2016

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CRIMES (SERIOUS AND ORGANISED CRIME) LEGISLATION AMENDMENT BILL 2016

EXPLANATORY STATEMENT

Presented by
Simon Corbell MLA
Attorney-General

Crimes (Serious and Organised Crime) Legislation Amendment Bill 2016

Outline

This explanatory statement relates to the Crimes (Serious and Organised Crime) Legislation Amendment Bill 2016 as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Assembly.

The statement must to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Purpose of the Bill

The Crimes (Serious and Organised Crime) Legislation Amendment Bill 2016 (the Bill) will make a number of amendments to the ACT's laws targeting serious and organised crime and other criminal activity.

The Bill aims to provide ACT Policing (ACTP) with the appropriate powers to target and disrupt serious and organised crime, and in particular criminal activities of outlaw motorcycle gangs (OMCGs). This will give police better tools to ensure the safety and protection of the Australian Capital Territory (ACT) community from violence, drug trafficking and associated illegal activity that is sometimes undertaken by these groups.

This Bill will also make a number of minor and technical amendments to the ACT's criminal legislation, primarily with a focus on serious crimes.

The Bill will:

- modernise and relocate move-on powers from the *Crime Prevention Powers Act 1988* to the *Crimes Act 1900*;
- expand the categories of offence which are subject to non-association and place restriction orders (NAPROs) under the *Crimes (Sentencing) Act 2005*;
- introduce a new bail power of review for the Director of Public Prosecutions (DPP) in the *Bail Act 1992*;
- allow corresponding offenders to be prescribed where they have not been convicted but have been subject to a registration order in another jurisdiction, and in these circumstances require the Chief Police Officer (CPO) to decide whether a prescribed corresponding should be registered under the *Crimes (Child Sex Offenders) Act 2005*;
- provide that the registrar for the ACT child sex offenders register is the respondent in applications for removal of a person from the register under section 122C of the Crime (Child Sex Offenders) Act;

- clarify the operation of the new Intensive Corrective Order (ICO) through amendments to the *Crimes (Sentence Administration) Act 2005*; and
- amend the *Crimes (Assumed Identities) Act 2009* to improve the operation of assumed identities for Commonwealth intelligence agencies.

Background

The landscape of serious and organised crime

On 18 December 2015 the Australian Crime Commission (ACC) released findings from a study undertaken in conjunction with economist and criminologist Mr John Walker and the Australian Institute of Criminology showing that serious and organised crime costs the Australian economy at least $36 billion per year. This equates to $1,561 per year for every person in Australia.

The most successful serious and organised criminal groups operate across many sectors and crime types but are typically involved in some form of financial crime or money laundering. They will also usually have some connection with the illicit drugs market and may be involved in crimes such as people or firearms trafficking, fraud, or cybercrime.

Organised crime in Australia exhibits a number of features that largely reflect patterns in organised crime internationally, including financial gain as a primary motivator. It also 'generally involves systematic and careful planning, the capacity to adapt quickly and easily to changing legislative and law enforcement responses and the capacity to keep pace with, and exploit, new technologies and other opportunities'.[1]

The social structure of organised criminal groups is largely characterised by a ready disregard for rules, laws and general social order,[2] and these groups 'embody a deliberate, considered and persistent defiance of the authority of the law'.[3]

Outlaw motorcycle gangs (OMCGs) are 'one of the most high profile manifestations of organised crime'.[4] OMCG members play a prominent role in Australia's domestic production of amphetamine-type stimulants and are also involved in other illicit drug markets, vehicle re-birthing, and firearms trafficking. Some OMCG members are also involved in serious fraud, money laundering, environmental crime, extortion, prostitution, property crime, and bribing and corrupting officials.

The ACC has noted that OMCG chapters do not usually engage in organised crime as a collective unit, but generally the threat in these circumstances arises from small numbers of

[1] Australian Crime Commission, *Organised Crime in Australia* (2009) 5-6.

[2] James Finckenauer, 'Problems of Definition: What Is Organized Crime?' (2005) 8(3) *Trends in Organized Crime* 63, 71.

[3] Taskforce on Organised Crime Legislation, Department of Justice and Attorney-General (Qld), *Final Report* (2016) 14.

[4] Australian Crime Commission website, https://crimecommission.gov.au/organised-crime/organised-crime-groups/outlaw-motor-cycle-gangs, accessed 18 March 2016.

members leveraging off the OMCG and conspiring with other criminals for a common purpose.[5] Although to some extent it is true that OMCGs have an 'image problem'[6] due to their visible and intimidating presence, their history demonstrates a clear link with random but recurring acts of 'barbarian' public violence[7] that requires an appropriate legislative and operational response.

The number of OMCG members across Australia increased by 34% to 6,000 between 2012 and 2015.[8]

National framework

In 2010 Attorneys-General and Police Ministers endorsed the National Organised Crime Response Plan 2010-2013 (NOCRP). Key elements of the NOCRP included:

1. strengthening the policy, legislative and operational arrangements which support jurisdictional and national efforts to combat organised crime;

2. promoting the harmonisation of Commonwealth and State and Territory laws in relation to organised crime;

3. enhancing the coordination across jurisdictions of activities to combat organised crime, including interoperability of capabilities and resources; and

4. removing both capability gaps and impediments to inter-jurisdictional collaboration and sharing of information and intelligence.

In June 2013, the NOCRP expired and a review was undertaken to inform development of a new national plan. The 2015-18 NOCRP, which was endorsed by Attorneys-General and Police Ministers in May 2015, identifies threats posed by serious and organised crime and outlines six key initiatives where national action can be focused. These initiatives focus on methamphetamines, gun-related crime and violence, organised crime groups committing technology-enabled crime, financial crime, criminal proceeds of organised crime, and information sharing issues.

In separate but related work, the ACC has identified several emerging threats in its biennial Organised Crime in Australia project, and jurisdictions used this information in developing the new NOCRP. The key emerging threats overlap with the initiatives identified in the NOCRP and also include globalised professional money laundering syndicates and the increased prominence of entrepreneurial individuals as key players in illicit markets.

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[5] Australian Crime Commission, *Crime Profile: Outlaw Motorcycle Gangs* (July 2013) 2.

[6] Taskforce, above n 3, 15; OMCGs are viewed as the public face of organised criminal activity, despite the most reliable statistical data indicating that they are only charged with no more than 0.52% of all offences across Queensland: Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015) 25.

[7] Queensland, Statutory Review of the *Criminal Organisation Act 2009, Final Report* (2015) 13.

[8] Assistant Professor Terry Goldsworthy, Submission Nos 5.17 and 11.11 to Department of Justice and Attorney-General (Qld), *Taskforce on Organised Crime Legislation*, 4 March 2016, 17.

This national work has assisted the ACT to identify areas of focus and develop legislative and operational measures targeting the specific issues faced in the Territory.

Effectiveness of legislation in other Australian jurisdictions

There has been a flurry of activity in state and territory parliaments over the last decade to introduce legislation targeting the operations of organised criminal groups.[9] All jurisdictions, apart from Tasmania and the ACT, have criminal organisation declaration legislation – that is, legislation that involves the declaration of organisations as criminal organisations, with powers to make control orders as a result of that declaration. In addition, all jurisdictions, apart from the ACT, have fortification removal laws, and some jurisdictions have anti-consorting provisions primarily aimed at targeting OMCG activities.

The South Australian and New South Wales legislative schemes were found to be invalid by the High Court in 2008 and 2009 (respectively).[10] In 2013 and 2014, the High Court held that certain challenged provisions in Queensland's 2009 and 2013 suites of legislation were valid,[11] and on 8 October 2014 the High Court upheld the New South Wales anti-consorting laws, which make it an offence for convicted criminals to 'habitually' associate with each other after being issued with a warning not to consort.[12] It is important to note that the key considerations in all of these cases was whether the legislation run afoul of Chapter III of the Commonwealth Constitution by vesting certain powers in state courts, and whether it limited the implied freedom of political communication. Ethical and moral questions relating to the human rights implications of the legislation were not considered in any depth.

This means that although to date challenges to the constitutional validity of criminal group laws have been dismissed by the High Court, significant human rights concerns remain in relation to the framing of legislative responses to serious and organised criminal activity.

Some of these issues have recently been considered by three groups conducting reviews of Queensland's serious and organised crime legislative scheme. The *Queensland Organised Crime Commission of Inquiry Report* considered the extent and nature of organised crime in Queensland.[13] This was followed by the *Review of the Criminal Organisation Act 2009* which was a legislative review required after five years of operation under section 130 of that Act.[14]

[9] Queensland Statutory Review, above n 7, 136.

[10] *South Australia v Totani* [2010] HCA 39; *Wainohu v New South Wales* [2011] HCA 24.

[11] *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* [2013] HCA 7; *Kuczborski v the State of Queensland* [2014] HCA 46.

[12] *Tajjour v New South Wales; Hawthorne v New South Wales; Forster v New South Wales* [2014] HCA 35.

[13] Queensland, Commission of Inquiry into Organised Crime, *Final Report* (2015).

[14] Queensland Statutory Review, above n 7.

Finally, the *Taskforce on Organised Crime Legislation* reviewed the suite of laws which was introduced by the Newman Government in 2013.[15]

Some key and notable findings of the three reviews are:

- in the 21 month period from 1 October 2013 to 30 June 2015, outlaw motorcycle gang members accounted for only 0.52 per cent of criminal activity in Queensland;[16]
- the heavy focus on outlaw motorcycle gangs has meant the Crime and Corruption Commission has lost visibility of other areas of organised crime active in Queensland, and has meant that other types of organised crime have not been able to be appropriately investigated;[17]
- overall, an immediate (if, perhaps, short-term) effect of the 2013 suite was to lighten the burden of serving police officers due to OMCG members being less visible on the Gold Coast and announcing disassociation, with a 4% reduction in OMCG member numbers;[18] and
- the repeal of the greater part of the 2013 suite to be replaced by a renewed Organised Crime Framework better suited for combating not just OMCGs, but organised crime in all its forms.[19]

On receiving the Report the Queensland Government committed to adopting a number of the Taskforce's recommendations, and also to exploring ways to ensure that OMCG clubhouses remain closed and extending a ban on 'colours' in licensed premises to all public places.

At this time, however, there is little evidence that specific anti-gang laws such as those mentioned above are displacing OMCG members or their activities. This may be because there is also limited evidence that the laws have actually been put into use by law enforcement authorities.[20] Across all Australian jurisdictions except the ACT, in seven years

[15] The Taskforce, which reported to the government on 31 March 2016, was chaired by Alan Wilson QC, and was comprised of a number of key stakeholders including senior representatives of the Queensland Police Service, the Police unions, the Bar and the Law Society, the Departments of the Premier and Cabinet and Justice and Attorney-General, and the Public Interest Monitor. The 2013 suite of legislation considered by the Taskforce was:

- *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld)*;*
- *Tattoo Parlours Act 2013* (Qld)*;*
- *Vicious Lawless Association Disestablishment Act 2013* (Qld);
- *Criminal Law (Criminal Organisations Disruption) and Other Legislation Amendment Act 2013* (Qld); and
- *Criminal Code (Criminal Organisations) Regulation 2013* (Qld).

[16] Queensland, Commission of Inquiry, above n 13, 25.

[17] Ibid 24.

[18] Taskforce, above n 3, 5.

[19] Ibid 3.

[20] Queensland Statutory Review, above n 7, 136.

of control order legislation, there has only ever been one valid control order made, imposing only limited restrictions, in relation to one individual.[21] Additionally, public safety orders have only been used with any success in one Australian jurisdiction and fortification removal orders have been used rarely.[22]

The findings outlined in these reports and experience from other Australian and international jurisdictions suggests that traditional, assertive investigation of alleged criminal activities, combined with proactive targeting of OMCG members, are key elements to disrupt their activities. For example, Alan Wilson QC highlighted the existence of a 'comprehensive *Criminal Code*' and ancillary legislation addressing more specific issues such as drug and violence crime, and that these laws are sufficient to deal with any criminal act that an OMCG member may commit.[23] Furthermore, these 'long-settled laws provide a logical starting point, and a sound foundation' for any additional responses to criminal OMCG activity.[24]

Another example is found in the response to the violent brawl in March 2009 between members of the Hells Angels and the Comancheros at Sydney Airport resulting in the death of Anthony Zervas, the brother of one of the Hells Angels members.[25] Despite the immediate political pressure to introduce specific anti-gang legislation, the perpetrators were eventually dealt with under the existing criminal law for affray and homicide offences.[26]

In policy making, any response should reflect and address the nature and extent of the risk as revealed by the available evidence.[27] The existing and most up to date evidence taken together demonstrates that the key proposition of the criminal law that a 'person's criminality should be determined by their individual conduct'[28] is important when implementing legislation targeting serious and organised criminal activity.

ACT legislative and policing framework

The ACT has consistently responded to serious and organised crime by pursuing considered and targeted responses to the threats posed by this type of crime within the Territory. These have traditionally focused on using specific criminal offences to target the behaviour of individuals within organised criminal groups and ACT and cross-border criminal investigation laws, as well as relying on the cooperation of ACT and Federal law enforcement agencies.

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[21] Ibid.

[22] Ibid 135.

[23] Ibid 13.

[24] Ibid 13.

[25] Bronwen Merner et al, 'Criminal Organisations Control Bill 2012' (Research brief No 10, Parliamentary Library, Parliament of Victoria, 2012) 10.

[26] *R v Menzies* [2012] NSWSC 158 (2 March 2012) (RA Hulme J); *R v Hawi* [2012] NSWSC 332 (10 April 2012) (RA Hulme J).

[27] Queensland Statutory Review, above n 7, 229.

[28] Ibid 230.

In June 2009, in response to a motion passed by the ACT Legislative Assembly, the Attorney-General Simon Corbell MLA published the *Government Report to the Legislative Assembly: Serious Organised Crime Groups and Activities* providing advice on laws available in the ACT to combat serious organised crime groups. The report also considered laws adopted in other Australian jurisdictions and developments internationally relevant to combating OMCGs.

In 2010 the *Crimes (Serious Organised Crime) Amendment Act 2010* was passed in response to recommendations in the Government Report. The *Crimes (Serious Organised Crime) Amendment Act 2010* introduced the offences of affray, participation in a criminal group, and recruiting people to participate in criminal activity into the Crimes Act and the *Criminal Code 2002*. It also extended the existing offences relating to the protection of people involved in legal proceedings contained in division 7.2.3 of the Criminal Code, and introduced the criminal liability concepts of 'joint criminal enterprise' and 'knowingly concerned' into the Criminal Code.

In addition, a court may make a non-association or a place restriction order as part of a sentence under part 3.4 of the Crimes (Sentencing) Act. The Bail Act also allows the court to impose an association or place restriction when granting bail to adults. These orders can be used strategically to target serious and organised criminal activity where it is appropriate and required.

In terms of operational policing, ACTP actively monitors OMCG activity through Taskforce Nemesis which commenced in June 2014. Taskforce Nemesis is a dedicated team from within ACTP's Criminal Investigations Unit that is tasked with tracking, disrupting and arresting those members of OMCGs involved in criminal activities such as drug trafficking, illegal firearms, money laundering, extortion and serious assaults.

Taskforce Nemesis works closely with all areas of ACTP and ACT Government Directorates to ensure consistency in the regional approach and targeting of OMCGs. Through Taskforce Nemesis ACTP also joins a concerted national effort to respond to the activities of OMCGs to ensure maximum disruption and targeting opportunities.

Taskforce Nemesis also works closely with Operation Morpheus, which was established by the Serious and Organised Crime Coordination Committee and subsequently endorsed by the ACC Board on 11 September 2014 as a national task force. Operation Morpheus capitalises on the commitment that has already been invested by state and territory police as well as Commonwealth law enforcement and regulatory agencies through the Attero National Task Force.

The need for reform in the ACT

Although incidents involving offending that can be directly attributed to OMCGs are rare in the ACT, ACTP has recently reported an increase in activities related to these gangs, particularly 'patching over'.[29] This is because the picture of OMCGs in the ACT is changing,

[29] This means that members of one club are changing allegiances and wearing the patch of another club.

reflective of trends and activities of gangs and their members across Australia. Due to the ACT's location within New South Wales and between Sydney and Melbourne, the ACT must maintain a law enforcement focus on OMCG activities.

This law enforcement focus must have a strong component of long-term preventative capability to ensure that police have the tools to disrupt and dismantle organised crime networks.

While the level of activity by OMCGs is relatively low in the ACT, it poses a public safety risk to communities through OMCG linkages to criminality, the use of violence and their ability to create fear in the community.

Because of the need to remain vigilant, the ACT continues to be part of the ongoing national effort to disrupt, disable and dismantle the activities of organised crime, and has been monitoring the progress and success or otherwise of relevant Australian legislation over the past decade.

On 5 June 2015 the Chief Minister Mr Andrew Barr MLA outlined the government's strategic priorities for 2015-16, including 'Enhancing liveability & social inclusion'. Under this priority the government has committed to 'Tackling Organised Crime' which includes '*implement[ing] new laws to combat organised criminal groups, including outlaw motorcycle clubs*'.

This priority is consistent with the ACT Government's ongoing approach to addressing serious and organised crime, which includes pursuing considered and targeted responses to the threats posed by this type of crime within the ACT.

In close consultation with ACTP and other key stakeholders, the Bill has been developed to enhance the work of Taskforce Nemesis and to target serious and organised crime in the Territory.

Human Rights Considerations

This section will provide an overview of the human rights which may be engaged by the Bill, together with a discussion on reasonable limits where appropriate. Where necessary, a further human rights analysis is provided under specific provisions.

The Bill will limit and support a number of rights protected by the *Human Rights Act 2004* (the HR Act). Accordingly, the proposed amendments have been carefully considered in the context of the purposes of the HR Act.

The Bill takes the least restrictive approach so that human rights are only limited as necessary to allow the Bill to appropriately target and disrupt serious illegal criminal activity in the ACT and protect the community from the activities of organised crime groups and serious criminals.

The Bill seeks to strike a balance between introducing strong laws to increase the Territory's ability to combat serious organised crime while at the same time ensuring that human rights are not unnecessarily or unreasonably limited.

The proposed amendments also engage the 'doctrine of positive obligations' which has been discussed in European human rights jurisprudence and defined as the responsibility of governments to undertake measures to protect their citizens. This encompasses the notion that governments not only have the responsibility to ensure that human rights are free from violation, but that governments are required to provide for the full enjoyment of rights.[30]

Limitations on human rights – section 28 of the HR Act

Section 28(1) of the HR Act provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Section 28(2) states that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including the following:

(a) the nature of the right affected;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The list of factors in section 28(2) is non-exhaustive. Where it is accepted that a right is engaged and limited by the Bill's provisions in relation to the new sentence, these factors are addressed by referencing the factor in bold type followed by the explanation as to why the limitation is reasonable in relation to that factor.

The ICO regime was introduced in the ACT in the *Crimes (Sentencing and Restorative Justice) Act 2016* which was notified on 24 February 2016 and commenced on 2 March 2016. The explanatory statement for that legislation comprehensively addresses the human rights implications of the introduction of ICOs. Given that the amendments included in this Bill in relation to ICOs are minor and technical in nature, the human rights issues raised by ICOs will not be dealt with further in this explanatory statement.

The right to privacy and reputation

Section 12 of the HR Act provides that everyone has a right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily.

[30] Colvin, M & Cooper, J, 2009 '*Human Rights in the Investigation and Prosecution of Crime'* Oxford University Press, p. 424-425.

The right to privacy is a fundamental right that encompasses the idea that individuals should have a separate area of autonomous development, dignity and freedom from arbitrary, unreasonable or oppressive government interference.

The right to privacy and reputation is 'one of the broadest and most flexible of human rights'[31] and has been described as protecting a wide 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).[32]

Section 12 of the HR Act gives effect to article 17 of the International Covenant on Civil and Political Rights (the ICCPR) by aiming to protect individuals from unlawful and arbitrary interference with privacy. An interference that is lawful may still be arbitrary if it is unreasonable or unjustified in all the circumstances of the case.

The UNHRC's General Comment 16 notes: [33]

> *as all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society...*

Accordingly, the right to privacy requires that the state does not itself arbitrarily or capriciously invade a person's privacy in a manner not based on demonstrable evidence, and adopts legislative and other measures to protect people from arbitrary interference with their privacy from others.

The right to privacy needs to be balanced against other rights, particularly the right to freedom of expression, and it can be limited as long as it can be demonstrated that the limitation is necessary, reasonable and proportionate.

The concept of arbitrariness requires that any interference with privacy, even when provided for by law, should be reasonable in the particular circumstances. Whether an interference with privacy is permissible will depend on whether a person has a reasonable expectation of privacy in the circumstances, and reasonableness implies that any interference with privacy must be proportionate to the end sought and must be necessary in the circumstances of any given case.[34]

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[31] Gans et al, *Criminal Process and Human Rights*, 2011, The Federation Press, Sydney, para 8.1, p 301.

[32] Lester QC., Pannick QC (General editors), 2005, *Human Rights Law and Practice'*, Second edition, LexisNexis UK, p 261.

[33] UN Human Rights Committee, *General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art 17*), UN Doc CCPR General Comment 16 (1988), para.7.

[34] *Toonen v Australia*, Communication 4888/1992, UN Doc CCPR/C/50/D/488/1992 (1994), para 8.3.

As established in case law, 'arbitrary' may denote a decision or action, which is not based on any relevant identifiable criterion, but which stems from an act of caprice or whim.[35] Interference can only be on the basis of law that is precise and circumscribed, and does not give too much discretion to authorities.

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

In this Bill, the right to privacy is ***engaged and limited*** by the amendments to the definition of 'prescribed corresponding offenders' under the Crimes (Child Sex Offenders) Act as the child sex offenders register necessarily includes personal information about a registered offender for reporting and monitoring purposes.

The ***nature of the right*** to privacy is that it is not an absolute right, and the amendment to ensure that certain interstate child sex offenders can be registered in the Territory is in accordance with law and proportionate. The ***purpose of the limitation*** is to ensure that the ACT retains the integrity of the national registration scheme in its local registration law, and to ensure that children and other members of the ACT community are protected. This limitation will also assist in achieving the purposes outlined in section 4 of the Crimes (Child Sex Offenders) Act, being to reduce the likelihood of convicted child sex offenders reoffending; facilitate the investigation and prosecution of future offences that they may commit by requiring them to keep police informed of their whereabouts and other personal details for a period of time; to prevent registrable child sex offenders from working in child related employment; and to prohibit registrable offenders from engaging in conduct that poses a risk to the lives or sexual safety of children.

In terms of the ***nature and extent of the limitation***, amending the definition of prescribed corresponding offender to include those offenders who were subject to registration obligations in another Australian jurisdiction, but did not have a conviction order, will require those offenders to meet reporting requirements in the ACT. Although the requirement to report personal details is a limitation on the right to privacy, it is not a significant engagement as the offender would be obliged to report in every other Australian jurisdiction. Additionally, the amendments provide that the CPO must make a decision in relation to whether an interstate offender who has an order corresponding or substantially corresponding to a non-conviction order under the Crimes (Sentencing) Act should be registered in the ACT based on a list of matters including the severity of the offence, attempts at rehabilitation, and whether the person poses a risk to the lives of sexual safety of one or more people in the community.

This also demonstrates that the ***relationship between the limitation and its purpose*** has been carefully balanced to ensure that the purposes of the Crimes (Child Sex Offenders) Act are met. A key factor in this relationship is that the prevention of crime and the protection of the

[35] *WBM v Chief Commissioner of Police* [2010] VSC 219 (28 May 2010), para 51.

rights of others is a legitimate ground for placing restrictions on the right to privacy.[36] There is ***no less restrictive means available*** as without the limitation on the right to privacy in this situation, certain interstate offenders could reside in the ACT without needing to register or report. In these circumstances, requiring registrable offenders to report personal details, including the contact that they have with children, is a fundamental aspect of the Crimes (Child Sex Offenders) Act. The purpose of this requirement is to ensure that ACTP can undertake important monitoring activities and take protective measures where they have concerns for a child's safety.

The right may also be ***engaged and supported*** by the amendment to the Crimes (Assumed Identities) Act as leaving an entry in the ACT Births, Deaths or Marriages register when it is no longer required could create unnecessary risk of exposure to the undercover operatives or their operational associates.

The right to freedom of movement

Section 13 of the HR Act provides that everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT. The right to freedom of movement is linked to the right to liberty – a person's movement across borders should not be unreasonably limited by the state. It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places. The obligation requires not only that the state must not prevent people from moving freely, but also that the state must protect people from others who might prevent them from moving freely. General comment 27 describes the liberty of movement as an 'indispensable condition for the free development of a person'.[37]

As with the right to privacy, the right to freedom of movement is not an absolute right.[38] 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'.*

In a submission to the ACT's Police Powers Discussion Paper in 2010 in relation to proposed amendments to move-on powers, Civil Liberties Australia noted the 'tension between the desire of people to live free from intrusive intervention of the state in ordering their lives, and the interest of the many to be free from the inconvenience the exercise of these rights might

[36] Starmer, K, 1999, *European Human Rights Law: the Human Rights Act 1998 and the European Convention on Human Rights*, p. 416

[37] HR1/GEN/1/Rev.9 (Vol 1) page 223.

[38] For example, see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

entail', and that '[c]omplete and un-impinged freedom to move without regulation or constraint is a precursor to anarchy'.[39]

In this Bill, the right is ***engaged and limited*** by a number of the amendments including in relation to exclusion orders, the imposition of NAPROs, amendments to the definition of prescribed corresponding offenders for the purposes of the child sex offender registration scheme, and the introduction of a new bail review power for the DPP. These are each addressed separately below.

Exclusion powers

The amendments to clarify exclusion powers ***engage and limit*** the right to freedom of movement as an officer can direct a person to leave a certain 'exclusion zone' for up to six hours, and failure to do so constitutes an offence.

The ***nature of the right*** to freedom of movement is that it is not an absolute right, and the amendments to clarify the operation of exclusion orders ensure that ACTP has the appropriate powers to disrupt OMCG and other public disorder activity is in accordance with law and proportionate. The ***purpose of the limitation*** is to provide ACTP with better tools to deal with antisocial behaviours that can intimidate members of the public or reasonably cause them to fear for their safety. In particular, the amendments will assist ACTP to deal with certain OMCG behaviours, including activities relating to intimidatory behaviour by groups (two or more people) in public places, which would be difficult to capture under the existing provisions.

The ***nature and extent of the limitation*** is proportionate to the risk posed by those who are engaged in conduct, or are likely to engage in the immediate future in conduct in a public place, that:

- involves violence towards or intimidation of a person; or
- involves damage to property; or
- would cause a reasonable person to fear for their safety.

Although an exclusion order, by its very nature, engages and limits on the right to freedom of movement, the engagement is mitigated by a number of safeguards that have been included to clarify the operation of the power and ensure that it is not used in an arbitrary or inappropriate manner. Of particular concern is the potential use of the power against vulnerable groups such as those sleeping rough or Aboriginal and Torres Strait Islander peoples. These safeguards include the requirement for a police officer issuing an exclusion direction to have a reasonable belief that the conduct involves or will involve one of the factors above. This threshold is not insignificant, and in combination with the maximum timeframe of six hours for which an exclusion order can be made, provides an important safeguard on an exercise of power to ensure that it is neither arbitrary nor unreasonable.

[39] Civil Liberties Australia, Submission No 2 to ACT Legislative Assembly Standing Committee on Legal Affairs, *Inquiry into Police Powers of Crowd Control in the ACT*, commenced February 2005, 1.

The existing move-on powers in the Crime Prevention Powers Act provide an 'exception' in certain circumstances (s 4(5)). That provision provided that a move-on order did not apply *at all* where a person was:

- picketing a place of employment; or
- demonstrating or protesting about a particular issue; or
- speaking, carrying or otherwise identifying with a banner, placard or sign or otherwise behaving in a way that is apparently intended to publicise the person's view about a particular issue.

In effect, a person could be picketing and then begin to intimidate a person, and they would not have been subject to the move-on order provisions.

The exclusion powers in section 175 of the Bill have been drafted so that they would not apply *only because* a person is involved in picketing, demonstrating, and speaking etc. If the person is picketing, and then engages in the conduct covered by section 175 (for example, violence towards or intimidation of a person) they would be subject to an exclusion order.

An exclusion direction issued *only because* a person is engaged in one of these activities, which involve conduct that is closely connected with the rights to peaceful assembly and freedom of expression, would not be valid. The person's freedom of movement will not be engaged and limited unless they have engaged in conduct that involves violence towards or intimidation of a person, or involves damage to property, or would cause a reasonable person to dear for their safety.

Importantly, the amendments outline the information that an officer must tell, or make reasonable efforts to tell, the person when issuing an exclusion direction. The officer must also make a record of this information as soon as practicable after giving a person an exclusion direction, which can include a written record or an electronic record. Of particular importance is that the officer must provide clear directions about the 'exclusion zone', which is the 'area specified by the officer' at the time the direction is given. The exclusion zone may only include a public place or a place prescribed by regulation, and the officer can describe it by reference to landmarks or other identifiable boundaries of the zone, or distances from a fixed point. To be a valid direction, it is vital that the officer describes a zone that is 'confined to such area as would remove the risk of violence from the directed person but not interfere with his right to freedom of movement beyond that necessary to avert the risk of further violence'.[40] Essentially, a direction should be framed with sufficient precision or it will be an arbitrary interference with the right to freedom of movement. A final safeguard is that the offence of failing to comply with an exclusion direction does not apply if the person has a reasonable excuse for remaining within the zone. A reasonable excuse may be that the person

[40] *Tahi Temoannui v Brett Jason Eric Ford* [2009] ACTSC 69, 37 [Higgins CJ].

resides within the zone, or they are employed within the zone and need to work within the time limit set for the exclusion order.

This demonstrates that the ***relationship between the limitation and its purpose*** has been carefully balanced to ensure that the purposes of the amendments to clarify the operation of the exclusion powers are met. The amendments provide for a balance between the person's civil and political rights and the good order of the state. There is ***no less restrictive means available*** as without the limitation on the right to freedom of movement in this situation, ACTP would not have sufficient powers to prevent or stop antisocial behaviour in public places.

Expanding NAPROs

The amendments to broaden the offences to which a NAPRO can apply ***engage and limit*** the right to freedom of movement as the definition of a place restriction order is that it prohibits an offender from being in, or within a stated distance of, a named place or area or attempting to be in, or within the stated distance, of the place or area. The non-association order provisions will be expanded to also apply to people convicted of serious drug offences, serious property offences, serious administration of justice offences (defined as offences punishable by imprisonment for five years or longer), and ancillary offences such as conspiracy and attempt, meaning that a broader range of convicted offenders may be subject to a place restriction order in certain circumstances.

The ***nature of the right*** is that it is not absolute, and it is appropriate that an offender has restrictions placed on their movements in certain circumstances when subject to a sentence imposed by a court of a good behaviour order or an ICO. The ***purpose of the limitation*** on the right freedom of movement is to protect the safety of members of the community by enhancing ACTP's ability to disrupt organised crime in the ACT, with a specific focus on the activities of OMCGs. The limitation will also assist in protecting certain victims from the convicted offender (for example, victims of stalking).

The ***nature and extent of the limitation*** is proportionate to the risk posed by members of organised criminal groups, or other serious offenders, being in a location that has the potential to facilitate further offending. It is reasonable that an offender who has been convicted of offences such as serious drug offences and ancillary offences such as conspiracy and attempt should be subject to restrictions on their movements while on a good behaviour order or an ICO. An aim of these orders is also to prevent an offender from harassing or endangering the safety or welfare of anyone and if there is a risk of further offending, the limitation on the right to freedom of movement is arguably not extensive in comparison. Additionally, NAPROs require that the nature and period of the NAPRO must not be unreasonably disproportionate to the purpose for which the order is to be made, providing a further safeguard on the limitation.

The ***relationship between the limitation and its purpose*** has been carefully balanced to ensure that any engagement is as minimal as possible in circumstances that potentially carry a significant risk to the community, and also to the convicted offender in terms of potential

reoffending. The limitation on the right to freedom of association is legitimate to ensure that the convicted offender is given the best chance possible to rehabilitate, and also to protect community safety. Bearing the purpose of the limitation in mind, there are ***no less restrictive means reasonably available to achieve this purpose.***

Amendment to definition of 'prescribed corresponding offender

The amendments to the definition of 'prescribed corresponding offender' in the Crimes (Child Sex Offenders) Act ***engage and limit*** the right to freedom of movement as registration potentially places a number of limitations on place of residence, employment options and locations of travel both within Australia and internationally. By amending the definition of prescribed corresponding offender to include certain interstate offenders who do not have a conviction but do have registration obligations, registration requirements in the ACT will apply to a broader range of people.

The ***nature of the right*** is that it is subject to limitations, and it is reasonable that a person who is an interstate offender and has been subject to reporting requirements in that jurisdiction might be subject to registration in the ACT. The ***purpose of the limitation*** on the right to freedom of movement is to ensure that the ACT retains the integrity of the national registration scheme in its local registration law, and to ensure that children and other members of the ACT community are protected. This will support the legislative purpose of reducing the likelihood that the person will reoffend and prohibiting conduct that poses a risk to the lives or sexual safety of children in the ACT (Crimes (Child Sex Offenders) Act s 6 (1) (a) (ii) and (c)).

The ***nature and extent of the limitation*** is that while registrable offenders are not prevented from engaging in these activities, they must report them to the police. They may be imprisoned for up to five years if they do not meet their obligations to keep the police informed of their movements and of some of their associations with children. If the CPO makes a decision that a specific prescribed corresponding offender is subject to registration under new section 11A, the person will become a registrable offender and will be subject to reporting obligations under the Crimes (Child Sex Offenders) Act, which includes reporting the address of each of the premises where the offender generally lives, information about employment, and details relating to travel. The requirement for the CPO to address the factors outlined in section 11A before making a decision that a person is a registrable offender in these circumstances mitigates any concerns that the limitation would be arbitrary. In addition, the CPO must provide the person with a reviewable decision notice which includes information about seeking a review of the decision with the ACT Civil and Administrative Tribunal. In combination, these safeguards will ensure that the individual circumstances of a prescribed corresponding offender are considered in order to determine if a registration order is necessary and appropriate.

The ***relationship between the limitation and its purpose*** has been carefully balanced to ensure that any engagement is as minimal as possible in circumstances that potentially carry a significant risk to children and the community. The requirement for registrable offenders to

report their personal details, including details of travel and employment, is a fundamental aspect of the child sex offender registration scheme. It allows ACTP to monitor registrable offenders in order to protect and maintain the lives and sexual safety of children in the Territory and across other Australian jurisdictions, and is thereby rationally connected to the legitimate legislative aim of protecting children and their families. This amendment is necessary to give effect to the protective and preventive purposes of the Crimes (Child Sex Offenders) Act, and is justified as it protects the rights and freedoms of others. This is ***the least restrictive option reasonably available*** to address concerns that certain offenders who are not subject to reporting obligations (and therefore monitoring activities) may pose an ongoing risk to children and the community. The limitation on freedom of movement that may arise from registration is mitigated by the fact that a registrable offender must report details, but may not be subject to actual limitations in movement within the ACT and across borders. Additionally, this provision has been drafted to ensure that the individual circumstances of previous offenders are appropriately considered.

Bail review power for the DPP

The amendments to introduce a new power of bail review for the DPP ***engage and limit*** the right to freedom of movement as notice that an application will be made stays a bail decision, meaning that the accused person who was initially granted bail will be detained until the application is heard or abandoned.

The ***nature of the right*** is not absolute, and it is appropriate that a person's release on bail is stayed in order to review the decision in exceptional circumstances and the DPP considers that it is in the public interest to do so. The ***purpose of the limitation*** on the right to freedom of movement is to ensure that a power is available for the DPP to seek a review where, in rare circumstances, high risk situations arise in relation to certain bail decisions and it is imperative that the bail decision is stayed in order to protect public safety.

The ***nature and extent of the limitation*** on the right to freedom of movement is proportionate to the risk posed by releasing a person on bail where exceptional circumstances exist that carry a safety risk to the community. While an accused person may be detained when a bail decision is stayed, the inclusion of safeguards has ensured that the limitation on liberty is reasonable in all the circumstances. The first safeguard is that the review power is only available to the DPP, and only in relation to certain serious offences and family violence offences. Serious offence has been defined as: (a) an offence that involves causing harm, or threatening to cause harm, to anyone, punishable by imprisonment for more than 10 years; or (b) an offence under the Criminal Code, chapter 3 (Theft, fraud, bribery and related offences), punishable by imprisonment for more than 10 years; or (c) an offence under the Criminal Code, part 4.1 (Property damage offences), punishable by imprisonment for more than 14 years; or (d) an offence under the Criminal Code, chapter 6 (Serious drug offences), punishable by imprisonment for more than 10 years. These are a narrow set of offences which assists in ensuring that this power will only be exercised in limited circumstances. In addition, a decision will only be stayed until the Supreme Court has made a decision on review. The Supreme Court must deal with an application in relation to bail as soon as

practicable (s 19(4) Bail Act). Given the nature of the offences subject to this bail review power, the limitation on the right is reasonable and proportionate.

The ***relationship between the limitation and its purpose*** has been carefully balanced to ensure that any limitation is as minimal as possible in circumstances that potentially carry a significant risk to the community. Where these circumstances exist, the limitation on the right to freedom of movement is justified to ensure that the bail decision is correct. Taking the procedural safeguards and purpose of the limitation into account, there are ***no less restrictive means reasonably available to achieve this purpose.***

The right of 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. These rights are engaged and limited by the amendments to non-association and place restriction orders (NAPROs) by expanding the range of offences to which NAPROs can apply.

The rights to peaceful assembly and freedom of association are core political rights which protect the right of individuals to hold public protests or demonstrations either by themselves or as part of a group, in order to express their views. The right to freedom of association also aims to respect the freedom of individuals to meet, communicate and engage with any other people they choose. These rights are closely related to the right to freedom of expression, freedom of thought, conscience, religion and belief and the right to freedom of movement.

The rights to peaceful assembly and freedom of association are crucial to the operation of Australia's democratic society because they enable an open, better informed and more participatory public discourse about social, economic and political policies.[41]

The right to freedom of association allows for individuals to form groups to foster common goals or interests, and is therefore very broad. It is most simply explained as 'the freedom to do in combination with others what one is free to do alone'.[42] The right recognises that all persons should have the right to voluntarily meet, communicate and co-operate with any other people they choose.

Freedom of association is not simply a collective right – it is an individual right vested in the individual to enable personal freedom and to enrich the individual's participation in the democratic process by acting through those groups.[43]

The amendments to broaden the offences in relation to which a NAPRO can be made ***engage and limit the right to freedom of association***. This is because non-association orders, which

[41] Human Rights Committee, *General Comment* 25, Article 25 (Fifty-seventh session, 1995), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev. 9 at 221 (2008) [26].

[42] Brian Langille, "The Freedom of Association Mess: How We Got into It and How We Can Get out of It" (2009) 54 *McGill Law Journal* 177 [15].

[43] Clyde Summers "Freedom of Association and Compulsory Unionism in Sweden and the United States" (1964) 112 *University of Pennsylvania Law Review* 647, 647.

can be made by a court when a good behaviour order or an ICO has been made, place restrictions on an offender's associates for a specified period of time. The non-association order provisions will be expanded to include serious drug offences, serious property offences, serious administration of justice offences (defined as offences punishable by imprisonment for five years or longer), and ancillary offences such as conspiracy and attempt.

The ***nature of the right*** is that it is subject to reasonable limitations, and it is appropriate that an offender has restrictions placed on their associations in certain circumstances when subject to a good behaviour order or an ICO. The ***purpose of the limitation*** on the right freedom of association is to protect the safety of members of the community by enhancing ACTP's ability to disrupt organised crime in the ACT, with a specific focus on the activities and associations of OMCGs. The limitation will also assist in protecting certain victims from the convicted offender (for example, victims of stalking), and will be instrumental in removing negative influences from the offender's life, providing them with an opportunity to rehabilitate.

The ***nature and extent of the limitation*** is proportionate to the risk posed by members of organised criminal groups, or other serious offenders, associating with a person or people who have the potential to facilitate and support further offending. It is reasonable that an offender who has been convicted of offences such as serious drug offences and ancillary offences such as conspiracy and attempt should be subject to restrictions on their associations while on a good behaviour order or an ICO. These orders provide periods of rehabilitation and an opportunity for the convicted offender to reintegrate into the community, and if there is a risk of the association leading to further offending, the limitation on the right to freedom of association is arguably not extensive in comparison.

The ***relationship between the limitation and its purpose*** has been carefully balanced to ensure that any engagement is as minimal as possible in circumstances that potentially carry a significant risk to the community, and also to the convicted offender in terms of potential reoffending. The limitation on the right to freedom of movement is legitimate to ensure that the convicted offender is given the best chance possible to rehabilitate, and also to protect the community from potential reoffending. Bearing the purpose of the limitation in mind, there are ***no less restrictive means reasonably available to achieve this purpose.***

The right to peaceful assembly is ***engaged and supported*** by the clarification of exclusion order powers as the exception providing that an exclusion direction must not be given for certain conduct protects the fundamental rights of individuals to hold public protests or demonstrations either by themselves or as part of a group, in order to express their views. The exceptions to the exclusion order powers include picketing a place of employment, demonstrating or protesting about a particular issue, speaking, carrying or otherwise identifying with a banner, placard or sign or otherwise behaving in a way that is apparently intended to publicise the person's view about a particular issue.

The right to liberty and security of person

Section 18 of the HR Act provides that everyone has the right to liberty and security of person, and that in particular no-one may be arbitrarily arrested or detained. This right is engaged by the introduction of a new review provision which gives the DPP power to seek a review where there is a significant risk due to a person being released on bail. The right is engaged because the defendant may be detained while the bail decision is reviewed.

The prohibition against arbitrary detention requires that the state should not deprive a person of their liberty except in accordance with law and that the law, and the enforcement of it, must not be arbitrary under human rights law.

Arbitrary detention can include elements of inappropriateness, injustice and lack of predictability. Therefore, in addition to being lawful, any detention must also be reasonable, necessary and proportionate in all the circumstances.

Detention that may initially be necessary and reasonable may become arbitrary over time if the circumstances no longer require the detention. Therefore regular reassessment is required to ensure detention remains appropriate.

The right to liberty and security of person relates only to a very specific aspect of human liberty,[44] namely the forceful detention of a person at a certain narrowly bounded location, such as a prison or other detention facility. This suggests that section 18 requires particular consideration where an accused person is granted bail and the DPP makes an application to have this decision reviewed, ***engaging and limiting*** the right to liberty where the bail decision is stayed.

The ***nature of the right*** is not absolute, and it is appropriate that a person's release on bail is stayed in order to review the decision where it is in the public interest to do so. The ***purpose of the limitation*** on the right to liberty is to ensure that a power is available for the DPP to seek a review where, in rare circumstances, high risk situations arise in relation to certain bail decisions and it is imperative that the bail decision is stayed in order to protect public safety.

The ***nature and extent of the limitation*** is proportionate to the risk posed by releasing a person on bail where exceptional circumstances exist that carry a safety risk to the community. As noted previously, while an accused person may be detained when a bail decision is stayed, the inclusion of a number of safeguards in relation to offences for which an application can be made and other procedural rules ensures that the limitation on liberty is proportionate.

The ***relationship between the limitation and its purpose*** has been carefully balanced to ensure that any limitation is as minimal as possible in circumstances that potentially carry a significant risk to the community. Where these circumstances exist, the limitation on the right to liberty is justified to ensure that the bail decision is correct. Taking the procedural

[44]Murdoch J.L. (ed), 2005, *Article 5 of the European Convention on Human Rights: The Protection of Liberty and Security of Person.*

safeguards and purpose of the limitation into account, there are ***no less restrictive means reasonably available to achieve this purpose.***

Rights in criminal proceedings – to be tried without unreasonable delay

Section 22(2)(c) of the HR Act provides that everyone charged with a criminal offence is entitled to be tried without unreasonable delay. This right is engaged by the introduction of a bail review power for the DPP as the power will allow the defendant to be detained while the bail decision is reviewed.

International human rights law has established the importance of maintaining strict procedural standards in criminal proceedings. The existence of clear rights and obligations is vital for those accused of criminal acts, as well as those responsible for enforcing the law. In the HR Act, rights in criminal proceedings are based on article 14 of the ICCPR.

This right preserves the expectations associated with the administration of justice. Proceedings should take place without unreasonable delay, and failure to do so may result in a stay on proceedings.[45] The UN Human Rights Committee has affirmed this right, and its application to all stages of a trial, before, during and until judgment is given. Delay may be particularly significant where the accused is in custody, due to the presumption against the deprivation of liberty. However, the right is subject to reasonable limitations, and some delays may be considered reasonable in the circumstances. The ***nature of the right affected*** is therefore that it can be limited where proportionate and justified in relation to the purposes of the engagement.

In this case, the ***importance of the purpose of the limitation*** mirrors the engagement with the right to liberty outlined above. The purpose of the limitation on the right to be tried without unreasonable delay is to ensure that a power is available for the DPP to seek a review where, in rare circumstances, high risk situations arise in relation to certain bail decisions and it is imperative that the bail decision is stayed in order to protect public safety. As with the engagement with the right to liberty, the ***nature and extent of the limitation*** on this right is proportionate to the risk posed by releasing a person on bail where circumstances exist that carry a safety risk to the community. While an accused person may be detained when a bail decision is stayed, the inclusion of a number of safeguards such as the types of offences for which a bail review can be sought, has ensured that the limitation on rights in criminal proceedings is proportionate. The ***relationship between the limitation and its purpose*** has been carefully balanced to ensure that any engagement is as minimal as possible in circumstances that potentially carry a significant risk to the community. Where these circumstances exist, the limitation on the right to be tried without unreasonable delay is legitimate to ensure that the bail decision is correct. Again, taking the procedural safeguards and purpose of the limitation into account, there are ***no less restrictive means reasonably available to achieve this purpose.***

[45] *R v Martiniello* [2005] ACTSC 9.

Crimes (Serious and Organised Crime) Legislation Amendment Bill 2016

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 will be the Crimes (Serious and Organised Crime) Legislation Amendment Act 2016.

Clause 2 — Commencement

This clause provides that the Act will commence the day after its notification day. The naming and commencement provisions will automatically commence on the notification day.

This clause also provides that sections 7 and 8 will commence on the earlier of the day after this Act's notification day, or the day section 3 of the *Family Violence Act 2016* commences.

Clause 3 — Legislation amended

This clause identifies the legislation amended by the Act.

Clause 4 — Legislation repealed

This clause provides that the Act will repeal the *Crime Prevention Powers Act 1998*.

Part 2 – Bail Act 1992

Clause 5 — Sections 42 to 43A

This is a technical clause reflecting the insertion of the Director of Public Prosecutions (DPP) bail review power in sections 42 to 43A in the *Bail Act 1992.*

Clause 6 — New section 44

This clause provides the DPP with a right of review of bail decisions in certain circumstances. The power applies in relation to bail decisions for an accused person charged with a domestic violence offence or a serious offence, and the clause provides that the DPP may apply to the Supreme Court for a review the decisions if the DPP considers it is in the public interest to make the application.

For the purposes of this clause 'domestic violence offence' is defined by reference to section 13 (2) of the *Domestic Violence and Protection Orders Act 2008.* 'Serious offence' is defined as one or more of the following:

- an offence that involves causing harm, or threatening to cause harm, to anyone, punishable by imprisonment for more than 10 years;
- an offence under the Criminal Code, chapter 3 (Theft, fraud, bribery and related offences), punishable by imprisonment for more than 10 years;
- an offence under the Criminal Code, part 4.1 (Property damage offences), punishable by imprisonment for more than 14 years;
- an offence under the Criminal Code, chapter 6 (Serious drug offences), punishable by imprisonment for more than 10 years.

Limiting the offences for which review of a bail decision can be sought to those outlined above is recognition that this power is to be exercised sparingly and only in circumstances where there is likely to be a safety risk to the community if the person is released on bail.

This clause also outlines the procedures and timing for the DPP to make an application. The DPP must give oral notice of the application to the court making the bail decision at the time it is made. This oral notice then stays the operation of the bail decision. The decision is stayed until the DPP tells the court that made the bail decision that the formal application will not be progressed; or 24 hours have passed since the oral notice was given and the DPP has not made the formal application to the Supreme Court and given the accused person written notice of this application; or the Supreme Court makes a decision on the application. In making this decision, the Supreme Court is required to deal with an application in relation to bail as soon as practicable (s 19).

Given that the DPP must consider that it is in the public interest to make the application, this will involve scenarios where the likelihood of re-offending or harm to another is high, and where the DPP has evidence to demonstrate that the review is required.

This amendment will be accompanied by guidelines prepared by the Office of the DPP for an exercise of this power.

This amendment engages the rights to liberty and freedom of movement in the *Human Rights Act 2004* (HR Act). A proportionality assessment has been conducted in relation to this provision in the human rights analysis section of this explanatory statement.

Clause 7 — Section 44 (1)

This clause, with clauses 8 and 9, are technical clauses providing for terminology changes when the Domestic Violence and Protection Orders Act is repealed by the *Family Violence Act 2016.* The term 'domestic violence offence' will be replaced by the term 'family violence offence'.

Clause 8 — Section 44 (6), definition of *domestic violence offence*

This clause substitutes the definition of 'domestic violence offence' for the term 'family violence offence' in section 44 (6).

Clause 9 — Review limited to bail conditions
Section 46 (5)

This is a technical clause reflecting the insertion of the DPP bail review power in 46 (5) in the Bail Act.

Part 3 – Crimes Act 1900

Clause 10 — New part 9

This clause inserts a new part 9 to include exclusion powers in the Crimes Act. Part 9 includes sections 174 to 179 which outline the nature of exclusion powers and the procedures that are attached to the issuing of exclusion directions and orders. New section 179 introduces a strict liability offence of failing to comply with an exclusion direction.

New part 9 relates to the repeal of the 'move-on' powers in the Crime Prevention Powers Act in clause 4 above. The purpose of this amendment is to ensure that the operation of exclusion powers is clear in order to provide ACT Policing with better tools to deal with antisocial behaviour, and that those who may be subject to an order under this part are aware of their rights and responsibilities.[46]

Section 174 provides specific definitions for new part 9. The definitions of 'exclusion direction', 'exclusion period', and 'exclusion zone' are provided in the relevant sections below. The definition of 'public place' is replicated from the dictionary in the Crime Prevention Powers Act and means a street, road, public park or reserve, or a building, premises or other place that the public is entitled to use or that is open to, or used by, the public, whether on payment of money or otherwise. This section also provides that licensed premises under the *Liquor Act 2010* are an example of a public place for the purposes of this part.

Section 175 provides the definition of an exclusion direction and outlined the circumstances that must exist for a police officer to give a person a direction under this part. In order to issue an exclusion direction a police officer must reasonably believe that a person (whether part of a group or not) has recently engaged in, is engaged in, or is likely in the immediate future to engage in certain conduct. The conduct in this situation must involve either violence

[46] For discussion of the previous move-on powers see the decisions of the ACT Supreme Court in *Tahi Temoannui v Brett Jason Eric Ford* [2009] ACTSC 69 and *Vince Spatolisano v Geoffrey David Hyde* [2009] ACTSC 161.

towards, or intimidation of, a person, or damage to property, or be conduct that would cause a reasonable person to fear for their safety.

This section provides that when issuing an exclusion direction it may be for the person to do any of the following:

- immediately leave an area specified by the officer (defined as an exclusion zone);
- remain outside the exclusion zone for a period, decided by the officer (defined as an exclusion period), for not more than six hours;
- leave the exclusion zone by a particular route, or in a particular direction, decided by the officer.

This section interacts with sections 174, 176, and 177 in relation to the information that should be given to the person to ensure that the 'exclusion zone' is clear and identifiable. As noted in illustration by Chief Justice Higgins in the case of *Tahi Temoannui v Brett Jason Eric Ford*, where a directing officer considers that Green Square in the ACT suburb of Kingston includes all surrounding public streets and/or any public place within sight of the Square this must be clearly communicated to the person subject to the direction.[47]

Section 176 provides further detail in relation to the definition of an exclusion zone. The zone may only include a public place (as defined in clause 174) or a place, other than a public place, that is prescribed by legislation. This Act does not prescribe any regulations for the purposes of this part. This section also provides that an exclusion zone may be described by reference to landmarks or other identifiable boundaries of the zone, or distances from a fixed point. The purpose of this provision is to ensure that ACTP has appropriate tools and direction to assist in making an exclusion direction.

Section 177 outlines the information that a police officer must tell, or make reasonable efforts to tell, the person or people being issued with the exclusion warning. This drafting reflects the fact that an exclusion direction may be given in the circumstances where there is a large group of people being issued with a direction (or indeed one person in a large group) and that there may be barriers to telling the person this information. For example, there may be a noisy crowd restricting effective hearing in the area.

The information to be given is that the person has been given an exclusion direction, the reason for the direction, and the exclusion zone to which the direction relates. The officer must also detail that the person must not remain in the zone, the exclusion period (if any), the route or direction (if any) that the person must take to leave the zone, and the time and date that the direction ends. Finally, the officer must inform the person that it is an offence to fail to comply with the direction.

[47] [2009] ACTSC 69, 39.

If the direction is given to two or more people at the same time, the police officer giving the direction may tell, or make reasonable efforts to tell, the group generally the information outlined above, and in that case, need not give the information to the person individually.

Section 178 aligns with section 177 to provide the information that the police officer must record as soon as practicable after issuing an exclusion direction. This information includes the date and time that the direction was given, the name or detailed description of the person who was given the direction and the reason for the direction, and information relating to the zone, period and route as outlined in section 177.

Section 179 introduces the offence of failing to comply with an exclusion direction which is similar to the offence of contravening a move-on direction in section 4 (4) of the Crime Prevention Powers Act. The main change is that the offence is now strict liability. It retains a maximum penalty of two penalty units, and provides that the offence does not apply if the person has a reasonable excuse. A reasonable excuse may be that the person resides within the zone, or they are employed within the zone and need to work within the time limit set for the exclusion order.

This amendment engages the rights to freedom of association and freedom of movement in the HR Act. A proportionality assessment has been conducted in relation to these provisions in the human rights analysis section of this explanatory statement.

Clause 11 — Dictionary, new definitions

This clause inserts new definitions into the dictionary of the Crimes Act to reflect the change in terminology from move-on powers to exclusion powers. This clause references the definitions in part 9, including the definitions of ‘exclusion direction’, ‘exclusion period’, ‘exclusion zone’, and ‘public place’.

Part 4 – Crimes (Assumed Identities) Act 2009

Clause 12 — Making entries in register of births, deaths or marriages
Section 16 (6)

This is a technical clause that removes the definition of ‘intelligence agency’ from section 16 as it is being defined for the Act.

Clause 13 — Cancellation of authority affecting entry in register of births, deaths or marriages
Section 17 (1) (a)

This clause amends section 17 (1) (a) of the Crimes (Assumed Identities) Act providing that the chief officer of an intelligence agency, when cancelling an authority affecting an entry in the register of births, deaths or marriages, must apply for an order within 28 days after the day the authority is cancelled. This amendment gives intelligence agencies the same powers to request the removal of an entry as those already afforded to law enforcement agencies.

Clause 14 — Cancellation of evidence of assumed identity
Section 22 (2)

This clause amends section 22 of the Crimes (Assumed Identities) Act to provide that an intelligence agency can cancel evidence of an assumed identity from records. This amendment will ensure that the unnecessary risk of exposure of undercover operatives or their operational associates created by these records is eliminated.

Clause 15 — Dictionary, new definition of *intelligence agency*

This clause inserts the definition of 'intelligence agency' into the dictionary of the Crimes (Assumed Identities) Act.

Part 5 – Crimes (Child Sex Offenders) Act 2005

Clause 16 — Section 11

This clause amends the definition of 'prescribed corresponding offender' in *the Crimes (Child Sex Offenders) Act 2005* to include certain offenders who are currently subject to registration in other Australian jurisdictions but not in the ACT. The purpose of the amendment is to ensure that an offender who is subject to an order corresponding or substantially corresponding to a non-conviction order under the Crimes (Sentencing) Act in a foreign jurisdiction and who, if they were currently in that jurisdiction, would be required to report can be required to report under the ACT law.

This clause also provides that a person will not be captured under this definition if the chief police officer (CPO) decides, on consideration of the factors under the new section 11A, that they should not be a prescribed corresponding offender.

New section 11A provides that the CPO must decide if those people captured under the new definition are in fact prescribed corresponding offenders. This relates only to those prescribed corresponding offenders who are subject to an order corresponding or substantially corresponding to a non-conviction order under the Crimes (Sentencing) Act in a foreign jurisdiction in relation to an offence. The CPO must make a decision about whether the person should be a prescribed corresponding offender as soon as practicable after the person becomes a prescribed corresponding offender, and not later than 28 days after information about the person is included on the register under section 117. The CPO must consider a number of factors when making this decision that will assist in risk managing the person and highlighting whether the registration will serve a risk mitigation purpose. These factors include the age of the person at the time of the offence, the period for which they were reporting to the corresponding registrar in the foreign jurisdiction, and any other circumstances that the CPO considers relevant.

This clause also provides that where the CPO decides that the person should not be a prescribed corresponding offender, she or he must remove the person from the register.

This amendment engages the right to a number of rights under the HR Act that have been subject to a proportionality assessment in the human rights analysis section of this explanatory statement. Further to these rights, the amendment also ***engages and limits*** the right to protection of the family and children under section 11 of the HR Act. Noting that this right is not absolute, the ***nature of the right*** is outlined in a number of international human rights instruments. Article 3 (1) of the Convention on the Rights of the Child states that 'in all actions concerning children... the best interests of the child shall be a primary consideration'. General comment 19 from the UNHRC, which describes the right to the protection of the family at article 23 of the ICCPR, 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.[48] In addition, general comment 17, notes that the rights of the child (at article 24 of the ICCPR) require states to adopt special measures to protect children, and that this responsibility for guaranteeing children necessary protection lies with the family, society and the state.[49] ***The importance of the purpose of the limitation*** is that the amendment to slightly broaden the definition of prescribed corresponding offender may limit, in certain circumstances, the access of those who are registered because of it to their families where a registration order is made. These amendments will, however, promote the protection of the family and children by reducing the contact of certain offenders and children where the offender poses an ongoing risk. This amendment is designed to protect children and their families and carers.

The ***nature and extent of the limitation*** is that the section 11 (1) right of certain offenders to the protection of the family unit is arguably engaged and limited by the introduction of the power to make registration orders where CPO makes a decision under section 11A that there is a risk that in certain circumstances would be reduced by registering the person. However, this amendment also 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 as a result of contact with the offender. The engagement is also limited by the factors that the CPO must consider under new section 11A, which include the severity of the offence, the age of the person at the time of the offence, and whether the person poses a risk to the lives or sexual safety of one or more people or of the community. The section 11 (2) rights of children to special protections because of their status as children is supported by this amendment. The ability to make a registration order in relation to a person who is subject to reporting requirements in another Australian jurisdiction in certain circumstances will ensure that the person is subject to annual and ongoing reporting obligations, which means that unsupervised contact with children and any child-related employment will be reported to ACTP.

[48] 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)/6f97648603f69bcdc12563ed004c3881?Opendocument

[49] 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

The ***relationship between the limitation and its purpose*** has been carefully balanced to ensure that the purposes of the Crimes (Child Sex Offenders) Act are met. 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 violence. The ability to register certain offenders who are subject to reporting requirements in other jurisdictions will ensure that children are provided greater protection by monitoring those registrable offenders who have been deemed a risk to their lives or sexual safety from contacting or associating with them. There are ***no less restrictive means reasonably available*** to provide added protections for children in the circumstances where a person was not subject to reporting obligations by virtue of having received a non-conviction order in another jurisdiction. It is appropriate (and therefore not arbitrary) to limit the rights of certain previous 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.

Clause 17 — Reporting period for prescribed corresponding offenders
Section 94 (1)

This clause amends section 94 (1) to reflect the reporting requirements for a prescribed corresponding offender having regard to the changed definition of this term.

Clause 18 — Protected and unprotected registrable offender declarations
Section 111 (2)

This clause substitutes the existing section 111 (2) with a note providing that a decision under section 111 is a reviewable decision under new chapter 5B, and the CPO must give a reviewable decision notice to the person. This amendment reflects the separation of notification and review provisions into a standalone chapter in the legislation. This amendment also reflects the removal of the internal review of a declaration as the initial decision is made by the CPO, meaning that internal review by a more senior officer is not appropriate.

Clause 19 — Sections 112 to 114

This clause removes sections 112 to 114 of the Crimes (Child Sex Offenders) Act, reflecting their inclusion in new chapter 5B which deals with notifications and reviews.

Clause 20 — When protected and unprotected registrable offender declarations take effect
Section 115 (2) (b) and (c)

This clause is a consequential amendment relating to amendments to remove internal review of a declaration.

Clause 21 — Order for removal of registrable offender who was young offender at time of offence—application by offender
New section 122C (7A)

This clause amends section 122C to clarify that where an application for removal from the register is made by a person who was a young person at the time of the offending the CPO, or an officer authorised by the CPO may, with the court's consent, make submissions in relation to an application to be removed from the child sex offenders register.

Clause 22 — New chapter 5B

This clause inserts separate notification and review provisions into a standalone chapter in the Crimes (Child Sex Offenders) Act. Section 132ZV defines reviewable decision for the purposes of chapter 5B. Section 132ZW in new chapter 5B provides that reviewable decision notices must be provided to the person subject to that decision by the person who made the reviewable decision. Section 132ZX provides that certain people may apply to the ACT Civil and Administrative Tribunal for review of the decision.

Clause 23 — New schedule 3

This clause defines reviewable decisions for the purposes of the Crimes (Child Sex offenders) Act. These decisions are a decision under new section 11A (2) in relation to whether a person is a prescribed corresponding offender in certain circumstances, and a decision under section 111 in relation to whether a declaration is made that a person is or is not a protected registrable offender.

Part 6 – Crimes (Sentence Administration) Act 2005

Clause 24 — Intensive correction order—core conditions
Section 42 (1) (e)

This clause amends section 42 (1) (e) which provides for the core conditions of an intensive correction order (ICO). It clarifies that every offender who is subject to an ICO is on probation under the supervision of the director-general, and that the offender must comply with the director-general's reasonable directions in relation to the probation.

Clause 25 — Section 42 (4), definition of *probation condition*

This clause removes the definition of 'probation condition' as this definition has been clarified by the amendment to section 42 (1) (e) outlined above.

Clause 26 — Curfew—directions
Section 58 (1) (a)

This is a technical clause that removes the term 'the curfew place' from the provision dealing with curfew directions as it will be defined in proposed new section 58 (6).

Clause 27 — New section 58 (1A)

This clause provides that the director-general may direct an offender to remain at a different place for the duration of their curfew. In order to make this direction, the director-general must be satisfied that each adult who is living at the place, or has parental responsibility or guardianship for a person who is living at the place, consents to the place being used for the purposes of the offender following the curfew direction. This amendment will assist with streamlining the administration of curfew orders to support the new ICO sentence and ensure that it is imposed and administered effectively.

Clause 28 — New section 58 (6)

This clause inserts the new definition of 'curfew place' into section 58 (6) to reflect that the director-general may now direct the offender to remain at a different place in certain circumstances.

Part 7 – Crimes (Sentencing) Act 2005

Clause 29 — Non-association and place restriction orders—when may be made Section 23 (1)

This clause amends the section which provides when a non-association order or a place restriction order can be made. 'Personal violence offence' has been replaced by 'relevant offence', which reflects that these orders may now be made in relation to an expanded set of offences.

Clause 30 — Section 23 (4), new definition of *relevant offence*

Non-association orders and place restriction orders can be made by a court when a good behaviour order or an ICO has been made. This clause amends the offences in relation to which one of the orders can be made. 'Relevant offence' now includes:

- an offence under the Criminal Code, part 4.1 (Property damage offences), punishable by imprisonment for 5 years or more; or
- an offence under the Criminal Code, chapter 6 (Serious drug offences); or
- an offence under the Criminal Code, chapter 7 (Administration of justice offences), punishable by imprisonment for 5 years or more; or
- a personal violence offence; or
- an offence prescribed by regulation.

The note in this section also clarifies that a reference to an offence includes a reference to a related ancillary offence such as an attempt or conspiracy (see Legislation Act, s 189). Personal violence offence is defined in section 23 (4).

This amendment engages the rights to freedom of association and freedom of movement in the HR Act. A proportionality assessment has been conducted in relation to this provision in the human rights analysis section of this explanatory statement.

Part 8 – Magistrates Court (Crimes Infringement Notices) Regulation 2008

Clause 31 — Schedule 1, new item 1A

This clause inserts a new item into schedule 1 of the *Magistrates Court (Crimes Infringement Notices) Regulation 2008* to include an exclusion order under section 180 of the Crimes Act as an infringement notice offence.