

2011

REVISED

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMINAL PROCEEDINGS LEGISLATION AMENDMENT BILL 2011

EXPLANATORY STATEMENT

REVISED

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 increases penalties for the offences of ‘act of indecency without consent’, ‘possession of child pornography’ and ‘using the internet etc to deprave young people’ in the Crimes Act.

The proposed amendments to section 190 of the *Legislation Act 2001* (Indictable and summary offences) by the Courts Legislation Amendment Bill 2010 initially led to consideration of the penalties for these offences to ensure that they remained indictable. Although the *Courts Legislation Amendment Act 2011* was passed with significant amendments, it is still considered appropriate to proceed with the penalty increases. While it is difficult to directly compare penalties for such offences between Australian jurisdictions as they capture different physical elements, it is clear the penalties in the ACT differed significantly. The increases more appropriately reflect the serious nature of the offences.

Increasing the maximum penalties for the offences specified in the Bill will also ensure that they can be dealt with appropriately, either summarily or on indictment.

Appropriate increases to maximum penalties will mean that the Magistrates Court will be able to deal with less serious instances of the offences but nonetheless imposes a penalty that accords with the relative seriousness of the offence.

Where the Magistrates Court deals with an indictable offence summarily and convicts the offender, the court will be able to impose a penalty of up to 5 years imprisonment or a fine of \$15,000 or both.

Where a Court will deal with the offences increased in this Bill it will note the new maximum penalty as the starting point for calculating the correct sentence. It will also have regard to the aggravating and mitigating circumstances of the offences together with other sentencing considerations listed in the *Crimes (Sentencing) Act 2005*, section 33 — Sentencing—relevant considerations.

When maximum penalties are raised this is a sign that higher penalties should be imposed. In *R v Way* (2004) 60 NSWLR 168 at [52], the court said:

“Traditionally any intention on the part of the legislature that the offence should attract a heavier sentence has been manifested by an increase in the statutory maximum: *R v Sha* (1988) 38 A Crim R 334; *R v Peel* [1971] 1 NSWLR 247. The

courts are expected to recognise and reflect that intention when sentencing offenders for offences after such amendments are made: *R v Slattery* (1996) 90 A Crim R 519 at 524 and *R v Jurisic* (1998) 45 NSWLR 209 at 227.”

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 reflect the seriousness of the offence.

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).

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 reflect the seriousness of the offence.

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 reflect the seriousness of the offence.

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 reflect the seriousness of the offence.

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 knows 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.