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**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES (PROTECTION OF POLICE, FIREFIGHTERS AND PARAMEDICS)
AMENDMENT BILL 2019**

EXPLANATORY STATEMENT

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**CRIMES (PROTECTION OF POLICE, FIREFIGHTERS AND PARAMEDICS)
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Introduction

This Explanatory Statement relates to the Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019 (the Bill) as presented to the ACT 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 Explanatory Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the amendments. 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 policy objectives of the Bill are to:

- ensure that the special occupational vulnerability of police officers, firefighters and paramedics as providers of important emergency services is appropriately recognised through ACT criminal laws; and
- support the safety and protection of police officers while executing their duties on ACT roads.

In summary, the Bill will amend the *Crimes Act 1900* to:

- a) create a new offence for assaults against police officers, firefighters and paramedics, with a maximum penalty of two years imprisonment;
- b) create a new offence for intentionally or recklessly driving at a police officer and exposing a police officer to a risk to safety, with a maximum penalty of 15 years imprisonment; and
- c) create a new offence for driving at and causing damage to a police vehicle, with a maximum penalty of five years imprisonment.

Police officers, firefighters and paramedics have duties and responsibilities which mean they are routinely called upon to attend emergency incidents and render assistance in volatile and dangerous situations where they are exposed to an increased risk of violence. When undertaking operational duties, these workers are obliged to attend, render assistance and stay at a scene, as opposed to members of the public who may elect to leave an escalating incident.

The frequency and severity of assaults against emergency frontline workers in the ACT is a growing concern. A new offence for assaults against police officers, firefighters and paramedics recognises the discrete criminality of this offending and reflects clear community expectation that these assaults are unacceptable. Specific offences against driving at police officers and their vehicles recognises the special vulnerability these workers experience while

executing their duties on our roads. These offences aim to reflect the serious criminality of dangerous driving activity targeting police officers and police vehicles and seek to deter others from engaging in this type of violent conduct.

Human Rights Considerations

This human rights consideration will provide an overview of the human rights that may be engaged by this Bill.

Broadly, the Bill places limitations on the following rights under the *Human Rights Act 2004* (HR Act):

- Section 8 – Recognition and equality before the law
- Section 22 – Rights in criminal proceedings

The Bill also supports the following HR Act rights:

- Section 9 – Right to life
- Section 18 – Right to liberty and security of person
- Section 21 – Right to a fair trial

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

International human rights law places obligations on governments to “respect, protect and fulfil” rights. The obligation to respect means governments must ensure its organs and agents do not commit violations themselves; the obligation to protect means governments must protect individuals and groups from having rights interfered with by third parties and punish perpetrators; and the obligation to fulfil means governments must take positive action to facilitate the full enjoyment of rights.

The European Court of Human Rights has considered the positive obligation of governments to uphold rights in depth, noting government must put in place legislative and administrative frameworks to deter conduct that infringes rights, and to undertake operational measures to protect an individual who is at risk of rights infringement.¹

¹ Colvin, M & Cooper, J, 2009 *‘Human Rights in the Investigation and Prosecution of Crime’* Oxford University Press, p.425. For more detail on positive obligations, see generally, Akandji-Kombe, J, 2007 *‘Positive obligations under the European Convention on Human Rights’*, Council of Europe.

Detailed human rights discussion

Rights engaged and supported

The Bill engages and supports the rights to life (section 9 HR Act), liberty and security of the person (section 18 HR Act), and fair trial (section 21 HR Act). These are discussed briefly below.

The primary purpose of the Bill is to ensure that the special occupational vulnerability of police officers, firefighters and paramedics as providers of important emergency services is appropriately recognised through ACT criminal laws. The purpose supports the right to life under s 9 of the HR Act for police officers, firefighters and paramedics. Creating specific offences for violence against these workers makes clear the serious criminality of such conduct which may deter people from engaging in this type of unacceptable behaviour, and hence help to support the protection of these workers from harm.

Section 18(1) of the HR Act states that everyone has the right to liberty and security of person. The right to liberty needs to be balanced with the right to security, specifically, the community's right to safety and security, which includes protection from being subject to criminal offending. The offences in the Bill and corresponding penalties apply to a clearly defined cohort of victims, that is, police officers, firefighters and paramedics. By working in dangerous environments these workers play an important role on behalf of the broader community. In these circumstances the deprivation of an offender's liberty is necessary to preserve the right to security of person of police officers, firefighters and paramedics.

Section 21(1) of the HR Act states that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The offences in the Bill do not impact on a person's ability to respond to the allegations made against them, to advocate for leniency in sentencing, to appeal the decision of a court or to have their matters determined consistently with the rules of procedural fairness, criminal procedures and other sentencing laws.

Rights engaged and limited

Section 28 of the HR Act requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*.² A party must show that:

[f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality

² [1986] 1 S.C.R. 103.

*between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.”*³

The limitations on human rights in the Bill are proportionate and justified in the circumstances because they are the least restrictive means available to achieve the purpose of ensuring appropriate recognition of the occupational vulnerability of police officers, firefighters and paramedics.

The amendments in the Bill engage and limit the rights to recognition and equality before the law (section 8 HR Act) and rights in criminal proceedings (section 22 HR Act).

Section 8 – Recognition and equality before the law

Section 8 (3) of the HR Act states:

Everyone is equal before the law and is entitled to equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

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

The right reflects the notion that the law should not elevate the protection of particular groups in the community above that of others. The right is engaged because clauses 5 and 6 of the Bill create specific offences for victims who have a certain occupation, namely police officers, firefighters and paramedics.

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

The creation of new offences in the Bill recognises the important role that police officers, firefighters and paramedics have in providing emergency services to the community which places them at greater risk of violence. The Bill’s intention is to establish that an assault against a police officer, firefighter or paramedic, or violent driving behaviour against police and police vehicles are serious crimes. That is, they are crimes which involve a discrete criminality and should be recognised as distinct from other similar conduct. Similar provisions currently exist in ACT legislation in relation to aggravated offences against pregnant women. These aggravated offences were created in recognition of the fact that ‘some acts of violence are worse than others’.⁴ The same principle applies for the offences in the Bill, recognising the unique nature of responsibility that the Territory places upon those acting in frontline emergency service roles. Police officers, firefighters and paramedics are

³ *R v Oakes* [1986] 1 S.C.R. 103.

⁴ Explanatory Statement for the Crimes (Offences Against Pregnant Women) Amendment Bill 2005, p.2.

required to place themselves in harm's way in service to the community, and it is appropriate for the law to specifically reflect this vulnerability.

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

In relation to clause 5 of the Bill, which establishes a new assault offence for police, firefighters and paramedics, the limitation is not significant, as the maximum penalty stipulated for the new assault offence is in line with the penalty for common assault under section 26 of the *Crimes Act 1900*. This means that offenders charged under the new assault offence would face the same maximum penalty as if the assault was against any other person in the community.

The offences for intentionally or recklessly damaging a police vehicle, and for driving at police officers, under clause 6 of the Bill, provides for a maximum penalty of 5 years imprisonment and 15 years imprisonment, respectively. The purpose of these offences is to ensure police exercising duties on our roads are better protected, and to communicate that driving behaviour which places police and members of the community at risk of injury or death is an issue that will be treated seriously.

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

The limitation is rationally and necessarily connected to its purpose. Recognising the specific occupational vulnerability of police officers, firefighters and paramedics in the exercise of functions and due to the roles they are required to perform in the community necessarily requires those occupations to be treated separately through the offences in the Bill.

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

These restrictions are proportionate to the aim of keeping police officers, firefighters and paramedics safe and are the least restrictive means possible in the circumstances.

Section 22 – Rights in criminal proceedings

Section 22 (1) of the HR Act states (relevantly) that:

Everyone charged with a criminal offence has the right to be presumed innocent.

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

The presumption of innocence is contained in article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) and is one of the guarantees in relation to legal proceedings contained in article 14. The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Generally, consistency with the

presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

In *Momcilovic v The Queen*,⁵ French CJ discussed the nature of the presumption of innocence. The Chief Justice noted that ‘the presumption of innocence is part 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.’⁶

The right to be presumed innocent requires judges, juries and the relevant public authorities to refrain from prejudging any case. The authorities, particularly prosecutors and police, should not make statements about the guilt or innocence of an accused before the outcome of the trial.⁷

The Bill limits the presumption of innocence by applying strict liability to elements of the offences. The application of strict liability engages the presumption of innocence because it allows for a physical element of an offence to be proven without the need to prove fault.

The Bill also limits the presumption of innocence through including statutory presumption provisions. The effect of a statutory presumption is that a fact shall be ‘deemed’ or ‘presumed’ (the ‘presumed fact’) on proof of another fact (the ‘basic fact’). Where the basic fact is treated as ‘sufficient proof’ of the presumed fact, in the absence of evidence to the contrary, proof of the basic fact alone will be enough to support a finding that the presumed fact also exists. The Bill also includes rebuttal clauses which stipulate the defence has an evidential burden to displace the presumption. This means the defence has “the burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist” on the balance of probabilities.⁸

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

The purpose of the limitation is to ensure the effective and just prosecution of offences in the Bill. The application of strict liability to certain elements of offences is reasonable because they are elements where the question of the person’s state of mind should not be relevant. The use of statutory presumption provisions assists the efficient administration of justice.

⁵ (2011) 345 CLR 1.

⁶ (1980) 55 ALJR 5, 7.

⁷ UN Human Rights Committee General Comment 13, para. 7; *Alenet de Ribemont v. France*, 1995

⁸ An evidential burden is defined in section 58 of the *Criminal Code 2002*.

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

Strict liability applies to elements of the assault offence and drive at police offence under clause 5 and 6 of the Bill. It is important to note that strict liability does not apply to any offences as a whole, but only particular elements of the offences.

For the new assault offence, strict liability applies to section 26A (1) (d) (i) and (ii) in relation to the circumstance that the victim was ‘exercising a function as an emergency worker’. That is, it is not necessary to prove that the defendant knew (or believed or had any other fault element) that the victim was exercising a function as an emergency worker. It is sufficient that the prosecution prove that the victim was in fact exercising functions of an emergency worker. Similarly for the drive at police offence, strict liability applies to section 29A (1) (c), but in relation to the victim exercising a function as a police officer.

The Bill includes statutory presumption provisions for all offences. The presumption applies so that the element of the offence that requires the defendant to know the victim’s occupation (for offences under section 26A and 29A), or that the vehicle was a police vehicle (for the offence under section 29B) is taken to be proven in certain prescribed circumstances. Further provisions provide that the defence has an evidential burden to displace the presumption.

The limitations on the right to be presumed innocent are minimal. The application of strict liability only applies to elements of the offence where the question of the person’s state of mind should not be relevant. In addition, the presumption of innocence will still apply with respect to all the other elements of the offence, including proving commission of an assault.

The statutory presumptions only prescribe circumstances where it is reasonable to infer that in those circumstances the particular element of the offence should be clearly established. In addition, it is open to the defence to displace the presumption by pointing to evidence that suggests a reasonable possibility that the specific circumstances do not exist on the balance of probabilities. This evidential burden relates to matters which are peculiarly within the knowledge of the defendant.

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

Strict liability is appropriate for the element that the victim was ‘exercising a function’ as an emergency worker or police officer, as it is not reasonable to expect the defendant to know or have sufficient awareness of the specific functions of a police officer, firefighter or paramedic, legislated or otherwise. It is therefore appropriate that the prosecution not have to prove fault in relation to those physical elements of the offences.

The use of a statutory presumption as to knowledge of the victim’s occupation (for offences under sections 26A and 29A) and the vehicle being a police vehicle (for the offence under section 29B) are appropriate due to the rational connection between the element of the offence to be proved and the prescribed circumstances where it will be taken that such element is to be proved. In other words, the statutory presumptions in the Bill only provide for situations where it is reasonable to infer that the particular element of the offence is established. For example, there is a clear rational connection between a person knowing that

the other person is a police officer (an element of the offence under section 26A (1) (c)), and the police officer identifying themselves as a police officer to the other person (a prescribed circumstance under section 26A (2) (a)).

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

The Bill places the least restrictive limitation on this right. While strict liability applies to some elements of the offences, a number of defences remain open to the accused, depending on the particular facts of each case. Section 23 (1) (b) of the *Criminal Code 2002* provides a specific defence to strict liability offences of mistake of fact. Section 23 (3) of the Criminal Code provides that other defences may also be available for use for strict liability offences, which includes the defence of intervening conduct or event, as provided by section 39 of the Criminal Code.

Inclusion of statutory presumption provisions is balanced by the availability of rebuttal clauses which stipulate it is open for the defence to displace the presumption where the defendant can point to evidence that suggests a reasonable possibility that any of the circumstances listed did not in fact exist, on the balance of probabilities.

Crimes (Protection of Police, Firefighters and Paramedics) Amendment Bill 2019

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 (Protection of Police, Firefighters and Paramedics) Amendment Act 2019*.

Clause 2 — Commencement

This clause provides that the Act will commence on the day after its notification day.

Clause 3 — Legislation Amended

This clause provides that the Bill will amend the *Crimes Act 1900*.

Clause 4 — Offences against Act—application of Criminal Code etc

This is a consequential amendment to insert a reference to new sections 26A, 29A and 29B into note 1 of section 7A. This identifies that the offences created under sections 26A, 29A and 29B are subject to the provisions of the *Criminal Code 2002*.

Clause 5 — New sections 26A and 26B

This clause inserts a new criminal offence for assaulting an emergency worker, and an alternative verdict provision.

New section 26A – Assault of emergency worker

New section 26A creates a new offence for assaulting an emergency worker. An emergency worker is defined under s 26A (5) to mean a police officer, member of the fire and rescue service, or member of the ambulance service who is employed as a paramedic or patient transport officer. Patient transport officers drive ambulances and provide patient transport to and from healthcare facilities, clinics and private residences. Patient transport officers wear the same uniform as ambulance service paramedics and may be tasked to attend emergency situations as a first response as well as operate an intensive care ambulance in conjunction with a paramedic.

New section 26A (1) sets out the circumstances in which a person commits an offence of assaulting an emergency worker. The offence is established where the person assaults an emergency worker, and person knows or is reckless about whether the other person is an emergency worker, and the assault is committed when the emergency worker is exercising a function as an emergency worker. The definition of function is provided under the

Legislation Act 2001 to include ‘authority, duty and power’. The offence may also be established where an assault was committed against an emergency worker as a consequence of, or in retaliation for, action taken by the emergency worker in exercising a function, or because the person is an emergency worker. The maximum penalty for the offence is 2 years imprisonment.

New section 26A (2) is in relation to the requirement to prove the defendant knew that the victim was an emergency worker under subsection (1) (c). This section provides that the defendant will be taken to know the person was an emergency worker (and hence the element will be proved) in certain prescribed circumstances. The purpose of this section is to provide for specific situations where it is reasonable to infer that a person recognises that the other person is an emergency worker.

New section 26A (3) prescribes an evidential burden in relation to the presumption that the person knew the emergency worker was an emergency worker. This means the presumption may be displaced where the defendant can point to evidence that suggests a reasonable possibility that any of the circumstances listed did not in fact exist, on the balance of probabilities.

New section 26A (4) (a) provides that strict liability applies to the physical circumstance that the person was exercising a function as an emergency worker under subsections (1) (d) (i) and (ii). That is, it is not necessary to prove that the defendant knew (or believed or had any other fault element) that the person he or she assaulted was exercising functions of an emergency worker. It is sufficient for the prosecution to show that the person was in fact exercising functions of an emergency worker. The application of strict liability to this requirement means that the defendant is not liable if he or she makes an honest and reasonable mistake (in accordance with the terms of section 36 of the Criminal Code) about the fact that the person was exercising functions as an emergency worker.

New section 26 (4) (b) notes that it does not matter if the emergency worker was off duty when they were exercising a function as an emergency worker.

New section 26B – Assault of emergency worker – alternative verdict

This section includes an alternative verdict of common assault is available if the trier of fact is not satisfied that the defendant committed the offence but is satisfied beyond reasonable doubt that the defendant committed an offence of common assault.

Clause 6 – New sections 29A and 29B

This clause creates a new offence for driving at a police officer, and a new offence for damaging police vehicles. These clauses are based on offence provisions adopted in Victoria through passage of the Crimes Legislation Amendment (Protection of Emergency Workers and Others) Bill 2017. The Victorian provisions obtained Human Rights compatibility, and a copy of the explanatory material can be accessed online at: <http://www.legislation.vic.gov.au/>

New section 29A - Driving motor vehicle at police

New section 29A (1) inserts a new offence for driving a motor vehicle at a police officer. The offence occurs if the person is driving a motor vehicle near or at a police officer exercising their functions as an officer, is reckless about whether the police officer is an officer and the person intends to, or is reckless about, risking that officer's safety. The maximum penalty for this offence is imprisonment for up to 15 years.

New section 29A (2) provides that strict liability applies to the physical circumstance that the police officer was exercising a function as a police officer under subsection (1) (c). That is, it is not necessary to prove that the defendant knew (or believed or had any other fault element) that the person he or she drove near or at was exercising functions of a police officer. It is sufficient for the prosecution to show that the person was in fact exercising functions as a police officer. The application of strict liability to this requirement means that the defendant is not liable if he or she makes an honest and reasonable mistake (in accordance with the terms of section 36 of the Criminal Code) about the fact that the person was exercising functions as a police officer.

New section 29A (3) is in relation to the requirement to prove the defendant knew that the victim was a police officer under subsection (1) (b). This section notes that the defendant will be taken to know the person was a police officer (and hence the element will be proved) in certain prescribed circumstances. The purpose of this section is to provide for specific situations where it is reasonable to infer that a person recognises that the other person is a police officer.

New section 29A (4) prescribes an evidential burden in relation to the presumption that the person knew the police officer was a police officer. This means the presumption may be displaced where the defendant can point to evidence that suggests a reasonable possibility that any of the circumstances listed did not in fact exist, on the balance of probabilities.

New section 29A (5) provides that a person may be guilty of an offence against this section regardless of whether the police officer was injured or not. The purpose of this section is to clarify that it is sufficient for police officer to merely be endangered by the conduct in order to satisfy the elements of the offence.

New section 29B – Damaging police vehicle

New section 29B (1) creates a new offence for damaging a police vehicle. The offence occurs if the person drives a motor vehicle and causes damage to a police vehicle as a result of that conduct, knows or is reckless about whether the damaged vehicle is a police vehicle and intends to cause or is reckless about causing damage to the police vehicle. The maximum penalty for this offence is imprisonment for 5 years.

New section 29B (2) provides that it is presumed that the defendant knew that the damaged vehicle was a police vehicle in certain prescribed circumstances. The purpose of this section

is to provide for specific situations where it is reasonable to infer that a person recognises that the vehicle is a police vehicle.

New section 29B (3) prescribes an evidential burden in relation to the presumption that the person knew the vehicle was a police vehicle. This means the presumption may be displaced where the defendant can point to evidence that suggests a reasonable possibility that any of the circumstances listed did not in fact exist, on the balance of probabilities.

New section 29B (4) provides that a person may be guilty of an offence against this section regardless of whether the damaged vehicle was occupied by a police officer. The purpose of this section is to clarify that the offence is about the damage of a police vehicle, rather than any consequent harm to police officers who may be inside the vehicle.

New section 29B (5) includes a definition of ‘police vehicle’ for the purposes of this section.

Clause 7 – New section 442B

This clause inserts a provision requiring statutory review of the operation of these provisions.

The review must commence no later than two years after the commencement of the provisions, with a report to be presented to the Legislative Assembly within twelve months of the review commencing. This clause expires three years after commencement.

Clause 8 – Dictionary, note 2

This clause is a technical insertion and includes definitions for the dictionary.