administration of bankruptcies, the proceeds are paid into the common investment fund account (also not public moneys) for subsequent distribution to creditors.[22]

Item 7 inserts **proposed paragraph 20B(8)(aa)** to provide that moneys held or received by the Official Trustee in accordance with an order of a court in relation to payment of a debt by a person to the Commonwealth or a Commonwealth authority will not form part of the Common Investment Fund. This allows the Official Trustee to act in accordance with the additional function prescribed under **proposed subsection 18(3)** where a court order may provide for an Official Trustee to seize and sell property and apply the proceeds in payment, either in whole or in part, of the person's debt. The Explanatory Memorandum notes that seizure and sale of property pursuant to court orders is now mostly undertaken in relation to child support matters where AFSA obtains orders for the enforcement of child support arrears.[23]

Changes to powers of the Official Receiver

The Official Receiver is an office created under the *Bankruptcy Act* to carry out statutory functions under that Act, including maintaining the National Personal Insolvency Index, providing registry services in relation to personal insolvency, and assisting trustees to perform their functions through the issue of statutory notices.[24]

Section 77C of the *Bankruptcy Act* gives the Official Receiver the power to require a person, by written notice, to give information to the Official Receiver (paragraph 77C(1)(a)) and/or to attend before the Official Receiver to give evidence and/or produce all books relating to matters connected with the performance of functions of the Official Receiver (paragraph 77C(1)(b)).

Item 10 of **Schedule 1** inserts **proposed paragraph 77C(1)(c)** to allow the Official Receiver to also require a person to produce all books in the person's possession relating to any matters connected with the performance of functions by the Official Receiver or a trustee under the *Bankruptcy Act*, without the need to attend before the Official Receiver. This will enable the Official Receiver to require that a person produce books, without having to require them to appear in person.[25]

Section 116 of the *Bankruptcy Act* is concerned with property of a bankrupt that is divisible amongst creditors. Subsection 116(2) lists the types of property that are exempt from such division. **Item 11** inserts **proposed paragraph 116(2)(s)** which refers to support for the bankrupt funded under the National Disability Insurance Scheme (NDIS) or an amount paid under the NDIS. As the Explanatory Memorandum notes, where payments are received by the bankrupt under the *National Disability Insurance Scheme Act 2013*, the property will not vest in the trustee.[26]

Section 265 of the *Bankruptcy Act* is concerned with the failure by a bankrupt to disclose to the trustee all of the person's property and its value. Paragraph 265(4)(a) currently provides that a person who has become a bankrupt and conceals or removes any part of his/her property to the value of $20 or more, is guilty of an offence punishable on conviction by imprisonment for a period not exceeding one year. **Item 13** amends **paragraph 265(4)(a)** to include reference to disposing of or dealing with property. As a result, a person will commit an offence if they 'conceal, remove, dispose of or deal with' any part of his or her property to the value of $20 or more. This amendment ensures that the provision will cover electronic financial transactions such as electronic funds transfers, which are arguably not covered by the current provision.[27]

Section 273 currently deals with how offences under the *Bankruptcy Act* are to be tried. Subsection 273(1) provides that offences (other than those punishable by a fine only) may be tried either on indictment or summarily. As with this provision, the mode of trial of offences under the *Bankruptcy Act* (as with any other Commonwealth legislation) would be governed by sections 4G and 4H of the *Crimes Act 1914*.[28] These sections provide that, unless a contrary indication appears in the relevant legislation, indictable offences are those that are punishable by a period of imprisonment exceeding 12 months. **Item 16** repeals and replaces **section 273**. As

22. AFSA, *Portfolio budget statement 2014–15*, op. cit., p. 181.
23. Explanatory Memorandum, op. cit., p. 14.
24. AFSA, 'Glossary', AFSA website, accessed 26 November 2014.
25. Explanatory Memorandum, op. cit., p. 16.
26. Ibid., p.17.
27. Ibid., p. 17.
28. *Crimes Act 1914*, accessed 4 December 2014.

the revised section 273 does not deal with the mode of trial of offences, the *Crimes Act* provisions will apply to offences under the *Bankruptcy Act*, so that offences that are punishable by a maximum period of imprisonment of 12 months or less, or that are not punishable by imprisonment, will be summary offences.[29]

Proposed section 273 will have a new focus–to put the issue of the territoriality of certain offences beyond doubt.[30]

Proposed subsection 273(1) provides that the section applies to an offence against the *Bankruptcy Act* where the physical element of the offence is a refusal, failure or omission to act, or a contravention constituted by a refusal, failure or omission to act.[31] An example of such an offence can be found in section 267D, which relates to the failure of a person to attend before the Official Receiver after being notified that their attendance is required.

Proposed subsection 273(2) provides that a person may be charged with, and convicted of a relevant offence as if the place of the offence is one of the following:

- the place where the person should have done the act
- the person's usual place of residence at the time the act should have been done or
- the person's last place of residence known to the Official Receiver.

Proposed subsection 273(3) provides that subsection 273(2) is subject to section 80 of the *Constitution*. Section 80 of the *Constitution* is concerned with trial by jury and provides:

> The trial on indictment of any offence against a law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.[32]

The Explanatory Memorandum notes:

> The effect of section 80 of the *Constitution* is that if an offence under the *Bankruptcy Act* is tried on indictment then the trial will be held in the State where the offence was committed despite the new section 273.[33]

Proposed subsection 273(4) provides that subsection 273(2) does not apply to offences against subsections 264A(1A), 264C(1) and 267F(1). As the Explanatory Memorandum states, for these offences the locus (place) of the offence is clear.[34]

Item 17 provides that **proposed section 273** has retrospective application and applies whether the refusal, failure, omission or contravention occurred before, on or after the commencement of Schedule 1.

Schedule 2—International Arbitration

The *Arbitration Act* was significantly reformed in 2010.[35] In short, the key reforms included:

---

29. Section 4G of the *Crimes Act 1914* concerns indictable offences. Offences against the law of the Commonwealth punishable by imprisonment exceeding 12 months are indictable offences unless the contrary intention appears. Section 4H concerns summary offences. Offences against the law of the Commonwealth punishable by imprisonment not exceeding 12 months or that are not punishable by imprisonment are summary offences unless the contrary intention appears.
30. Explanatory Memorandum, op. cit., p. 19.
31. An offence is made up of a *physical element* and a *fault element*. The physical element may be conduct, a result of conduct or a circumstance in which conduct or a result of conduct, occurs. Conduct means an act, an omission to perform an act or a state of affairs. A fault element for a particular element may be intention, knowledge, recklessness or negligence. Section 7A of the *Bankruptcy Act* confirms the application of Chapter 2 of the *Criminal Code*, which outlines physical and fault elements in Division 4 and Division 5 respectively.
32. *Australian Constitution*, section 80, accessed 5 February 2015.
33. Explanatory Memorandum, op. cit., p. 19.
34. Subsection 264A(1A) of the *Bankruptcy Act* creates an offence where a person served with a summons to attend for examination or appear as a witness before the court fails to attend or fails to appear and report from day to day. In this instance, the place of the offence is clear (the location of the court where they were to appear). Likewise subsection 264C(1) creates an offence where a person appearing before the court to be examined (or to appear as a witness) refuses (or fails) to be sworn or make an affirmation, answer a question or to produce any books required by the court. Again, the place of the offence is clear (the physical location of the court). Finally, subsection 267F(1) creates an offence where a person attending before the Official Receiver refuses (or fails) to be sworn or to make an affirmation, to answer a question or to produce any books. Again, the place of the offence is clear.
35. *International Arbitration Act 1974*, accessed 5 December 2014.

- reducing the grounds (and hence scope) for resisting enforcement of foreign arbitral awards and
- providing that the *Arbitration Act* and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, as implemented by it, 'covers the field' in relation to regulating international commercial arbitrations and their enforcement in Australia.

Prior to the 2010 amendments, the *Arbitration Act* allowed the parties to an arbitration agreement to resolve their dispute under an arbitral law other than the Model Law (for example, the parties could choose to resolve their dispute under state or territory legislation).[36] This ability to 'law shop' created 'significant legal difficulties and confusion concerning the interaction of the different laws'.[37] The 2010 amendments addressed this problem by 'removing the ability of the parties to an arbitration agreement to nominate an alternative arbitral law… and expressly provid[ing] that the Model Law covers the field with respect to international commercial arbitration'.[38]

Section 21 of the *Arbitration Act* provides that if the Model Law applies to an arbitration, the law of a state or territory does not apply to it. Section 21 came into effect on 6 July 2010.[39]

Item 2 of **Schedule 2** inserts **proposed subsection 21(2)**, which provides that subsection 21(1) applies to an arbitration arising from **arbitral proceedings that commence on or after the commencement of proposed subsection 21(2)**,[40] regardless of whether the arbitration agreement giving rise to the arbitration was made before, on or after 6 July 2010. This provision has retrospective application and will provide, as the Explanatory Memorandum notes, 'certainty to private parties with arbitration agreements completed before 6 July 2010'.[41]

Schedule 3—Family Law

In March 2013, the Attorney-General's Department published a report by Professor Richard Chisholm entitled *Information-sharing in family law and child protection: enhancing collaboration*.[42] Professor Chisholm was engaged by the Department to assist in developing a best practice framework to improve the exchange of information by federal family courts and the state and territory child protection systems.[43] In May 2013, the Department again requested Professor Chisholm to review in more detail the sharing of expert reports between the child protection system and the family law system. A taskforce consisting of representatives from various stakeholder groups contributed to a report released in March 2014.[44] Both reports recommended that steps be taken at both the Commonwealth and the state/territory level to encourage sharing of relevant information.

Currently, section 121 of the *FLA* provides that a person commits an offence if a person publishes or disseminates to the public any account of the proceedings or part of proceedings which may identify a party to the proceedings, a person who is related to or associated with a party to the proceedings or a person who is a witness in the proceedings. Publishing includes publishing in a newspaper or a periodical, on radio or TV or by other electronic means.[45] The offence is punishable on conviction by imprisonment not exceeding one year. Professor Chisholm's March 2014 report identified that 'differing views [exist] about whether section 121 operates to prohibit the provision of family court reports to agencies within the State and Territory child protection systems'.[46]

Subsection 121(9) deals with the circumstances where the general prohibition on publication does not apply. **Item 5** of Schedule 3 inserts **proposed paragraph 121(9)(aa)** which allows any pleading, transcript of evidence or other documents to be communicated to authorities of states and territories with responsibility for the welfare of children. This proposed amendment will implement Recommendation 1 of the Chisholm report of 2014 which stated:

---

36. Explanatory Memorandum, International Arbitration Amendment Bill 2010, p. 1, accessed 5 February 2015.
37. Ibid.
38. Ibid.
39. *International Arbitration Amendment Act 2010*, no. 97 of 2010, section 2, accessed 4 February 2015.
40. **Clause 2** of the Bill provides that Schedule 2 will commence the day after the Bill receives Royal Assent.
41. Explanatory Memorandum, op. cit., p. 20.
42. R Chisholm, Information-sharing in family law and child protection: enhancing collaboration, 2013, accessed 9 February 2015.
43. Ibid.
44. R Chisholm, The sharing of experts' reports between the child protection system and the family law system, report, Attorney-General's Department, 2014, accessed 9 February, 2015.
45. *Family Law Act 1975*, section 121.
46. Explanatory Memorandum, op. cit., p. 22.

> The Commonwealth should review the wording of s 121 [of the *FLA*] and consider the desirability of an amendment that would, to remove doubt, state explicitly that it does not apply to the provision of information to the child protection system.[47]

Item 6 is an application provision, which provides that paragraph 121(9)(aa) will apply to proceedings occurring before, on or after the commencement of Schedule 3.[48]

Schedule 4—Court security

Court Security Act 2013

The *Court Security Act 2013* (*CSA*) deals with security arrangements for the federal courts, the Family Court of Western Australia (FCWA) and the Administrative Appeals Tribunal (AAT).[49] Section 41 of the *CSA* allows a member of the Family Court of Australia, the FCWA or the Federal Circuit Court of Australia to make a 'court security order'. As set out in the Explanatory Memorandum, these orders are 'similar in nature to restraining orders under state and territory legislation… [and] restrict the behaviour of a specified person in or around court premises, or in relation to a member or official of a court'.[50]

Section 45 of the CSA provides that a member of a court who may make a court security order may also vary or revoke an order relating to that member's court. However, the current legislation does not allow a person to apply to a court to have a court security order varied or revoked. This is addressed by **item 8** of Schedule 4, which inserts **proposed section 45A** into the CSA.

Proposed subsection 45A(1) provides that an application for variation or revocation of a court security order may be made by the person specified in the order or the administrative head of the court to which the order relates. If the application is made by the person specified in the order, he or she must inform the administrative head of the court; if the application is made by the administrative head of the court, he or she must inform the person specified in the order. Both persons are entitled to be heard on the application (**proposed subsection 45A(2)**). **Item 9** provides that section 45A of the *CSA* will apply to orders made before, on or after commencement of Schedule 4.[51]

Dangerous Items

Section 16 of the *CSA* enables a security officer or an authorised court officer to request that a person hand dangerous items over for safe keeping while the person is on court premises. Section 27 provides that a security officer may seize a dangerous item from a person if they have not complied with a request under section 16 or the security officer reasonably believes it is necessary to seize the item. If a security officer seizes a dangerous item from a person, it must be given to a police officer as soon as reasonably practicable or the item is to be returned to the person if they request it when they leave the premises. When returning the item, the security officer has to be satisfied that the item is not likely be used in the commission of an offence on court premises; that the item is not a firearm or other weapon whose possession is prohibited by the law of a state or territory; and that there is no imminent threat to safety of any person.

At present there is no power in the Act to cover the disposal of dangerous items seized by security officers. As well, the Explanatory Memorandum notes that 'police officers are also generally reluctant to receive knives and other potential weapons where there is no offence provision which covers the confiscation'.[52] Without a disposal power, there is concern about the accumulation of these unclaimed dangerous items by the courts.[53]

Item 10 inserts **proposed section 48A**, which deals with the disposal of dangerous items handed over to, or seized by, court security officers. **Proposed subsection 48A(1**) provides that dangerous items given up on request or seized may be disposed of by the administrative head of a court after a six month period has elapsed if the item has not been returned to the person or given to the police. **Proposed subsection 48A(2)** provides that

47. R Chisholm, *The sharing of experts' reports between the child protection system and the family law system*, op. cit.
48. **Clause 2** of the Bill provides that Schedule 3 will commence the day after the Bill receives Royal Assent.
49. *Court Security Act 2013*, accessed 2 February 2015.
50. Explanatory Memorandum, op. cit., p. 26.
51. **Clause 2** of the Bill provides that Schedule 4 will commence the day after the Bill receives Royal Assent.
52. Explanatory Memorandum, op. cit., p. 27.
53. Ibid., p. 27.

if the disposal resulted in an acquisition of property within the meaning of paragraph 51(xxxi) of the *Constitution*, the Commonwealth is liable to pay a 'reasonable amount' of compensation.[54] A person may institute proceedings in a court of competent jurisdiction if there is no agreement on the amount of the compensation—**proposed subsection 48A(3)**.

Family Law Act 1975

Part X of the *FLA* deals with appeals in the family law jurisdiction. Under the existing provisions, there are no appeal rights for court security orders made by the Family Court and the Family Court of Western Australia (FCWA).[55] **Item 14** inserts **proposed section 94AB** which concerns appeals relating to court security orders. **Proposed subsection 94AB(1)** provides for the application of Part X under the *FLA* in relation to the making, variation or revocation of a court security order under Part 4 of the *CSA* by a member of the Family Court or the FCWA. **Proposed subsection 94AB(2)** provides that Part X applies as if the making, variation or revocation were a decree of the member's court exercising original jurisdiction under the *FLA*. A legislative note explains that this means that an appeal from the making, variation or revocation of an order may be made under subsection 94(1) of the *FLA*, if the member is a member of the Family Court or the FCWA, other than a Family Law Magistrate of Western Australia (WA). **Proposed subsection 94AB(3)** relates to a Family Law Magistrate of WA.[56] Part X applies in this situation as if the making, variation or revocation of a court security order were a decree of the Magistrates Court of WA constituted by the Family Law Magistrate of WA exercising original jurisdiction under the *FLA* and that such proceedings were proceedings in the Magistrates Court of WA. The accompanying legislative note explains that the result is that an appeal from the making, variation or revocation of an order will lie under subsection 94AAA(1A) of the *FLA*. As noted in the Explanatory Memorandum, the effect of proposed section 94AB is to:

> … provide that appeals in relation to the making, variation or revocation of a court security order made by the Family Court or the Family Court of Western Australia may be appealed in the same way as other orders made by those courts if they are exercising family law jurisdiction.[57]

Schedule 5—Evidence

In February 1995, the Minister for Justice Duncan Kerr referred to the passage of the Evidence Bill 1994 through Parliament as marking:

> …one of the most important reforms in the administration of justice in this country. It is a substantial step towards national uniformity in our laws and procedures. Technological change and the increased complexity of white collar crime have led to difficulties in the presentation of evidence and caused delays in trials and court management of cases. The Evidence Act will remove unnecessary restrictions on evidence put before courts. It will make it easier and simpler to prove many facts in court proceedings and render the laws of evidence much more certain.[58]

According to the Australian Law Reform Commission (ALRC) report in 2006, it was hoped that the *Evidence Act 1995* would lead to uniform legislation throughout Australia, but this had not occurred at that time.[59] New South Wales, Tasmania and Norfolk Island had passed mirror legislation and although they were substantially the same as the Commonwealth legislation, they were not identical.[60]

The importance of the rules of evidence is stated by Odgers:

---

54. Section 51(xxxi) provides the Parliament with power to legislate with respect to 'the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws' *Australian Constitution*, accessed 5 February 2015.
55. The Family Court of Western Australia (FCWA) was established in 1976 as a state court exercising both state and federal jurisdiction. The Court comprises judges and registrars. It deals with disputes arising out of the breakdown of marriages and de facto relationships. Specialist Family Law Magistrates work alongside the judges… The Court is principally funded by the Federal Government, with support from the State Government to assist in dealing with the de facto financial jurisdiction: source: Family Court of Western Australia, *Annual Review 2013-14*, 2014, p. 6, accessed 9 February 2015.
56. The Family Court of Western Australia is vested with state and federal jurisdiction. It comprises the judges, registrars and specialist Family Law Magistrates. See Family Court of Western Australia, *Annual review 2013–14*, ibid., p. 6,
57. Explanatory Memorandum, Civil Law and Justice Legislation Amendment Bill 2014, op. cit., p. 28.
58. D Kerr (Minister for Justice), *Historic reform for Australian legal procedures*, media release, 3 February 1995, accessed 4 February 2015.
59. ALRC, Uniform Evidence law, *Report No. 102*, Chapter 2, 'The movement towards a uniform evidence law', 2006.
60. Ibid. *Evidence Act 1995* (NSW), *Evidence Act 2001* (Tas) and *Evidence Act 2004* (NI).

> The rules of evidence applied in Australian courts serve a number of functions—they regulate the material a court may consider in determining factual issues; how that material is to be presented in the court; and how the court actually goes about the task of deciding the factual issues on the basis of the evidence. They are a central part of the system of procedural justice.[61]

A Model Uniform Evidence Bill was approved by the Standing Committee of Attorneys-General (SCAG) in July 2007 with a number of amendments largely reflecting the changes proposed by the ALRC in its 2006 report.[62] After continued work in a number of areas, SCAG in 2010 agreed to include in the Uniform Evidence Bill the mutual recognition of self-incrimination certificates issued under section 128 or section 128A.[63]

After the endorsement of the Model Evidence Bill, the following states and territories then followed up with further legislation:

- *Evidence Amendment Act 2007* (NSW)
- *Evidence Amendment Act 2008* (Cth)—substantially identical to the NSW amending legislation
- *Evidence Act 2008* (Vic)
- *Evidence Act 2011* (ACT) and
- *Evidence (National Uniform legislation) Act 2011* (NT).[64]

Schedule 5 of the Bill amends the *Commonwealth Evidence Act*. Many of the amendments mirror minor amendments to the Model Uniform Evidence Bill agreed by SCAG in May 2010.[65]

Self-incrimination certificates

Part 1—Privilege in respect of self-incrimination

Part 1 of **Schedule 5** of the Bill contains amendments to sections 128 and 128A of the *Evidence Act* which deal with self-incrimination certificates.[66] These sections are located in Part 3.10 of Chapter 3 of the Act, which deals with a number of privileges 'which allow a party to proceedings or a witness to refuse to disclose certain confidential (and privileged) communications and documents'.[67] The privileges include as Odgers notes:

> The privileges relate to client legal communications (Div 1), professional confidential relationships (Div 1A), sexual assault communications (Div 1B), religious confessions (s. 127), self-incrimination (s.128), reasons for judicial and jury decisions (s. 129), matters of state (s. 130), and settlement negotiations (s.131).Those provisions prohibit the adducing of evidence in a proceeding.[68]

Items 1 to 3 amend **sections 128 and 128A**, which deal with the privilege against self-incrimination. The privilege against self-incrimination found in section 128 allows a witness to object to giving evidence if it would go to establishing that they have committed an offence or are liable to a civil penalty. The court must decide whether there are reasonable grounds for the objection. If the court decides there are reasonable grounds for the objection it must tell the witness they can refrain from giving evidence. The court is, however, able to insist that the witness give the evidence if the 'interests of justice' require it (although only if the evidence doesn't go to show guilt of an offence or liability for a civil penalty in a foreign country). The court can also offer the witness a

---

61. S Odgers, *Uniform Evidence Law*, tenth edn., Law Book 2012, p. 1.
62. Ibid., p. 4; SCAG is now known as the Law Crime and Community Safety Council (LCCSC).
    The LCCSC website notes the following: on 13 December 2013 the Council of Australian Governments (COAG) agreed to streamline its council system. It replaced 22 councils with eight, one of which is the Law, Crime and Community Safety Council (LCCSC). The LCCSC effectively replaces the Standing Council on Law and Justice (SCLJ) and the Standing Council on Police and Emergency Management (SCPEM).
63. Standing Committee of Attorneys-General (SCAG), 'Uniform Evidence Laws', *Communique*, May 2010, accessed 18 December 2014.
64. Odgers, op. cit., p. 4.
65. Explanatory Memorandum, op. cit., p. 30.
66. *Evidence Act 1995*, accessed 2 February 2015.
67. Odgers, op.cit., p.631.
68. Odgers, op. cit., p. 631; **Adducing evidence** means leading information and statements in a court to prove or disprove a fact in issue. Evidence is adduced in three forms: oral testimony of a witness, documentary evidence and real evidence. Only evidence to a proceeding and complying with the other rules of evidence is admissible in a proceeding.—Source: *LexisNexis concise Australian legal Dictionary*, fourth edn., LexisNexis Butterworths, 2011.

choice about whether to give the evidence and explain that it can provide a certificate to ensure that the certified evidence cannot be used against the witness in further proceedings (referred to in the Explanatory Memorandum as a self-incrimination certificate).[69]

Items 1 and 2 make only minor amendments to section 128, adding clarifying phrases to **subsection 128(3)** so that, subject to subsection 128(4), the court is not to require a witness to give particular evidence if the court determines that that particular evidence is self-incriminating under subsections 128(1) and (2).

Section 128A 'extends the application of the privilege against self-incrimination to some ancillary processes related to civil proceedings'.[70] As the Explanatory Memorandum notes, section 128A provides a certification process similar to that in section 128 for persons with objections on the grounds of self-incrimination who are subject to either a search order (Anton Pillar) or a freezing order (Mareva) in civil proceedings other than proceeds of crime legislation.[71] The Explanatory Memorandum further notes that 'evidence of information disclosed by a person in respect of which a self-incrimination certificate has been given, cannot be used against the person'.[72]

Item 3 inserts **proposed subsections 128A(11) to (13)**. **Proposed subsection 128A(11)** provides that if a person is given a self-incrimination certificate under a prescribed state or territory provision in respect of information that may tend to prove that the relevant person has committed an offence against, or is liable to a civil penalty under, an Australian law, it will have the same effect as if it had been issued under section 128A of the *Commonwealth Evidence Act*. For the purposes of subsection 128A(11), state and territory provisions will be prescribed in the Regulations—**proposed subsection 128A(12)**.

Proposed subsection 128A(13) provides that subsection 128A(11) applies to:

- a proceeding to which the *Commonwealth Evidence Act* applies where indicated by section 4,[73] and
- a proceeding for an offence against a law of the Commonwealth or for the recovery of a civil penalty under a Commonwealth law, other than a proceeding to which the Act applies due to section 4.

As the Explanatory Memorandum notes, the amendments in **item 3** mirror subsections 128(12)-(14) of the *Evidence Act* to ensure that self-incrimination certificates issued to persons subject to disclosure orders (that is, required to provide evidence before trial) under a prescribed state or territory provision can be relied on as if they were issued under the *Commonwealth Evidence Act*. It further states:

> These amendments were endorsed by the then Standing Committee of Attorneys-General in May 2010 to ensure that self-incrimination certificates are recognised in all jurisdictions irrespective of where they are issued. [74]

Part 2—Application to the Australian Capital Territory

Subsection 4(6) of the *Commonwealth Evidence Act* provides that that Act applies to proceedings in Australian Capital Territory (ACT) courts until a day fixed by proclamation. After the commencement of the *Evidence Act 2011* (ACT), on 9 February 2012 the Governor-General proclaimed that, from 1 March 2012, the *Commonwealth Evidence Act* ceased to apply to proceedings in an ACT court, except so far as the provisions apply to proceedings in all Australian courts.[75] As a result of the proclamation, subsection 4(6) of the *Commonwealth Evidence Act* is obsolete and is repealed by **item 11** of Schedule 5 to ensure that it does not confuse readers. This is in accordance with clearer Commonwealth laws principles.[76]

The proclamation under subsection 4(6) is also mentioned in subsection 4(5), which provides that the Act (other than specified sections) does not apply to appeals from state and territory courts. Currently paragraphs 4(5)(c)

---

69. See MA Neilsen, M Biddington and K Magarey, *Evidence Amendment Bill 2008*, Bills digest, 140, 2007–08, Parliamentary Library, Canberra, 2008, accessed 4 February 2015.
70. Odgers, op. cit., p. 631.
71. Explanatory Memorandum, Civil Law and Justice Legislation Amendment Bill 2014, op. cit., p. 31.
72. Ibid.
73. Section 4 of the *Evidence Act 1995* (Cth) deals with the courts and proceedings to which the *Commonwealth Evidence Act* applies.
74. Explanatory Memorandum, op. cit., p. 31.
75. Evidence Act 1995 - Proclamation, accessed 6 February 2015.
76. Explanatory Memorandum, op. cit., pp. 32–33.

and (d) provide that the *Commonwealth Evidence Act* applies to appeals from ACT courts, until the day proclaimed under subsection 4(6). Accordingly, now that the proclaimed day has passed, paragraphs 4(6)(c) and (d) are no longer needed and are repealed by **item 9**. To clarify the application of the *Commonwealth Evidence Act* to appeals from ACT courts, an amendment is made to paragraph 4(5)(b) by **item 8**. The proposed amendments will clarify that the ACT is in the same position as the other states and territories in relation to the application of the *Commonwealth Evidence Act* to appeals.

The remaining items in **Part 2** of **Schedule 5** of the Bill remove references to the ACT and ACT courts from the *Commonwealth Evidence Act*.

Part 3—Differences from Evidence Acts of other jurisdictions

At the beginning of Chapter 1 of the *Commonwealth Evidence Act* there is an 'Introductory note', which provides an outline of the Act and an explanation of the relationship between the *Commonwealth Evidence Act* and the *Evidence Act 1995* (NSW) (the *NSW Act*). It explains that differences between the legislation are identified in legislative annotations, and that to ensure that corresponding provisions are located in the same place in each Act, 'if one Act contains a provision that is not included in the other Act, the numbering of the other Act has a gap in the numbering in order to maintain consistent numbering for the other provisions'.

Item 21 amends the Introductory note by omitting the information after the heading *Related Legislation* (with its focus on the NSW Act) and replacing it with a list of state and territory Acts that are in most respects uniform with the *Commonwealth Evidence Act*.

Items 22-24, 26-29, 31-34, 36-41, 43, 45, 47-49, 51-52 and **55** of **Schedule 5** repeal notes to provisions identifying differences between the *Commonwealth Evidence Act* and the *NSW Act*.

Items 25, 30, 35, 42, 44, 46, 50 and **54** of **Schedule 5** re-number notes as a consequence of the repeal of other notes.

Items 53 and 56 of **Schedule 5** repeal sections 194 and 196 of the *Commonwealth Evidence Act*. These sections correspond to provisions in the *NSW Act* but they currently do not contain any text.

Items 57-59 of **Schedule 5** repeal notes in the Dictionary to the *Commonwealth Evidence Act*.

Part 4—Other amendments

Part 4 of **Schedule 5** makes a number of minor amendments to the *Commonwealth Evidence Act*. For example **item 62** repeals and replaces the definition of 'unavailability of persons' in **clause 4** of the Dictionary.

The existing definition provides that a person is taken not to be available to give evidence if:

- they are dead
- they are not competent to give evidence
- it would be unlawful for them to give evidence
- a provision in the *Evidence Act* prohibits the evidence from being given or
- the person cannot be found or compelled to give evidence.

Item 62 provides an additional ground for unavailability to include persons who are mentally or physically unable to give evidence and where it is not reasonably practicable to overcome that inability.

The Explanatory Memorandum notes that this amendment implements a 2005 recommendation of the Australian, NSW and Victorian Law Reform Commissions to ensure that relevant evidence was not excluded under the hearsay rule due to a witness being unfit to give evidence.[77] Consistent with the aim of the recommendation, the Explanatory Memorandum states that it is not intended that this amendment should lower the standard of unavailability generally and that 'a real mental and physical inability to testify must be shown'.[78]

77. Explanatory Memorandum, op. cit., p. 41.
78. Ibid., p. 41.

Schedule 6—Protection of movable cultural heritage

The purpose of the *Protection of Movable Cultural Heritage Act 1986* (*PMCH Act*)[79] can be found in the Explanatory Memorandum to the Bill:

> The purpose of the Bill is to provide for the protection of Australia's heritage of important movable cultural objects by introducing export controls and to extend protection to the cultural heritage of other countries through import controls.
>
> Implementation of the Act will enable Australia to become a party to the 1970 UNESCO Convention on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.
>
> The legislation will replace existing provisions of the *Customs Act 1901* concerning the import and export of certain cultural items by a more comprehensive and more readily accessible scheme.[80]

Schedule 6 amends section 17 the *PMCH Act*, which is concerned with the constitution of the National Cultural Heritage Committee, the qualifications of members required, particular conditions relating to members, how members are appointed and their conditions of appointment, and what happens when vacancies on the Committee arise and their effect on the exercise of power or the performance of a function. The Committee is appointed by the Minister for the Arts (subsection 17(2)) and advises the Minister on the operation of the *PMCH Act*, the National Cultural Heritage Control List, and the National Cultural Heritage Account (section 16).[81]

Under subsection 17(1), the Committee is required to consist of:

- four people, each representing a different collecting institution (public art galleries, museums, libraries or archives)
- a member of the Australian Vice-Chancellors' Committee (AVCC)
- a nominee of the Minister administering the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (the *Aboriginal Land Grant Act*) and
- four people having experience relevant to the cultural heritage of Australia.

On 28 October 2014, the Minister for the Arts appointed six people as members of the Committee.[82] There are currently ten members of the Committee, as required by subsection 17(1).[83]

Subsection 17(5) currently provides that the exercise of power or the performance of a function by the Committee is not invalidated:

- if the Committee does not have a member representing the AVCC or nominated by the Minister administering the *Aboriginal Land Grant Act*, provided that the vacancy does not last for more than three months or
- if the Committee does not have four people representing collecting institutions and four people with cultural heritage experience, provided that the situation does not continue for more than three months.

Item 1 of **Schedule 6** repeals subsection 17(5). The Explanatory Memorandum notes that the repeal will allow 'the continued functioning of the National Cultural Heritage Committee when membership falls below the maximum number'.[84] However, currently subsection 17(1) of the Act *requires* the Committee to consist of ten individuals meeting the prerequisites set out in that provision–it is not expressed in a way that would permit the Committee to be comprised differently, or allow the Committee to consist of fewer than ten members.

---

79. *Protection of Movable Cultural Heritage Act 1986*, accessed 2 February 2015.
80. Explanatory Memorandum, Protection of Movable Cultural Heritage Act 1986, p. 1.
81. Attorney-General's Department (AGD) Ministry for the Arts, 'National Cultural Heritage Committee', AGD Ministry for the Arts website, accessed 6 February 2015.
82. G Brandis (Attorney-General), *Appointments to the National Cultural Heritage Committee*, media release, 28 October 2014, accessed 4 February 2015.
83. The list of members of the Committee can be found on the 'National Cultural Heritage Committee' webpage, op. cit.
84. Explanatory Memorandum, op. cit., p. 42.

Schedule 7—National Library material

The legal deposit scheme

Currently the *Copyright Act 1968* requires publishers of certain literary, dramatic, musical or artistic works to provide copies of their works to the National Library. This is known as the **legal deposit scheme**.[85] The Explanatory Memorandum notes that:

> The purpose of the legal deposit scheme is to preserve Australia's published cultural heritage, consistent with the National Library's mandate to build a comprehensive collection of library material relating to Australia and the Australian people.[86]

As the National Library of Australia's website notes:

> Legal deposit is a requirement under the *Copyright Act 1968* for publishers and self-publishing authors to deposit a copy of any print work published in Australia with the National Library and when applicable, the deposit libraries in [the] states. Legal deposit ensures that Australian publications are preserved for use now and in the future.[87]

The *Copyright Act 1968* was the first complete revision of the *Copyright Act 1912* (the *1912 Act*). Legal deposit provisions existed in the *1912 Act* which provided for the following in section 40:

> The publisher of every book which is first published in the Commonwealth after the commencement of this section, and in which copyright subsists under this Act, shall within one month after the publication deliver, at his own expense, a copy of the book to the Librarian of the Parliament who shall give a written receipt.[88]

The section operated so that the Library of the Parliament received deposit copies of the first published books. At the time, the Commonwealth Parliamentary Library served both the Federal Parliament and the nation.[89] This changed when the National Library of Australia was established by the *National Library Act 1960*.[90]

Currently the legal deposit scheme only applies to materials published in a print format. The requirements under the *Copyright Act* apply to the following materials:

> … a book, periodical, newspaper, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table, being a literary, dramatic, musical or artistic work or an edition of any material unless that edition contains additions or alterations in the letter-press or in the illustrations.[91]

In 2012, the Attorney-General's Department issued a consultation paper entitled *Extending legal deposit* that proposed extending the current scheme to include electronic materials.[92] This followed an earlier 2007 discussion paper which canvassed issues which might arise as a result of extending the legal deposit scheme.[93] The discussion paper noted:

> Legal deposit may not effectively serve its purpose of building a broad national collection of culturally significant material because materials such as films, sound recordings and web material do not come within the scheme.[94]

However, the discussion paper also recognised that the extension of the legal deposit scheme could impose costs on the National Library and publishers. As a result, the discussion paper stated that there 'is merit in considering alternatives to a comprehensive extension of the legal deposit scheme. Those alternatives would involve selective deposit of the extended range of material'.[95]

---

85. *Copyright Act 1968* (Cth), section 201.
86. Explanatory Memorandum, op. cit., p. 43.
87. National Library of Australia, 'Legal deposit', website, accessed 15 December 2014.
88. Section 40, *Copyright Act 1912*, accessed 6 February 2015.
89. National Library of Australia, 'History of the Library', website, accessed 15 December 2014.
90. Ibid.
91. Subsection 201(5), *Copyright Act 1968*.
92. Attorney-General's Department, *Extending legal deposit*, Consultation paper, 2012, accessed 17 December 2014.
93. Attorney-General's Department, *Extension of legal deposit*, Discussion paper, 2007, accessed 17 December 2014.
94. Ibid., p. 4.
95. Ibid., p. 4.

The amendments contained in Schedule 7 of the Bill will extend the legal deposit scheme to works published in an electronic format. However, in contrast to print and offline electronic material, electronic online works are only required under legal deposit if the National Library makes a request for them.

These seek to ensure that the legal deposit scheme works in a way that is consistent with advances in publishing of electronic materials. The Minister notes in his second reading speech:

> At present, publishers of certain literary, dramatic, musical or artistic works must deliver copies of their works in print format. The amendments will provide for publishers to submit their works electronically, which will reduce the time and cost burden on the industry.[96]

Defining national library material

As set out above, section 201 of the *Copyright Act* lists the hard copy materials which need to be delivered to the National Library as part of the legal deposit scheme. **Item 6** of **Schedule 7** repeals section 201. The legal deposit scheme will instead be dealt with under **proposed Division 3** of Part X of the *Copyright Act*, inserted by **item 5** of Schedule 7 and consisting of proposed **sections 195CA** to **195CJ**.

Proposed section 195CE sets out the scope of materials (termed 'National Library material') covered by the legal deposit scheme. A literary, dramatic, musical or artistic work, or an edition of such a work (whether in an electronic form or otherwise) is National Library material if it is:

- a website, web page, web file, book, periodical, newspaper, pamphlet, sheet of music, map, plan, chart or table or
- prescribed by the National Library Minister for the purposes of this subparagraph and meets certain other criteria set out in **proposed paragraphs 195CE(b)-(e)**.

In summary, **proposed section 195CE** expands the materials included in the legal deposit scheme to include electronic works.

Proposed subsection 195CB(1) creates an offence where a person publishes National Library material in Australia, either in print or in electronic format that is not available online, but fails to deliver a copy to the National Library.

Proposed subsection 195CB(2) creates an offence where a person:

- publishes National Library material
- the material is available online[97]
- the National Library requests the person to deliver a copy, and
- the person fails to deliver a copy to the National Library.

The difference between subsections 195CB (1) and (2) is that in respect of subsection (2), the offence is only committed if the material is not provided *after a request* has been made by the National Library. No request is required under subsection 195CB(1) – relevant material must automatically be delivered. The penalty for each offence is ten penalty units, which equates to $1,700.[98] Under current section 201, the failure of a publisher of any library material to deliver that material within one month of publication is subject to a penalty of $100. **Proposed subsection 195CB(3)** provides that subsection (1) and (2) are offences of strict liability.[99] The Explanatory Memorandum notes:

---

96. G Brandis, 'Second reading speech: Civil Law and Justice Legislation Amendment Bill 2014', Senate, *Debates*, 29 October 2014, p. 8160, accessed 4 February 2015.
97. Defined in **proposed section 195CF** as being on the Internet or 'in an electronic form prescribed by the National Library Minister for the purposes of this paragraph'.
98. A penalty unit is defined in section 4AA of the *Crimes Act 1914* as $170.
99. Under section 6.1 of the *Criminal Code Act 1995* if an offence is one of strict liability, no fault elements need to be proved for any of the physical elements of the offence and the defence of mistake of fact is available under section 9.2 of the Code.

> Both offences will be offences of strict liability. This is appropriate since the offence will impose a low penalty, is intended to operate in conjunction with an infringement notice scheme to be set out in the Copyright Regulations 1969 and cases of infringement can easily be identified.[100]

Proposed section 195CG allows the Minister to prescribe an infringement notice scheme, whereby a person alleged to have committed an offence against subsection 195CB(1) or (2) in failing to deliver National Library material would be able to pay a penalty as an alternative to prosecution. The penalty imposed under the infringement notice is to be one fifth of the maximum fine a court could impose for that offence, which would currently equal $340.

Proposed section 195CC provides that the Director-General of the National Library may request a person to deliver material the person publishes which is available online and which the Director-General considers is material that should be included in the national collection. **Proposed section 195CD** provides that a person contravenes the section unless a copy of the material is provided to the Library before the end of the delivery period, in a format that complies with specified requirements. The delivery period will be at least one month (**proposed subsection 195CD(2)**).

100. Explanatory Memorandum, op. cit., p. 45.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.