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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES LEGISLATION AMENDMENT BILL 2010

EXPLANATORY STATEMENT

Circulated by authority of
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Crimes Legislation Amendment Bill 2010

Outline

The Crimes Legislation Amendment Bill 2010 ('the Bill') enacts a number of amendments to the *Crimes Act 1900*, the *Crimes (Sentencing) Act 2005*, the *Criminal Code 2002* and the *Prostitution Act 1992*.

The Bill:

- Includes a bestiality offence in the *Crimes Act 1900*;
- Inserts an alternative verdict provision for the drug trafficking offences at section 603 of the *Criminal Code 2002*;
- Amends section 52 (2) (a) of the *Crimes (Sentencing) Act 2005* to vary the circumstances when a victim impact statement can be tendered in court;
- Amends the definition of 'object' as it relates to sexual offences at section 50 (2) of the *Crimes Act 1900*;
- Amends the mental element for the offence of an act of indecency without consent at section 60 of the *Crimes Act 1900*;
- Amends the definition of stolen property at section 324 of the *Criminal Code 2002*; and
- Includes the new bestiality offence as a disqualifying offence in the *Prostitution Act 1992*.

The amendments in the Bill were raised by key criminal justice stakeholders as requiring further consideration.

The amendments are largely minor and technical and are required to ensure that criminal legislation gives effect to the intention of the Assembly at the time of enactment.

Human Rights Considerations

Section 28 of the ACT's *Human Rights Act 2004* ('HR Act') states that human rights may be subject to reasonable limits set by the laws of the ACT, where the laws can be demonstrably justified in a free and democratic society.

The Crimes Legislation Amendment Bill 2010 amendments do not substantially interfere with the human rights located in the HR Act. The amendment which gives rise to consideration of human rights issues is the re-introduction of the bestiality offence at section 63A of the *Crimes Act 1900*.

It is noted that the preamble to the HR Act, at 6, states that few rights are absolute. Whilst the re-introduction of the bestiality offence may raise some concerns over the interference with the section 12 right to privacy, the limitation on the right to privacy is proportionate to achieving the policy objective of preventing animals from being subjected to abuse in the form of non-consensual sexual acts. The criminalising of

bestiality is consistent with the criminalising of non-consensual act generally. The re-introduction of the offence is the least restrictive and appropriate interference with this right, as required by section 28 of the HR Act.

Summary of Clauses

1 - Name of Act- this is a technical clause that names the Act. The Act is the *Crimes Legislation Amendment Act 2010*.

2 - Commencement- this clause states that the Act commences on the day after the Act is notified.

3 - Legislation amended- this is a technical clause which states the primary acts being amended are the *Crimes Act 1900*, the *Crimes (Sentencing) Act 2005*, the *Criminal Code 2002* and the *Prostitution Act 1992*.

4 - Crimes Act 1900 - New section 50 (2) – this clause inserts a new section 50 (2) to clarify the extent of the definition of sexual intercourse.

The amendment ensures that the definition of ‘object’ includes an animal.

The necessity for this amendment arose in the course of investigating the breadth of the new bestiality offence (new section 63A of the *Crimes Act 1900*).

The case of *R v CAP* (2009) QCA 174 involved numerous sexual offences perpetrated against the daughter and nieces of the offender. Of the charges, there were four counts of carnal knowledge against the order of nature, in which the offender forced his daughter into sexual acts with an animal.

The Government considers that this serious sexual offending should be captured by the existing sexual assault offences located at sections 51, 52 and 53 of the *Crimes Act 1900*.

To remove any uncertainty as to whether the conduct described in *R v CAP* is captured by the existing sexual assault offences, this clause clarifies the definition of ‘sexual intercourse’ at section 50 (b) of the *Crimes Act 1900*.

5 - Crimes Act 1900 – New section 60 (1) – this clause clarifies the fault element at section 60 (1).

Section 60 (1) creates the sexual offence of an act of indecency on or in the presence of another person. Previously, the required fault element was ‘knowledge’ or ‘recklessness’.

The Supreme Court has raised the concern that by stating two fault elements in the one offence, questions of duplicity are raised. In *Johnson v Miller* (1937) 59 CLR 467, the Court concluded that where there is duplicity, the fundamental rights of an

accused person cannot be exercised as the defendant does not know the precise charge against them.

In the recent ACT case of *R v DF* (2010) ACTSC 31, at paragraph 7, Justice Penfold stated that the offence of an act of indecency appears to be duplicitous because it should allege knowledge or recklessness, but not both.

Previously, the case of *R v Maddison* (2007) ACTSC 31, at paragraph 7, considered a question of duplicity with the mental elements of 'knowledge' and 'recklessness' at section 54 (1) and (2) of the ACT's *Crimes Act 1900*. The Court considered that because both elements were stated in the offence, the prosecution must elect which mental element to proceed with.

However, the original intent of the inclusion of both fault elements was to allow for a judge or jury to decide which element was satisfied on the basis of the facts before them.

As a consequence, section 54 was amended by the *Justice and Community Safety Amendment Act 2008 (No 2)*. The amendment removed the fault element of 'knowledge' from section 54 (1) and (2) and included a new subsection to state that proving recklessness in relation to consent can also be achieved by proving that the accused knew the victim did not consent.

The amendment to section 60 (1) will remove the element of knowledge in relation to consent, which will address the duplicity which arises because of the inclusion of two fault elements in that subsection.

The inclusion of the new section 60 (3) will state that the fault element of 'recklessness' can be established by proving 'knowledge' or 'recklessness'.

The amendment to section 60 is identical to the previous amendment to section 54 and ensures that section 60 is consistent with section 54 of the *Crimes Act 1900*.

6 – Crimes Act 1900 – New section 60 (2) – this clause clarifies the fault element at section 60 (2).

Section 60 (2) creates the offence of an act of indecency in company. Previously, the required fault element was 'knowledge' or 'recklessness'.

As with the amendment to section 60 (1), this amendment is necessary to remove the duplicity which arises from the inclusion of two fault elements for the offence.

The amendment to section 60 (2) will remove the element of knowledge to consent, which will address the duplicity which arises because of the inclusion of two fault elements.

The inclusion of the subsection 60 (3) will state that the fault element of 'recklessness' can be established by proving 'knowledge' or 'recklessness'.

7- Crimes Act 1900 – New section 60 (3) – this clause inserts a new section to clarify the duplicity issues with sections 60 (1) and 60 (2).

The new section clarifies the original intention of the Government to provide that either knowledge or recklessness will establish the fault element of recklessness.

8 – Crimes Act 1900 – New section 63A – this clause inserts a bestiality offence into the *Crimes Act 1900*.

It is intended that the new bestiality offence capture all sexual activities between a person and an animal.

Historically, there was an offence of ‘bestiality and buggery’ located at section 79 of the *Crimes Act 1900*. In November 1985, prior to the ACT attaining self-government, section 79 was repealed by the *Crimes (Amendment) Ordinance (No 5)*.

The explanatory statement for the November 1985 Ordinance, at page 1, states that one of the objectives of the ordinance was ‘the recognition of the equality of all persons’. This statement was made in relation to the offence of buggery. The explanatory statement makes no reference to the reasons for the removal of the bestiality offence.

The inclusion of the new bestiality offence will ensure that the ACT is consistent with other Australian jurisdictions in clearly outlawing bestiality.

9 - Crimes Sentencing Act 2005 - New section 52 (2) (a) – this clause substitutes a new section to extend the circumstances in which a victim impact statement may be tendered in court.

The need for amendment to this section arose following the decision of Justice Gray in *R v MB* (SCC 122 of 2008). In *R v MB*, Justice Gray was asked to consider whether he could receive a victim impact statement prior to a conviction being recorded to determine whether a conviction should be recorded at all.

In that case, Justice Gray found that due to the wording of the section, which previously stated that a victim impact statement may be provided to the court following conviction or before sentencing, the victim impact statement could not be received prior to conviction.

The obstacle in *R v MB* is resolved by amending section 52 (2) to state that a victim impact statement may be given to the court after the offender has pleaded guilty to the offence, after the court has found the offence proved and after the offender has been found guilty or convicted of the offence.

The intent of this amendment is to extend the circumstances in which a victim of crime’s views, in the form of a victim impact statement, can be tendered to the court to include informing whether a conviction should be recorded at all.

10 – Criminal Code 2002- section 324 (4) – this clause omits the definition of ‘stolen property’ when applied to section 324 of the *Criminal Code 2002* to instead state that ‘stolen property’ is property obtained in a way that is an appropriation of property pursuant to section 304 of the *Criminal Code 2002*.

Section 324 creates the offence of unlawful possession of stolen property. The offence arises in circumstances where a person has property in their possession, or the person gives property to another person not entitled to it, and the property is reasonably suspected of being ‘stolen property’ or property ‘otherwise unlawfully obtained’.

Previously, section 324 relied on the definition of ‘stolen property’ at section 314 of the *Criminal Code 2002*. However, when this definition was applied, subsequent receivers of property, apart from the first receiver and the person who appropriated the property, were not captured by the offence.

This result is contrary to the intention of parliament. The intention of the section, as stated in the *Criminal Code 2002* explanatory statement at page 35, is to create a summary offence for a person who has property, or who gives possession of property to another person who is not lawfully entitled to it, if the property is reasonably suspected of being ‘stolen’ or ‘otherwise unlawfully obtained’. The section is also intended to capture a person who innocently receives stolen goods and who subsequently discovers that the goods are stolen and who continues to be in possession of the property.

This amendment defines stolen property to be ‘appropriated property’ as defined at section 304 of the *Criminal Code 2002*. This definition will capture any person who assumes the rights of an owner to ownership, possession or control of property, without the consent of the person to whom the property belongs. Notably, the *Criminal Code 2002* explanatory statement, at page 13, states that section 304 (1) includes cases where a person comes by property (innocently or not) without theft but who later assumes the owner’s rights (without consent) by keeping or dealing with the property as if it was their own. Therefore, the application of this definition will give effect to the original intent of the parliament.

11- Criminal Code 2002 – New note at section 603 – this is a technical amendment which inserts a new note after subsection (8) that refers readers to the new alternative verdict provision at 636A.

12- Criminal Code 2002- new section 636A – this clause inserts an alternative verdict provision for the section 603 controlled drug trafficking offence in the *Criminal Code 2002*.

Previously, there was no statutory alternative verdict provision to allow the Supreme Court to consider the summary offence of possession of a drug of dependence or a prohibited substance pursuant to sections 169 and 171 of the *Drugs of Dependence*

Act 1989 or section 36 of the *Medicines, Poisons and Therapeutic Goods Act 2008*, in circumstances where a defendant has been found not guilty of the indictable offence of trafficking pursuant to section 603 of the *Criminal Code 2002*.

An alternative verdict allows an accused person to be convicted of a lesser offence than the offence charged, where the more serious offence encompasses the less serious offence. As stated in *R v Springfield* (1969) 53 Cr App R 608 'the test is to see whether it (the alternative charge) is a necessary step towards establishing the major offence... in other words, is the lesser offence an essential ingredient of the major one?'

The possession offences located in the *Drugs of Dependence Act 1989* and the *Medicines, Poisons and Therapeutic Goods Act 2008* are necessary steps toward establishing the trafficking offence. Pursuant to section 602 of the *Criminal Code 2002*, a person traffics in a controlled drug if the person sells, supplies, transports, guards, conceals or possesses the controlled drug with the intention of selling it.

The inclusion of an alternative verdict provision will remove the uncertainty that arises when a not guilty verdict is returned on the section 603 *Criminal Code 2002* trafficking offence. Where a person has been found not guilty, it is uncertain as to whether the defendant was found to be not guilty of trafficking but in possession of a drug of dependence or a prohibited substance, or alternatively, was found to be not guilty of trafficking and *not* in possession.

13 – Prostitution Act 1992 – new disqualifying offence – this clause inserts a new item in schedule 1 of the *Prostitution Act 1992*.

Section 6 of the *Prostitution Act 1992* details the offences which disqualify a person, who is convicted or found guilty of these offences, from becoming or continuing to be an operator, owner or director of a commercial brothel or escort agency.

The new bestiality offence at section 63A of the *Crimes Act 1900* is included as a disqualifying offence.