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LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CRIMES LEGISLATION AMENDMENT BILL 2012 (No 2)

EXPLANATORY STATEMENT

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Crimes Legislation Amendment Bill 2012 (No 2)

Outline

Purpose of the Bill

The Crimes Legislation Amendment Bill 2012 (No 2) will provide amendments to address a number of criminal justice legislation issues that have arisen in the ACT. The Bill will amend criminal laws to make key improvements to the criminal justice system.

The Bill will:

- provide greater clarity for justice stakeholders in applying a number of pieces of legislation including the offence of affray, appeals for automatic disqualification of driver licences and when property offences can be dealt with summarily;
- provide consistency among similar property offences in the *Crimes Act 1900* and *Criminal Code 2002*;
- improve the ability of the courts to take into account alcohol and drug issues when sentencing;
- ensure that the Childrens Court has jurisdiction to hear and decide charges against both an adult and a child or young person where they are jointly charged;
- ensure that possession of a controlled pre-cursor offence is enforceable; and
- create a new offence of possessing a tablet press.

The Bill will also strengthen a number of amendments in relation to sexual offences and the giving of evidence in violent and/or sexual offences including:

- creating new offences of sexual intercourse and act of indecency with a young person under special care;
- bringing the definition of 'vagina' for sexual offences into line with other jurisdictions;
- ensuring that fellatio is captured in the definition of 'sexual intercourse'; and
- strengthening Sexual Assault Reform Program evidence provisions for giving evidence in sexual and violent offences and the giving of victim impact statements in such cases.

Human Rights Considerations

The Crimes Legislation Amendment Bill 2012 (No 2) engages a number of the rights in the ACT's *Human Rights Act 2004* (HR Act).

The 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 22 – Rights in criminal process; and
- Section 10 – Right to not be punished in a cruel, inhuman or degrading way.

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

- Section 11 – Protection of family and children.

Sexual offences – 16-17 year olds

The right to protection of families and children contained in section 11 of the HR Act is engaged and supported by this Bill.

However, this right is not absolute. Section 28 of the HR Act states that "human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society".

The Bill engages the right to protection of families and children as sexual offences prohibiting sexual relations between 16-17 year olds and adults who are in a position of authority with respect to these young people may limit a person's right to choose their sexual partner. This limitation may operate to limit both a 16-17 year old's right and an adult's right.

The limitation on this right can be justified and is reasonable.

The right to protection of families and children may encompass a relationship between a 16-17 year old and an adult who is in a position of authority with respect to that young person. The UN Human Rights Committee has confirmed that it is not possible to give the concept of 'family' a standard definition and that protection should be given to any group of people regarded within a particular country or region as a 'family'.[1] Such a definition may encompass the relationship between a consenting young person and an adult who may be in a position of authority.

The purpose of the limitation is to afford better protection for 16-17 year old young people from potential harm by providing a clear prohibition on sexual acts with 16-17 year olds by people in authority. This prohibition would enhance the right to protection of families and children as 16 and 17 year old young people will be

[1] HRC, *General Comment No 16*: *The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988) [5], *General Comment No 19: Protection of the Family, the Right to Marriage and Equality of the Spouses* (1990) [2]

afforded better protection from harm through the drawing of clear boundaries for both the young people and the adults who care for them, with appropriately significant penalties for betraying that trust and authority.

The relationship between the limitation and its purpose is clear. By prohibiting sexual relations between 16-17 year olds and adults who are in a position of authority over them a clear boundary is drawn, making it less likely that adults in such positions will abuse their authority and engage in sexual relations with young people. Such a limitation is proportionate and justifiable as most young people aged 16-17 are at a much higher level of risk of being subject to harm (including psychological and other types of harm) than adults when they are in a relationship with adults in a position of authority due to the power imbalance inherent in such a relationship. Such a high level of risk of harm warrants the creation of specific offences.

The law acknowledges the special vulnerability of young people, aged 16-17 years. Young people cannot vote, consume alcohol, buy cigarettes, enter into contracts or marry without their parents' consent. The criminal law applies differently to young people, for example, by providing that the maximum penalties a court may impose for summary disposal of offences by young people are different to those for adults.[2] Human Rights law acknowledges the special vulnerability of young people, for example in the context of criminal trials where special rights are afforded to young people to ensure the trial is fair. The existence of a separate Childrens Court where proceedings for defendants under the age of 18 are heard and special procedures apply is a practical example.

This special vulnerability of young people under the age of 18, combined with being under the care and authority of an adult means that it is always unacceptable for such an adult to engage in sexual acts with such a young person.

The nature and extent of the limitation are only such as is required to achieve the purpose in protecting young people from harm.

There are no less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve. Reliance on the current offence scheme at section 67(h), which requires proof that an adult's authority *caused* the young person's consent, does not have the same prohibitive and deterrent effect as criminalising this behaviour. The creation of specific offences places adults who are in trust relationships with 16-17 year olds on further notice that sexual relations with those children are not permitted. It should also be noted that adults in positions of trust or authority with young people in their care ought to be on notice already with respect to their responsibility for the wellbeing, safety and protection of young people over whom they have authority.

The new offence will provide a non-exhaustive list of 'position of authority' relationships. It will include: teacher in a school/student at that school; step-parent, foster parent or legal guardian/young person; religious instructor/young person; professional counsellor/young person; health professional/patient; police or prison officer/young person in care or custody; employer/employee; and sports coach/young person.

[2] Section 375(15) *Crimes Act 1900*

Such people are on notice with respect to their responsibilities as they are in a clear position of authority (such as step-parent or foster-parent) or belong to a profession which provides an industry code of conduct (teacher, professional counsellor, health professional, police, prison officer). Religious instructors, sports coaches and other leaders are on notice as they are entrusted with the care of young people by parents and the groups they may represent. These adults in positions of authority may be required to complete 'working with vulnerable people' checks prior to assuming such a position. The *Working With Vulnerable People (Background Checking) Act 2011* provides that 'vulnerable person' for the purposes of the Act means 'a child' which includes all people under the age of 18 years. This regulatory requirement also places people in positions of authority on notice as to their responsibilities with respect to young people in their care.

Employers are on notice as they are responsible under work health and safety legislation for the safety and wellbeing of their employees. An employer is clearly in a position of authority over a young person as they have power over many aspects of an employee's work situation. Employers are also likely to be on notice about a young person's age as they need to know it to determine the appropriate award wage and to ensure they comply with the *Children and Young People (Employment) Standards 2009 (No.1).*

Providing a non-exhaustive list ensures that the court has discretion to determine further 'positions of authority' that are appropriately included within the definition but exclude positions where no authority, trust or special care relationship is created. This ensures that the principle of equality before the law is recognised and upheld. Principles of statutory interpretation provide that the list of 'positions of authority' is to give guidance to the courts and the community as to which people, by virtue of their position with respect to a young person, are prohibited from sexual relations with that young person and which people are not.

It should also be noted that under section 20 of the *Criminal Code 2002* the fault element for the physical element of 'the young person being in the adult's special care' is recklessness. This is the least restrictive measure available.

The right to equality before the law in section 8 of the HR Act may be said to be similarly engaged by the Bill as prohibiting sexual relations between 16-17 year olds and adults who are in a position of authority with respect to these young people discriminates between these 16-17 year olds and other 16-17 year olds. Section 8 of the HR Act states that: everyone is equal before the law and is entitled to the equal protection of the law without discrimination. Sexual acts between 16-17 year olds and adults is generally accepted however these new offences will prohibit such acts between 16-17 year olds and adults where they are in a relationship of authority or 'special care' with those adults. Any limitation on this right can be justified and is reasonable in accordance with the discussion outlined above for the right to protection of families and children.

The right to equality before the law contained in section 8 of the HR Act is also engaged by these amendments as section 67(h) of the *Crimes Act 1900*, which continues to operate alongside the new offences and provides that where consent to sexual acts can be shown to be caused by the defendant's position of trust or authority

that consent can be said to be negated and the defendant may be found guilty of sexual intercourse or acts of indecency without consent.
For the new sexual offences the prosecution would only need to show that the defendant was in one of the roles listed as a 'position of authority' role in order to show that the young person was under the adult's 'special care' or authority for the purposes of the offence. This means the defendant would not be able to dispute whether or not they were in fact in a 'position of authority' in relation to the victim/young person because the Bill deems them to be in such a position whereas if a defendant is not in a 'position of authority' such as is captured by the new offences they may nevertheless be captured by section 67(h). In this latter case they will be afforded the opportunity to provide evidence that they were not, *in fact*, in a 'position of authority' in relation to the victim.

This difference in treatment between (a) those captured by the new offences and (b) those captured instead by section 67(h) may amount to a limit on the right to equality before the law.

The limitation on this right can be justified and is reasonable.

The purpose of the limitation is to distinguish between adults whose role creates a formal relationship of trust and authority with 16-17 year olds and adults whose role is not clearly defined. Specifying certain roles as ones of 'special care' or a 'position of authority' for the purposes of prohibiting sexual relations between 16-17 year olds and adults who are in those roles sets a clear boundary, making it less likely that adults in such positions will abuse their authority and engage in sexual relations with young people. The purpose of the limitation is to provide certainty to these adults who are captured by the offence so that they know they are being held to a higher standard by the community.

Those adults in roles which are captured by the new offences ought to be on notice (by virtue of their role) with respect to their responsibility for the wellbeing, safety and protection of young people over whom they have authority whereas those whose role is not captured by the new offences (such as babysitters or private tutors) should be afforded greater opportunity to show that they were not in fact in a position of authority in relation to the young person as they would not necessarily be on notice as to their responsibilities for young people aged 16-17.

There are no less restrictive means reasonably available to achieve the purpose of the limitation as without specifying the roles that are definitely captured by the new offences (and in addition giving guidance to the community as to the other sorts of formal authority relationships that may be captured) the adults in these roles are not provided with certainty about the fact that they are being held to a higher standard and that they are committing a crime where they engage in sexual acts with a young person for whose care they are responsible.

Court Alcohol and Drug Service – sentencing consideration

The Bill would not seem to engage the right to protection from torture and cruel, inhuman or degrading treatment at section 10(2) of the HR Act.

The Bill will amend sentencing legislation to ensure that the ACT Supreme Court and ACT Magistrates Court can order an assessment by the Court Alcohol and Drug Service (CADAS) if an offender has drug and alcohol misuse issues that are relevant to the sentence to be imposed for an offence. The Bill provides that the court will only make such an order with the consent of the offender. This will enable the court to take such an assessment (and any treatment provided by CADAS) into account as a pre-sentencing matter. Specifically, the amendments will enable a sentencing court to:

a) order that an offender submit to an assessment, treatment (with the offender's consent) or referral to treatment and monitoring by the Court Alcohol and Drug Assessment Service (CADAS);
b) order that the offender (in the course of submitting to the assessment and treatment or referral to treatment by CADAS) also submit to any reasonable directions by ACTCS; and
c) require a CADAS officer to appear at sentencing.

Section 10(2) of the HR Act provides that: No-one may be subjected to medical or scientific experimentation or treatment without his or her free consent.

The Bill would not seem to engage this right as even though the amendment provides that a court may order that an offender submit to treatment referred by CADAS, such treatment may only be provided with the consent of the offender. Secondly, the court may only make such an order in the first place after obtaining the consent of the defendant. Finally, the Bill will not affect existing requirements on health providers under ACT law that a person must provide consent to medical treatment.

The Bill provides that if a person has complied with the court order to submit to assessment, treatment, referral to treatment and monitoring by CADAS then a sentencing court may take this into account as a sentencing consideration. A further safeguard is provided by the Bill as the court cannot increase the severity of a sentence because of an offender's non-compliance with the order and refusal to submit to assessment, treatment, referral to treatment and monitoring by CADAS. This will ensure that consent by the offender to any treatment is real consent and freely given.

Damage property offence amendments

See detail section, below.

Drug offence amendments

See detail section, below.

Crimes Legislation Amendment Bill 2012 (No 2)

Detail

Part 1 — Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act would be the *Crimes Legislation Amendment Act 2012.*

Clause 2— Commencement

This clause commences the Act 7 days after it is notified on the ACT Legislation Register.

Clause 3— Legislation amended

This clause identifies the legislation amendment by the Act.

Part 2 — Crimes Act 1900

Clause 4 – Section 35A

This clause will amend the offence of affray so that the elements of the offence are clearer and consistent with the principles of offence construction in the *Criminal Code 2002*. The offence of affray was introduced into the *Crimes Act 1900* by the *Crimes (Serious Organised Crime) Amendment Act 2010.*

The elements of the offence, as amended are:

- The defendant engaged in conduct (fault element of intention);
- The defendant's conduct was violent conduct, or the threat of violent conduct (fault element of recklessness); and
- The defendant's conduct is directed towards another person (fault element of recklessness);
- The violence or threat of violence would be likely to cause a reasonable person to fear for his/her safety (fault element of recklessness).

The offence of affray is historically a public order offence. The offence aims to address the inherent risks involved in engaging in violent behaviour which is directed towards another person. Such behaviour can result in an escalation of violence and/or people putting themselves in danger in trying to escape such violence.

The offence cannot be committed by words alone and the defendant's conduct must be directed towards another person. These elements ensure that the public order

nature of the offence is reflected as the defendant must have directed their violence or threats towards at least one other person. Despite the public order nature of the offence it can be committed in a public or private place.

The offence is distinguished from common assault, which does not require conduct to be directed towards another and can be committed by words alone.

While the offence requires proof that the violence or threat would be likely to cause a reasonable person to fear for his/her safety, no person present need fear at the time the defendant engages in this conduct. In addition, while the offence requires that the defendant's conduct be directed towards another person that person need not necessarily be present at the scene although in practice this would usually be the case.

This offence is necessary as in a public melee situation there is likely to be great difficulty in identifying specific people who have 'apprehended immediate violence' as a result of the defendant's violent conduct. It is also likely that such witnesses may fear for their safety where they provide evidence as to such apprehension of violence.

The Bill will decrease the maximum penalty for the offence to 2 years imprisonment so that it is commensurate with the maximum penalty for the offence of assault (which is also 2 years imprisonment) as the offences are similar in terms of fault and seriousness.

The offence of affray will continue to apply where police and prosecutors believe a person's conduct may be captured by the offence. It can also be said that the amendments support concerns that the conduct of criminal organisations is appropriately dealt with by the criminal law.

Clause 5 — Meaning of *sexual intercourse* in pt 3 Section 50(1), definition of *sexual intercourse,* paragraphs (a) and (b)

This clause will amend section 50(1) of the *Crimes Act 1900* so that the definition of 'sexual intercourse' includes 'penetration to any extent of the genitalia of a female person' rather than 'penetration to any extent of the vagina' to broaden the definition as it relates to sexual offences and bring the section into line with other jurisdictions. This new definition will include a surgically constructed vagina.

Currently the definition of 'vagina' in the ACT is more limited than that in other jurisdictions. Other jurisdictions such as NSW and Victoria amended their legislation following the decision of the High Court in *R v Holland* (1993) to make it clear that penetration of the labia or external genitalia will suffice to constitute 'sexual intercourse' or 'sexual penetration' and that it is not necessary to prove 'penetration beyond the hymen', as is currently the case in the ACT.

The effect of this provision will be to bring acts that constitute any penetration of female genitalia under the more serious sexual offences involving 'sexual intercourse' rather than those involving 'acts of indecency'.

Clause 6 — section 50(1), new paragraph (ca)

This clause will amend section 50(1) of the *Crimes Act 1900* so that the definition of 'sexual intercourse' includes any oral contact with genitals so that an act of fellatio is included in this definition.

Currently fellatio (where a victim is forced to lick or kiss an offender's penis or where an offender licks/kisses a victim's penis) is only captured under the lesser 'act of indecency' offence.

The purpose of this amendment is to bring such an act under the more serious offences of sexual assault, sexual intercourse without consent, sexual intercourse with a young person and incest. Currently the introduction of any part of the penis of a person *into* the mouth of another person is included in the definition of 'sexual intercourse', as is cunnilingus. As there is such a fine distinction the act of fellatio and acts currently captured under the definition of 'sexual intercourse' it is appropriate for fellatio to be included in this definition.

Clause 7 – section 50(1)(e)

This clause provides that for the purposes of sexual offences in the Act, 'sexual intercourse' includes the continuation of sexual intercourse as defined in new paragraph (ca).

Clause 8 – section 50(2), new definition of *female person*

This clause provides a new definition of *female person* for the purposes of section 50 of the *Crimes Act 1900* to include a transsexual person with a surgically constructed vagina. This will have the result that 'penetration of the genitalia of a female person' will include penetration of the genitalia of a transsexual person with a surgically constructed vagina.

Clause 9 – New section 55A

This clause creates a new offence of sexual intercourse with a young person under special care. The purpose of this amendment is to make it an offence for adults who are in a position of authority in relation to 16-17 year olds to have sexual intercourse with those 16-17 year olds. Under section 20 of the *Criminal Code 2002* the fault element for the physical element of 'the young person being in the adult's special care' is recklessness. This is the least restrictive measure available.

The new offence will provide a non-exhaustive list of 'position of authority' relationships. It will include: teacher in a school/student at that school; step-parent, foster parent or legal guardian/young person; religious instructor/young person; professional counsellor/young person; health professional/patient; police or prison officer/young person in care or custody; employer/employee; sports coach/young person.

While the age of consent is 16 years, most young people aged 16-17 are at a much higher level of risk of being subject to harm than adults when they are in a relationship with adults in a position of authority due to the inherent power imbalance

in such a relationship. Such a high level of risk of harm warrants the creation of a specific offence.

It will be a defence to the new offence if the offender can prove on the balance of probabilities that he/she believed the victim was over 18 or if the defendant was not more than 2 years older than the young person at the time. This latter defence means that a young person cannot be found guilty or convicted of this offence. Marriage will also be a defence to the new offence.

The maximum penalty for this offence is 10 years imprisonment.

Where a person cannot be said to be in a position of authority as captured by this offence but the person has nonetheless abused a position of trust or authority the consent rule at section 67(h) of the *Crimes Act 1900* may apply. That is, where consent to sexual acts can be shown to be caused by the defendant's position of trust or authority that consent can be said to be negated and the defendant may be found guilty of sexual intercourse or acts of indecency without consent.

Section 67(h) will continue to apply to people in positions of authority in relation to a 16 or 17 year old where it is not necessarily expected that the adult is on notice about their responsibilities towards a young person by virtue of their role but where an authority or trust relationship has nevertheless been established.

Clause 10 – New section 61A

This clause creates a new offence of act of indecency with a young person under special care. The purpose of this amendment is to make it an offence for adults who are in a position of authority in relation to 16-17 year olds to engage in acts of indecency with those 16-17 year olds. Under section 20 of the *Criminal Code 2002* the fault element for the physical element of 'the young person being in the adult's special care' is recklessness. This is the least restrictive measure available.

The new offence will provide a non-exhaustive list of 'position of authority' relationships. It will include: teacher in a school/student at that school; parent, grandparent, step-parent, foster parent or legal guardian/young person; religious instructor/young person; professional counsellor/young person; health professional/patient; police or prison officer/young person in care or custody; employer/employee; sports coach/young person.

While the age of consent is 16 years, most young people aged 16-17 are at a much higher level of risk of being subject to harm than adults when they are in a relationship with adults in a position of authority due to the inherent power imbalance in such a relationship. Such a high level of risk of harm warrants the creation of a specific offence.

It will be a defence to the new offence if the offender can prove on the balance of probabilities that he/she believed the victim was over 18 or if the defendant was not more than 2 years older than the young person at the time. This latter defence means that a young person cannot be found guilty or convicted of this offence. Marriage will also be a defence to the new offence.

The maximum penalty for this offence is 7 years imprisonment.

Where a person cannot be said to be in a position of authority as captured by this offence but the person has nonetheless abused a position of trust or authority the consent rule at section 67(h) of the *Crimes Act 1900* may apply. That is, where consent to sexual acts can be shown to be caused by the defendant's position of trust or authority that consent can be said to be negated and the defendant may be found guilty of acts of indecency without consent.

Section 67(h) will continue to apply to people in positions of authority in relation to a 16 or 17 year old where it is not necessarily expected that the adult is on notice about their responsibilities towards a young person by virtue of their role but where an authority or trust relationship has nevertheless been established.

Clause 11 – Alternative verdicts for certain sexual offences, New section 70(6)

This clause provides that a jury may find an accused guilty of the offence of act of indecency with a young person under special care where the jury is not satisfied that the accused is guilty of the offence of sexual intercourse with a young person under special care, on the trial for the latter offence.

Clause 12 – Indictment for act of indecency, Section 72

This clause will provide that section 72 of the Act applies to the new offence of act of indecency with young person under special care so that in an indictment for an offence against the new offence at section 61A it will not be necessary to describe the act constituting the act of indecency.

Clause 13 - Destroying or damaging property, Section 116(3)

This clause will omit the destroying or damaging property offence at section 116 (3) and will remake the offence at section 116A. As the offence is remade, section 8(1)(a) of the *Criminal Code 2002* provides that chapter 2 of the Code (General principles of criminal responsibility) will apply to the new offence.

There are four elements to the offence. Firstly, section (3) (a) details the conduct for the offence. Section (3) (a) creates an offence where a person destroys or causes damage to property, and that damage is not caused by fire or explosive. The fault elements that apply to this conduct are at section (3) (c).

Secondly, section (3) (b) requires that the destroyed or damaged property belongs to someone (other than the person who destroys or causes damage to the property) or is property that belongs to the person and someone else. Section 22 (2) of the *Criminal Code 2002* will apply to section (3) (b), which means that the fault element of recklessness will apply to the circumstance at (3) (b).

Thirdly, (3) (c) prescribes the fault elements for section (3) (a). The person will commit the offence if they intend to destroy or cause damage, or are reckless about destroying or causing damage to the property.

Finally, section (3) (d) requires that for the person to commit this offence, the damage that is caused to the property does not exceed $5000.

The new offence at section 116A will depart from the omitted offence at section 116 (3) in three ways. It will increase the maximum penalty from 6 months to 2 years imprisonment, will apply the fault element of recklessness to section (3) (a) and will provide that the offence applies where the value of the damage to the property (rather than the value of the property itself) does not exceed $5000. This is an increase from $1000 and changes the offence to recognise the damage caused.

The increase in the maximum penalty to 2 years imprisonment will ensure that the 116A *Crimes Act 1900* offence is a viable alternative to the damaging property offence at section 403 of the *Criminal Code 2002.* The increase in penalty and availability of the offence will ensure that in appropriate circumstances, this offence will be heard in the Magistrates Court. This is particularly relevant where this offence is charged as a result of a domestic or family violence incident, and these related charges are in the Magistrates Court. Additionally, the increase in the penalty will recognise the increase to the value of the damage, thus the seriousness of the offence, and will allow the court to impose an appropriate penalty for this conduct.

The application of recklessness to the new 116A offence will ensure that it is consistent with the damage property offence located at section 403 of the *Criminal Code 2002*. The old section 116 (3) offence required proof of intention and therefore was a more difficult offence to prove than the section 403 *Criminal Code 2002* offence, despite the fact that it had a much lower penalty of 6 months imprisonment, compared to the maximum penalty of 10 years imprisonment for the *Criminal Code 2002* offence.

The increase in the value of the damage caused to $5000 is a necessary modernisation of the offence. The old section 116 (3) offence required the value of the property that is damaged be less than $1000. This made the offence redundant because in today's terms, many items of property would be excluded from the offence.

Human Rights Considerations

The increase in the maximum penalty from 6 months imprisonment to 2 years imprisonment may arguably engage the right at section 10 (1) (b) of the *Human Rights Act 2004* to not be punished in a cruel, inhuman or degrading way.

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

Section 10 (1) of the HRA states that no-one may be:

(a) tortured; or
(b) treated or punished in a cruel, inhuman or degrading way.

Section 10 (1) is modelled on article 7 of the International Covenant on Civil and Political Rights (ICCPR). In General Comment 20 on the ICCPR, the Office of the High Commission for Human Rights has commented on article 7's operation, stating

that the aim of the article is 'to protect both the dignity and the physical and mental integrity of the individual.[3]'

In Victoria, this right has been said to have 'particular reference to persons in the custody, care or control of the state, including persons held in prisons, detention centres and mental health facilities. It may also be relevant to issues such as corporal punishment, child abuse or neglect, extradition and systematic and serious discrimination[4]'.

In the context of the imposition of maximum penalties by Government, the right at section 10 (1) (b) not to be treated or punished in a cruel, inhuman or degrading way may be engaged where the prescribed penalty is so grossly disproportionate to the offence, that it may be found to be 'cruel, inhuman or degrading'.

The importance of the purpose of the limitation (section 28 (2) (b))
The purpose of the maximum penalty of 2 years imprisonment is to recognise the increase in the seriousness of the offence (due to the increase in the value of the property damaged) and to ensure that the offence is an available alternative to the section 403 Criminal Code offence, which carries a maximum penalty of imprisonment of 10 years. This will allow for the less serious destroying or damaging property offenders to be charged with the section 116A *Crimes Act 1900* offence.

As is provided for by section 7 of the *Crimes (Sentencing) Act 2005,* the purposes of sentencing, and maximum penalties are to:

- ensure that the offender is adequately punished for the offence in a way that is just and appropriate;
- to prevent crime by deterring the offender and other people from committing the same or similar offences;
- to protect the community from the offender;
- to promote the rehabilitation of the offender;
- to make the offender accountable for his or her actions;
- to denounce the conduct of the offender; and
- to recognise the harm done to the victim of crime and the community.

By setting the maximum penalty, the Legislature is placing a limit on the sentence of imprisonment that may be imposed on the offender. The task of considering the specific facts and circumstances of the case, and the offender, will occur in the sentencing court.

[3] Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1989 'General Comment No.20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment. Available: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/3888b0541f8501c9c12563ed004b8d0e?Opendocument

[4] Human Rights Law Centre '*Guide to the Victorian Charter of Human Rights and Responsibilities'* p. 23-24, available: http://www.hrlc.org.au/content/topics/victorian-charter-of-human-rights/hrlrc-guide-victorian-charter

Nature and extent of the limitation (section 28 (2) (c))
In considering whether the maximum penalty of 2 years imprisonment for the offence of destroying or damaging property at section 116A of the *Crimes Act 1900* is 'grossly disproportionate' to the offence, the Canadian Supreme Court case of *R v Smith (Edward Dewey)* [5] is relevant.

In *Smith*, the court considered whether mandatory prison sentences violated section 12 of the Canadian Charter of Rights and Freedoms (located in the *Constitution Act 1982*). Section 12 of the Canadian Charter of Rights and Freedoms (the Canadian Charter) is the equivalent to section 10 of the HRA and provides 'everyone has the right not to be subjected to any cruel and unusual treatment and punishment'.

The Canadian Supreme Court observed that in order for punishment to be 'cruel or unusual' it must be 'so excessive as to outrage the standards of decency'. The test to determine whether the punishment was 'cruel or unusual' was to consider whether the punishment was 'grossly disproportionate'. The court considered the nature of the offence, the circumstances in which it was committed, the character of the offender as well as deterrence and other objectives that go beyond the case of an individual offender (for example, deterrence) to decide whether the punishment was 'grossly disproportionate'.

The Government does not consider that the proposed maximum penalty of 2 years imprisonment is 'so excessive as to outrage the standards of decency.' The proposed penalty is consistent with similar property damage offences. In the *Criminal Code 2002*, the offence at section 408 of possession of a thing with intent to damage property has a maximum penalty of 3 years imprisonment, the offence at section 407 of threat to cause property damage has a maximum penalty of 2 years imprisonment.

Relationship between the limitation and its purpose (section 28 (2) (d))
The maximum penalty of 2 years imprisonment arguably does not limit the right at section 10 of the HRA as it is not 'grossly disproportionate' to the offence. As is discussed above, this maximum penalty is consistent with similar offences and is intended to be a lesser offence to the *Criminal Code 2002* section 403 offence of damaging property.

This maximum penalty will support the purposes of sentencing and will ensure that offenders convicted of an offence against section 116A are appropriately punished. It will also provide a deterrent for members of the ACT community and re-offending by the offender.

Any less restrictive means reasonably available to achieve the purpose (section 28 (2) (e))
The imposition of a maximum sentence of imprisonment will not result in all offenders receiving the maximum penalty of 2 years imprisonment. Indeed, other non-custodial sentencing alternatives are available under the *Crimes (Sentencing) Act 2005*. All sentences are determined by a Judge or Magistrate on the particular facts of the offence and the circumstances of the offender.

[5] 1987 1 S.C.R. 1045

Clause 14 – Summary disposal of certain cases, section 375(1)(c)

This clause will amend section 375(1)(c) to clarify that section 311(1)(b) of the *Criminal Code 2002* (the Code) can be dealt with summarily by the Magistrates Court.

Section 311(1)(b) of the Code provides that a person commits the offence of burglary if the person enters or remains in a building as a trespasser with intent to commit an offence that involves causing harm or threatening to cause harm to anyone in the building (the 'cause harm' category of burglary). The maximum penalty is imprisonment for 14 years.

Section 375(1) of the *Crimes Act 1900* (the Act) allows an indictable offence (punishable by a maximum of 14 years of imprisonment) that relates to 'money or other property' (which was defined to include the 'cause harm' category of burglary offence in *Fares v Longmore [1998] ACTSC 133*) to be dealt with summarily by the Magistrates Court only where certain conditions are met. This includes (at section 375(4)), for a charge that relates to money, or to property other than a motor vehicle, where the amount of the money or the value of the property does not exceed $30,000.

Currently there is concern that it is not possible for the Magistrates Court to deal with an offence at section 311(1)(b) of the Code summarily where the value of 'real property' upon which the person has trespassed exceeds $30,000. As almost all 'real property' in the ACT would greatly exceed $30,000, on one reading the Magistrates Court does not have jurisdiction to hear the 'cause harm' category of burglary offences summarily.

The purpose of the amendment to section 375(1)(c) is to clarify that burglary offences with the intent to cause harm or threaten to cause harm mentioned in section 311 of the Code can be heard summarily by the Magistrates Court.

Clause 15 – New section 375(4A)

This clause provides that for section 375 4(b) of the Act the 'property' does not include real property or any building at which the offence charged was allegedly committed. The purpose of this amendment is to clarify that with respect to offences under section 311 of the Code 'property' does not include real property or any building on which the offence of burglary is committed.

Part 3 — Crimes (Child Sex Offenders) Act 2005

Clause 16 – Schedule 1, part 1.1, new item 10A

This clause provides that the new offence of sexual intercourse with a young person under special care at section 55A(1) of the Crimes Act 1900 is a Class 1 Offence for the purposes of the *Crimes (Child Sex Offenders) Act 2005*.

Clause 17 – Schedule 2, part 2.1, new item 4A

This clause provides that the new offence of act of indecency with a young person under special care at section 61A(1) of the Crimes Act 1900 is a Class 2 Offence for the purposes of the *Crimes (Child Sex Offenders) Act 2005*.

Part 4 — Crimes (Sentencing) Act 2005

Clause 18 – Sentencing – relevant considerations, New section 33 (1) wa

This clause provides that if an offender has complied with a court order for assessment, treatment, referral or monitoring by the court alcohol and drug assessment service this is a relevant sentencing consideration.

This amendment engages and supports an offender's right to a fair trial at section 21 of the *Human Rights Act 2004*. It does this by providing procedural fairness as the court may only take into account an offender's compliance with the relevant order in sentencing and not any non-compliance with the order.

Clause 19 – Sentencing – irrelevant considerations, New section 34 (1) (fa)

This clause provides that if an offender has not complied with an order for assessment, treatment, referral or monitoring by the court alcohol and drug assessment service this is not a relevant sentencing consideration.

Clause 20 – Pre- sentence report matters, New Section 40A (ja)

This clause provides that whether an offender is addicted to or misuses alcohol or a controlled drug and has been assessed, treated or monitored by the court alcohol and drug assessment service is a pre-sentence report matter.

Clause 21 – New section 40B

This clause will enable a sentencing court to:

a) order that an offender submit to an assessment, treatment (with the offender's consent) or referral to treatment and monitoring by the Court Alcohol and Drug Assessment Service (CADAS);
b) order that the offender (in the course of submitting to the assessment and treatment or referral to treatment by CADAS) also submit to any reasonable directions by ACTCS; and
c) require a CADAS officer to appear at sentencing.

The Bill provides that the offender's consent must be obtained before the court can make such an order.

The purpose of this amendment is to ensure that the ACT Supreme Court and ACT Magistrates Court can order a full CADAS assessment if an offender has drug and alcohol misuse issues that are relevant to the sentence to be imposed for an offence. This will enable the courts to take such an assessment (and any treatment provided by CADAS) into account as a pre-sentencing and sentencing matter.

Clause 22 – Victim impact statements – use in court
New sections 52(3) and (4)

The law is currently unclear as to whether a court can refuse to allow a victim impact statement (VIS) to be read aloud to the court. New section 52(3) of the *Crimes*

(Sentencing) Act 2005 will provide that the court must allow a VIS to be read aloud in court where a person listed at section 49 (Victim impact statements – who may make) of the Act wishes to do so. The VIS is still required to meet the form and contents criteria in section 51 of the Crimes (Sentencing) Act.

New section 52(4) will provide that where a victim or other witness (including child witnesses, victims of sexual assault and violent offences, intellectually impaired witnesses and all witnesses in sexual and violent offence matters) is eligible under part 2 or part 4 of the *Evidence (Miscellaneous Provisions) Act 1991* to give evidence in a proceeding by audiovisual link they can read out a VIS by audiovisual link in that same proceeding.

These new sections do not alter the right provided by legislation of a defendant to cross-examine a person who makes a statement on the contents of the statement.

Part 5 – Criminal Code 2002

Clause 23- New section 612A

This clause will amend the possessing controlled precursor offence at section 612 (5) of the *Criminal Code 2002* by inserting a presumption that will apply to one of the two intent fault elements for the offence.

The presumption will apply to the fault element at section 612 (5) (b) and will only apply where the elements at sections (5) and (5) (a) are proved. This means that the prosecution will be required to prove that the defendant possessed the controlled precursor with the intention of using any of it to manufacture a controlled drug. Where these elements are proved, the presumption will apply and the defendant will be presumed, unless the contrary is proved on the balance of probability, to have possessed the controlled precursor with the intention of selling any of the manufactured drug or believing that someone else intends to sell any of the manufactured drug. The presumption will therefore satisfy the fault element at section 612 (5) (b).

Human Rights Considerations

The introduction of a presumption will engage the right at section 22 (1) of the HRA to be presumed innocent until proven guilty according to law. This is because the introduction of a presumption will reverse the burden of proof and will place the defendant under a legal burden to prove that they, or someone else, did not intend to sell the controlled drug.

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

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.

In *Momcilovic v The Queen*[6], Chief Justice French discussed the nature of the presumption of innocence. French CJ noted that 'the presumption of innocence is part

[6] (2011) HCA 34

of the common law of Australia, subject to its statutory qualification or displacement in particular cases'. French CJ noted that the nature of the presumption of innocence was concisely stated in *Howe v The Queen*:

> 'The presumption of innocence in a criminal trial is relevant only in relation to an accused person and finds expression in the direction to the jury of the onus of proof that rests upon the Crown. It is proof beyond a reasonable doubt of every element of an offence as an essential condition precedent to conviction which gives effect to the presumption[7].'

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

The purpose of this amendment is to address concerns about the enforceability of the possession of controlled precursor offences at section 612 of the *Criminal Code 2002*. Enforceability issues arise because of the difficulty in proving two intent fault elements for the possession offences at section 612. Currently, the offence requires the prosecution to prove three elements:

- that the defendant possessed the controlled precursor;
- that the defendant possessed the controlled precursor with the intent to use it to manufacture a controlled drug; and
- that the defendant, or someone else, intended to sell the manufactured drug.

It is this third element that poses difficulties for law enforcement, and has contributed to the offence being rarely prosecuted. Therefore, the purpose of this amendment is to increase the enforceability of the offence by creating a presumption that will apply to the lesser offence at section 612 (5).

The amendment will also bring the offence closer into line with other jurisdictions that use a presumption for this offence.

Additionally, the purpose of this amendment is to support the overarching purpose of the ACT's serious drug offences. As was noted in the revised explanatory statement for the *Criminal Code (Serious Drug Offences) Amendment Act 2004*, the ACT's serious drug offences have an organised crime focus and cover a broad range of criminal activity in comparison with the earlier offences in the *Drugs of Dependence Act 1991*. It was noted in the *Criminal Code (Serious Drug Offences) Amendment Act 2004* that the inclusion of offences relating to 'precursors' was to address the problem that many precursors are present in products that are available from pharmacies, supermarkets and hardware stores and are commonly extracted in backyard laboratories to create controlled drugs. The explanatory statement noted that the problem has become particularly acute over recent years and subsequently, serious drug offences were introduced into the *Criminal Code 2002* to address the possession, manufacture and selling of controlled precursors that are used to manufacture controlled drugs.

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

With regard to the operation of a presumption (that presumes a person committed a particular element of the offence), international jurisprudence has held that

[7] (1980) 55 ALJR 5 at 7.

presumptions can operate in criminal offences, but they must be reasonable and maintain the rights of the defence.

In *Salabiaku v France*[8], the applicant challenged a decision under the French Customs Code. The applicant was proved to have imported a consignment of prohibited drugs and under the Code, was presumed to know that the drugs were in his possession. As a result of the presumption, the applicant was found guilty of the offence of importing prohibited drugs.

In the judgement, the Court held that:

> 'Presumptions of fact or law operate in every legal system. Clearly the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards the criminal law... Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.'[9]

The Court held that the presumption did not violate Article 6 (2) of the European Convention on Human Rights. This was because the prosecution bore the onus to prove the physical element of the offence, and it was a defence for the accused to prove that he was unaware of the contents of the consignment[10].

In *Momcilovic v The Queen*[11] the High Court of Australia considered an appeal by the applicant against her conviction against section 71AC of the Victorian *Drugs, Poisons and Controlled Substances Act 1981* (the Victorian Drugs Act) for trafficking in a drug of dependence. One of the key issues of the appeal was the application of section 5 of the Victorian Drugs Act to the offence at section 71AC. Section 5 created a presumption that provides that a substance on premises occupied by a person is deemed to be in the possession of that person unless the person satisfies the court to the contrary.

The majority (French CJ, Gummow J, Crennan J, Kiefel J and Hayne J) held that section 5 could not be read to apply to the offence at section 71AC using conventional principles of statutory interpretation. However, in considering the operation of section 5, the majority considered that section 5 places a legal burden of proof on the accused to rebut the presumption.

Like section 5 of the Victorian Drugs Act, new section 612A creates a legal burden on the accused to rebut the presumption that they were in possession of a controlled precursor with the intention of selling any of the manufactured drug or believing that someone else intends to sell any of the manufactured drug.

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[8] (1991) 13 E.H.R.R 379.

[9] Salabiaku v France (1991) 13 E.H.R.R 379.

[10] Emmerson, B. Q.C., Ashworth, Andrew (Prof)., Macdonald, A., *Human Rights and Criminal Justice*, Second Edition, Thomson, 2007, p. 348-349

[11] (2011) HCA 34.

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

In *Momcilovic v The Queen*, Crennan and Kiefel JJ noted:

> 'Section 7(2) is an acknowledgement that charter rights are not absolute or always completely consistent with each other. So much is confirmed by the Explanatory Memorandum to the Bill which introduced the Charter. It would appear to follow that if a limitation or restriction effected by a statutory provision is demonstrably justified, a Charter right is to be read and understood as subject to such a limitation or restriction...[12]'

In *Momcilovic v The Queen*, only three of the High Court Justices specifically considered the question of whether the legal presumption at section 5 of the Victorian Drugs Act was consistent with the Victorian Charter right to the of presumption of innocence. Justice's Crennan, Kiefel and Bell determined that section 5 was inconsistent with the right at section 25 (1) of the Victorian Charter to the presumption of innocence.

However, it is notable that Chief Justice French and Justices Hayne and Gummow did not provide a position on whether section 5 was compatible with the Charter right to the presumption of innocence. This is because they found that section 5 could not be applied to the offence for which the applicant had been charged and therefore did not consider the question. Additionally, Justice Hayne found that the 'whole Charter is invalid'. This was because sections 7(2) and 32 (1) of the Charter 'permit and compel a considerable redefinition of rights... which effect statutes to be changed radically.[13]'

The inclusion of section 612A is consistent with the purposes of the serious drug offences in the ACT's *Criminal Code Act 2002* to disrupt the manufacture and sale of controlled drugs. While the presumption will create a legal burden on an accused person to disprove an essential element of the offence, the onus remains on the prosecution to prove two of the remaining essential elements of the offence (possession of the precursor and possession with the intent to use the precursor to manufacture a controlled drug).

The inclusion of a presumption is also consistent with the approach taken by the Commonwealth Government. Like the ACT, the Commonwealth *Criminal Code Act 1995* contains offences for the possession of controlled precursors. The offences at section 306 are structured similarly to the ACT's offences at section 612 as they contain the identical two fault elements that relate to intent.

The Commonwealth *Criminal Code Act 1995* also contains two presumptions that apply to the offence at section 306.4 for possession of pre-trafficking controlled precursors. The presumption applies to this offence as it carries the lowest penalty of imprisonment for 7 years, 1400 penalty units, or both.

The first presumption (at section 306.8 (1)) applies in circumstances where a person possessed a substance, and the possession was not authorised by the Commonwealth, a State or Territory. The presumption states that where a person possessed the

[12] Momcilovic v The Queen (2011) HCA 34 at 571.

[13] Momcilovic v the Queen (2011) HCA 34, at 456.

substance in the above circumstance, the person is then taken to have possessed the substance with the intention of using some or all of it to manufacture a controlled drug. This presumption will satisfy the intent element at section 306.4 relating to manufacture.

The second presumption (at section 306.8 (3)) states that if a person possessed a marketable quantity of a substance with the intention of using some or all of it to manufacture a controlled drug, the person is taken to have done so with the intention of selling some or all of the drug so manufactured. This presumption will satisfy the intent element at section 306.4 relating to sale of the manufactured controlled drug.

The Explanatory Memorandum for these Commonwealth presumptions (the explanatory memorandum to the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act 2005*) addressed the reasons for the inclusion of presumptions for the offence at section 306.4. At page 38, the memorandum states that the presumptions were included to 'increase the enforceability of the offence' and 'in many cases it will be difficult for the prosecution to obtain any evidence of an intention to manufacture a controlled drug. If a person is dealing illegally with the precursor it is considered reasonable to reverse the burden of proof by presuming that they are doing so for an illicit purpose.'

Like the reasons for the Commonwealth including presumptions to apply to their possession of precursor offences, the ACT proposed this amendment in order to increase the enforceability of this offence to target those involved in the illegal sale and manufacture of controlled drugs.

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

The ACT Government recognises that the inclusion of a presumption that places a legal burden on an accused to disprove an essential element of the offence will significantly limit the right to be presumed innocent at section 21 (1) of the HR Act.

The inclusion of a legal presumption on an accused is consistent with the approach at section 604 (presumption if trafficable quantity possessed) and section 608 (presumption if trafficable quantity manufactured) of the *Criminal Code 2002*. The presumption at section 604 applies to the five offences at section 603 for trafficking in a controlled drug. If the accused prepared a trafficable quantity of a controlled drug for supply, transported a trafficable quantity of a controlled drug, guarded or concealed a trafficable quantity of a controlled drug or possessed a trafficable quantity of a controlled drug, then it is presumed, unless the contrary is proved, that the defendant had the intention or belief about the sale of the drug required for the offence. The result of this presumption is that for the offences at section 603, the prosecution is only required to prove the physical element for the offence.

In order to limit the encroachment on this right, the ACT Government has provided that the presumption only applies to the lesser offence at section 612 (5) of the *Criminal Code 2002*. This offence is punishable by 700 penalty units, imprisonment for 7 years, or both. The remaining offences with heavier penalties at sections 612 (1)

and 612 (3) will remain unchanged and will still require the prosecution to prove two intent fault elements.

Clause 24- Sections 613 and 614

This is a technical clause that will clarify the operation of the offences at sections 613 and 614 of the *Criminal Code 2002*. These offences are for the supply or possession of a substance, equipment or instructions for manufacturing a controlled drug. At present the offences read: 'a person commits an offence if the person supplies to someone else/ possesses any substance, any equipment or any document containing instructions for manufacturing a controlled drug'.

This clause will insert a comma after 'document containing instructions'. This is to address the concern that the offences may be interpreted as requiring the substance and equipment to contain instructions for manufacturing a controlled drug. This amendment is to ensure that this is not the case and the only object that contains instructions for manufacturing a controlled drug is a document.

Clause 25- New Section 614A

This clause will insert a new offence at section 614A. The new offence will criminalise the possession of a tablet press in circumstances where a person is reckless about the risk that the thing in their possession is a tablet press.

The new offence has three elements. Firstly, section 614A (1)(a) and (b) require the prosecution to prove that the person is in possession of a thing and the thing is a tablet press. A tablet press is defined at section 612A (3) as an instrument or machine that may be used to manufacture a controlled drug in tablet form.

The third element provides the fault element for the offence. Section 614A (1)(c) provides that a person commits the offence if the person possess a tablet press, and the person is reckless about the risk that the thing in their possession is a tablet press.

The inclusion of the recklessness fault element will ensure that people who both intentionally possess a tablet press and those who are reckless about the risk that the thing in their possession is a tablet press are captured by the offence.

Section 614A (2) contains a defence of reasonable excuse. The section places an evidential burden on the accused to adduce evidence that suggests a reasonable possibility that the accused had a reasonable excuse for the possession of the tablet press.

Clause 26- Sections 620 and 621

This is a technical clause that will clarify the operation of the offences at sections 620 and 621 of the *Criminal Code 2002*. These offences are for supplying plant material, equipment or instructions for cultivating a controlled plant and for possessing plant material, equipment or instructions for cultivating a controlled plant. Prior to this amendment, the offences read: 'a person commits an offence if the person supplies to

someone else/ possesses any controlled plant, any product of a controlled plant, any equipment, or any document containing instructions for cultivating a controlled plant'.

This clause will insert a comma after 'document containing instructions'. This is to address the concern that the offences may be interpreted as requiring the controlled plant or equipment to contain instructions for cultivating a controlled plant. This amendment is to ensure that this is not the case and the only object that contains instructions for cultivating a controlled plant is a document.

Clause 27 – Participating in a criminal group – causing harm
New section 653(3) and (4)

This clause amends section 653 of the *Criminal Code 2002* to provide that in the prosecution of an offence against section 653(2) (participating in a criminal group with threat to cause harm) it is not necessary to prove that the person threatened actually feared that the threat would be carried out. This is a minor amendment to bring the offence at section 653 into line with other equivalent provisions in the *Criminal Code 2002*.

This clause provides a definition of 'threat' for the purposes of section 653 in order to clarify the operation of the offence.

Clause 28 – Participating in a criminal group – property damage
Section 654 (1), new note

This clause amends section 654(1) to clarify that for the purposes of the offence at section 654(1) which requires proof of recklessness, this fault element can be satisfied by proof of intention, knowledge or recklessness.

Clause 29 - Section 654(3)

This clause amends section 654(3) so that the provision states 'the threat would be carried out' rather than 'the threat would be carried' as the word 'out' has been omitted in error.

Clause 30 – Section 654(4)

This clause provides a definition of 'threat' for the purposes the offence at section 654(2) in order to clarify the operation of the offence.

Part 6 — Domestic Violence and Protection Orders Act 2008

Clause 31 - Schedule 1, part 1.2, table 1.2, new item 27A

This clause ensures that the new offence of sexual intercourse with a young person under special care can be considered a domestic violence offence for the purposes of the *Domestic Violence and Protection Orders Act 2008.*

Clause 32 – Schedule 1, part 1.2, table 1.2, new item 32A

This clause ensures that the new offence of act of indecency with a young person under special care can be considered a domestic violence offence for the purposes of the *Domestic Violence and Protection Orders Act 2008.*

Part 7 — Evidence (Miscellaneous Provisions) Act 1991

Clause 33 – Meaning of *witness* - div 4.2A, Section 40D(1)

This clause amends section 40D(1) of the *Evidence (Miscellaneous Provisions) Act 1991* to replace the reference to complainant with a reference to a witness.

Division 4.2A contains sections 40A to 40M to permit an audiovisual recording of a police interview of certain witnesses to be admitted into evidence as the evidence-in-chief of the witness. Section 40D(1) currently defines witness for the purposes of this division. Witness is currently defined to mean a complainant in a sexual offence or a violent offence proceeding who is a child or who is intellectually impaired (as defined in section 40D(2)).

The amendment will broaden the class of witnesses to which the protections offered under division 4.2A apply to include a witness (including a similar act witness) who is a child or is intellectually impaired, in sexual or violent offence proceedings.

Clause 34 – Section 40D(1)(a)

This clause amends section 40D(1)(a) of the *Evidence (Miscellaneous Provisions) Act 1991* to insert the words 'on the day the audiovisual recording is made' after the word 'child' in the section.

The amendment will provide clarity around the class of witnesses to which the protections offered under division 4.2A apply. Currently, it is not clear that the protections apply in a situation where a witness is a child at the point at which the police recording is made, and then is no longer a child at the point at which the recording is to be admitted as evidence-in-chief in a proceeding.

The amendment will clarify that the provisions in division 4.2A apply to a witness who was a child at the time that the relevant police audiovisual recording was made. This will remove any doubt in relation to the admissibility of a police audiovisual recording for a witness who turns 18 years or older before the recording is admitted into evidence for a proceeding.

Clause 35 – Meaning of *witness*- div 4.2B, Section 40P(1)(a)

This clause amends section 40P(1)(a) of the *Evidence (Miscellaneous Provisions) Act 1991* to insert the words 'on the day the proceeding started in the Magistrates Court' after the word 'child' in the section.

Division 4.2B contains sections 40N to 40W to permit the entire evidence of certain witnesses to be pre-recorded at a pre-trial hearing and to allow this pre-recorded evidence to be admitted into evidence at trial. Section 40P(1) currently defines witness for the purposes of this division. Witness is currently defined to mean a

prosecution witness in a sexual offence proceeding who is a child, or an intellectually impaired person (as defined in section 40D(2)), or a complainant who the court considers must give evidence as soon as practicable because they are likely to suffer severe emotional trauma or be intimidated or distressed.

The amendment will provide clarity around the class of witnesses to which the protections offered under division 4.2B apply. Currently, it is not clear that the protections apply in a situation where a witness is a child at the point at which the pre-trial recording is made, and then is no longer a child at the point at which the recording is to be admitted as evidence in the sexual offence proceeding or a related proceeding (as defined in section 40V). The amendment will clarify that the provisions in division 4.2B apply to a witness who was a child on the day the proceeding started in the Magistrates Court. This will remove any doubt in relation to the admissibility of a pre-trial recording for a witness who turns 18 years or older before the recording is admitted into evidence in the sexual offence proceeding or a related proceeding.

Clause 36 – New section 43A

This clause inserts new section 43A into the *Evidence (Miscellaneous Provisions) Act 1991*.

New section 43A will facilitate the recording of evidence given by specific witnesses in sexual offence proceedings, and then the admission of this evidence in a related proceeding. Currently, section 43 of the Act provides that the evidence of complainants and similar act witnesses, in sexual or violent offence proceedings, must be given from a place which is separate from the courtroom, but connected to it by audiovisual link, unless the court otherwise orders. The amendment will ensure that all or part of the evidence of complainants and similar act witnesses, in sexual offence proceedings only, who give their evidence by audiovisual link under section 43 may be recorded. The recording of the evidence will be at the discretion of the Court. The amendment also ensures that the audiovisual recording of evidence is admissible as evidence in a related proceeding.

The court in the related proceeding is not prevented from ruling on the admissibility of the recording and may order any editing of the recording. The court in the related proceeding can also order that the witness attend the related proceeding to give further evidence. The court can make such an order in the following circumstances:
• the applicant has become aware of something new;
• the witness could have been recalled if they had given their evidence in person at the hearing (as opposed to having the recording of their evidence played); and
• it is in the interests of justice to make the order.

Related proceeding is defined to mean any of the following:
• a re-hearing or re-trial of, or appeal from, the hearing of the sexual offence proceeding in which the audiovisual recording was made; or
• another proceeding in the same court as the proceeding for the sexual offence, or another offence arising from the same, or the same set of, circumstances; or
• a civil proceeding arising from the sexual offence.

Part 8 — Firearms Act 1996

Clause 37 - Adult firearms licences – genuine reasons to possess or use firearms Table 61, item 2

This clause removes reference to the term 'recreational hunting' in table 61 of the *Firearms Act 1996*. Currently, under table 61 item 2.2 a person can apply for an adult firearm licence on the basis that they have permission from the ACT Parks and Conservation Service or ACT Forests to carry out "recreational hunting or vermin control in a reserved area...". However, these agencies have a policy to not permit recreational hunting in a reserved area. Therefore, it is not appropriate to have this listed as a 'genuine reason' to possess or use a firearm.

The amendment to table 61 item 2.2 will not interfere with a person's ability to apply for an adult firearm licence on the basis that they have permission from ACT Park and Conservation Service or ACT Forests for the purpose of carrying out vermin control in a reserved area under the *Nature Conservation Act 1980*.

Clause 38 - Regulation-making power
Section 272(1)(a)

This clause inserts in the *Firearms Act 1996* a power for the Executive to make regulations concerning the manufacturing of firearms to enable the ACT to take steps to adopt a nationally consistent approach to the regulation of the manufacture of firearms.

The ACT currently regulates the manufacture of firearms by allowing licensed firearms dealers to also engage in such activities. However, as a result of a recommendation made by the Firearms and Weapons Policy Working Group the ACT Government has agreed to amended the current provision to provide for a regulation making power for the manufacture of firearms.

The amendment will give the ACT Government the power to create regulations in relation to the manufacture of firearms so that the ACT is compliant with Australia's international obligations under the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime* .

Part 9 — Magistrate's Court Act 1930

Clause 39 - Appeals to which div 3.10.2 applies
New section 208(1)(g)
This clause amends section 208(1) of the *Magistrates Court Act 1930* to clarify that it is possible for a defendant to appeal an order to disqualify a person from holding a driver licence under an automatic disqualification as defined by section 61A of the *Road Transport (General) Act 1999*.

The purpose of this amendment is to provide that a person subject to a default disqualification period is not in a different position with regards to appeal rights than

a person who has had a greater/lesser period of disqualification imposed and that the disqualification can be appealed in both cases.
This amendment will not affect the requirement of the appeal court to comply with the statutory minimum disqualifications provided for by automatic disqualification provisions.

Clause 40– Jurisdiction of Childrens Court
New section 288(1)(e)

This clause amends section 288 of the *Magistrates Court Act 1930* to ensure that where a person under 18 is charged jointly with an adult the Childrens Court has jurisdiction to hear and decide the charges against both the person under 18 and the adult jointly.

Apart from committal proceedings it is not currently possible for an adult and a young offender who are jointly charged for their charges to be heard together either in the Magistrates Court, or the Childrens Court. It would be necessary to conduct two hearings even though the evidence will be the same in each hearing. This would require witnesses to give the same evidence twice. Running duplicate hearings where adults and children are involved as offenders puts further strain on limited court resources and may be unnecessarily traumatic for victims.

In the Magistrates Court charges may be preferred against each defendant individually on a separate charge sheet. This will occur even where defendants are charged with the same offence or offences, arising out of the same set of facts. It is intended that this clause would apply in such a situation so that the Childrens Court would have jurisdiction to hear and decide charges against both a person under 18 and an adult who have been charged with the same offence or offences, arising out of the same set of facts.

The court may use its discretion to hear the matters separately where the circumstances call for it.

Clause 41 – Section 289 heading

This clause amends the heading of section 289 so that it accurately reflects the contents of the section following the amendments at clause 43.

Clause 42 – Section 289(1) and (2)

This clause amends section 289 to clarify that where the Children's Court has jurisdiction to hear a proceeding against a child and an adult charged jointly with an offence a magistrate may order that the hearing for the offence against both the child and the adult be heard together.

This clause also clarifies that the protections that currently apply to young people appearing as offenders in the Children's Court, particularly those provided at Part 7A of the *Court Procedures Act 2004*, will not be affected by this amendment.

Furthermore, the Court will retain the discretion to hear the matter separately where circumstances call for it.

Part 10 — Prostitution Act 1992

Clause 43 – Schedule 1, new item 14A

This clause provides that the new offence of sexual intercourse with a young person under special care is a disqualifying offence under the *Prostitution Act 1992*.

Clause 44 – Schedule 1, new item 19A

This clause provides that the new offence of act of indecency with a young person under special care is a disqualifying offence under the *Prostitution Act 1992*.

Part 11 — Supreme Court Act 1933

Clause 45 – Schedule 2, part 2.2, new item 12A

This clause provides that the new offence of sexual intercourse with a young person under special care is an excluded offence under the *Supreme Court Act 1933*.

Clause 46 – Schedule 2, part 2.2, new item 18A

This clause provides that the new offence of act of indecency with a young person under special care is an excluded offence under the *Supreme Court Act 1933*.