

**2011**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**CRIMINAL PROCEEDINGS LEGISLATION AMENDMENT BILL 2011**

**EXPLANATORY STATEMENT**

Circulated by authority of  
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# **Criminal Proceedings Legislation Amendment Bill 2011**

## **Outline**

The Criminal Proceedings Legislation Amendment Bill 2011 amends the *Crimes Act 1900* and the *Supreme Court Act 1933*.

The Bill amends the Supreme Court Act by limiting the types of offences for which an election for trial by judge alone can be made. The Bill does this by specifying a class of offences where an election to be tried by judge alone cannot be made. The excluded offences include charges involving the death of a person and charges of a sexual nature.

The Bill also makes a number of amendments to the Crimes Act that flow from amendments to the Courts Legislation Amendment Bill 2010 and to ensure consistency with amendments to the Supreme Court Act in this Bill.

The Bill increases penalties for the offences of ‘act of indecency without consent’, ‘possession of child pornography’ and ‘using the internet etc to deprave young people’, to ensure they remain indictable offences.

The Courts Legislation Amendment Bill 2010 will amend the *Legislation Act 2001*, section 190 (Indictable and summary offences) to amend the definition of indictable offence for the purpose of ACT legislation. Previously, an indictable offence was defined as an offence punishable by imprisonment for longer than 2 years. The definition of an indictable offence has been amended to mean offences with a maximum period of imprisonment longer than 5 years.

Furthermore, the offence under section 66 of the Crimes Act (using the Internet etc to deprave young people) has been amended to clarify the intention of the provision to capture only pornographic material and to update references to new classifications.

## **Human Rights Considerations**

The Criminal Proceedings Legislation Amendment Bill 2011 amendments do not substantially interfere with the human rights located in the ACT’s *Human Rights Act 2004* (‘HR Act’). Clause 10, section 68B gives rise to consideration of human rights, specifically section 21 of the HR Act (fair trial).

The amendment does not limit the right to a fair trial including the right to equal access, the right to legal advice and representation and the right to procedural fairness. A person accused of an excluded offence who is tried on indictment will have their criminal charges ‘decided by a competent, independent and impartial court or tribunal after a fair and public hearing’ (section 21 (1), HR Act). A person indicted on an excluded offence will have a fair trial provided for by existing jury trial provisions and further supported by appeal provisions set in the *Supreme Court Act 1933*, part 2A Court of Appeal.

## Clause Notes

### Part 1 — Preliminary

#### Clause 1 Name of Act

This is a technical clause that names the Act. The Act, once made, is the *Criminal Proceedings Legislation Amendment Act 2011*.

#### Clause 2 Commencement

This clause states that the Act commences on the day after the Act is notified.

#### Clause 3 Legislation amended

This is a technical clause which states that the primary Acts being amended are the *Crimes Act 1900* and the *Supreme Court Act 1933*. The *Court Procedures Rules 2006* are also amended consequentially.

### Part 2 — Crimes Act 1900

#### Clause 4 Act of indecency without consent Section 60 (1)

This clause increases the maximum penalty for the offence in section 60(1) from 5 years to 7 years. The penalty has been increased to ensure the offence remains an indictable offence.

The offence is a serious offence that should be capable of being dealt with on indictment. Although offences of this nature in Australia cannot be easily compared as they capture different physical elements, the new maximum penalty is proportionate with that applicable in other jurisdictions.

#### Clause 5 Section 60 (2)

This clause increases the maximum penalty for the offence in section 60(2) from 7 years to 9 years. The penalty has been proportionally increased as a consequence of the increase to the maximum penalty in section 60(1).

The offence is a serious offence that should be capable of being dealt with on indictment. Although offences of this nature in Australia cannot be easily compared as they capture different physical elements, the new maximum penalty is proportionate with that applicable in other jurisdictions.

#### Clause 6 Possessing child pornography Section 65 (1), penalty

This clause increases the maximum penalty for the offence in section 65(1) from 500 penalty units, imprisonment for 5 years or both to 700 penalty units, imprisonment for

7 years or both. The penalty has been increased to ensure the offence remains an indictable offence.

The offence is a serious offence that should be capable of being dealt with on indictment. Although offences of this nature in Australia cannot be easily compared as they capture different physical elements, the new maximum penalty is proportionate with that applicable in other jurisdictions.

**Clause 7 Using the internet etc to deprave young people Section 66 (1), penalty, paragraph (a)**

This clause increases the maximum penalty for the offence in section 66(1) from 5 years to 7 years. The penalty has been increased to ensure the offence remains an indictable offence.

The offence is a serious offence that should be capable of being dealt with on indictment. Although offences of this nature in Australia cannot be easily compared as they capture different physical elements, the new maximum penalty is proportionate with that applicable in other jurisdictions.

**Clause 8 Section 66 (2), penalty**

This clause increases the maximum penalty for the offence in section 66(2) from 100 penalty units, imprisonment for 5 years or both to 700 penalty units, imprisonment for 7 years or both. The penalty has been increased to ensure the offence remains an indictable offence.

The offence is a serious offence that should be capable of being dealt with on indictment. Although offences of this nature in Australia cannot be easily compared as they capture different physical elements, the new maximum penalty is proportionate with that applicable in other jurisdictions.

The penalty unit portion of the offence has been increased in line with current offence ACT offence drafting practice to ensure a nexus with the term of imprisonment set for the offence.

**Clause 9 Section 66 (6), definition of *pornographic material***

The offence under section 66 (2) is committed where a person uses electronic means to send or make available pornographic material to a young person. The definition of pornographic material has been amended to clarify the intention of the provision to capture only pornographic material and to update references to new classifications.

Limiting the definition to only include material of a sexual nature is important as a conviction under section 66 may result in the inclusion of the offender's name and offender's name and other identifying particulars on the Child Sex Offenders Register.

The amended definition of pornographic material refers to current classifications under the Commonwealth *Classification (Publications, Films and Computer Games) Act 1995*.

The Guidelines for the Classification of Films and Computer Games and the Guidelines for the Classification of Publications 2005 made under the Classification (Publications, Films and Computer Games) Act specify the classifiable elements for each of each classification.

The amendment to the definition will have the effect that making material available to a child using electronic means will not apply unless the material is of a sexual nature.

The offence in the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995 (ACT)* — section 13 — Private exhibition of certain films in presence of a child, will apply where a person exhibits a film in a place other than a public place where a child is present and the film is classified RC, X 18+ or R 18+; or is an unclassified film.

### **Part 3 — Supreme Court Act 1933**

#### **Clause 10      Section 68B**

This clause amends section 68B — Trial by judge alone in criminal proceedings — to make the ability to elect for a trial by judge alone available only for offences other than excluded offences. Excluded offences are listed in a schedule and include all *Crimes Act 1900* offences involving the death of a person and sexual offences, including offences relating to child pornography and bestiality. Two *Prostitution Act 1992* offences are also included and one offence under the *Radiation Protection Act 2006* where death results.

The clause further amends section 68B, at (1) (c) to clarify that where election for a trial by judge alone remains available, the election must be made before the person or their legal representative know the identity of the trial judge. This is consistent with the original intention of the provisions.

The clause re-makes subsections 68B (2) and (3) in the same terms to ensure that a person can withdraw an election to allow them to be tried by a jury. Also, where an accused person makes and then withdraws an election, the person cannot make another election. This will ensure that a person does not seek to make a further election after learning the trial judge's identity for the trial. This is in keeping with the original intention of the section.

#### **Clause 11      Definitions—pt 8A Section 69A, definitions of *ACT court and corresponding court***

This clause renumbers schedule 2 — ACT and corresponding courts — as schedule 3. This is as a result of the insertion of a new schedule 2 for excluded offences for the election for a trial by judge alone.

## **Clause 12 Section 69H**

This clause amends the existing section 69H to ensure the section refers to the renumbered schedule 3.

## **Clause 13 New schedule 2**

This clause inserts a new schedule 2 Trial by judge alone—excluded offences. Excluded offences are listed in the schedule and include all *Crimes Act 1900* offences involving the death of a person and sexual offences, including offences relating to child pornography and bestiality. Two *Prostitution Act 1992* offences are also included and one offence under the *Radiation Protection Act 2006* where death results.

## **Clause 14 Schedule 2 heading**

This clause renames schedule 2 — ACT and corresponding courts — as Schedule 3 ACT and corresponding courts.

# **Schedule 1 Consequential amendment**

## **Part 1.1 Court Procedures Rules 2006**

This consequential amendment substitutes a new note in the *Court Procedures Rules 2006*, rule 4733 (Supreme Court criminal proceedings—appearance when committed for trial) to include reference to the amended section name for section 68B.