

2010

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMINAL CODE AMENDMENT BILL 2010

EXPLANATORY STATEMENT

Circulated by authority of
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Criminal Code Amendment Bill 2010

Outline

The progressive reform and codification of the criminal law of the ACT commenced in September 2001 with the passage of the *Criminal Code 2001* (which has since been renamed the *Criminal Code 2002*). The reforms are primarily based on the Model Criminal Code, developed by the national Model Criminal Code Officers Committee (MCCOC) (which has since been renamed the Model Criminal Law Officers Committee – MCLOC), established by the Standing Committee of Attorneys-General.

Since September 2001 the ACT's *Criminal Code 2002* (the Code) has progressively grown in volume and to date it consists of six chapters, which deal with a wide range of matters:

- Chapters 1 and 2 deal with preliminary matters and, most importantly, with the general principles of criminal responsibility;
- Chapter 3 contains offences relating to theft, fraud, bribery and related matters;
- Chapter 4 contains property offences and computer crime;
- Chapter 6 contains the ACT's serious drug offences; and
- Chapter 7 contains offences against the administration of justice.

For an offence to operate effectively under the Code, the offence must be structured in a way that conforms to the general principles of criminal responsibility set out in Chapter 2.

Chapter 2 of the Code also sets out defences that are available for offences in the Territory, unless indicated otherwise. Current defences in Chapter 2 include self-defence, duress, emergency and lawful authority.

The Government has become aware that there is some concern among those employed and/or engaging in the criminal justice system that a number of offences on the ACT statute book do not provide a defence to the possession of an otherwise prohibited item if the possession is as a result of intelligence gathering, investigation, prosecution or consideration of a charge.

A clear illustration of this can be seen in relation to the offence of possessing child pornography under Section 65 of the *Crimes Act 1900* (the Crimes Act). For this offence, a person commits an offence if they intentionally possess pornography, and that pornography is child pornography.

The possession arm of the offence is one of absolute liability, and the only defence under section 65 of the Crimes Act is if the defendant can prove that they “had no reasonable grounds for suspecting that the pornography concerned was child pornography”. This defence cannot be used by anyone lawfully involved in the intelligence gathering, investigation, prosecution, or

determination of the offence in a court of law, as in all cases the person would suspect or know that the pornography is child pornography.

This creates an anomaly where individuals engaged or employed in the criminal justice system may be reluctant to receive and/or review evidence from the police, or have the material tendered as evidence for fear that they themselves are committing an offence under section 65 of the Crimes Act.

The *Criminal Code Amendment Bill 2010* intends to address this by adding a new defence of lawful possession into Chapter 2 of the Code by inserting new section 43A.

By including this defence in Chapter 2 of the Code the Government is providing certainty to those people employed in the criminal justice system that they will not be held criminally responsible for the possession of a material, item or thing, of which the possession is otherwise prohibited.

This means that people who are employed to undertake law enforcement purposes of intelligence gathering, investigating allegations and offences, the prosecution and deliberation of charges (such as police officers, public prosecuting authorities, court staff and the judiciary) will have the necessary assurances and confidence to perform their lawful duties without reliance on prosecutorial and charging discretion.

The Government acknowledges that technically the people who will rely on this defence are committing an offence, but this Bill will provide a defence to prosecution for those people who can satisfy the court that their possession of a material or item is:

- as a result of their work or employment within the parameters of the criminal justice system;
- for a law enforcement purpose; and
- reasonable in the circumstances for the law enforcement purpose in which the person was engaged in.

It is the Government's intention that this defence be available to police officers, public prosecuting authorities, defence advocates, technical experts, court staff including associates, and members of the judiciary.

It is not the intention of the Government that this defence be available to neighbourhood vigilante groups, do-gooders, or self styled private investigators.

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Detail

Part 1 — Preliminary

Clause 1— Name of Act

This is a technical clause that names the short title of the Act. The name of the Act is the *Criminal Code Amendment Act 2010*.

Clause 2— Commencement

This clause states that the Act will commence on the day after notification.

Clause 3— Legislation amended

This is a technical clause stating that the primary Act being amended is the *Criminal Code 2002*.

Clause 4— New Division 2.3.6

This clause inserts new section 43A into Chapter 2 of the *Criminal Code 2002* (the Code) by inserting a new defence of lawful possession.

Chapter 2 of the Code sets out the general principles of criminal responsibility, as well as the defences that apply to offences in the Territory, unless indicated otherwise.

The *Criminal Code Amendment Bill 2010* (the Bill) inserts new section 43A into Chapter 2 of the Code to provide a defence of lawful possession.

This new defence provides that a person will not be criminally responsible for an offence of possessing a particular material or item that is an otherwise prohibited item (such as a firearm, prohibited substance, or child pornography images) if they can show that the possession is related to that person's employment or work in the criminal justice system.

The defence contains three limbs which the court must be satisfied of before a person can successfully negate criminal responsibility.

The **first limb** is that a person must show that their possession of a material or item is as a result of their work or employment within the parameters of the criminal justice system. Section 43A (1)(a) articulates the nexus between a person's possession of a material or item and the work that the person themselves is engaged in that has resulted in their possession of the material or item. To satisfy this limb, a person must be:

- employed by, or appointed as a member of, a law enforcement or justice agency; or
- required to provide technical, professional or expert services to a law enforcement or justice agency; or

- a legal practitioner, or a person employed by or required to provide technical, professional or expert services to a legal practitioner.

The **second limb** is that a person can show that the conduct which resulted in their possession of the material or item was for a law enforcement purpose. Section 43A (2) is a definitional clause for what a law enforcement purpose constitutes, and states that it is conduct that is necessary for, or of assistance in:

- enforcing a law of the Commonwealth, a State or Territory; or
- monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or Territory; or
- the administration of justice.

Section 43A (2) also includes the following examples of what is considered conduct for law enforcement purposes:

- police investigations;
- giving legal advice or providing legal representation;
- carrying out analyses or tests for forensic reasons;
- judicial service.

By including these examples, this is a clear statement from the Government that the defence is available to those who can show their involvement in the criminal justice system for a law enforcement purpose.

In this limb, law enforcement purposes is used as a term to distinguish what an ordinary person perceives that they can do to comply with a law of the Territory, and what is expected of a person involved in law enforcement.

The **third and final limb** is that the person must be able to show that their possession of the material or item is reasonable in the circumstances for the law enforcement purpose in which the person was engaged in (section 43A (1)(b)(ii)).

This limb introduces an objective test, and even if a person can satisfy the first two limbs, if the Court is of the view that the person's possession of the item is not reasonable in the circumstances, then the person cannot rely on the defence of lawful possession for criminal responsibility under new section 43A.

The operation of this defence and the three limbs of the defence can be seen through the following examples.

Example 1:

Anita is a public servant and she suspects that David, her colleague, is using drugs. Anita searches David's work cabinet and she finds a package that she believes to be prohibited drugs. She takes the package with the intention of reporting the package to the police. However on the way to the police station

she runs into a friend and decides to catch up with her over a coffee, and forgets that the package is in her handbag. After a week, Anita has still not taken the package to the police, or reported the matter to police. She attends an outdoor music concert where she draws the attention of a police dog. She is subsequently charged with possession of a trafficable quantity of a prohibited drug.

In this instance, Anita cannot rely on the defence in new section 43A as she cannot satisfy all three limbs of the defence.

Question 1: Can Anita show that the prohibited drug came into her possession in the course of her employment?

No – Anita cannot show that the prohibited drug came into her possession in the course of her employment as her employment does not fit within section 43A (1)(a)(i). Also, Anita did not come into possession of the prohibited drug in the course of her work duties as she took them from David’s work drawer.

Question 2: Can Anita show that her possession of the prohibited drug is for a law enforcement purpose in accordance with section 43A (2)?

No – Anita cannot show that her possession of the prohibited drug is for a law enforcement purpose in accordance with section 43A (2).

Question 3: Is Anita’s possession of the prohibited drugs reasonable in the circumstances?

No – the possession of the prohibited drug in Anita’s handbag a week after Anita took them from David’s work cabinet is not reasonable in the circumstances.

Anita cannot rely on this defence in the Criminal Code.

Example 2:

Nikki works as a defence barrister, and has been employed by Rodger to defend a charge of possession of child pornography under section 65 of the *Crimes Act 1900* after a police raid in which his computer was seized. Stewart, the investigating police officer, provides Nikki with a copy of the images found on Rodger’s computer and Nikki stores these images with Rodger’s file in her chambers.

In this instance, Nikki can rely on the defence in new section 43A as she can satisfy all three limbs of the defence:

Question 1: Can Nikki show that the images came into her possession as part of her employment?

Yes – Nikki can show that the images came into her possession as part of her employment as Rodger has employed her to defend his charges in accordance with section 43A (1)(a)(iii).

Question 2: Can Nikki show that her possession of the images is for a law enforcement purpose in accordance with section 43A (2)?

Yes – Nikki is able to demonstrate her possession of the images is necessary for the administration of justice, as without the images she is unable to provide Rodger with legal counsel in accordance with section 43A (2) (c).

Question 3: Is Nikki’s possession of the images reasonable in the circumstances?

Yes – the court could be expected to be of the view that it is reasonable in all the circumstances of this scenario that Nikki is provided with a copy of the images that Rodger is accused of possessing in order to provide Rodger with legal representation – although this may depend on the individual circumstances. If Nikki retained the images for several years after completion of Rodger’s matter that would not likely be reasonable.

Nikki can rely on this defence in the Criminal Code.

Example 3:

Nicole is a primary school teacher and lives next door to Hugo. After being invited over to his house for coffee one afternoon, she becomes concerned after seeing a very graphic image as a screen saver on his home computer. One day Nicole is home sick and notices that Hugo has received a large package while he was at work. She removes the package from Hugo’s mailbox and opens the package to discover that the package contains a series of child pornography images. Nicole takes the package containing the child pornography images with a view to destroying them at a later time.

In this instance, Nicole cannot rely on the defence in new section 43A as she cannot satisfy all three limbs of the defence:

Question 1: Can Nicole show that the images came into her possession as part of her employment?

No – Nicole cannot show that the images came into her possession as a result of her employment in accordance with section 43A(1)(a). The images came into her possession as a result of her suspicions on Hugo’s character and are her own personal opinions and are not related to her job as a primary school teacher.

Question 2: Can Nicole show that her possession of the images is for a law enforcement purpose in accordance with section 43A (2)?

No – Nicole is not able to demonstrate that her possession of the images is necessary for either monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or Territory; or the administration of justice; as her employment of a primary school teacher does not constitute conduct for ‘law enforcement purpose’ in accordance with section 43A(2).

Question 3: Is Nicole’s possession of the images reasonable in the circumstances?

No – in this instance it is not reasonable for Nicole to possess the child pornography images as she should have reported her concerns to the police.

Nicole cannot rely on this defence in the Criminal Code.

Example 4:

Emma is an analyst at a government laboratory that provides services to ACT Policing. Part of her job description is to test and analyse substances that have been seized by ACT Policing during the course of their investigations, and to provide a report to ACT Policing on the presence and concentration of prohibited drugs. ACT Policing provides Emma with a sample of a substance that ACT Police have seized from an alleged drug manufacturer. Emma conducts an analysis of the substance and determines that it is prohibited drugs. After she has written up her report, she returns the sample to ACT Policing.

In this instance, Emma can rely on the defence in new section 43A as she can satisfy all three limbs of the defence.

Question 1: Can Emma show that the substance came into her possession as part of her employment?

Yes – Emma show that the prohibited drug came into her possession as part of her employment with the government laboratory in accordance with section 43A (1)(a)(ii).

Question 2: Can Emma show that her possession of the substance is for a law enforcement purpose in accordance with section 43A (2)?

Yes – Emma is able to demonstrate that her possession of a prohibited drug is necessary for the monitoring compliance with, or investigating a contravention of, a law of the Commonwealth, a State or Territory in accordance with section 43A (2)(b).

Question 3: Is Emma’s possession of the substance reasonable in the circumstances?

Yes – it is reasonable in the circumstances that Emma possesses a sample of the substance in order to analyse the presence and concentration of prohibited drugs. However, if Emma took a sample of the prohibited drug home, then that would not likely be reasonable.

Emma can rely on this defence in the Criminal Code.

By including this defence in chapter 2 of the Code the Government is providing certainty to those people employed in the criminal justice system that they will not be held criminally responsible for the possession of a material, item or thing, of which the possession is otherwise prohibited. This means that people who are employed to undertake law enforcement purposes of intelligence gathering, investigating allegations and offences, the prosecution and deliberation of charges (such as police officers, public prosecuting authorities, court staff and the judiciary) will have the necessary assurances and confidence to perform their lawful duties without reliance on prosecutorial and charging discretion.