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**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES (CHILD SEX OFFENDERS) AMENDMENT BILL 2012**

**EXPLANATORY STATEMENT**

Presented by  
Simon Corbell MLA  
Attorney General

# Crimes (Child Sex Offenders) Amendment Bill 2012

## Outline

The Crimes (Child Sex Offenders) Amendment Bill 2012 amends the *Crimes (Child Sex Offenders) Act 2005* (the CSO Act).

The CSO Act establishes the ACT's Child Sex Offender Register which requires certain offenders who commit sexual offences against children to keep police informed of their whereabouts and personal details. Personal details must be reported for a period of time commencing when the offender is sentenced, or no longer in government custody.

The amendments contained in the Bill fall into two broad categories – the 'prohibition order scheme' (the new chapter 5A) and 'general amendments' (the remaining amendments). This Bill makes the following amendments to address issues arising from national discussions and calls for amendments by the ACT Ombudsman and ACT Policing to:

- introduce a child protection prohibition order scheme to prohibit some registrable offenders from engaging in certain conduct for a period of time;
- introduce provisions to allow the ACT to recognise the prohibition orders of registrable offenders from foreign jurisdictions (jurisdictions outside the ACT) who travel or relocate to the ACT;
- create a new offence where a registrable offender contravenes a condition of their prohibition order;
- create a new offence relating to the publication of identifying information from a child protection prohibition order proceeding;
- increase the penalties for failing to comply with a reporting obligation to 5 years imprisonment, 500 penalty units or both;
- amend section 59 to require registrable offenders to provide police with electronic communication identifiers (for example, email addresses and user names) and information about whether they have ever been the subject of a prohibition order or interim order in a foreign jurisdiction;
- amend section 60 (b) and (c) to replace the defined period of time of 'regular unsupervised contact' from 7 days in a 12 month period to 3 days in a 12 month period and to require this information to be reported to police within 24 hours of the contact;
- include a new offence where a registrable offender does not notify the Chief Police Officer 2 days after the day the offender makes an application under the *Births, Deaths and Marriages Act 1997* to change their name;
- amend section 47 to require registrable offenders to present their passports and any other travel documents to the Chief Police Officer within 7 days of their return to the ACT; and
- amend section 83 to require a registrable offender who receives a sentence of periodic detention to commence their reporting obligations on the commencement of periodic detention.

## Purpose of the Bill

The impetus for the introduction of these amendments, and the original 2005 Bill, is for the protection of children. In November 1989 the United Nations General Assembly adopted the *Convention on the Rights of the Child* (CROC), which was ratified by Australia in December 1990. There are two articles which are of specific importance to the purposes of this Bill. Firstly, article 34 of the CROC states that parties shall undertake to protect children from all forms of sexual exploitation and sexual abuse. Secondly, article 3 states that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The prohibition order scheme is intended to protect children and reduce the likelihood that registrable offenders will re-offend by targeting those offenders who engage in concerning conduct and prohibiting them from engaging in that conduct. The recidivism rates of sex offenders were analysed in a 2007 research paper for the Victorian Sentencing Advisory Council.<sup>1</sup> The paper examined a 2002 Western Australia study of male sex offenders which found that by the end of the seventh year of follow-up, 10.7% of the sex offenders had been arrested for a sexual offence as their first arrest after release, 16.8% had been arrested for a violent offence and 49.7% had been arrested for any criminal offence.<sup>2</sup> This study was in relation to all sex offences, not specifically child sex offences.

The September 2011 ‘Trends & Issues in crime and criminal justice’ paper published by the Australian Institute of Criminology focussed on ‘misconceptions about child sex offenders’.<sup>3</sup> The paper discusses a study on recidivism rates amongst extra-familial child sex offenders over a 25 year period. The study, conducted by Prentky et al, found that 52% of child sex offenders reoffended (they were charged with a further sex offence) in the 25 year at risk period following the original conviction. However, this study also notes the limitations of sex offender recidivism studies, and notes that the 52% recidivist figure could be higher.<sup>4</sup>

These statistics should be viewed with caution given the fact that child sex offences have very low rates of reporting, detection, arrest and successful prosecution. However, what can be said is that the research indicates that a significant proportion of child sex offenders will reoffend.

Court orders preventing a person from engaging in certain conduct are one mechanism that governments have adopted to address recidivism and offending behaviour.

The prohibition order scheme will provide a mechanism for ACT Policing to intervene and apply for a prohibition order in circumstances where an offender has engaged in behaviour that is deemed a risk to the lives or sexual safety of children. This intervention is directly

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<sup>1</sup> Gelb, G, January 2007, ‘Recidivism of Sex Offenders Research Paper’, Sentencing Advisory Council. (Available at: [www.sentencingcouncil.vic.gov.au](http://www.sentencingcouncil.vic.gov.au)).

<sup>2</sup> Ibid, p.22.

<sup>3</sup> Richards, K ‘Misperceptions about child sex offenders’ *Trends and Issues in Crime and Criminal Justice*, issue number 429, Australian Institute of Criminology, September 2011.

<sup>4</sup> Ibid, p5.

linked to the research which indicates that the estimated recidivism rate for convicted child sex offenders is between 10%-52%.

The purpose of the general amendments to the CSO Act is to ensure that the CSO Act keeps pace with changes in technology and the behaviours of registrable offenders. In particular, the amendments to require registrable offenders to report their electronic communication devices and to present their passports and documents on their return from travel are important amendments that support the purposes of the CSO Act. These general amendments support the purpose at section 6 (1) (a) (ii) to facilitate the investigation and prosecution of future offences that registrable offenders may commit.

The second purpose of the general amendments is to ensure that the ACT has, as far as possible, a child sex offender register and monitoring scheme that is consistent with the schemes across all Australian jurisdictions. This will ensure that the ACT does not become an attractive place for convicted child sex offenders due to perceptions about lenient obligations and penalties. This will reduce the likelihood that offenders will relocate to the ACT to be subject to less burdensome monitoring laws, which may in turn reduce the incidence of re-offending by requiring that registrable offenders are subject to strict obligations.

New South Wales, Queensland, South Australia and the Northern Territory have passed legislation to create prohibition order schemes, to which the ACT scheme will correspond.

## Human Rights Considerations - Overview

The Crimes (Child Sex Offenders) Amendment Bill 2012 engages a number of the rights in the ACT's *Human Rights Act 2004* (the HR Act). This Bill is a good example of how the human rights of a person affected by changes in the law are balanced against the rights and interests of the community to protect children from sexual assault and violence.

This Bill engages, and places limitations on, the following HR Act rights:

- Section 8 - Recognition and equality before the law;
- Section 11- Protection of family and children;
- Section 12- Privacy and reputation;
- Section 13- Freedom of movement;
- Section 15- Peaceful assembly and freedom of association;
- Section 16- Freedom of expression;
- Section 18- Right to liberty and security of person;
- Section 21- Fair trial; and
- Section 22- Rights in criminal process.

The Bill also engages, and supports, the following HR Act rights:

- Section 11- Protection of family and children;
- Section 12- Privacy and reputation;
- Section 18- Right to liberty and security of person; and
- Section 21- Fair trial

The purposes of the CSO Act are described at section 6 of the Act. The purposes are to:

- reduce the likelihood that certain offenders who commit sexual offences against children will reoffend;
- facilitate the investigation and prosecution of future offences that these offenders may commit; and
- prevent registrable offenders from working in child related employment.

The inclusion of the prohibition order scheme and the general amendments are directly linked to the purpose of reducing the likelihood that registrable offenders will re-offend. It is also linked to the broader responsibility of the ACT Government to ensure, as far as possible, the safety and protection of children from sexual assault and violence.

The responsibility of governments to undertake measures to protect their citizens has been discussed in European human rights jurisprudence. This responsibility has been described as the 'doctrine of positive obligations' which encompasses the notion that governments not only have the responsibility to ensure that human rights free from violation, but that governments are required to provide for the full enjoyment of rights.<sup>5</sup> This notion has been interpreted as requiring states to put in place legislative and administrative frameworks designed to deter conduct that infringes human rights and to undertake operational measures to protect an individual who is at risk of suffering treatment that would infringe their rights.<sup>6</sup>

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<sup>5</sup> Colvin, M & Cooper, J, 2009 *'Human Rights in the Investigation and Prosecution of Crime'* Oxford University Press, p. 424-425

<sup>6</sup> Ibid, p.425.

This responsibility supports the positive protection of the right of children and families to enjoy their human rights and supports the right to the protection of family and children and the right to liberty and security of person (sections 11 and 18 of the HR Act).

### **Limitations on human rights- Section 28 (2) of the HR Act**

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HR Act contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

Section 28 requires that any limitation on a fundamental right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality has been described as requiring that the proposed limitation of the right goes only so far as is necessary to achieve the recognised need.<sup>7</sup>

The Government acknowledges that these amendments engage the human rights of a section of the ACT community - namely registrable offenders. However, the Government believes that this engagement is proportionate and justified in the circumstances because it is the least restrictive means available to achieve the purpose and to protect the human rights of others – children and young people and their families. This view is reached by undertaking a section 28 (2) analysis on the limitations for each human right that the Bill engages in the detail stage below.

Although greater analysis on the engagement of each human right is provided under the specific provisions, a number of the amendments in the Bill engage the section 8 right to recognition and equality before the law and/or the section 12 right to privacy and reputation, warranting a general discussion on these rights.

### **Section 8- Recognition and equality before the law**

Section 8 of the HR Act provides:

- (1) Everyone has the right to recognition as a person before the law.
- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

#### ***The nature of the right affected (section 28 (2) (a))***

The prohibition order scheme and general amendments engage section 8 of the HR Act because they only apply to a particular category of people (registrable offenders). The limitations imposed by these provisions apply only to registrable offenders and therefore limit the right of that group of people to enjoy their human rights without distinction or discrimination.

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<sup>7</sup> ACT Department of Justice and Community Safety, 2004 *Human Rights Act 2004: A Plain English Guide*, p9. Available at : <http://www.justice.act.gov.au/publication/view/94>

Section 8 of the HR Act is based on Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). In order to provide guidance with the application and interpretation of the ICCPR, the Office of the High Commissioner for Human Rights has issued general comments, one of which addresses the right to non-discrimination.

*General comment* 18 notes that:

‘non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights’.<sup>8</sup>

However, the committee also observes at paragraph 14 of the General comment that:

‘not every differentiation of treatment will constitute discrimination, if the criteria for such discrimination are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’.<sup>9</sup>

In addition, while section 7(o) of the ACT’s *Discrimination Act 1994* (the Discrimination Act) prohibits discrimination on the ground of a spent conviction, section 8 (2) provides that a person does not discriminate by imposing a condition or requirement on a person with a protected attribute, if the condition or requirement is reasonable in the circumstances.

Therefore, it is reasonable to interpret section 8 of the HR Act as not prohibiting all kinds of distinction or differential treatment. However, the criteria for this distinction or differential treatment must be reasonable and intended to achieve a legitimate aim.

#### ***The importance of the purpose of the limitation (section 28 (2) (b))***

Please refer to the purpose section (pages 3-4) for a detailed discussion on the broad purposes of this Bill. As discussed above, the limitations on the section 8 rights are important for the protection of children and minimising the incidence of reoffending by registrable offenders.

#### ***Nature and extent of the limitation (section 28 (2) (c))***

The application of the prohibition order scheme is limited because it does not apply to all registrable offenders. The prohibition order scheme will allow the Chief Police Officer to apply to the Magistrates Court for a prohibition order only for a registrable offender and only in circumstances where the offender has recently engaged in concerning conduct. Concerning conduct is defined as conduct the nature or pattern of which poses a risk to the life or sexual safety of 1 or more children, or of children generally.

The general amendments will apply to all registrable offenders. They will extend existing obligations under the CSO Act by increasing the penalty for failing to comply with reporting obligations, by including new offences, by extending the information that a registrable offender is required to report to ACT Police and by clarifying when a registrable offender’s reporting obligations commence.

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<sup>8</sup>Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1989 ‘General Comment No.18: Non-discrimination. Available:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/3888b0541f8501c9c12563ed004b8d0e?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument)

<sup>9</sup> Ibid.

***Relationship between the limitation and its purpose (section 28 (2) (d))***

The purpose of the prohibition order scheme and the general amendments is to protect children. The prohibition scheme will allow ACT Policing to intervene to protect children in circumstances where a registrable offender has engaged in concerning conduct.

The general amendments will ensure that registrable offenders are required to report additional personal details to police. These additional personal details will ensure that the CSO Act keeps pace with changes in technology and the behaviours of registrable offenders.

***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

The ACT Government has concluded that, in balancing the respective rights of children and their families and registrable offenders, these amendments do not unreasonably or unnecessarily infringe on the human rights of convicted child sex offenders. This is because the ACT's children are entitled to special protections because of their status as children.

Without these amendments, police are limited in the steps they can take with respect to concerning conduct. Where such conduct does not amount to a criminal offence or does not amount to behaviour that can be the basis for a domestic violence order or a personal protection order under the *Domestic Violence and Protection Orders Act 2008*, police are limited with their powers to respond to the concerning conduct of registrable child sex offenders.

There are no less restrictive means available to achieve increased protection for children. The introduction of the ACT's prohibition order scheme is the least restrictive measure available as it will only apply to certain registrable offenders and only in certain circumstances where there is a real risk of recidivism. Further, the ultimate decision lies with the Magistrates Court about whether the registrable offender poses a risk to the lives and sexual safety of children.

The general amendments are necessary because they ensure national consistency and they ensure that the CSO Act keeps pace with technological advances and the changing nature of sexual offending against children. These are the least restrictive measures available because consistency with the schemes that operate in other Australian jurisdictions is necessary to enable the scheme to function effectively.

## **Section 12- Privacy and reputation**

Section 12 of the HR Act provides:

Everyone has the right-

- (a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and
- (b) not to have his or her reputation unlawfully attacked.

***The nature of the right affected (section 28 (2) (a))***

The right to privacy and reputation has been described as protecting a broad range of personal interests that include physical or bodily integrity, personal identity and lifestyle (including sexuality and sexual orientation), reputation, family life, the home and home environment and correspondence (which encompasses all forms of communication).<sup>10</sup>

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<sup>10</sup> Lester QC., Pannick QC (General editors), 2005, *Human Rights Law and Practice*, Second edition, LexisNexis UK, p.261.

General comment 16 from the Office of the High Commissioner for Human Rights describes this right as the right of every person to be protected against arbitrary or unlawful interference with their privacy, family, home or correspondence as well as unlawful attacks against a person's honour and reputation. The comment notes that the term 'unlawful' means that no interference can take place except in cases envisaged by the law.<sup>11</sup>

The term 'arbitrary interference' is described by General Comment 16 as intending to guarantee that even interference provided by law should be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.<sup>12</sup>

Therefore, it is reasonable to suggest that a person's right to privacy can be interfered with, provided the interference is both lawful (allowed for by the law) and not arbitrary (reasonable in the circumstances).

There are a number of clauses that engage the section 12 rights. These clauses are:

- Clause 8- Offence- offender must report return to ACT- section 47(d);
- Clause 14- New section 59 (o) to (t);
- New section 132C- CYP Director-General's report;
- New section 132F- Conduct that may be prohibited by prohibition order etc;
- New section 132Z- Service of applications;
- New Section 132ZD- Giving copy of order for young person etc;
- New section 132ZM- Chief Police Officer may require information about person; and
- New section 132ZN- Chief Police Officer may give information about order to prescribed entities;
- New section 132ZO- Chief Police Officer may give information about order to person with parental responsibility for child at risk;
- New section 132ZP- CYP Director-General to be given information about young person; and
- New Section 133B- Offence- failure to tell Chief Police Officer about application to change offender's name.

The shared purpose of these clauses and the new sections provided by the Bill is to protect the lives and sexual safety of children where there is a risk posed to them by a registrable offender. This purpose upholds the right to liberty and security of person and the right to protection of family and children at sections 18 and 11 of the HR Act by putting in place measures to minimise the risk of physical and mental harm to children by registrable offenders.

There are also provisions that support the right to privacy and reputation. These provisions are:

- New section 132ZG -Proceedings for orders to be closed to public; and
- New section 132ZH-Offences- prohibition of publication of identity.

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<sup>11</sup> Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1988 'General Comment No.16: the right to respect of privacy, family, home and correspondence, and protection of honour and reputation', para.3. Available:

([http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/23378a8724595410c12563ed004aeecd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23378a8724595410c12563ed004aeecd?Opendocument))

<sup>12</sup> Ibid, para 4.

***The importance of the purpose of the limitation (section 28 (2) (b))***

Please refer to the purpose section (pages 3-4) for a detailed discussion on the broad purposes of this Bill. As discussed above, the limitations on the section 12 rights are important for the protection of children and minimising the incidence of reoffending.

***Nature and extent of the limitation (section 28 (2) (c))***

The proposals in this Bill both limit and support the registrable offender's right to privacy and reputation. They also support the rights of victims of child sexual offences committed by the registrable offender and children identified to be at risk during prohibition order proceedings.

For clarity and ease, the remaining aspects of the proportionality analysis with respect to the section 12 right to privacy and reputation are considered with reference to the sections that engage this right.

# Crimes (Child Sex Offenders) Amendment Bill 2012

## Detail

### Clause 1— Name of Act

This is a technical clause that names the title of the Act. The name of the Act is the *Crimes (Child Sex Offenders) Amendment Act 2012*.

### Clause 2— Commencement

This clause states that the Act will commence on the day nominated by the Minister in a commencement notice.

### Clause 3— Legislation amended

This is a technical clause stating that the Act being amended is the *Crimes (Child Sex Offenders) Act 2005* (CSO Act). The Act also makes technical amendments to the *Court Procedures Act 2004*.

### Clause 4- Purpose and outline- New section 6 (1) (c)

This clause inserts a new paragraph to include the purposes of the new prohibition order chapter (new Chapter 5A) in the purpose and outline section of the CSO Act. The purpose of new Chapter 5A is to prohibit registrable offenders from engaging in conduct that poses a risk to the lives or sexual safety of children.

## Human Rights Considerations

### Section 11- Protection of the family and children

It could be argued that the amendment to this clause and the introduction of Chapter 5A engages Section 11 of the HR Act, which provides that:

- (1) The family is the natural and basic group unit of society and is entitled to be protected by society.
- (2) Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.

### *The nature of the right affected (section 28 (2) (a))*

Article 3 (1) of the CROC states that ‘in all actions concerning children... the best interests of the child shall be a primary consideration’.

General comment 19 from the Office for the High Commissioner for Human Rights describes the right to the protection of the family. The comment notes that when read with article 17 (right to privacy), the right to protection of the family establishes a prohibition on arbitrary or unlawful interference with the family unit.<sup>13</sup>

General comment 17 addresses the rights of the child. It notes that the rights of the child (at Article 24) require states to adopt special measures to protect children, and that this

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<sup>13</sup> Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1990 ‘General comment 19: Protection of the family, the right to marriage and equality of spouses, para 1. Available: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6f97648603f69bcd12563ed004c3881?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6f97648603f69bcd12563ed004c3881?Opendocument)

responsibility for guaranteeing children necessary protection lies with the family, society and the state.<sup>14</sup>

***The importance of the purpose of the limitation (section 28 (2) (b))***

The importance of these amendments is discussed above in the outline section of the Explanatory Statement.

The inclusion of new section 6 (1) (c) will promote the protection of the family and children by reducing the contact between registrable offenders and children. This restriction is designed to protect children and their families and carers.

In addition to promoting the right, the introduction of Chapter 5A may, in certain circumstances, limit the access of registrable offenders to their families.

***Nature and extent of the limitation (section 28 (2) (c))***

The section 11 (1) right to the protection of the family unit is not an absolute right, but has been characterised as a protection against unlawful or arbitrary interference of the family unit. In *Hugo Van Alphen v The Netherlands*<sup>15</sup> the United Nations Human Rights Committee held that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.

The section 11 (1) right of registrable offenders to the protection of the family unit is arguably limited by:

- the section 60 (b) and (c) amendment to reduce the period of time classified as ‘regular unsupervised contact’ and ‘regularly lives with’ from 7 days to 3 days; and
- the new prohibition order scheme which may limit the rights of certain registrable offenders to contact with a child or children from their family.

Conversely, the new prohibition order scheme supports the protection of the family unit by providing for the protection of children within a family unit who have been identified as at risk.

The section 11 (2) rights of children to special protections because of their status as children is supported by the prohibition order scheme. The prohibition order scheme will allow the Magistrates Court to prohibit registrable offenders from associating with or contacting children, being in a stated place or stated kind of place where children are located, or, from being in a stated kind of employment that will bring the registrable offender into contact with children.

The special provisions relating to young registrable offenders also support the section 11 (2) right by ensuring that young registrable offenders receive consideration, support and leniency because of their status as a young person.

***Relationship between the limitation and its purpose (section 28 (2) (d))***

The limitations on the rights of families at section 11 (1) against unlawful or arbitrary interference are intended to provide greater protection for children from sexual assault and

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<sup>14</sup> Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1989, General comment 17: Rights of the Child. Available:

[http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/cc0f1f8c391478b7c12563ed004b35e3?Opendocument)

<sup>15</sup> Communication No. 305/1988, 15 August 1990

violence. This position has been recognised in Europe, where the European Court of Human Rights (ECtHR) has acknowledged the importance of ensuring that vulnerable people (which includes children) are not subjected to sexual abuse.<sup>16</sup>

The ability for the Magistrates Court to limit a registrable offender's contact or association with children is a fundamental aspect of this scheme. It will ensure that children are afforded greater protection by prohibiting those registrable offenders who have been deemed a risk to their lives or sexual safety from contacting or associating with them.

***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

There are no less restrictive means available to provide added protections for children. It is appropriate (and therefore not arbitrary) to limit the rights of certain registrable offenders from having contact with children in circumstances where their conduct has been deemed a risk to the lives or sexual safety of a child or children.

The limitations on young registrable offenders, and consequently the interaction with section 11 (2) has been limited to ensure that it is the least restrictive. The Bill achieves this by limiting the term of a prohibition order and by requiring the court to make an order only where there are no less restrictive measures available to address the risk posed by the young registrable offender.

**Clause 5- New section 6 (2) (ga)**

This clause inserts a new paragraph to include the amendments contained in new Chapter 5A in the outline of the CSO Act.

**Clause 6 – Offence—offender must report after sentencing Section 23 (b) (i)**

This clause amends the offence at section 23 (b) (i) by inserting the words “or does not begin, full time”. The effect of this amendment is to require registrable offenders who are sentenced to periodic detention to report their personal details to the Chief Police Officer within 7 days after they are sentenced for the offence- rather than when they finish their periodic detention.

This clause supports the amendment in clause 17 to require a registrable offender to report their personal details to the Chief Police Officer concurrent to serving periodic detention in section 83 of the CSO Act.

Clause 6, together with the amendments at clauses 7 and 17, mean that a registrable offender commits an offence if they do not make their initial report to the Chief Police Officer within 7 days of being released from their first detention period (as there will not be an opportunity to report while the registrable offender is in government custody).

The amendment supports the purpose of the CSO Act at section 6 (1) (a).

**Clause 7 – Section 23 (b) (ii)**

This clause is a technical amendment that substitutes new section 23 (b) (ii) to ensure that the section 23 offence for a registrable offender not reporting to the Chief Police Officer applies to a registrable offender who is serving periodic detention. This supports the amendments in clauses 6 and 17.

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<sup>16</sup> *Dudgeon v United Kingdom* (1982) 4 E.H.H.R. 186

## **Clause 8 – Offence- offender must report return to ACT- Section 47(d)**

This clause substitutes a new paragraph (d) in the section 47 offence of failing to report an offender's return to the ACT. The new paragraph (d) requires registrable offenders to take all reasonable steps to report their return to the ACT and, if the offender travelled outside Australia, the registrable offender must provide their passport and supporting documents to verify the travel details provided to police prior to their departure. As further guidance, new paragraph (d) provides examples of what is meant by 'documents that verify or support the offender's travel details'.

The purpose of this amendment is to support division 3.3.2 (reporting of travel) of the CSO Act to require registrable offenders to verify the travel details provided to police prior to their departure. It will also support the investigation of offences against division 3.3.2. This amendment and reporting requirement is directly linked to the purpose of the CSO Act at section 6 (1)(a)(ii) to protect children by facilitating the investigation and prosecution of future offences that registrable offenders may commit.

This amendment engages a registrable offender's right to privacy and reputation (section 12 HR Act) because it requires the presentation of an offender's personal identity information (in their passport) and documents to evidence their reported travel details. This will disclose (to ACT Policing) personal and lifestyle information of the registrable offender.

### Human Rights Considerations

#### **Section 12- Privacy and reputation**

##### ***The importance of the purpose of the limitation (section 28 (2) (b))***

This amendment will support the investigation of offences against division 3.3.2. It is directly linked to the purpose at section 6 (1) (a) (ii) to protect children by facilitating the investigation and prosecution of future offences that registrable offenders may commit.

The reporting requirements of the CSO Act are a fundamental aspect to this monitoring scheme. The scheme depends on registrable offenders providing information to police, and the verification of this information by police.

##### ***Nature and extent of the limitation (section 28 (2) (c))***

The presentation of a registrable offenders passport and travel documents will engage the section 12 right to privacy and reputation because it will disclose the registrable offender's personal identification details and details of their previous travel and lifestyle information.

However, this section is not an arbitrary interference with the registrable offender's right to privacy and reputation. This is because the amendment provides clear, predictable and reasonable obligations on registrable offenders. Additionally, a proportion of the personal information that will be disclosed to police when the registrable offender presents their passport will be information that is known to police by virtue of the information that registrable offenders are required to report to police under section 59 of the CSO Act.

##### ***Relationship between the limitation and its purpose (section 28 (2) (d))***

Requiring registrable offenders to provide evidence to support their reporting obligations is not an unreasonable intrusion on the registrable offender's right to privacy and reputation. It is requiring supporting documentation to details that the offender is already required by the

CSO Act to provide to police in order to support the investigation of any future child sex offences committed in the ACT, interstate, or internationally.

***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

This proposal is the least restrictive measure available to ensure that registered child sex offenders comply with their obligations under the CSO Act. The alternative option available to ACT Policing is to conduct an investigation into the registrable offender's travels, which may result in a more intrusive investigation and questioning of witnesses in order to verify the travel details reported by the registrable offender.

**Clause 9- Offence- offender in ACT must report change of details - Section 54 (1) (b)**

This clause substitutes a new paragraph (b) in section 54 of the CSO Act. Section 54 creates an offence when registrable offenders fail to report a change to their personal details within a specified time.

The substitution will require a registrable offender to report a change to their personal details under section 59 (e) (the names and ages of children who generally live in the same household as the offender or with whom the offender has regular unsupervised contact) within 24 hours after the change to the details occurred.

This amendment does not alter the information the registrable offender's must report to police. It reduces the time in which the registrable offender has to report this change to their personal details to police. The purpose of this amendment is to enhance national consistency and to give effect to the June 2009 Ministerial Council for Police and Emergency Management- Police (MCPEMP) recommendation that all jurisdictions require registrable offenders to report unsupervised contact with a child within 24 hours of the contact occurring.

This amendment is supported by the amendment located at clauses 10 and 11.

**Clause 10- Section 54 (3)**

This clause specifies that a change occurs to registrable offender's personal details with respect to section 59 (e) (the names and ages of children who generally live in the same household as the offender or with whom the offender has regular unsupervised contact) at the end of the relevant 3 day period. This reflects the changes made by clauses 6, 7 and 17.

**Clause 11- New section 54 (4)**

This clause inserts a new subsection at 54 to support the amendments to reduce the number of days of unreported contact that a registrable offender has with a child or children and the time requirement to report this contact. This new subsection provides that section 151A of the *Legislation Act 2001* does not apply to new section 54 (1) (b) (i) (the requirement to report the names and ages of children who generally live in the same household as the offender or with whom the offender has regular unsupervised contact within 24 hours after the day the change happens).

Section 151A (periods of time ending on non-working days) of the *Legislation Act 2001* states that where something must be done within a particular period of time and the day is not a working day, then the thing must be done on the next working day.

The section 54 offence provides at (2) (b) that a report concerning a change to personal details (apart from the details at section (2) (a)) must be in an approved way. Section 63 of the CSO Act specifies that an approved way is in person, or in another way prescribed by regulation. For the reporting of the names and ages of children who generally live in the same household or with whom the offender has regular unsupervised contact, the regulation does not prescribe another way to report this information. It must be reported in person.

This report in person must be at an approved reporting place. The Woden Police Station is currently the only approved reporting place in the ACT. The Woden Police Station is open 24 hours a day. A registrable offender can therefore make their report on any day of the week, regardless of whether the obligation to report arises on a working day. This makes section 151A unnecessary.

### **Clause 12- Offence- offender returning to ACT must report change of details- Section 55 (1) (c)**

This clause substitutes a new paragraph at 55 (1) (c). Following a registrable offender's return to the ACT, the new paragraph provides that where the registrable offender's personal details pursuant to section 59 (e) (the names and ages of children who generally live in the same household as the offender or with whom the offender has regular unsupervised contact) have changed, the registrable offender must take all reasonable steps to report the changes within 24 hours after the day the registrable offender has been in the ACT for 7 consecutive days.

Section 55 (1) (c) (ii) is unchanged and requires all other personal details to be reported within 7 days after the day the offender has been in the ACT for 7 consecutive days.

This amendment does not alter the information the registrable offender's must report to police. It reduces the time in which the registrable offender has to report this change to police. The purpose of this amendment is to enhance national consistency and to give effect to the June 2009 MCPEMP recommendation that all jurisdictions require registrable offenders to report unsupervised contact with a child within 24 hours of the contact occurring.

Please refer to clause 16 for the human rights discussion on this amendment.

### **Clause 13- What are *personal details*? - Section 59 (e), notes**

Section 59 specifies what details are classified as personal details for the CSO Act. This is a technical clause that reflects the decrease in the number of days where a child 'generally lives in the same household' and 'with whom the offender has regular unsupervised contact' from 7 days to 3 days in notes 1 and 2 of section 59.

Please refer to clause 16 for the human rights discussion on this amendment.

### **Clause 14- New section 59 (o) to (t)**

This clause amends section 59 of the CSO Act to insert additional personal details that registrable offenders must report to police.

New section 59 (o) requires registrable offenders to report if they have ever been subject to a corresponding prohibition order, and if they have, the details of this order. A corresponding

prohibition order is defined in new section 132A as an order made under a law of a foreign jurisdiction that substantially corresponds to a prohibition order.

A registrable offender is required to report this information as it will allow the Chief Police Officer to assess the risk posed by the registrable offender to children in the ACT and will allow the Chief Police Officer to assess whether an application should be made to the Magistrates Court to register the corresponding prohibition order in the ACT.

New section 59 (p), (q), (r) and (s) require registrable offenders to report their electronic communication identifiers (for example email addresses, internet user names and chat room user names) to ACT Policing. This requirement supports the purpose of the CSO Act at section 6(1)(a)(ii) to facilitate the investigation and prosecution of future offences. However, it should be noted that this reporting requirement does not provide the authority for police to monitor the electronic correspondence of registrable offenders. In these circumstances, the existing police powers of criminal investigation apply.

New section 59 (t) requires registrable offenders to report their passport number and country of issue for each passport they hold. The purpose of this new reporting requirement is to support the amendment at clause 6 (offence- offender must report return to ACT- section 47 (d)) that requires registrable offenders to provide the Chief Police Officer with a copy of their passport and documents to verify the report of their travel details that was made prior to their departure. Additionally, the purpose of this amendment is to support section 6(1)(a)(ii) to facilitate the investigation and prosecution of future offences.

### Human Rights Considerations

#### **Section 12- Right to privacy and reputation**

##### ***The importance of the purpose of the limitation (section 28 (2) (b))***

The purpose of requiring registrable offenders to report their electronic communication identifiers is to facilitate the greater protection of children by providing police with increased information regarding convicted child sex offender's online activities. In particular, for registrable offenders convicted of offences that involved electronic communication devices, this will specifically support the purpose at section 6(1)(a)(ii) to facilitate the investigation and prosecution of future offences.

The purpose of requiring registrable offenders to report their passport information is to support the offences in division 3.3.2 of the CSO Act and more broadly, to support the purpose at section 6(1)(a)(ii) to facilitate the investigation and prosecution of future offences.

The purpose of requiring registrable offenders to report if they had been subject to a corresponding order is to allow ACT Policing to have the most information available in order to assess the risk of the offender. It will also support new chapter 5A by providing ACT Policing with the information necessary to determine whether to apply for the registration of the corresponding prohibition order so it applies in the ACT.

##### ***Nature and extent of the limitation (section 28 (2) (c))***

The prevention of crime and the protection of the rights of others is a legitimate ground for placing restrictions on the right to privacy.<sup>17</sup>

These new sections require registrable offenders to provide additional personal information to police. These provisions are not an arbitrary interference as they are clear and predictable. The requirement to provide passport details is appropriate because it supports existing offences in the CSO Act.

The requirement that registrable offender's advise ACT Policing if they have ever been subject to a corresponding prohibition order is appropriate as it informs ACT Policing of the potential risk posed by the registrable offender, and will enable ACT Policing to consider the registration of the order in the ACT. It will also assist with the national application of the child sex offender registration scheme by ensuring that registrable offences cannot evade their reporting obligations by moving to the ACT.

Importantly, this amendment does not provide ACT Policing with authority to monitor the computer and internet activities of registrable offenders. Like the existing reporting requirements, it merely requires the reporting of this information.

***Relationship between the limitation and its purpose (section 28 (2) (d))***

This limitation on the right to privacy supports the purposes of the CSO Act by requiring registrable offenders to provide further personal information to facilitate the investigation of future offences that registrable offenders may commit, thereby supporting the overarching purpose to protect children from sexual and violent crimes.

***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

The reporting of this information is the least restrictive measure available to reduce the likelihood that registrable offenders will reoffend and to facilitate the investigation of any future offences. In particular, the requirement on registrable offenders to report their electronic communication identifiers is the least restrictive as this reporting does not provide the authority for police to monitor the electronic correspondence of registrable offenders. In circumstances where police believe a criminal offence may have been or is likely to be committed, the existing police criminal investigation powers apply.

**Clause 15- New section 59 (2)**

This clause inserts new subsection (2) at 59 of the CSO Act to define a number of terms used in the new reporting requirements contained in clause 14. The new section defines the terms *carriage service*, *carriage service provider*, *corresponding prohibition order* and *internet service provider*.

**Clause 16- Meaning of some concepts in 59- Section 60 (b) and (c)**

This is a technical clause that amends sections 60 (b) and (c) to reflect the decrease in the number of days where a child 'generally lives in the same household' and 'with whom the offender has regular unsupervised contact' from 7 days to 3 days in a period of 12 months.

**Human Rights Considerations**

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<sup>17</sup> Starmer, K, 1999, *European Human Rights Law: the Human Rights Act 1998 and the European Convention on Human Rights*, p. 416.

## **Section 12- Privacy and reputation**

### ***The importance of the purpose of the limitation (section 28 (2) (b))***

The purpose of this amendment is to ensure that registrable offenders are providing police with details of the children that they are in contact with. This will enable police to ensure that appropriate monitoring and protections are in place.

The reduction in the number of days of contact that must be reported from 7 to 3 (in a period of 12 months) will give effect to the June 2009 MCPEMP recommendation that all jurisdictions limit the number of days of unreported regular unsupervised contact with a child to 3 days.

### ***Nature and extent of the limitation (section 28 (2) (c))***

The limitation imposed by the amendment to section 60 (c) to reduce the number of days classified as ‘regular unsupervised contact’ and ‘regularly lives with’ will require registrable offenders to report this contact with a child if it occurs for 3 days in a 12 month period. This requirement does not limit the contact that a registrable offender has with a child, but requires this contact to be reported to ACT Policing.

### ***Relationship between the limitation and its purpose (section 28 (2) (d))***

Requiring registrable offenders to report the contact that they have with children is a fundamental aspect to the CSO Act. The purpose of this requirement is to ensure that ACT Policing can undertake appropriate monitoring of this contact and will allow ACT Policing to undertake protective measures where they have concerns for the safety of these children.

### ***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

This amendment is the least restrictive available to ensure that registrable offenders report contact that they have with children and to ensure that the ACT is consistent with the legislative schemes that are in operation throughout Australia.

## **Clause 17- When reporting period begins- Sections 83 (b)**

Section 83 of the CSO Act defines when the reporting period for a registrable offender begins. The way the section is currently drafted has created the anomaly that where a registrable offender has been sentenced to periodic detention, their ‘reporting period’ does not commence until the conclusion of their periodic detention.

Clause 17 amends section 83 (when reporting period begins) of the CSO Act to ensure that the reporting period for a registrable offender who is serving a sentence of periodic detention is concurrent to their sentence – rather than at the conclusion of their periodic sentence.

The purpose of this amendment is to reduce the amount of time that registrable offenders who have received a sentence of periodic detention are unmonitored in the community. Practically, this amendment will result in registrable offenders making their initial report to the Chief Police Officer following their first detention period (as there will not be an opportunity to report while the registrable offender is in government custody).

The registrable offender will have a reasonable amount of time to make the initial report to the Chief Police Officer before they commit an offence for failing to make the report in the required time period. A registrable offender has 7 days after the day that they receive their sentence of periodic detention to report to the Chief Police Officer.

## **Clause 18- Offence- secrecy- section 121**

This is a technical clause that relocates the secrecy offence previously located at section 121 (Chapter 4) to new section 133A (Chapter 6). The purpose of this relocation is to ensure that the offence applies to the entire CSO Act, including new Chapter 5A, rather than just Chapter 4.

## **Clause 19- New chapter 5A**

This clause inserts new chapter 5A into the CSO Act. This new chapter creates a child protection prohibition order scheme for the ACT.

### **Part 5A.1 Preliminary**

#### **132A- Definitions- chapter 5A**

This section provides a number of new definitions for new chapter 5A.

### **Part 5A.2- Prohibition orders**

Part 5A.2 sets out the process for the application, making, and term of a prohibition order.

#### **132B- Application for prohibition order**

This section sets out the process for an application for a prohibition order. New section 132B (1) sets out the three elements that the Chief Police Officer must believe on reasonable grounds prior to making an application for a prohibition order. These three elements are that the person is a registrable offender; that the person has engaged in conduct the nature or pattern of which poses a risk to the lives or sexual safety of 1 or more children, or of children generally; and finally, that the making of the prohibition order will reduce that risk.

Section 132B (1)(b) provides examples of the type of conduct engaged in by the registrable offender that may be considered as conduct the nature or pattern of which poses a risk to the lives or sexual safety of one or more children, or of children generally. The section intentionally does not include a time period in which the behaviour must have occurred prior to the application being made to the Magistrates Court. This is to recognise that a pattern of conduct may occur over a lengthy period of time, or certain conduct may come to the attention of ACT Policing a time after it has occurred, but this information may still be relevant to the assessment of risk of the registrable offender.

The conduct engaged in by the registrable offender has intentionally not been defined (apart from section 132A which states that conduct includes a course of conduct), however, examples have been included in this section in order to provide some guidance. As the examples indicate, the conduct that poses a risk to the lives or sexual safety of a child or children does not need to amount to a criminal offence.

New section 132B (1) makes it clear that the Chief Police Officer must believe on reasonable grounds *all three elements exist* before making an application for a prohibition order.

Section 132B (2) outlines the details that must be included in an application for a prohibition order. Subsection (2)(e) provides that if the application is being made with respect to a young registrable offender, then the application must include a copy of the CYP Director-General's report on the young person. Section 132C details the requirements for this report.

Section 132B (3) provides that the Chief Police Officer may state on the application that an interim prohibition order is being sought. This information is included on the application as it will affect the return date that is set for the application under section 132Y.

### **132C- CYP Director-General's report**

This section applies when the Chief Police Officer intends to apply to the court for a prohibition order for a young registrable offender. It requires the Chief Police Officer to ask the CYP Director-General for a report on the young person that addresses:

- whether the conduct engaged in by the young registrable offender poses a risk to a child or children generally;
- whether all other reasonably appropriate ways of managing the young offender have been considered by the CYP director-general;
- whether the orders proposed by the Chief Police Officer are a reasonable response to the conduct of the young registrable offender; and
- what impact the prohibition order will have on the young person's best interests.

The purpose of this section is to ensure that all other reasonably appropriate and less restrictive ways of managing the young registrable offender have been considered prior to the Chief Police Officer applying the Magistrates Court for a prohibition order. The requirement that the Chief Police Officer obtain information from the CYP Director-General ensures that information held by the CYP Director-General properly informs the court's decision to make a prohibition order or to include particular conditions on the order.

The section will ensure that consideration is given to the impact that the prohibition order would have on a young registrable offender by considering the young registrable offender's best interests. This provision will support the section 11 (2) HR Act right that every child has to the protections needed because they are a child.

Subsection (3) provides that the CYP Director-General report may contain other information, assessment or reports that the CYP Director-General considers to be appropriate. The purpose of this section is to allow the CYP Director-General to provide information additional to that required by section 132C (2). This additional information may include expert reports on the conduct and behaviour of the young registrable offender.

Section (4) provides that the CYP Director-General's report need not contain protected information under the *Children and Young People Act 2008* about the young person.

Section (5) requires that the report must be given to the Chief Police Officer within 28 days after the day the Chief Police Officer requested the report. This time period is included to ensure that the Chief Police Officer has the necessary information to promptly apply to the Magistrates Court for a prohibition order where a risk is identified to the lives or sexual safety of a child or children.

### Human Rights Considerations

#### **Section 12- Privacy and reputation**

##### ***The importance of the purpose of the limitation (section 28 (2) (b))***

The purpose of this limitation is to provide for consideration of the implications that a prohibition order would have on a young person. This provision will support the right that every child has to the protections needed because they are a child (s11 (2) HR Act).

### ***Nature and extent of the limitation (section 28 (2) (c))***

This section engages a young registrable offender's right to privacy and reputation because personal information concerning the young person will be disclosed by the CYP Director-General in their report to the Chief Police Officer, and subsequently, to the ACT Magistrates Court.

The CSO Act allows for the registration of a child or young person in circumstances where they have either committed a serious sex offence against a child or where they commit less serious sex offences against a child on two or more occasions. This scheme is less onerous than the restrictions placed on young registrable offenders in other jurisdictions to properly recognise the needs of young offenders. The limitation placed on the right to privacy must be balanced with the fact that information about prohibition order proceedings, and access to the proceedings, is restricted.

### ***Relationship between the limitation and its purpose (section 28 (2) (d))***

The purpose of this provision is to support section 11 (2) of the HR Act by ensuring that consideration has been given to all other reasonably appropriate ways of managing the risk that the young person poses to a child or children have been considered prior to applying for a prohibition order. The provision will also ensure that consideration is given to the effect that a prohibition order will have on the best interests of a young person.

### ***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

This provision balances the need to protect children from an identified risk posed by a young registrable offender with the best interests of a young registrable person. The limitation on a young registrable offender's right to privacy and reputation is the least restrictive means of ensuring that appropriate consideration is given to the best way of managing the risk that the young registrable offender is posing which supports the section 11 (2) right of every child to the protections needed because they are a child.

Furthermore, article 37 (b) of the CROC provides that a child shall only be detained as a measure of last resort. Where a young registrable offender is subject to a prohibition order, that order may have the desired effect of preventing the young registrable offender from re-offending. Therefore, it could be said that this measure supports article 37 (b) of the CROC.

### **132D- Court may make prohibition order**

Section 132D (1) provides the elements that the Magistrates Court must be satisfied of prior to making a prohibition order. The Magistrates Court must be satisfied on the balance of probabilities that the person is a registrable offender; that the person has engaged in the conduct set out in application; that the nature and pattern of the conduct poses a risk to the lives or sexual safety of 1 or more children, or children generally; that the making of the order will reduce this risk; and after having regard to the matters at section 132E, that the order is appropriate.

New section 132D (1) makes it clear that the Magistrates Court must be satisfied that all these elements exist before making a prohibition order.

Section 132D (2) provides for the additional matters that must be considered prior to the Magistrates Court making an order for a young person. The purpose of the inclusion of this subsection is to ensure that all other reasonably appropriate ways of managing the young

registrable offender are considered, and that any order the court makes is appropriate and considers the specific needs the young person.

Section 132D (3) provides that the Magistrates Court does not need to be satisfied of a risk to a particular child or children in order to be satisfied that the registrable offender poses a risk to a child, children or a particular class of children. For example, if the registrable offender is loitering at or near a school or child care centre, the Magistrate's Court does not need to be satisfied of a risk to an identified child or children. It is sufficient to demonstrate that the risk is posed to all the children at the school or child care centre.

Section 132D (4) provides that the application for the prohibition order may be heard in the person's absence if the Magistrates Court is satisfied that the person was served with the application in accordance with the requirements set out in new section 132Z (Service of applications).

Section 132D (5) applies where the person is already subject to a prohibition order. Where there has not been an application to revoke the existing order, this section will apply to ensure that existing order is either revoked or amended in order to ensure that the person is subject to one order only.

Section 132D (6) clarifies that a failure to comply with section 132D (5) does not affect the validity of an existing prohibition order (as amended) or the new prohibition order.

### **Section 132E- Matters court must consider before making prohibition order**

This section specifies the matters that must be considered by the Magistrates Court at section 132D (1) (d) prior to making a prohibition order.

Section 132E (1) (a) requires the court to consider each offence for which the person is a registrable offender and includes the seriousness of each offence, the period of time since each offence was committed, the registrable offender's and victim's ages when the offence was committed and the difference in age between the registrable offender and each victim.

Section 132E (1) (b) requires the Magistrates Court to consider the person's present age.

Section 132E (1) (c) requires the Magistrates Court to consider the seriousness of the person's criminal history. A person's criminal history is defined by section 132E (3) to include all findings of guilt for a registrable or relevant offence; any charge against the person for a registrable offence or relevant offence (other than those charges that have been withdrawn, discontinued or dismissed or a charge for which the person was acquitted or found not guilty) for offences committed in the ACT and in foreign jurisdictions.

The inclusion of charges in the registrable offender's criminal history is intended to ensure that the Magistrates Court is aware of any current charges before ACT Courts. These charges will be relevant to the assessment of the risk that the person poses to a child or children as they may be evidence of conduct that poses a risk to the lives or sexual safety of one or more children. It is necessary as some charges may take some time to be finalised by the court.

A registrable offence is defined at section 10 of the CSO Act. A relevant offence is defined at section 132E (3) to be a sexual offence; an offence against the person; an offence involving violence; an offence involving dishonesty or fraud; an offence relating to property; an offence

relating to illegal drugs; an offence against an animal; and any other offence that the Chief Police Officer considers relevant.

The inclusion of ‘any other offence the Chief Police Officer consider relevant’ is intended to capture other offences including breaches of domestic violence orders and pornography offences. It is also included as an aspect of an offence that does not fall into one of the categories of ‘relevant offences’ may be relevant to an assessment of the seriousness of the person’s criminal history.

Under new section 132E (1) (d) the Magistrates Court is required to consider the individual circumstances of the registrable offender, and the court must balance the level of risk that the registrable offender will commit another registrable offence against the impact that the order itself will have on the registrable offender.

Section 132E (1) (f) requires the Magistrate Court to consider the best interests of a young person – such as their educational needs – where the registrable offender is a young person.

Section 132E (3) also defines the terms *criminal history*, and *family member*.

### Human Rights Considerations

#### **Section 22- Rights in criminal proceedings**

Section 22(1) of the HR Act provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

Subsection 22(1) may be perceived as being engaged by this Bill. This is because the definition of ‘criminal history’ includes a charge against a registrable offender for a registrable or relevant offence. The inclusion of a charge that has not been determined by a court may be said to engage the presumption of innocence because the person has not been proved guilty of the charge, however, the charge will be a fact that is considered by the court when determining whether to make a prohibition order.

The Government has concluded that right to be presumed innocent until proven guilty is not engaged by the Bill. Firstly, the presumption of innocence only applies to criminal and not civil proceedings (*International Transport Roth v Secretary of State for the Home Department* [2002] EWCA Civ 159). Secondly, the presumption relates to proceedings which may ultimately result in the loss of liberty, or the imposition of some other penalty, to a person charged with an offence (*R v Werhun* (1991), 62 C.C.C. (3d) 440 (Man. C.A)).

While ultimately the imposition of a prohibition order may result in a registrable offender losing their liberty if they are found guilty of a breach of their prohibition order, it has been held that procedures which are designed to prevent future offending or to protect public safety, even though they might involve an imposition on a person, are generally not considered to be a penalty (*Raimondo v Italy* [1994] 18 EHRR 237).

A prohibition order proceeding is a civil proceeding. It is important to note that while a prohibition order places an imposition on a registrable offender, the consequences of a proceeding to determine whether a prohibition order is made is not punitive and will not result in a penalty being given to the offender. The intention of a prohibition order is to provide police with a mechanism to intervene in circumstances where the registrable offender

has engaged in concerning conduct that is posing a risk to the lives and sexual safety of children.

Further, the definition of ‘criminal history’ is the least restrictive approach available to ensure that all relevant information regarding the risk posed by the registrable offender is before the court. When considering the scope of information that was to be provided as part of a registrable offender’s criminal history, the ACT Government considered the expansive approaches in other Australian jurisdictions. For example, section 9 (2) of Queensland’s *Child Protection (Offender Prohibition Order) Act 2008* includes as part of the registrable offenders criminal history ‘every charge made against the person for a reportable offence committed against a child, in Queensland or elsewhere, whether before or after the commencement of this Act, that has been withdrawn or discontinued because the complainant died or was unable or unwilling to proceed with the matter.’

The ACT approach has specifically excluded taking into account a charge that has been withdrawn, discontinued or dismissed or a charge for an offence for which the offender was acquitted or found guilty<sup>18</sup>.

### **Section 132F- Conduct that may be prohibited by prohibition order etc**

Section 132F (1) outlines the types of conduct that may be prohibited by a prohibition order. It provides that the types of conduct may include associating or contacting stated people or a stated type of person (for example, contacting children) being in stated places (for example, being within 200 metres of a school between 7am and 7pm), engaging in stated behaviour (for example, taking photographs of children) and being in stated employment (for example, employment that is within 200 metres of a child care centre).

Section 132F (2) provides the Magistrates Court with the flexibility to tailor the prohibition order to address the concerning behaviour of each registrable offender. The section allows for the conduct to be prohibited absolutely or on the conditions that the court considers to be appropriate. Section 132F (2)(b) requires the Magistrates Court to clearly articulate the conduct and any conditions contained in a prohibition order, ensuring that the registrable offender is fully aware of their obligations under the order.

Section 132F (3) ensures that where an order prohibits a registrable offender from engaging in conduct at or near a place, and the registrable offender has personal property at that place, then the Magistrates Court must ensure that the order provides for the registrable offender to collect their personal property from that place. The Magistrates Court must be satisfied that this order is reasonably necessary.

### Human Rights Considerations

#### **Section 12- Right to privacy and reputation**

This section allows the Magistrates Court to make an order prohibiting a registrable offender from engaging in particular conduct. The particular conduct that may be prohibited by the order will depend on the particular circumstances and behaviours of the registrable offender. One example of a limitation on the right to privacy and reputation under this provision would be an order that limits the contact that a registrable offender has with their family and

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<sup>18</sup> *Sekanina v Austria* [1993] ECHR 37, [30]: “The voicing of suspicions regarding an accused’s innocence is conceivable as long as the conclusion of criminal proceedings has not resulted in a decision on the merits of the accusation. However, it is no longer admissible to rely on such suspicions once an acquittal has become final.”

conversely, it may limit the rights of the registrable offender's family to have contact with the registrable offender.

***The importance of the purpose of the limitation (section 28 (2) (b))***

This section is fundamental to the reforms in this Bill. The purpose of this provision is to prohibit certain registrable offenders from engaging in particular conduct in circumstances where the conduct has been deemed a risk to the lives or sexual safety of a child or children.

***Nature and extent of the limitation (section 28 (2) (c))***

This section engages a registrable offender's right to privacy and reputation because it may affect where the registrable offender's home (by prohibiting the registrable offender from living at certain premises) and by prohibiting who the registrable offender may have contact with. However, this restriction must have a rational connection with the concerning conduct that is established in the application by the Chief Police Officer.

***Relationship between the limitation and its purpose (section 28 (2) (d))***

The section will limit the registrable offender's right to privacy and reputation in order to give effect to the fundamental purpose of the CSO Act to reduce the likelihood the registrable offenders will reoffend. The section recognises Article 3 of the CROC in order to protect children from sexual assault and violence.

***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

This section is the least restrictive means reasonably available to reduce the likelihood that registrable offenders will reoffend and consequently, to protect ACT children from sexual violence. While the provision allows for prohibition orders to be made against registrable child sex offenders, the specific conduct that may be prohibited will depend on the particular facts and circumstances of each registrable offender. This will ensure that the orders will only address specific behaviours that have been deemed a risk to children and in circumstances where the Magistrates Court is satisfied that the order will reduce the risk posed by the registrable offender.

**Section 13- Freedom of movement**

Section 13 of the HR Act provides that everyone has the right to move freely within the ACT, to enter and leave it, and the freedom to choose his or her residence.

***The nature of the right affected (section 28 (2) (a))***

The right to freedom of movement is not an absolute right. The right has inherent limitations, which are acknowledged at subsection (3) of article 12 of the ICCPR (the equivalent right to section 13 of the HR Act):

‘the rights to liberty and freedom of movement shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights or freedoms of others and are consistent with the other rights recognised in the Covenant.’

***The importance of the purpose of the limitation (section 28 (2) (b))***

This is discussed above in the outline section of the explanatory statement.

***Nature and extent of the limitation (section 28(2) (c))***

Section 132F allows the Magistrates Court to make an order preventing registrable offenders from living at or visiting certain places. Prior to making the order, the court must be satisfied that the registrable offender has engaged in the conduct as set out in the application, that the person poses a risk to the lives or sexual safety of one or more children, and the making of the prohibition order will reduce that risk.

Section 132G provides that the term of the prohibition order is 1 year for a young person, or in any other case, 5 years.

The European Court of Human Rights (ECtHR) discussed the use of residency restrictions in *Labuta v Italy*<sup>19</sup>. In *Labuta*, the Italian police placed a suspected mafia member under special supervision for a period of three years. The special supervision included severe restrictions on the person's freedom of movement. The ECtHR ruled that although the measures pursued legitimate aims, being the maintenance of public order and the prevention of crime, the measures failed to fulfil the requisite condition of being necessary in a democratic society to achieve those aims because there was insufficient evidence to demonstrate that there was a real risk that the suspect would re-offend.

The ACT Government has analysed evidence on the re-offending rates of convicted sex offenders and child sex offenders to ensure that the imposition of this scheme was appropriate and evidence based. This evidence is discussed in the purpose section of this explanatory statement.

Secondly, as highlighted by the ECtHR rulings, the necessity and proportionality of a residency restriction order must be assessed on an individual basis. This is one feature of the ACT proposal. These amendments provide that prohibition orders must be based on evidence, reduce the risk that the registrable offender is posing due to their conduct and that the orders are appropriate following consideration of the matters at section 132E.

The requirement on the court to consider the matters at section 132E will ensure that the individual circumstances of registrable offenders are considered in order to determine if a prohibition order is appropriate.

A further measure to ensure that this limitation is proportionate and that consideration is given to the individual circumstances of registrable offenders is at section 132E (2). This section provides the Court with the discretion to have regard to anything else that it considers relevant.

***Relationship between the limitation and its purpose (section 28 (2) (d))***

In the United States, the Eighth Circuit Court of Appeals has unanimously upheld the Iowa residency restriction statute. In *Doe v Miller* the US Court of Appeals for the Eighth Circuit concluded that residency restrictions are a form of civil regulation and that keeping sex offenders a certain distance from where children gather was rationally related to the legitimate legislative goal of protecting children.<sup>20</sup>

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<sup>19</sup> 26772/95, April 6, 2000.

<sup>20</sup> 405 F. 3d 700 (8<sup>th</sup> Cir. 2005), at 714.

The power at section 132F to prohibit a registrable offender from being in stated places or kinds of places, living at one or more stated premises, a stated kind of premise, or premises at a stated place, is a fundamental aspect of the prohibition order scheme.

***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

This amendment is necessary to give effect to the protective and preventive purposes of the CSO Act. This is the least restrictive option available.

This provision has been drafted to ensure that the individual circumstances of registrable offenders are properly considered and that an order is only made if the Magistrates Court is satisfied that it will reduce the risk that the registrable offender is posing to the lives and sexual safety of a child or children.

The review and appeal provisions provide further support for this limitation. Part 5A.4 allows registrable offender's to apply, with the courts leave, to amend or revoke an order. Part 5A.8 provides for decisions to be appealed to the ACT Supreme Court.

**Section 15- Peaceful assembly and freedom of association**

Section 15 of the HR Act provides that everyone has the right of peaceful assembly and the right to freedom of association.

***The nature of the right affected (section 28 (2) (a))***

The ability of the Magistrates Court to order that a registrable offender is not to associate with, or otherwise contact, stated people or a stated kind of person will engage the right to freedom of association. In *Lavigne v Ontario Public Service Employees Union*<sup>21</sup>, the Canadian Supreme Court observed that 'freedom of association is the freedom to combine together for the pursuit of common purposes or the advancement of common causes'.

The ECtHR has also considered the right to free association in Article 11(2) of the European Convention on Human Rights. In *Association X v Sweden*<sup>22</sup> the Court held that freedom of association is a general capacity for citizens to join, without interference from the State, in association in order to obtain various ends.

***The importance of the purpose of the limitation (section 28 (2) (b))***

As discussed above in the purpose section of this explanatory statement, the Bill's purpose is to prohibit a registrable offender from associating with or having contact with certain people. This purpose is directly linked to the purpose of the CSO Act to reduce the likelihood that registrable offenders will re-offend. It is also linked to the broader responsibility of the ACT Government to ensure, as far as possible, the safety and protection of children from sexual assault and violence.

***Nature and extent of the limitation (section 28(2) (c))***

Section 132F allows the Magistrates Court to prohibit a registrable offender from engaging in certain conduct. The conduct that will limit the right to freedom of association is:

- (2)(a) associating with, or otherwise contacting, stated people or a stated kind of person; and

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<sup>21</sup> (1991) 2 SCR 211.

<sup>22</sup> 9 DR 1 (1978)

(2)(e) being in stated employment, or a stated kind of employment, whether paid or voluntary, that is likely to bring the person into contact with children.

The purpose of these powers is to prohibit a registrable offender from engaging in behaviour that has been deemed a risk to the lives or sexual safety of children. The conduct that may be prohibited under (2)(a) may include contacting children or corresponding with other registrable offenders, while under (2)(e), it may include a prohibition on working within 200 metres of a school or child care centre.

#### ***Relationship between the limitation and its purpose (section 28 (2) (d))***

The section 15(2) right to freedom of association is not an absolute right. A number of human rights instruments containing the right to freedom of association provide that it may be limited in the ‘interests of public safety’ or for the ‘prevention of disorder or crime’<sup>23</sup>.

In some circumstances, it will be arguable that the section 15 rights are not engaged by the Bill. This is because it is unlikely that the right operates to promote associations that are in furtherance of a criminal offence. With regard to the limitation at section 132F (2)(a), the European Commission of Human Rights has held that freedom of association implies the right of individuals to come together to further their common interests, but does not include the right to share the company of others. In *McFeely v UK*<sup>24</sup>, the European Commission of Human Rights held that the concept of freedom of association is concerned with the right to form or be affiliated with a group or organisation, but does not concern the right of prisoners to share the company of other prisoners or to ‘associate’ with prisoners in this sense.

If the rights at section 15 are engaged, the purpose of the limitation in sections 132F 2 (a) and (e) is to protect children. They protect children by allowing the court to make an order prohibiting registrable offenders from having contact with other registrable offenders, children deemed to be at risk or from contact with children generally.

#### ***Any less restrictive means reasonably available to achieve the purpose (section 28(2) (e))***

This is the least restrictive option that allows police to intervene and prohibit certain registrable offenders from engaging in conduct that is deemed to be a risk to the lives or sexual safety of children. The freedom of certain registrable offenders to peaceful assembly and freedom of association will only be limited in circumstances where their conduct is posing a risk to children. In these circumstances, it is necessary and appropriate to intervene and prohibit the registrable offender from engaging in this conduct.

### **Section 16- Freedom of expression**

Section 16 provides that:

- (1) Everyone has the right to hold opinions without interference.
- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

#### ***The nature of the right affected (section 28 (2) (a))***

<sup>23</sup> See, for example, Article 11(2), *European Convention on Human Rights*; Article 17(2), *International Covenant on Civil and Political Rights*.

<sup>24</sup> Application 8317/78 (1981) 3 E.H.T.T 161.

The section 16 right to freedom of expression protects expression in any medium, including written and oral communication, the media, public protest, broadcasting and artistic works. The right not only protects favourable information and ideas but also unpopular or inflammatory sentiments.

However, the right to freedom of expression can be limited on several grounds. Under Article 19(3) of the ICCPR (from which section 16 derives), freedom of expression may be limited as provided for by law and in circumstances where it is necessary to protect the rights or reputations of others, national security, public order, public health or morals. In this case, the Bill is limiting the rights of registrable offenders where it is necessary to protect the rights of children and their families.

***The importance of the purpose of the limitation (section 28 (2) (b))***

The purpose of prohibiting a registrable offender from associating with or having contact with certain people is directly linked to the purpose of the CSO Act to reduce the likelihood that registrable offenders will re-offend. It is also linked to the broader responsibility of the ACT Government to ensure, as far as possible, the safety and protection of children from sexual assault and violence.

***Nature and extent of the limitation (section 28 (2) (c))***

The right to freedom of expression may be engaged by an order that prohibits a registrable offender from corresponding with certain people, where the registrable offender may go and what employment a registrable offender may undertake (please note that this is not an exhaustive list of the conduct that may engage the section 16 HR Act right).

***Relationship between the limitation and its purpose (section 28 (2) (d))***

The prohibition order scheme provides a mechanism for ACT Policing to intervene in circumstances where an offender has engaged in behaviour that is deemed a risk to the lives or sexual safety of children. This intervention, and the ability to prohibit a registrable offender from corresponding with certain people or restricting where the registrable offender may go, is directly linked to the purpose of the Bill. As discussed above in the purpose section of the explanatory statement, the overarching purpose of this Bill is to protect children.

***Any less restrictive means reasonably available to achieve the purpose (section 28(2) (e))***

There are no less restrictive means reasonably available to achieve the purpose of reducing risk to the lives or sexual safety of children.

This section is a reasonable limitation on the right to freedom of expression due to the purposes of the Bill and the protections that have been included in the Bill to limit the intrusion on a registrable offender's human rights. Prior to imposing a condition that restricts who a registrable offender may correspond with, a number of criteria must be met. Firstly, the offender must be a convicted child sex offender and secondly, it must be shown that the offender poses a risk to the lives or sexual safety of children. Finally, it must be shown that the particular condition will reduce the risk to the lives or sexual safety of children.

A further safeguard is the fact that it is a Magistrate who decides whether to impose such a condition on a registrable offender. This means that the circumstances of each registrable offender are taken into account and therefore the order can be tailored to the particular registrable offender and the risks posed to children.

### **Section 132G- Term of prohibition order**

Section 132G (1) provides for when a prohibition order takes effect. When the registrable offender is before the Magistrates Court when the order is made, the order takes effect when it is made. When the registrable offender is not before the court, the order takes effect when it is served on the registrable person in accordance with the requirements under new section 132ZC (Giving copy of order to person not before court).

Section 132G (2) provides the term of the prohibition order. A prohibition order for a young person can remain in force for no longer than one year. A prohibition order for an adult offender remains in force for no longer than five years.

The reduced term of a prohibition order for a young person is to support the rights of the young person and to provide the young person the opportunity to re-engage, without restriction, with the ACT community.

### **Part 5A.3- Interim prohibition orders**

Part 5A.3 sets out the process that allows the Magistrates Court to make an interim prohibition order for a registrable offender, the terms of such an order, and the process of extending an interim prohibition order if an application for prohibition order is adjourned.

### **132H- Court may make interim prohibition order**

Section 132H (1) provides that the Magistrates Court may make an interim prohibition order to prohibit a person from engaging in certain conduct if satisfied on the balance of probabilities that the person is a registrable offender, the conduct that the registrable offender is engaging in is posing a risk to the lives or sexual safety of 1 or more children, or children generally, and the interim order is necessary to reduce this risk until the application for the prohibition order is decided.

The conduct that may be prohibited by an interim order is identical to the conduct that may be prohibited under section 132F (Conduct that may be prohibited by prohibition order etc).

Like section 132D (3), the Magistrates Court does not need to be satisfied of a risk to a particular child or children in order to be satisfied that the registrable offender poses a risk to a child, children or a particular class of children.

Section 132H (3) specifies when the Magistrates Court may make an interim prohibition order. The section states that the court may only make an interim order on an application for a prohibition order. The purpose of this section is to ensure that all available evidence relating to the registrable offender's conduct is available to both the registrable offender and the court at the time of the application for an interim order. By virtue of section 132B (3), the registrable offender may be aware of the intention of the Chief Police Officer to apply for an interim order when served with the initial application.

The interim order may be made at any time during the proceedings for the application for a prohibition order. The inclusion of this section will address the circumstance where the proceedings for an application are adjourned, but the Chief Police Officer is concerned about the risk posed to children in the period until the application for the prohibition order is finalised.

Section 132H (4) provides that the application for the prohibition order (and therefore, an interim order) may be heard in the absence of the registrable offender if the Magistrates Court is satisfied that the application was served on the registrable offender in accordance with the requirements set out under new section 132Z (service of applications). The purpose of this provision is to allow the court to hear the application where the registrable offender is aware of the application and has not attended the proceeding.

Section 132H (5) is a procedural provision that ensures that the Magistrates Court sets a return date for the application for the prohibition order, so an offender is not left with an interim order without the prospect of a full hearing.

### Human rights considerations

#### **Section 21- Fair trial**

Section 21 provides:

- (1) Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) However, the press and public may be excluded from all or part of the trial-
  - (a) to protect morals, public order or national security in a democratic society; or
  - (b) if the interest of the private lives of the parties require the exclusion; or
  - (c) if, and to the extent that, the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice.
- (3) But each judgement in a criminal or civil proceeding must be made public unless the interest of a child requires that the judgement not be made public.

#### ***The nature of the right affected (section 28 (2) (a))***

The right to a fair trial guarantees the right of all parties in civil and criminal proceedings to a fair and public hearing. The right to a fair trial is limited by section 132H (4) because it allows for a prohibition order application to be heard, and for an order to be made, in the absence of a registrable offender if the Magistrates Court is satisfied that the registrable offender was served with the application under section 132Z (Service of applications).

The ECtHR has considered the compatibility of ex parte procedure with the right to a fair trial and has recognised that in any criminal proceedings there may be competing interests (in this circumstance, the necessity to protect a child or children) which must be weighed against the rights of the accused. The ECtHR has noted that the legitimacy of ex parte procedure is linked to the presence of necessary safeguards to protect the rights of the accused.<sup>25</sup> These safeguards are discussed below.

#### ***The importance of the purpose of the limitation (section 28 (2) (b))***

Section 132H (4) provides that a prohibition order application can be heard and determined in the registrable offender's absence. The purpose of this clause is to address the circumstance

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<sup>25</sup>Colvin, M & Cooper, J, 2009 'Human Rights in the Investigation and Prosecution of Crime' Oxford University Press, p. 242, paragraph 10.39.

where a registrable offender, who has been notified of the application, does not attend the hearing of the application.

***Nature and extent of the limitation (section 28 (2) (c))***

The Bill allows, in certain circumstances, for an application for a prohibition order to be heard in the absence of the registrable offender.

***Relationship between the limitation and its purpose (section 28 (2) (d))***

This provision will only apply where the registrable offender is aware of the application for a prohibition order.

The Bill includes safeguards to ensure that the registrable offender is aware of the application and the return date for the hearing. Under the Bill, the offender is put on notice of the prohibition order application because of section 132Z (service of applications). Additionally, the offender may apply to the Magistrates Court for an order to amend or revoke any order that is granted, or seek a review of the decision by the Supreme Court.

***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

There are no less restrictive means reasonably available to achieve the purposes of the Bill.

This limitation is appropriate because of the requirement that the registrable offender be served with an application and the review and appeal rights that are available to the registrable offender. The registrable offender can apply to amend or revoke the order under section 132K or appeal to the Supreme Court against an appealable decision under Part 5A.8.

**132I- Term of interim prohibition order**

Section 132I (1) specifies when an interim prohibition order takes effect. If the registrable offender is before the court, the interim order will take effect at the time it is made. If the registrable offender is not before the court when the interim order is made, the interim order takes effect when a copy of the order is served on the registrable offender in accordance with the requirements under new section 132ZC (Giving copy of order to person not before court).

Section 132I (2) provides that the order remains in force until the earlier of the end of the relevant period for the order (the relevant period is defined at section 132I (3)) and 1 of the occurrences listed at section 132I (2) (b). The occurrences are:

- the day that a prohibition order takes effect;
- the day the Magistrates Court makes a decision not to make a prohibition order;
- if the Chief Police Officer discontinues the application for the prohibition order;
- if the order (interim or prohibition order) is revoked or set aside on appeal;
- if a proceeding for a prohibition order is not started by the return date and the court does not extend the interim prohibition order;
- if the person's reporting period ends before the relevant period ends.

Section 132I (3) defines a relevant period as either 28 days or the period for which the order is extended under section 132J.

**132J- Extending interim prohibition order if application for prohibition order adjourned**

This section allows the Magistrates Court to extend an interim prohibition order on application by the Chief Police Officer or on its own initiative.

Section 132J (2) allows the Magistrates Court to extend the interim order for a period not more than 28 days. Unlike other Australian jurisdictions, the interim order may only be extended for a further 28 days. This is the least restrictive approach to ensure that registrable offenders are not subject to the obligations imposed by the prohibition order without first having their application determined by the Magistrates Court.

Section 132J (3) provides that the interim prohibition order may be extended in the registrable offender's absence if the registrable offender is served with the application for the prohibition order in accordance with the requirements under section 132Z (Service of applications). This section is necessary to ensure that registrable offenders who are posing a risk to the lives and sexual safety of a child or children, and who have been made aware of the prohibition order application following service of the application, are subject to an interim order where the order is considered necessary to reduce this risk until the application for the prohibition order is decided.

#### **Part 5A.4- Amending or revoking prohibition and interim prohibition orders**

Part 5A.4 introduces a process into the CSO Act that allows a prohibition order or an interim prohibition order to be amended or revoked by the Magistrates Court.

#### **132K- Application to amend or revoke prohibition order or interim prohibition order**

This section allows the Chief Police Officer or the registrable offender to apply to the Magistrates Court for an order to amend or revoke the prohibition order.

Section 132K (3) provides that other than for an order that was made in the registrable offender's absence, a registrable offender may only make an application to amend or revoke a prohibition order with the Magistrates Court's leave. This section ensures that applications are only made where the Magistrate Court is satisfied of the matters at section 132K (4).

Section 132K (4) specifies the circumstances where the Magistrates Court will grant leave to allow a registrable offender to apply to amend or revoke the prohibition order or interim prohibition order. Firstly, the Magistrate's Court may grant leave if satisfied on the balance of probabilities that it is in the interests of justice to do so by having regard to changes in the registrable offender's circumstances or the circumstances affecting the registrable offender since the order was made or last amended by the court.

A change in the person's circumstances may be a change to the person's accommodation, employment, health, cultural or social needs. For example, the registrable offender may require health treatment that will result in the offender breaching a condition of their order because the treatment facility is within the limit originally imposed by the Magistrates Court to prohibit the registrable offender from being within a certain distance from a child care centre.

A change to the circumstances affecting the person may be a change to a bus route that will result in the registrable offender being within the limit originally imposed by the Magistrates Court of a school that will result in the registrable offender breaching their order.

Section 132K (4)(b) provides the second circumstance where the Magistrates Court may grant the registrable offender leave to apply to amend or revoke their prohibition order.

Registrable offenders may apply for leave to apply on compassionate grounds, which includes having regard to the registrable offender's culturally specific needs.

An example of a compassionate ground is to attend the funeral of a relative.

The requirement that a registrable offender must demonstrate that the application to amend or revoke the order is in the interests of justice or is appropriate on compassionate grounds is a reasonable limitation. Where a registrable offender is unable to satisfy the Magistrates Court that the application is in the interests of justice or on compassionate grounds, part 5A.10 provides registrable offenders with the option to appeal to the Supreme Court against an appealable decision.

### **132L- Court may amend or revoke prohibition order or interim prohibition order**

Section 132L provides the Magistrates Court with the ability to make an order to amend or revoke a prohibition order or interim prohibition order following an application to do so.

Section 132L (2) specifies that in considering an order in relation to a prohibition order, the Magistrates Court must have regard to the matters considered pursuant to section 132D (Court may make prohibition order). The Magistrates Court must have regard to those matters at section 132D to the extent that the court that made the prohibition order was required to have regard to those matters. The Court must also have regard to any changes to the person's circumstances since the prohibition order was made, or last amended.

Section 132L (3) provides the matters that the Magistrates Court must have regard to when considering an order to amend or revoke an interim prohibition order. The Magistrates Court must have regard to the matters mentioned at section 132H (Court may make interim prohibition order) to the extent that the court that made the interim prohibition order was required to have regard to those matters and any changes to the person's circumstances since the prohibition order was made.

Section 132L (4) provides that where the registrable offender is before the court, the order to amend the prohibition order or interim prohibition order takes effect when the order is made. Where the person is not before the Magistrates Court, the order takes effect when a copy of the order is served on the person in accordance with the requirements in section 132ZC (Giving copy of order to person not before the court).

Section 132L (5) provides that an order revoking a prohibition order or interim prohibition order takes effect when it is made by the Magistrates Court.

### **Part 5A.5- Corresponding prohibition orders**

Part 5A.5 introduces a process into the CSO Act that allows the Chief Police Officer to apply to the Magistrates Court to register a corresponding prohibition order for a registrable offender who relocates to the ACT or enters the ACT for a period of 7 or more consecutive days.

### **132M- Application for registration of corresponding prohibition order**

This section allows the Chief Police Officer to apply to the Magistrates Court to register a corresponding prohibition order for a registrable offender. A corresponding prohibition order is defined at section 132A as an order made under a law of a foreign jurisdiction that substantially corresponds to a prohibition order or interim prohibition order in the ACT. A

law of a foreign jurisdiction includes a law of an Australian State or Territory apart from the ACT or the law of a jurisdiction outside Australia.

The purpose of this section is to ensure that registrable offenders who relocate to the ACT, or who enter the ACT for a period of 7 or more consecutive days, are subject to the same (or substantially similar) reporting obligations as they were in their original, or most recent, foreign jurisdiction.

Section 132M (2) specifies that the application to register the corresponding order must be accompanied by a copy of the corresponding prohibition order and evidence that the corresponding prohibition order was served on the registrable offender under the corresponding law (if this was a requirement under the foreign jurisdiction) and the details of any amendment sought for the order to operate effectively in the ACT.

### **132N- Registration of corresponding prohibition order- no amendment**

This section applies to applications pursuant to section 132M (Application for registration of corresponding prohibition order) that do not include details of any amendment sought for the corresponding order to operate effectively in the ACT under section 132M (2) (c).

In these circumstances, section 132N (2) provides that the Magistrates Court must register the corresponding prohibition order if the court is satisfied that the person is a registrable offender, that there is a corresponding order in force and that the order was served on the person in the foreign jurisdiction if the law of that jurisdiction required the order to be served.

Section 132N (3) provides that the Magistrates Court may deal with the application under section 132P (Registration of corresponding prohibition order- with amendment) if the court considers that the corresponding order will require amendment to operate effectively in the ACT. This section includes a note to ensure that the court sets a return date for a corresponding order, which will ensure that the registrable offender is served with the application pursuant to section 132Z.

### **132O- Notice of registration of unamended corresponding prohibition order**

This section applies to applications pursuant to section 132M (Application for registration of corresponding prohibition order) that do not include details of any amendment sought for the corresponding order to operate effectively in the ACT under section 132M (2) (c).

The section requires the Magistrates Court to provide a registration notice as soon as practicable after registering the corresponding order to the Chief Police Officer in order to confirm that the notice has been registered in the ACT. This notice must be then served by the Chief Police Officer on the registrable offender.

Section 132O (3) applies to a registered corresponding order for a young person. The section requires the Chief Police Officer to serve a copy of the registration notice on a person with parental responsibility for the young person (if the registrable offender lives with a person with parental responsibility) and the CYP Director-General if they have long-term care responsibility or daily care responsibility (alone or shared with someone else) for the young registrable offender.

Section 132O (4) requires the police officer serving the registration notice to explain, as far as practicable in the circumstances, the purpose, terms, effect and consequences of the notice.

Section 132O (5) requires this explanation to be in a language likely to be understood by the registrable offender.

Section 132O (6) provides that a failure to comply with sections (4) and (5) does not affect the validity of the notice.

The importance and effect of the explanation and language sections (132O (4) and (5)) are discussed in detail under section 132ZE of this explanatory statement.

### **132P- Registration of corresponding prohibition order- with amendment**

Section 132P applies to applications for the registration of corresponding prohibition orders where the application is seeking amendments to allow for the effective operation of the order in the ACT or if the Magistrates Court decides to deal with the application under this section because it is satisfied that amendment is required.

Section 132P (2) provides that the application may be heard in the registrable person's absence if the Magistrates Court is satisfied that the person was served with the application under section 132Z (Service of applications). The purpose of this section is to allow for applications to proceed in circumstances where the registrable offender is aware of the application and determines not to attend the proceedings. This prevents a person from avoiding registration of a corresponding prohibition order by simply not attending court. The engagement of the Bill's provisions to allow for application to be heard in the absence of the registrable offender is discussed under section 132H above.

Section 132P (3) allows the Magistrates Court to make an order to amend the corresponding prohibition order in a way that it considers necessary or desirable to allow for its effective operation in the ACT. In considering an order to amend a corresponding prohibition order for its registration in the ACT, section 132P (4) provides that the Magistrates Court must have regard to the matters that must be considered pursuant to section 132D (Court may make prohibition order) and any changes in the person's circumstances since the corresponding prohibition order was made.

Section 132P (5) provides that the Magistrates Court must register the corresponding prohibition order as amended if satisfied that the person is a registrable offender, the corresponding prohibition order is in force and the corresponding prohibition order was served on the registrable offender if the law of the foreign jurisdiction required the order to be served. The Magistrates Court must be satisfied that all three elements of section 132P (5) exist for the corresponding prohibition order as amended to be registered in the ACT.

### **132Q- Term of registered corresponding prohibition order**

Section 132Q provides the term of a registered corresponding prohibition order.

Section 132Q (1) provides that orders registered under section 132N (Registration of corresponding prohibition order- no amendment) take effect when the registration notice is served in the person. The registration of a corresponding prohibition order under section 132P takes effect in one of two ways. Under section 132Q (2) (a), if the person was before the Magistrates Court when the corresponding prohibition order as amended is registered, then the order takes effect when it is registered. Alternatively, if the person was not before the Magistrates Court when the amended corresponding order was registered, the order takes

effect when a copy of the registered corresponding order is served on the registrable offender in accordance with the requirements under section 132ZC (Giving copy of order to person not before court).

Section 132Q (3) provides that the registered corresponding prohibition order is registered for the lesser of 5 years or the period during which the corresponding prohibition order, as originally made, is on force. The purpose of this provision is to recognise that registrable offenders may have been subject to a prohibition order for a set period of time in a foreign jurisdiction, and this period of time is taken into account if the corresponding prohibition order is registered in the ACT.

Section 132Q (4) applies to young people. If a registered corresponding order is registered for a young person, the order is registered for the lesser of 3 months or the period during which the corresponding prohibition order, as originally made, is in force. The purpose of this provision is to recognise section 11 (2) of the HR Act by providing that young registrable offenders receive consideration, support and leniency because of their status as a young person.

### **132R- Application to amend or cancel registration of registered corresponding prohibition order**

Section 132R allows the registrable offender or the Chief Police Officer to apply to the Magistrates Court for an order to amend or cancel the registration of the corresponding order.

Like section 132K (Application to amend or revoke prohibition order or interim prohibition order), section 132R (2) provides that unless the order was made in the person's absence, a registrable offender may only make an application to amend or cancel the registration of the corresponding order with the court's leave.

Section 132R (3) provides the circumstances where the Magistrates Court will grant leave to allow a registrable offender to apply to amend or cancel the registration of the corresponding order. The circumstances are identical to those at section 132K. Firstly, the Magistrate's Court may grant leave if satisfied on the balance of probabilities that it is in the interests of justice to do so by having regard to changes in the registrable offender's circumstances or the circumstances affecting the registrable offender since the corresponding prohibition order was made or last amended by the court.

Section 132R (3) (b) provides the second circumstance. Registrable offenders may apply for leave on compassionate grounds, which includes having regard to the registrable offender's culturally specific needs.

### **132S- Court may amend or cancel registration of registered corresponding prohibition order**

Section 132S provides that the Magistrates Court with the ability to make an order to amend or cancel the registration of a registered corresponding prohibition order.

Section 132S (2) specifies that in considering an order, the Magistrates Court must have regard to the matters considered under section 132D (Court may make prohibition order), and any changes to the person's circumstances since the corresponding prohibition order was made or last amended by the court.

Section 132S (3) specifies when an order amending a registered corresponding prohibition order takes effect. Section 132S (3) (a) provides that where the registrable offender is before the court when the amending order is made, the order takes effect when it is made. Where the registrable offender is not before the Magistrates Court, section 132S (3)(b) provides that the order takes effect when it is served under section 132ZC (Giving copy of order to person not before court).

Section 132S (4) provides that an order cancelling the registration of a registered corresponding prohibition order takes effect when it is made.

### **Part 5A.6- People with legal disabilities**

Part 5A.6 sets out the process that must be complied with where a person has a legal disability. These provisions support the right to a fair trial at section 21 of the HR Act by ensuring that a person with a legal disability has a litigation guardian to ensure that the person has a fair hearing and that their interests are protected.

#### **132T- Definitions- pt 5A.6**

Section 132T provides the definitions for the terms *person with a legal disability* and *person with a mental disability* for part 5A.6.

#### **132U- Appointing litigation guardian for person with legal disability**

Section 132U (1) provides that this section applies if the Magistrates Court considers that the relevant person (the registrable offender) is a person with a legal disability.

Section 132U (2) provides who may be appointed as a litigation guardian.

Section 132U (3) provides the process for the appointment of a litigation guardian.

Section 132U (4) provides that if the relevant person has a guardian or manager under the *Guardianship and Management of Property Act 1991* then another individual can only be appointed as the relevant person's litigation guardian with the court's leave.

Section 132U (5) provides the definitions of *guardian* and *manager* for section 132U.

#### **132V- Functions of litigation guardian**

This section applies if a litigation guardian has been appointed for an application under chapter 5A.

Section 132V (2) states that the litigation guardian is able to do anything under chapter 5A that the registrable person is able to do. For example, this would include applying to amend or revoke a prohibition order or interim order under section 132K.

Section 132V (3) provides that the litigation guardian must do anything that the registrable offender is required to do under chapter 5A. However, the note at this section indicates that the litigation guardian must not give the registrable offender's evidence for them because of the operation of the Commonwealth *Evidence Act 1995*.

Section 132V (4) provides that the litigation guardian must do everything necessary in the proceedings to protect the person's interests.

### **132W- Removal of litigation guardian**

This section provides the Magistrates Court with the ability to remove a litigation guardian. This power may be exercised on an application by a party to the proceedings, anyone else, or on the Magistrates Court's own initiative.

Section 132W (1) allows the Magistrates Court to remove the litigation guardian and order that the proceedings be stayed until someone else has been appointed as the litigation guardian for the registrable offender.

Section 132W (2) requires the person who applied for the litigation guardian's removal to serve notice of this application on the person who the applicant is seeking to be removed as litigation guardian and on the person with a legal disability. This section applies unless the Magistrates Court directs otherwise.

Section 132W (3) provides for an application for the removal of a litigation guardian to be made by a party to the proceeding or anyone else.

### **132X Representation of parties with legal disability**

This section allows the Magistrates Court to adjourn prohibition order proceedings to allow a person with a legal disability to get legal representation for the proceedings.

Section 132X (1) states that the section applies where a person has a legal disability and does not have a legal representative, or an appropriate or suitable representative.

Section 132X (2) allows the Magistrates Court, on an application or its own initiative, to adjourn the proceedings so that the party with a legal disability can get legal representation. The section also ensures that the person with a legal disability has the information necessary to get representation and finally, the section allows the Magistrates Court to tell the Public Advocate that the proceeding has been adjourned to allow the person with a legal disability to get legal representation. The purpose of providing the Public Advocate with this information is to allow the Public Advocate to assist the person with a legal disability, where appropriate, to get legal representation.

## **Part 5A.7- Other provisions about orders prohibiting offender conduct**

### **132Y- Court sets return date**

This is a procedural section. It applies when a hearing is going to be held for an application under this chapter.

When the Magistrates Court receives an application, section 132Y (2) requires the court to enter the application in the courts record; set a date when the application will be returned to court (the return date) and requires the court to include this return date on the application and any copies of the application for service.

Section 132Y (3) requires that the return date must be not later than 2 days after the application is made to the Court. Or, if the Chief Police Officer is not seeking an interim prohibition order on the application and the Magistrates Court is satisfied that the longer time is necessary to allow the registrable person to be served with the application, the return date must be no later than 10 days after the application is made to the Court.

### **132Z- Service of applications**

This is a procedural section to ensure that applications for an order are served on registrable offenders if a hearing will be held for the application.

Section 132Z (2) requires the application to be served personally on the registrable offender and anyone else that the court directs.

Section 132Z (3) applies to applications for young registrable offenders. Where an application relates to a young registrable offender, the section requires that the application must be served on the young registrable offender and in some circumstances, additional people. If the young registrable offender lives with a person who has parental responsibility for the young registrable offender, the application must also be served on the person with parental responsibility for the young person. If the CYP Director-General has long-term care responsibility or daily care responsibility for the young registrable offender, then the application must also be personally served on the CYP Director-General.

Section 132Z (4) requires that the application must be served as soon as practicable after the return date is set or the day the application is made under section 132Y or, where the return date is the same day as when the application is made, then the application must be served as soon as practicable after the day that the application has gone before the Magistrates Court and the court has set a further return date for the application.

#### Human Rights Considerations:

### **Section 12- Privacy and reputation**

#### ***The importance of the purpose of the limitation (section 28 (2) (b))***

The purpose section 132Z is to ensure that registrable offenders are aware of the application and are afforded natural justice and procedural fairness in relation to the application.

Requiring service on the young person's parent or the CYP Director-General will ensure that they are aware of a prohibition order application and can provide assistance where necessary for a young registrable offender in their care.

#### ***Nature and extent of the limitation (section 28 (2) (c))***

This section will limit a young registrable offender's right to privacy and reputation because it will disclose the fact that an application has been made to the Magistrates Court, and the conduct that is proposed to be prohibited by the order, to a young person's parent and in some cases to the CYP Director-General.

Section 132Z (2) (b) may affect a registrable offender's right to privacy if the application is served on another person as directed by the Magistrates Court.

#### ***Relationship between the limitation and its purpose (section 28 (2) (d))***

This section will ensure that appropriate people are made aware of the prohibition order application. This section particularly applies to young people, and will give effect to section 11 of the HR Act (protection of the family and children) by providing for the parents or the CYP Director-General to take appropriate measures to support and assist the young person with the court process.

***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

The limitation on the registrable offender's right to privacy and reputation is appropriate. It will ensure that relevant people are made aware of the prohibition order application. By only providing for a prohibition order to be served on the registrable offender, a person directed by the court, a parent, or the CYP Director-General, this ensures that the infringement on the right to privacy and reputation of the registrable offender is limited and restricted. There are no less restrictive means available.

**132ZA- If personal service impractical or impossible**

This section applies to applications, orders or other documents that must be personally served on a person if personal service is not reasonably practicable. This section allows the Magistrates Court to order that in such situations, the application, order or document be served in a way that is likely to bring the application, order or document to the attention of the person required to be served.

This section allows for applications, orders or documents to proceed in circumstances where reasonable attempts have been made to serve the applications, orders or documents and the registrable offender is evading service, or they are otherwise unable to be served.

**132ZB- Court may issue warrant for person's arrest**

This section applies to hearings for applications under this chapter. Where the Magistrates Court is satisfied that a registrable offender has been served with an application under section 132Z (Service of applications), this section allows the court to issue a warrant for the registrable offender to be arrested and brought before the court and to adjourn the hearing of the application until the person is before the court.

**132ZC- Giving copy of order to person not before court**

The purpose of this section is to ensure that registrable offenders who do not attend the hearing of an application for a prohibition order are served with a copy of the prohibition order. This will ensure that the registrable offender is aware of their obligations and the conduct that is prohibited by the order. This section should be read in conjunction with section 132ZF, which requires prohibition orders to be explained to a person who is not before the court.

Section 132ZC (2) requires that a copy of the order must be personally served on the registrable offender. Section 132ZC (2) (b) requires that in addition to the order, a notice must be served on the registrable offender that advises the registrable offender of the foreign jurisdictions (both outside the ACT and internationally) that may require the order to be registered if the registrable offender travels or relocates to that jurisdiction.

Section 132ZC (3) provides that a failure to comply with section 132ZC in relation to an order that revokes an existing order, or an order that cancels the registration of a registered corresponding prohibition order, does not affect the validity of the revocation or cancellation order.

**132ZD- Giving copy of order for young person etc**

This provision will support the section 11 (2) HR Act right (every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind) by ensuring that young registrable offenders receive consideration and support because of their status as a young person.

Where a prohibition order will result in a young registrable offender needing to change where they live, this section requires the Chief Police Officer to serve a copy of the order on a person who has parental responsibility for the young person (if the young person lives with a person with parental responsibility) or with the CYP Director-General if they have long-term care responsibility or daily care responsibility for the young person. This is to ensure that the young person has the appropriate support and assistance to change where they live.

Section 132ZD (3) states that a failure to comply with this section does not affect the validity of the order.

### Human Rights Considerations

#### **Section 12- Privacy and reputation**

##### ***The importance of the purpose of the limitation (section 28 (2) (b))***

Where a prohibition order will result in a young person needing to change where they live, this section will require the Chief Police Officer to serve a copy of the order on a person with parental responsibility for the young person or the CYP Director-General if they have long-term care responsibility or daily care responsibility for the young person.

The purpose of this section is to ensure that the accommodation needs of the young person are addressed if the prohibition order will result in the young person changing where they live.

##### ***Nature and extent of the limitation (section 28 (2) (c))***

This section will limit a young registrable offender's right to privacy and reputation because it will disclose the fact that an order has been made by the Magistrates Court, and the conduct prohibited by the order, to a young person's parent and, if appropriate, the CYP Director-General.

##### ***Relationship between the limitation and its purpose (section 28 (2) (d))***

This section will ensure that the appropriate people are made aware that the prohibition order has resulted in a young person needing to change where they live. This section will give effect to section 11 of the HR Act (protection of the family and children) by providing for the parents or the CYP Director-General to take appropriate measures to support and assist the young person to comply with this requirement.

##### ***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

The limitation on the young registrable offender's right to privacy and reputation is appropriate. By only providing for the prohibition order to be served on a parent or the CYP Director-General, and only in the circumstance where the order has resulted in the young registrable offender changing where they live, this will ensure that the infringement on the right to privacy and reputation of the young registrable offender is limited and restricted.

#### **Section 132ZE- Explaining orders if person before the court**

The purpose of this section is to ensure that the consequences, purpose, terms and effect of a prohibition order are explained to the registrable offender if they are before the court when the prohibition order is made.

Section 132ZE (2) requires the Magistrates Court to explain the purpose, terms and effect of the order, the consequences for the registrable offender if they fail to comply with the order and the foreign jurisdictions that have corresponding laws that may result in the order being registered in that jurisdiction.

Section 132ZE (3) requires the Magistrates Court to explain the effect of an order that revokes or cancels an order.

Section 132ZE (4) requires the Magistrates Court to explain the matters at section 132ZE (2) and (3) in a language likely to be readily understood by the person. This section has been included to ensure that interpreters and interpreter services are utilised where necessary.

Section 132ZE (5) states that a failure to comply with this section does not affect the validity of an order. However, the failure to comply with section 132ZE (2) and (3) could be relevant, depending on the facts and circumstances of the breach, to the prosecution of an offence for contravening a prohibition order. In determining whether the registrable offender had a reasonable excuse for contravening the prohibition order, section 132ZK (c) allows the court to have regard to whether the form of notice given to the registrable offender about the order was adequate to advise the registrable offender of their obligations under the prohibition order.

### **132ZF- Explaining orders if person not before the court**

Like section 132ZE, the purpose of this section is to ensure that a police officer explains the consequences, purpose, terms and effect of a prohibition order to a registrable offender. This section applies when the registrable offender is not before the court when the prohibition order is made.

The obligations on a police officer under this section are identical to the obligations on the Magistrates Court at section 132ZE.

### **132ZG- Proceedings for orders to be closed to public**

This provision ensures that all proceedings in relation to an application for a prohibition order under chapter 5A are heard in the absence of the public. The registrable offender, Chief Police Officer, lawyer representing the registrable offender and lawyer representing the Chief Police Officer are entitled to be present. Where a litigation guardian has been appointed, that person is also entitled to be present.

Section 132ZG (3) allows the Magistrates Court, if it consider it appropriate, to order that a person other than the registrable offender, Chief Police Officer, lawyer representing the registrable offender and lawyer representing the Chief Police Officer be present at the proceedings.

## Human Rights Considerations

### **Section 12- Privacy and reputation**

#### ***The importance of the purpose of the limitation (section 28 (2) (b))***

The purpose of this provision is to ensure the protection of information on the child sex offender register, to ensure the privacy of people who are named in the proceedings (in particular, children who have been identified as at risk) and to protect registrable offenders from possible vigilante action from members of the community.

The provision will protect the right to privacy and reputation of a victim or a child identified to be at risk during a prohibition order proceeding from possible unwelcome attention from the media and public. Although this provision is in conflict with the notion of open justice, the provision is appropriate given the rights of children, families and registrable offenders to privacy.

***Nature and extent of the limitation (section 28 (2) (c))***

By closing these proceedings to the general public, this section will support the HR Act section 12 right to privacy, reputation and the personal identity of a victim of an offence committed by a registrable offender. It will also protect the section 12 rights of a child identified to be at risk and the section 12 rights of registrable offenders.

***Relationship between the limitation and its purpose (section 28 (2) (d))***

This limitation is necessary to protect the privacy and reputation rights of victims of offences committed by registrable offenders and children identified to be at risk from the conduct of registrable offenders. This will protect children and families from unwanted attention.

This section will ensure that the HR Act section 12 rights of registrable offenders to privacy and reputation are supported. In particular, this will protect the registrable offender from potential vigilante action. It will also support the information protections that apply to information in the child sex offender register.

***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

Section 132ZG (3) allows for the court to order that another person, other than the relevant person, Chief Police Officer, or lawyer for the relevant person may be present at the application for a prohibition order. This gives the court discretion to allow other people to be present, if the other person's presence is deemed by the court to be appropriate.

The Government considers that the introduction of an offence restricting the publication of prohibition order proceedings on its own will not sufficiently provide for the protection of victims, children identified at risk and registrable offenders. This is evident in offences prosecuted in other Australian jurisdictions, where information relating to child sex offenders has been published despite the existence of criminal offences prohibiting this conduct.

**Section 16- Freedom of expression**

A description of freedom of expression and the nature of the right appears above at section 132F.

***The nature of the right affected (section 28 (2) (a))***

In Europe, it has been observed that freedom of expression is one of the essential foundations of a democratic society.<sup>26</sup> It has been noted that any restriction that is placed on the media should be closely scrutinised as the media is the purveyor of information to the community.<sup>27</sup>

However, as discussed at section 132F, the right to freedom of expression can be limited on several grounds. It may be limited as provided for by law and in circumstances where it is

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<sup>26</sup> *Handyside v UK* (1976) 1 EHRR 737.

<sup>27</sup> Colvin, M & Cooper, J, 2009 *Human Rights in the Investigation and Prosecution of Crime* Oxford University Press, p. 424-425.

necessary to protect the rights or reputations of others, national security, public order, public health or morals.

***The importance of the purpose of the limitation (section 28 (2) (b))***

Section 132ZG will limit the right of the media to have access to the prohibition order proceedings. As is discussed under the right to privacy above, the purpose of this section is to ensure the protection of information on the child sex offender register, to ensure the privacy of people who are named in the proceedings (in particular, children who have been identified as at risk) and to protect registrable offenders from possible vigilante action from members of the community.

***Nature and extent of the limitation (section 28 (2) (c))***

In this case, the Bill is limiting the rights of the media to attend the prohibition order proceedings and therefore their ability to impart certain information to the community. It is the ACT Government position that this limitation is necessary in order to protect the section 12 rights of child victims of registrable offences, a child deemed to be at risk during a proceeding, the families of child victims and children identified to be at risk and registrable offenders.

***Relationship between the limitation and its purpose (section 28 (2) (d))***

This limitation is necessary to protect the privacy and reputation rights of victims of offences committed by registrable offenders and children identified to be at risk from the conduct of registrable offenders. This will protect children and families from possible unwanted attention from the media.

By restricting access to the proceedings, registrable offender's identities and locations will be protected in order to reduce the likelihood of potential vigilante action. It will also support the information protections that apply to information in the child sex offender register, as this information will comprise a large proportion of the information in the proceedings.

***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

As discussed in relation to the privacy limitation above, the Government considers that the introduction of an offence restricting the publication of prohibition order proceedings on its own will not sufficiently provide for the protection of victims, children identified at risk and registrable offenders.

**Section 21- Fair trial**

Section 21(2) and (3) of the HR Act provide that:

- (2) the press and public may be excluded from all or part of a trial—
  - (a) to protect morals, public order or national security in a democratic society; or
  - (b) if the interest of the private lives of the parties require the exclusion; or
  - (c) if, and to the extent that, the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice.
  
- (3) But each judgment in a criminal or civil proceeding must be made public unless the interest of a child requires that the judgment not be made public.

***The nature of the right affected (section 28 (2) (a))***

The right to a fair trial guarantees a right of all parties in civil and criminal trials to a fair and public hearing. This right is engaged by new section 132ZG as prohibition order proceedings are not held in public.

***The importance of the purpose of the limitation (section 28 (2) (b))***

A closed hearing will protect the offender's right to privacy and reputation. It will also protect the right to privacy and reputation of a victim or a child identified to be at risk during a prohibition order proceeding from possible unwelcome attention from the media and public.

In addition, a closed court also provides protection for offenders with respect to their criminal history information, particularly where a relevant matter in which they are an accused or defendant has not yet been finalised.

It is important to acknowledge that community attitudes to child sex offenders are such that certain members of the community feel they have a right to know who sex offenders are in order to protect their children and possibly, in some extreme cases, to seek retribution. This limitation will therefore protect offenders' right to security of person and enhance an offenders' safety.

***Nature and extent of the limitation (section 28 (2) (c))***

Children and young people may be involved or named in prohibition order proceedings. By ensuring that the court is closed for prohibition order proceedings means that the privacy of children and young people who may be victims, witnesses or identified as being at risk in these or related proceedings will be protected. In addition, an un-represented offender in such a proceeding will not need to apply for the court to be closed in order to protect their privacy, reputation and safety.

***Relationship between the limitation and its purpose (section 28 (2) (d))***

Ensuring that a prohibition order proceeding is always closed will result in the highest level of protection (of privacy, reputation and physical safety) for offenders and privacy for children.

***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

There are no less restrictive means reasonably available to achieve the purposes of the Bill. To ensure protection of potentially vulnerable persons, including the offender, the court must be closed for all prohibition order proceedings.

**Part 5A.8- Offences**

**132ZH- Offences- prohibition of publication of identity**

Section 132ZH (1) creates an offence where a person intentionally publishes protected identity information about a protected person in relation to a proceeding on an application for an order under chapter 5A. Section 18 of the *Criminal Code 2002* describes the fault element of intention.

This intentional offence is punishable by imprisonment for 1 year, 100 penalty units, or both.

Section 132ZH (2) creates an offence where a person is reckless about whether the information is protected identity information, and the person publishes that protected identity

information in relation to a proceeding for an application under chapter 5A. Section 20 of the *Criminal Code 2002* describes the fault element of recklessness.

This offence is punishable by imprisonment for 6 months, 50 penalty units, or both.

Section 132ZH (3) describes a defence for a prosecution for an offence against section 132ZH (1) or (2). It is a defence to a prosecution if the protected person is not a young person and the protected person consented to the publication of the protected identity information about himself or herself before the publication happened. Section 132ZH (3) places a legal burden on the defendant in relation to this defence, which is described in section 59 of the *Criminal Code 2002*.

Section 132ZH (4) defines the terms *protected identity information*, *protected person* and *publish* for this section.

### Human Rights Considerations

Section 132ZH will support the section 12 right to privacy and reputation of victims of child sexual offences committed by the registrable offender and children identified to be at risk during prohibition order proceedings. It also supports the section 12 rights of registrable offenders.

### **132ZI- Offence- contravention of prohibition order etc**

The section creates an offence for contravening a prohibition order or interim prohibition order. There are three elements to this offence. Firstly, the offence applies to registrable offenders who have a prohibition order or interim prohibition order in force. Secondly, the registrable offender must do something or fail to do something that is a contravention of a prohibition order or interim prohibition order. Finally, the registrable offender must be reckless about whether the doing or failing to do the thing is a contravention of the order. Section 20 of the *Criminal Code 2002* describes the fault element of recklessness.

This offence is punishable by imprisonment for 5 years, 500 penalty units, or both. This punishment is appropriate because it ensures that the punishment for breaching a prohibition order is consistent with the amendment at clause 25 of this Bill to increase to the penalties in the CSO Act that apply to the offences for registrable offenders who fail to comply with their reporting obligations.

Secondly, the penalty level recognises the seriousness of this offence. A prohibition order, or interim prohibition order, will be ordered in circumstances where the registrable offender has engaged in certain conduct that is posing a risk to the lives or sexual safety of one or more children. The penalty level is intended to deter the registrable offender from engaging further in this conduct and recognises the seriousness of a breach of an order. If an order is breached, it is likely (depending on the facts and circumstances) that the registrable offender has engaged in conduct that is posing a risk to the lives or sexual safety of children.

Section 132ZI (2) provides a defence of reasonable excuse for this offence. Section 132ZK provides the matters that the Magistrates Court must consider when deciding if a person has a reasonable excuse for contravening the order. If a defendant is seeking to rely on the defence of reasonable excuse, section 58 of the *Criminal Code 2002* provides that the defendant has an evidential burden in relation to proving that they had a reasonable excuse.

## Human rights considerations

### **Section 18- Right to liberty and security of person**

This discussion is also relevant to new section 132ZJ and clause 25, outlined below.

#### ***The nature of the right affected (section 28 (2) (a))***

ICCPR commentary suggests that the right to liberty and security of person relates only to a very specific aspect of human liberty.<sup>28</sup> This specific aspect of human liberty is an interference that results only from the forceful detention of a person at a certain narrowly bounded location, such as a prison or other detention facility. In *Celepli v Sweden* the United Nations Human Rights Committee considered the assigned residence of a Turkish citizen to a Swedish municipality for nearly seven years and his obligation to report to the police three times a week as an interference with his freedom of movement but not his personal liberty.<sup>29</sup>

The right to security and liberty of person is engaged as imprisonment for breach of a prohibition order arguably amounts to arbitrary detention (section 18(1) of the HR Act). The United Nations Human Rights Committee confirmed in the case of *Van Alphen v the Netherlands* that ‘arbitrary’ deprivation of liberty must not be manifestly disproportionate, unjust or unpredictable.<sup>30</sup>

#### ***The importance of the purpose of the limitation (section 28 (2) (b))***

The limitation on the right to liberty and security of person exists to allow a court to impose an appropriate penalty (which may include imprisonment) on an offender who has breached a prohibition order. This punitive element underpins the prohibition order scheme as it enables courts to give effect to the purposes of sentencing, including deterrence, by providing a strong disincentive to offenders who engage in behaviour that may risk the lives and sexual safety of children.

#### ***Nature and extent of the limitation (section 28(2) (c))***

This limitation on the right to liberty and security of person is not manifestly disproportionate, unjust or unpredictable.

Firstly, the limitation is not manifestly disproportionate. The maximum penalty of imprisonment for 5 years, 500 penalty units, or both, is consistent with the penalty for breaching a domestic violence protection order at section 90 of the ACT’s *Domestic Violence and Protection Orders Act 2008*.

Secondly, the limitation is not manifestly unjust. Prior to imposing a prohibition order, the Magistrates Court must be satisfied that (i) the person is a registrable offender; (ii) the registrable offender poses a risk to the lives or sexual safety of 1 or more children, or of children generally; and (iii) the making of the order will reduce the risk. Additionally, the Bill not only affords the offender the opportunity to appeal the decision to make the prohibition order to the Supreme Court, but where the offender is charged with breaching such a

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<sup>28</sup> Murdock, J.L. (ed.), 2005, *Article 5 of the European Convention on Human Rights: The Protection of Liberty and Security of Person*.

<sup>29</sup> (Communication no. 456/1991 *Ismet Celepli v Sweden* ) Under the Optional Protocol, individuals who claim that any of their rights set forth in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Human Rights Committee for consideration.

<sup>30</sup> *Van Alphen v The Netherlands* UN Doc CCPR/C/39/D/305/1988, 15 August 1990, paragraph 5.8)

prohibition order, the ordinary protections afforded to an accused/defendant in a criminal proceeding apply.

Thirdly, the limitation is not manifestly unpredictable. The Bill provides that the offender is not subject to a prohibition order (and therefore cannot breach it) until they have been served with the order. The registrable offender is therefore on notice about their obligations. The Bill also includes provisions (132ZE and 132ZF) to ensure that the consequences, purpose, terms and effect of a prohibition order are explained to the registrable offender.

***Relationship between the limitation and its purpose (section 28 (2) (d))***

The limitation on the right to liberty and security of person exists to allow a court to impose an appropriate penalty (which may include imprisonment) on an offender who has breached a prohibition order. This punitive element underpins the prohibition order scheme as it enables courts to give effect to the purposes of sentencing, including deterrence, by providing a strong disincentive to offenders to engage in behaviour that may risk the lives and safety of children.

***Any less restrictive means reasonably available to achieve the purpose (section 28(2) (e))***

This is the least restrictive approach available in the circumstances. In order to achieve the purpose of deterrence and therefore reduce the risk that children will be harmed, it is necessary to enable the court to impose an appropriate penalty for breach of a prohibition order.

The imposition of a maximum penalty does not necessarily result in the maximum penalty being imposed. Sentences for breaching prohibition orders will only be imposed after consideration has been given to the appropriate sentencing considerations under Chapter 4 of the *Crimes (Sentencing Act) 2005*. This Chapter ensures that the relevant circumstances of the offender are taken into account when determining an appropriate sentence.

**132ZJ- Offence- contravention of registered corresponding prohibition order**

This section inserts an offence for contravening a registered corresponding prohibition order. There are three elements to this offence. Firstly, the offence applies to registrable offenders who have a registered corresponding prohibition order in force. Secondly, the registrable offender must do something, or fail to do something that is a contravention of the registered corresponding order. Finally, the registrable offender must be reckless about whether the doing or failing to do the thing is a contravention of the registered corresponding order. Section 20 of the *Criminal Code 2002* describes the fault element of recklessness.

Like the section 132ZI offence, this offence is punishable by imprisonment for 5 years, 500 penalty units, or both. This punishment is appropriate because it ensures that the punishment for breaching a prohibition order is consistent with the amendment at clause 25 of this Bill to increase to the penalties in the CSO Act that apply to the offences for registrable offenders who fail to comply with their reporting obligations. It is also consistent with the maximum penalty for breaching domestic violence protection order at section 90 of the ACT's *Domestic Violence and Protection Orders Act 2008*.

Secondly, the penalty level recognises the seriousness of this offence. A corresponding prohibition order will be ordered in circumstances where the registrable offender has engaged in certain conduct that is posing a risk to the lives or sexual safety of one or more children. The penalty level is intended to deter the registrable offender from engaging further in this

conduct and recognises the seriousness of a breach of an order. If an order is breached, it is likely (depending on the facts and circumstances) that the registrable offender has engaged in conduct that is posing a risk to the lives or sexual safety of children.

Section 132ZI (2) provides a defence of reasonable excuse for this offence. Section 132ZK provides the matters that the Magistrates Court must consider when deciding if a person has a reasonable excuse for contravening the order. If a defendant is seeking to rely on the defence of reasonable excuse, section 58 of the *Criminal Code 2002* provides that the defendant has an evidential burden in relation to proving that they had a reasonable excuse.

### **132ZK- Matters relevant to reasonable excuse defence**

This section provides the matters that the Magistrates Court must consider when deciding whether the defendant has a reasonable excuse for contravening a prohibition order, an interim prohibition order or a registered corresponding prohibition order.

The matters are:

- the person's age;
- whether the person had, at the time of the contravention, a disability that affected the person's ability to understand or to comply, with the order;
- whether the form of notice given to the person about the order was adequate to tell the registrable person their obligations under the order; and
- any other matter that the court considers appropriate.

### **Part 5A.9- Obtaining and disclosing particular information**

#### **132ZL- Meaning of government agency- pt 5A.9**

This section provides the definition of *government agency* for this part.

#### **132ZM- Chief police officer may require information about person**

This section allows the Chief Police Officer to direct a government agency to give to the Chief Police Officer any information that is held by that government agency and that information is considered by the Chief Police Officer to be reasonably necessary to assess whether the registrable offender poses a risk to the lives or sexual safety of 1 or more children, or children generally.

Section 132ZM (4) states that the government agency must give the Chief Police Officer the information sought in the application. However, this section does not apply to information that is protected by client legal privilege.

Section 132ZM (5) states that the government agency is not required to give personal health information in a health record under the *Health Records (Privacy and Access) Act 1997*. However, privacy principle 10 under the Health Records Act allows for the disclosure of this information if the disclosure is necessary to prevent or lessen a serious and imminent risk to the life or physical, mental or emotional health of someone. This principle may apply to the disclosure of information held under the Health Records Act if the information discloses that a registrable offender is posing a risk to the lives or sexual safety of a child or children.

The purpose of this section is to allow the Chief Police Officer to obtain information from a government agency that is considered necessary by the Chief Police Officer to assess whether the registrable offender poses a risk to the lives or sexual safety of children. As discussed in

the following *Human Rights Act 2004* considerations, this section is proportionate and necessary to allow the Chief Police Officer to assess the risk of the registrable offender.

### Human Rights Considerations

#### **Section 12- Privacy and reputation**

##### ***The importance of the purpose of the limitation (section 28 (2)(b))***

The purpose of this section is to ensure that the Chief Police Officer has access to relevant information in order to determine if an application for a prohibition order should be made to the Magistrates Court. This amendment recognises that from time to time agencies other than police will hold information relevant to a risk posed to a child or children generally and provides relevant government agencies with the lawful authority to disclose this information to police.

The amendment will ensure that applications are only made in circumstances where the registrable offender poses a risk to the lives or sexual safety of children and in circumstances where the making of the prohibition order will reduce that risk. The amendment also ensures that such information is placed before the court to allow it to properly consider whether to make an order or to place a certain condition in the order.

Secondly, as section 132ZQ (certain material may be kept) allows the Chief Police Officer to retain the information, it will enable the Chief Police Officer to use the information to apply for a later prohibition order, where there is insufficient evidence to support a prohibition order at that time but further evidence is obtained at a later date. The human rights implications of this provision are discussed at section 132ZQ.

##### ***Nature and extent of the limitation (section 28(2)(c))***

This section will limit a registrable offender's right to privacy and reputation because it will allow for the disclosure of certain personal information held by a government agency to the Chief Police Officer.

##### ***Relationship between the limitation and its purpose (section 28 (2)(d))***

The purpose of this section is to allow for the Chief Police Officer to be provided with the information reasonably necessary to determine whether to apply for a prohibition order or to register a corresponding prohibition order.

##### ***Any less restrictive means reasonably available to achieve the purpose (section 28 (2)(e))***

This provision has been drafted in order to restrict the information provided to the Chief Police Officer. Section 132ZM (2) (b) has been drafted to state the information must be considered reasonably necessary to assess whether the registrable offender poses a risk to the lives or sexual safety of one or more children or children generally.

Additionally, the section restricts the information that may be provided to the Chief Police Officer by excluding personal health information in a health record under the *Health Records (Privacy and Access) Act 1997* (the Health Records Act). However, privacy principle 10 under the Health Records Act allows for the disclosure of this information if the disclosure is necessary to prevent or lessen a serious and imminent risk to the life or physical, mental or emotional health of someone.

The section has been drafted to balance the necessity for the Chief Police Officer to be provided with the information reasonably necessary to determine whether to apply for a prohibition order with the registrable offender's right to privacy and reputation.

### ***Privacy Act 1988 (Cth)***

In addition, the Chief Police Officer and Government agencies must comply with the Information Privacy Principles (IPPs). The IPPs, located at section 14 of the *Privacy Act 1988*, set the standards for handling personal information.

In particular, ACT Policing are bound by IPP 10.1. IPP 10.1 includes the requirement that an agency must not use personal information for any purpose other than the purpose for which it obtained the information, unless the use is required or authorised by law or is reasonably necessary to enforce the criminal law or a law imposing a pecuniary penalty.

Government agencies providing information to ACT Policing are bound by IPP 11.1. IPP 11.1 requires a record-keeper, who has possession or control of a record containing personal information, shall not disclose the information to another agency unless the disclosure is required or authorised by law or is reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty.

### **132ZN- Chief police officer may give information about order to prescribed entities**

This section allows the Chief Police Officer to give a prescribed entity particular information about an order. This information includes the registrable offender's name and date of birth; the term of the order; the conduct that the order prohibits; and anything else that the Chief Police Officer considers reasonably necessary to allow the prescribed entity to identify a registrable offender in order to ensure the safety of a child or children in the entities care, or the safety of the registrable offender.

The purpose of this provision is to allow the Chief Police Officer to give information to prescribed entities that provide key child care, education, protection and support services to enable these entities to take measures to ensure the safety and protection of the children in their care.

Where the Chief Police Officer has provided information to an entity under this section, 132ZN (2) requires the Chief Police Officer to give to the prescribed entity, as soon as practicable, written notice of any amendment, revocation or cancellation of the order following a decision by the court.

### **Human Rights Considerations**

#### **Section 12- Privacy and reputation**

##### ***The importance of the purpose of the limitation (section 28 (2)(b))***

The purpose of this provision is to allow the Chief Police Officer to give information to prescribed entities that provide key child protection and support services. This information is provided to enable these entities to identify the registered offender to ensure the safety and protection of the children in their care.

##### ***Nature and extent of the limitation (section 28(2)(c))***

This section will limit a registrable offender's right to privacy and reputation because it will disclose that an order has been made by the Magistrates Court, the conduct that has been

prohibited by the order, the registrable offender's name and place of birth and anything else the Chief Police Officer considers reasonably necessary to ensure the safety of a child or children, or the safety of the registrable offender.

***Relationship between the limitation and its purpose (section 28 (2)(d))***

The purpose of this provision is to ensure that the appropriate people are made aware of registrable offenders who are subject to prohibition orders. The section will support section 11 (2) of the HR Act by providing increased protection for children by ensuring that prescribed entities can identify registrable offenders who are subject to prohibition orders.

***Any less restrictive means reasonably available to achieve the purpose (section 28 (2)(e))***

This provision will allow prescribed child protection and support entities to be provided with essential identify information in order to identify registrable child sex offenders and protect the children in their care. There is no less restrictive means of achieving this purpose.

**132ZO- Chief police officer may give information about order to person with parental responsibility for child at risk**

This section allows the Chief Police Officer to give information about an order to a person who has parental responsibility for a child or children protected by the order. The purpose of the provision is to provide parents and guardians with the information necessary to enable them to take protective measures to protect their children against an identified risk to their lives and sexual safety.

Section 132ZO (2) states that information must only be provided under this section if the Chief Police Officer considers on reasonable grounds that the provision of the information is necessary and appropriate to reduce a risk to the lives or sexual safety of the child or children.

Human Rights Considerations

**Section 12- Privacy and reputation**

***The importance of the purpose of the limitation (section 28 (2)(b))***

The purpose of this provision is to provide parents and guardians with the information necessary to enable them take protective measures to protect their children against an identified risk to their lives and sexual safety.

***Nature and extent of the limitation (section 28(2)(c))***

This section will limit a registrable offender's right to privacy and reputation because it will disclose the existence of a prohibition order and other information about the prohibition order to a person with parental responsibility for a child or children identified at risk.

***Relationship between the limitation and its purpose (section 28 (2)(d))***

The purpose of this provision is to ensure that people with parental responsibility are aware of prohibition orders that have been made in order to protect the person's child or children. The section will support section 11 (2) of the HR Act by providing increased protection for children by ensuring that people with parental responsibility can identify a registrable offender in circumstances where they are posing a risk to the lives or sexual safety of their child or children.

This section also supports the section 11 (1) right to the protection of the family unit by ensuring that a parent has information about risks to their child.

*Any less restrictive means reasonably available to achieve the purpose (section 28 (2)(e))*  
This provision will allow a person with parental responsibility to be provided with essential identify information in order to identify registrable child sex offenders and protect the children in their care.

This provision is restricted because information is only to be provided in circumstances where the Chief Police Officer considers on reasonable grounds that it is necessary and appropriate.

### **132ZP- CYP Director-General to be given information about young person**

This section supports section 132C (CYP Director-General's report) to allow the CYP Director-General to request in writing information held by another government agency that is relevant to CYP Director-General's report.

Section 132ZP (4) states that the government agency must give the CYP Director-General the information requested. However, like section 132ZM, the government agency is not required to give personal health information in a health record under the *Health Records (Privacy and Access) Act 1997*. However, privacy principle 10 under the Health Records Act allows for the disclosure of this information if the disclosure is necessary to prevent or lessen a serious and imminent risk to the life or physical, mental or emotional health of someone.

### Human Rights Considerations

#### **Section 12- Privacy and reputation**

##### ***The importance of the purpose of the limitation (section 28 (2) (b))***

The section allows the CYP Director-General to ask a government agency for information that is relevant to their report on whether there are any other reasonably appropriate ways of managing the young registrable offender and the effect of a proposed prohibition order on the young registrable offender.

The purpose of this provision is to ensure, as far as possible, that consideration is given to section 11 (2) of the HR Act and the best interests of the young registrable offender.

##### ***Nature and extent of the limitation (section 28 (2) (c))***

This section will limit a registrable offender's right to privacy and reputation because it will allow for the disclosure of certain personal information held by a government agency to the CYP Director-General.

##### ***Relationship between the limitation and its purpose (section 28 (2) (d))***

The purpose of this section is to allow for the CYP Director-General to be provided with information relevant to the report under section 132C. Where an application for a prohibition order is being considered and a report has been requested from the CYP Director-General, it is critical that the CYP Director-General has access to relevant information from other government agencies.

##### ***Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))***

This provision has been drafted in order to restrict the information provided to the CYP Director-General to information relevant to the report pursuant to section 132C.

Section 132ZP has been drafted to ensure that the information held by the government agency must be relevant to the report on whether all other reasonably appropriate means of managing the behaviour of the young registrable offender have been considered and the impact that the order will have on the best interests of the young registrable offender.

Like section 132ZM, this section restricts the information that may be provided to the CYP Director-General by excluding personal health information in a health record under the *Health Records (Privacy and Access) Act 1997* (the Health Records Act). However, privacy principle 10 under the Health Records Act allows for the disclosure of this information if the disclosure is necessary to prevent or lessen a serious and imminent risk to the life or physical, mental or emotional health of someone.

#### **132ZQ- Certain material may be kept**

This section applies to documents, fingerprints and photographs that have been obtained by the Chief Police Officer in relation to an order under chapter 5A.

Section 132ZQ (2) allows the Chief Police Officer to keep this information for law enforcement, crime prevention or child protection purposes for the duration of the person's reporting period under the CSO Act.

Section 132ZQ (3) provides that the documents, fingerprints and photographs must be destroyed at the end of the person's reporting period.

#### **Part 5A.10- Appeals to Supreme Court**

##### **132ZR- Meaning of appealable decision- pt 5A.10**

This section provides the meaning of *appealable decision* for part 5A.10.

##### **132ZS- Appeals to Supreme Court**

Section 132ZS (1) provides that a person may appeal to the Supreme Court against an appealable decision if the person was a party to the proceedings (the Chief Police Officer or the registrable offender) in which the decision was made.

Section 132ZS (2) provides the time period in which a person must file a notice of appeal.

Section 132ZS (3) allows the Supreme Court to allow a person to file a notice of appeal after the relevant time period at section 132ZS (2) if the court is satisfied that it is appropriate to do so.

##### **132ZT- Powers of Supreme Court on appeal**

This section provides the powers of the Supreme Court when they hear an appeal against an appealable decision under chapter 5A.

#### **Clause 20 – New section 133B- Offence- failure to tell the chief police officer about application to change offender's name**

This clause inserts an offence of failing to tell the Chief Police Officer about an application to change an offender's name. This offence has two elements. Firstly, the offence applies where a person applies under a relevant law to change the name of a registrable offender. Section 133B (2) defines the term *relevant law*.

The second element is that the person fails to tell the Chief Police Officer in writing about the application not later than 2 days after the day the person makes the application.

The maximum penalty for this offence is 500 penalty units, imprisonment for 5 years or both.

The purpose of this offence is to provide for continued monitoring of child sex offenders and to discourage registrable offenders from evading their reporting and monitoring obligations by changing their names.

### Human Rights Considerations

#### **Section 12- Privacy and reputation**

##### ***The importance of the purpose of the limitation (section 28 (2)(b))***

The purpose of this limitation is outlined above.

##### ***Nature and extent of the limitation (section 28(2)(c))***

This section will limit a registrable offender's right to privacy and reputation because it will require registrable offenders to disclose their decision to change their name.

##### ***Relationship between the limitation and its purpose (section 28 (2)(d))***

This provision will support a fundamental purpose of the CSO Act to require registrable offenders to keep police informed of their whereabouts and personal details for a period of time.

##### ***Any less restrictive means reasonably available to achieve the purpose (section 28 (2)(e))***

The approach in section 133B is the least restrictive means of ensuring that registrable offenders do not evade their reporting obligations and the obligations imposed by the CSO Act by changing their names. It will ensure that the obligation to report a name change arises when the application is made to the registrar of a births, deaths and marriages act and not after the name change has been registered (as is currently the case under the CSO Act).

This approach balances the offender's right to apply to change their name (as this section will not affect the right to make an application to the registrar) with the interests of the community to provide for the continued monitoring of registrable offenders. There are no less restrictive measures available.

In preparing this amendment, the Government has had regard to similar provisions in other Australian jurisdictions. These jurisdictions require registrable offender's to obtain authority from police prior to applying to change their name. Such authority can be refused in certain cases. However, in the ACT, section 20 (2) of the *Births, Deaths and Marriages Registration Act 1997* (the BDM Act) already provides the Registrar-General with the authority to refuse an application for a name change unless satisfied that the change of name is not for a fraudulent or improper purpose.

To support section 20 (2) of the BDM Act, section 16A (1)(j) of the *Crimes (Child Sex Offenders) Regulation 2005* (the regulation) prescribes the *Registrar-General of the Births, Deaths and Marriages Registration Act 1997* as an entity with access to personal information in the child sex offenders register. This allows the Chief Police Officer to disclose to the Registrar-General information about the names of registrable offenders. Together, these provisions will achieve the purpose of preventing inappropriate changes of name by registrable offenders, but as this new section does not require registrable offenders to obtain

the authority of the Chief Police Officer prior to filing an application to change their name, this is achieved in the least restrictive manner.

### **Clause 21 – Schedule 1, part 1.2, item 10**

This clause is a technical amendment to ensure that the list of the registrable offences in Schedule 1 part 1.2, item 10 is concise. This amendment will clarify the language of this item to ensure that it captures those offences committed in jurisdictions outside the ACT that would require the person to be a registrable offender if the offences had been committed in the ACT.

### **Clause 22 – Schedule 2, part 2.2, item 36**

This clause is a technical amendment to ensure that the list of the registrable offences in Schedule 2, part 2.2, item 36 is concise. Like clause 21, this amendment will clarify the language of this item to ensure that it captures those offences committed in jurisdictions outside the ACT that would require the person to be a registrable offender if the offences had been committed in the ACT.

### **Clause 23 – Dictionary, note 2**

This is a technical clause that inserts a number of terms into note 2 of the Dictionary of the CSO Act.

### **Clause 24 – Dictionary, new definitions**

This is a technical clause that adds further definitions to the Dictionary of the CSO Act.

### **Clause 25 - Further amendments, penalties**

There are 21 reporting offences located throughout the CSO Act that relate to specific acts or omissions by the registrable offender. The offences include failing to report after sentencing, failing to report annually and failing to report travel details.

This clause increases the penalties for these offences in the CSO Act from 200 penalty units, imprisonment for 2 years or both, to the new penalty value of 500 penalty units, imprisonment for 5 years or both.

This increase means that there is consistency in the penalties for the new offences across the CSO Act, and achieves legislative consistency with both New South Wales and Victoria.

### ***The importance of the purpose of the limitation (section 28 (2) (b))***

The limitation on the right to liberty and security of person exists to allow a court to impose an appropriate penalty (which may include imprisonment) on an offender who has committed an offence against the CSO Act. This punitive element underpins the CSO scheme as it enables courts to give effect to the purposes of sentencing, including deterrence, by providing a strong disincentive to offenders who commit an offence under the CSO Act. The increase in the level of penalty attached to the offences in the CSO Act is to give effect to the June 2009 MCPEMP recommendation that all jurisdictions increase the penalties for offenders who fail to comply with their reporting obligations.

### ***Nature and extent of the limitation (section 28(2) (c))***

This limitation on the right to liberty and security of person is not manifestly disproportionate, unjust or unpredictable.

Firstly, the limitation is not manifestly disproportionate. The maximum penalty of imprisonment for 5 years, 500 penalty units, or both, is consistent with the penalty for breaching a domestic violence protection order at section 90 of the ACT's *Domestic Violence and Protection Orders Act 2008*.

Secondly, the limitation is not manifestly unjust or unpredictable. The new penalty level will ensure that the ACT gives effect to the June 2009 MCPEMP recommendation that all jurisdictions increase the penalties for offenders who fail to comply with their reporting obligations to 5 years imprisonment or 500 penalty units.

***Relationship between the limitation and its purpose (section 28 (2) (d))***

The limitation on the right to liberty and security of person exists to allow a court to impose an appropriate penalty (which may include imprisonment) on an offender who commits an offence against the CSO Act. This punitive element underpins the CSO Act is an important incentive for registrable offenders to comply with their reporting obligations.

***Any less restrictive means reasonably available to achieve the purpose (section 28(2) (e))***

This is the least restrictive approach available in the circumstances. In order to achieve the purpose of deterrence and therefore reduce the risk that children will be harmed, it is necessary to enable the court to impose an appropriate penalty for breach of an obligation under the CSO Act.

The imposition of a maximum penalty does not necessarily result in the maximum penalty being imposed. Sentences for breaching prohibition orders will only be imposed after consideration has been given to the appropriate sentencing considerations under Chapter 4 of the *Crimes (Sentencing Act) 2005*. This Chapter ensures that the relevant circumstances of the offender are taken into account when determining an appropriate sentence.

**Clause 26 – Court Procedures Act 2004, new section 41 (2) (ba)**

Section 41 of the *Court Procedures Act 2004* explains that a person has a right to enter and remain in an area of court premises that is open to the public if they have complied with the requirements of the court and security officers, and there is seating available for the person. However, this access is subject to any law which restricts access to court proceedings.

Clause 36 inserts new section 41 (2) (ba) into the *Court Procedures Act 2004* to give effect to restricting access to court proceedings under new section 132ZG (Proceedings for orders to be closed to public) of the CSO Act.