

2022

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES LEGISLATION AMENDMENT BILL 2022

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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Attorney-General**

CRIMES LEGISLATION AMENDMENT BILL 2022

The *Crimes Legislation Amendment Bill 2022* (the Bill) is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004* (HR Act).

OVERVIEW OF THE BILL

The Bill amends crimes legislation to improve the effectiveness and operation of the criminal justice system in the ACT.

The Bill will:

- a) create a new offence of public display of a Nazi symbol;
- b) create a new offence of unauthorised entry of a motor vehicle;
- c) provide that residence outside of the ACT is an indication of unsuitability matter for the purposes of an Intensive Correction Assessment;
- d) provide that ACT courts can obtain the email and phone details of an offender who has been issued with a court fine;
- e) provide that the Childrens Court can dispose of charges of sections 310 or 312 of the Criminal Code 202 (Aggravated robbery or Aggravated burglary) summarily, without the consent of the prosecution; and
- f) a number of technical amendments to ACT crimes legislation.

CONSULTATION ON THE PROPOSED APPROACH

The amendments were developed in consultation with the following key justice stakeholders: the ACT Bar Association; the ACT Law Society; Legal Aid ACT; the ACT/NSW Aboriginal Legal Service; Civil Liberties Australia; the ACT Aboriginal and Torres Strait Island Elected Body; the ACT Human Rights Commission; ACT Policing; the ACT Director of Public Prosecutions; ACT Corrective Services; ACT Courts and Tribunal; Canberra Community Law; and the ACT Housing Commissioner.

CONSISTENCY WITH HUMAN RIGHTS

Rights Promoted

The Bill engages and supports the following rights under the *Human Rights Act 2004*:

- Section 8 – the right to equality and non-discrimination before the law

- Section 14 – the right to freedom of thought, conscience, religion or belief
- Section 20 – the rights of children in the criminal process
- Section 21 – the right to a fair trial
- Section 22 – rights in criminal proceedings
- Section 27 – the rights of minorities to culture

Rights Limited

The Bill engages and limit the following rights under the *Human Rights Act 2004*:

- Section 8 – the right to equality and non-discrimination before the law
- Section 11 – the right to protection of the family and children
- Section 12 – the right to privacy
- Section 14 – the right to freedom of thought, conscience, religion or belief
- Section 16 - the right to freedom of expression
- Section 18 – the right to liberty and security of person
- Section 22 – rights in criminal proceedings, including the right to be presumed innocent
- Section 27 – the rights of minorities to culture

The preamble to the *Human Rights Act 2004* (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.

Detailed human rights discussion

Criminal Code 2022 – New offence of public display of a Nazi symbol

Rights promoted

The new offence of public display of a Nazi symbol may promote the right to equality and non-discrimination (section 8) as the offence protects against harm towards vulnerable groups, particularly Jewish people. The new offence may also promote the right to freedom of thought, conscience and religion or belief (section 14) and the

rights of minorities to culture (section 27(1)) by supporting Jewish people to practice their faith and culture without fear of vilification.

Rights limited

The right to liberty and security of person

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The Bill limits the right to liberty (section 18 of the HR Act) because the maximum penalty for the offence is 120 penalty units, imprisonment for 12 months or both and may result in the imposition of a term of imprisonment, and thus deprivation of liberty. The right to liberty prohibits the arbitrary and unlawful deprivation of liberty.

2. Legitimate purpose (s 28 (2) (b))

The amendment's purpose is to reduce racism and vilification in the community by preventing Nazi symbols from being displayed publicly and by allowing them to be removed from public display. The offence engages and supports the following rights under the HR Act by reducing the likelihood that members of the community will feel intimidated or threatened and therefore unable to engage in their own religion, beliefs and culture:

- the right to recognition and equality before the law (section 8);
- the right to freedom of thought, conscience, religion and belief (section 14); and
- the rights of minorities, including the right to culture (section 27).

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

Prohibiting the public display of Nazi symbols and allowing for police officers to remove them will reduce racism and vilification in the community by minimising the harm caused by the display of Nazi symbols. While the ACT has not seen specific examples of public display of Nazi symbols in recent times, both Victoria and NSW (the jurisdictions surrounding the ACT) have. These incidents point to the necessity of this offence and associated police powers.

4. Proportionality (s 28 (2) (e))

The maximum penalty of 120 penalty units, 12 months imprisonment or both is set as low as possible while still achieving the aim of deterring the behaviour and reflecting the seriousness of the offence. This penalty amount aligns with similar serious offences such as the offence of public mischief at section 396 of the *Crimes Act 1900* which prohibits falsely representing that an emergency exists and is punishable by 1 year imprisonment, by a fine of \$2000 or both.

The amendments do not create a mandatory sentencing regime and judicial sentencing discretion is retained to ensure that justice is done as appropriate in each individual case.

The right to freedom of expression

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The Bill limits the right to freedom of expression (section 16 of the HR Act) as the amendment prohibits displaying a swastika in public and may require people to remove such symbols from display. The right to freedom of expression protects the right of people to hold an opinion and to seek, receive and impart information and ideas. The right to freedom of expression comes with responsibilities. The Government can lawfully restrict this right if the restriction is necessary to protect the rights of others or to protect public order, public health, public morality or national security.

2. Legitimate purpose (s 28 (2) (b))

The amendment's purpose is to reduce racism and vilification in the community by preventing Nazi symbols from being displayed publicly and by allowing them to be removed from public display. The offence engages and supports the following rights under the HR Act by reducing the likelihood that members of the community will feel intimidated or threatened and therefore unable to engage in their own religion, beliefs and culture:

- the right to recognition and equality before the law (section 8);
- the right to freedom of thought, conscience, religion and belief (section 14); and
- the rights of minorities, including the right to culture (section 27).

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

Prohibiting the public display of Nazi symbols and allowing for police officers to remove them will reduce racism and vilification in the community by minimising the harm caused by the display of Nazi symbols. While the ACT has not seen specific examples of public display of Nazi symbols in recent times, both Victoria and NSW (the jurisdictions surrounding the ACT) have. These incidents point to the necessity of this offence and associated police powers. The offence prohibits the public display of Nazi symbols online so that if a person in the ACT publicly displays a Nazi symbol via social media and it is conveyed to people outside the ACT, that person will still be captured by the offence.

4. Proportionality (s 28 (2) (e))

The offence broadly prohibits public display of a Nazi symbol. However, the offence adopts the least restrictive approach necessary by ensuring that exceptions for reasonable and good faith public display of a swastika exist, specifically:

- for a genuine academic, artistic, religious or scientific purpose
- for a genuine cultural or educational purpose
- in making or publishing a fair and accurate report of an event or matter of public interest
- in opposition to fascism, Nazism, neo-Nazism or other related ideologies.

Additionally, the offence does not apply if a person has the swastika symbol tattooed (or similar) on their body.

The amendment also provides that a proceeding against a child for an offence against this section must not be started without the written consent of the director of public prosecutions.

The right to be presumed innocent

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The new offence engages and limits the right to be presumed innocent (section 22 of the HR Act). The HR Act provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. The right is limited as the offence contains a reasonable excuse defence, being that a defendant who publicly displays a Nazi symbol for a legitimate reason must point to evidence that the public display of a Nazi symbol was reasonable, in good faith and for one of the purposes listed as an exception. Requiring the defendant to raise facts in this way amounts to a reversal of the burden of proof and may consequently limit the right to presumption of innocence.

2. Legitimate purpose (s 28 (2) (b))

The purpose of including a reasonable excuse defence is to ensure that offence can operate to prohibit public display of Nazi symbols while still ensuring that legitimate public display of such symbols is not penalised.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

Effective prohibition of the public display of Nazi symbols in general will reduce racism and vilification in the community by minimising the harm caused by the display of Nazi symbols.

4. Proportionality (s 28 (2) (e))

The right is limited as a defendant who publicly displays a Nazi symbol for a legitimate reason must point to evidence that the public display of a Nazi symbol was reasonable, in good faith and for one of the purposes listed as an exception.

However, this requirement on the defendant is not a legal burden. It only places an evidential burden on the defendant. This means that once the defendant has pointed to evidence of an exception, the burden shifts back to the prosecution to prove the essential elements of the offence beyond reasonable doubt.

It is possible the burden for demonstrating a religious or cultural purpose for a public display of a symbol could instead rest with the prosecution as an element of the offence. However, this would require the prosecution to prove beyond reasonable doubt that a symbol was not displayed for a good faith and reasonable religious or cultural purpose in every case, even where there is no evidence suggesting such a use. It would also create inconsistencies with the approach to all other exceptions, such as artistic use or opposition to Nazism and neo-Nazism. In addition, whether a person is displaying a symbol for a religious or cultural purpose is a matter peculiarly within the knowledge of that person. Such persons are best placed to provide evidence as to whether the display was for a religious or cultural purpose.

The right to privacy and reputation

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The new offence engages and limits the right to be privacy and reputation (section 12 of the HR Act). The right to privacy protects people from 'unlawful' interference with their privacy – this means that no interference can take place except in cases authorised by law. Under international law, the right to privacy has been interpreted as applying in a variety of different circumstances. It has been defined widely as 'the right to be left alone' (the right to live free from interference), and so includes the right to autonomy. The amendment limits the right to privacy by allowing a police officer to direct a person to remove a Nazi symbol from public display (whether on public or private property).

2. Legitimate purpose (s 28 (2) (b))

The purpose of giving police officers power to remove a publicly displayed Nazi symbol is to support enforcement of the offence and to prevent any further harm caused by the continued display of the symbol. It requires the police officer to reasonably believe the person is committing or has committed the offence of public display of a Nazi symbol. A person who does not comply with a direction to remove the symbol is liable for a fine of 10 penalty units, which is commensurate with the severity of the conduct.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

Effective enforcement of the offence of public display of Nazi symbols will reduce racism and vilification in the community by minimising the harm caused by the display of Nazi symbols.

4. Proportionality (s 28 (2) (e))

The defence of reasonable excuse will ensure a person who does not receive or have notice of a direction to remove the Nazi symbol would not be liable for a penalty. Given the limited circumstances in which a direction can be given and that a Nazi symbol can still be displayed in private where they cannot be viewed from a public place, interference with the right is lawful and does not arbitrarily or unreasonably limit the right to privacy.

The right to freedom of thought, conscience, religion and belief; and the right to culture (rights of minorities)

1. Nature of the rights and the limitation (s 28 (2) (a) and (c))

The right to freedom of thought, conscience, religion and belief (section 14 of the HR Act) protects a person's right to manifest beliefs externally, such as by displaying symbols (although this freedom may be limited where it has the potential to negatively impact others). The rights of minorities to culture (section 27 of the HR Act) allows those belonging to minority groups to enjoy their own culture and profess and practice their own religion (in private and in public). The Bill limits the right to freedom of thought, conscience, religion and belief and the rights of minorities to culture as the amendment prohibits displaying a swastika in public and may require people to remove such symbols from display.

2. Legitimate purpose (s 28 (2) (b))

The amendment's purpose is to reduce racism and vilification in the community by preventing Nazi symbols from being displayed publicly and by allowing them to be removed from public display. The offence engages and supports the following rights under the HR Act by reducing the likelihood that members of the community will feel intimidated or threatened and therefore unable to engage in their own religion, beliefs and culture:

- the right to recognition and equality before the law (section 8);
- the right to freedom of thought, conscience, religion and belief (section 14); and
- the rights of minorities, including the right to culture (section 27).

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

Prohibiting the public display of Nazi symbols and allowing for police officers to remove them will reduce racism and vilification in the community by minimising the harm caused by the display of Nazi symbols. While the ACT has not seen specific examples of public display of Nazi symbols in recent times, both Victoria and NSW (the jurisdictions surrounding the ACT) have. These incidents point to the necessity of this offence.

4. Proportionality (s 28 (2) (e))

The offence broadly prohibits public display of a Nazi symbol. However, the offence adopts the least restrictive approach necessary by ensuring that exceptions for reasonable and good faith public display of a swastika exist, specifically:

- for a genuine academic, artistic, religious or scientific purpose
- for a genuine cultural or educational purpose
- in making or publishing a fair and accurate report of an event or matter of public interest
- in opposition to fascism, Nazism, neo-Nazism or other related ideologies

The burden on a defendant to show that they engaged in the display for a legitimate purpose is an evidential one. This means that once the defendant has pointed to evidence of an exception, the burden shifts back to the prosecution to prove the essential elements of the offence beyond reasonable doubt.

It is possible the burden for demonstrating a religious or cultural purpose for a public display of a symbol could instead rest with the prosecution as an element of the offence. However, this would require the prosecution to prove beyond reasonable doubt that a symbol was not displayed for a good faith and reasonable religious or cultural purpose in every case, even where there is no evidence suggesting such a use. It would also create inconsistencies with the approach to all other exceptions, such as artistic use or opposition to Nazism and neo-Nazism. In addition, whether a person is displaying a symbol for a religious or cultural purpose is a matter peculiarly within the knowledge of that person. Such persons are best placed to provide evidence as to whether the display was for a religious or cultural purpose.

Criminal Code 2022 – New offence of unauthorised entry of a motor vehicle

The right to be presumed innocent

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The new offence of unauthorised entry of a motor vehicle engages and limits the right to be presumed innocent (section 22 of the HR Act). The HR Act provides that

everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

The right is limited as the offence contains a reasonable excuse defence – the offence will not apply if a defendant has a reasonable excuse for entering a motor vehicle that belongs to someone else – but the defendant must raise evidence that such entry was reasonable. Requiring the defendant to raise facts in this way amounts to a reversal of the burden of proof and this may engage and limit the right to be presumed innocent.

2. Legitimate purpose (s 28 (2) (b))

The purpose of the limitation is to ensure that the offence can operate effectively to prohibit people trespassing in another person's motor vehicle while still providing that defendants who do have a reasonable excuse for such entry are not penalised.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

It is necessary to impose a requirement on the defendant to tender, or point to, evidence of their reasonable excuse if they seek to rely on this defence, because any reason for entering a motor vehicle is peculiarly within the knowledge of the defendant. The defendant is best placed to provide evidence as to their reason for entering a motor vehicle without permission.

4. Proportionality (s 28 (2) (e))

The requirement on the defendant is not a legal burden. It only places an evidential burden on the defendant. This means that once the defendant has pointed to evidence of an exception, the burden shifts back to the prosecution to prove the essential elements of the offence beyond reasonable doubt.

It is also noted that the maximum penalty for this offence is a fine of 10 penalty units, which is proportionate to the seriousness of the offence, and does not allow punishment by imprisonment.

Residence outside of the ACT an unsuitability matter for the purposes of an Intensive Correction Assessment

The Bill provides that an offender's residence outside of the ACT is a matter that indicates their unsuitability for the purposes of an Intensive Correction Assessment and determining their suitability to serve their sentence of imprisonment by Intensive Correction Order (ICO). The amendment potentially engages and limits the right to liberty and security of the person (section 18 of the HR Act) and the right to protection of family (section 11 of the HR Act).

The right to liberty and security of person and the right to protection of family

1. Nature of the rights and the limitation (s 28 (2) (a) and (c))

The amendment potentially engages and limits the right to liberty and security of the person (section 18 of the HR Act) as an offender may be more likely to be found to be unsuitable to serve their sentence of detention in the community, by way of ICO, with the result that the offender must serve their sentence of imprisonment in full-time detention.

The amendment may engage and limit the right to protection of family (section 11 of the HR Act) as an offender may be more likely to be found to be unsuitable to serve their sentence of imprisonment in the community, by way of ICO, which would mean they are less likely to spend time with their family as they would be required to serve their sentence of imprisonment in full-time detention.

2. Legitimate purpose (s 28 (2) (b))

The Crimes (Sentencing and Restorative Justice) Amendment Bill 2015 Explanatory Statement indicates that the overarching purpose of an ICO is to be punitive while incorporating elements of rehabilitation. This requires strict supervision of the offender, including home visits and appointments. An ICO is the serving of a sentence of imprisonment within the community.

The offender's residence outside of the ACT can impact whether ACT Corrective Services (ACTCS) can appropriately supervise the offender. For example, the conditions of an ICO can include home visits and drug-testing which a Corrections Officer cannot perform without ready access to the offender. The offender's residence outside of the ACT can also impact whether the offender is able to comply with conditions. Such conditions can include regular reporting to ACTCS Offices in Canberra, which requires the offender to regularly attend the ACT at particular times. An offender can also be subject to other 'location relevant' orders as part of an ICO, such as community service orders, which may require almost daily attendance within the ACT.

Appropriate monitoring and improved compliance result in less breaches of ICOs and likely better rehabilitation of the offender.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between the limitation on the right to liberty, the right to protection of family and the right to equality and non-discrimination before the law and the objective of ensuring supervision of the offender and compliance with the ICO, therefore promoting rehabilitation.

The amendment will ensure the offender's place of residence is taken into account in determining whether an ICO is a suitable for the particular offender, in the context of

the particular conditions which would attach to an ICO for that offender. The limitation is likely to achieve its purpose by making it mandatory for the writer of an Intensive Correction Assessment to turn their minds to an offender's residence outside of the ACT when considering unsuitability for an ICO, and therefore requiring the Court to also consider this circumstance.

4. Proportionality (s 28 (2) (e))

Any limitation on rights must be reasonably justified having regard to the objective sought to be achieved.

An ICO is a sentence of imprisonment, served in the community, and as such, requires intensive supervision. The ability of ACTCS to supervise the offender, which may be impaired because of the location of the offender's residence outside the ACT, is an important consideration to ensure that intensive supervision can occur, and that the offender can comply with the conditions of the ICO and successfully complete their sentence.

The offender's suitability will continue to be assessed on a case by case basis. The amendment will not mean that an offender who resides outside the ACT will necessarily be found to be unsuitable to serve their sentence by way of an ICO. If the offender can and will attend the necessary appointments within the ACT, and ACTCS can provide the intensive supervision required for the offender, then that person may be found suitable for an ICO, even if their residence is outside the ACT.

Any restriction on rights is proportionate as it allows a more comprehensive assessment of an offender's suitability for an ICO which also addresses any administrative or practical difficulties faced by ACTCS. This will support the offender's effective completion of an ICO.

Furthermore, the ultimate discretion of the Court at section 78 of the *Crimes (Sentencing) Act 2005* to determine an offender's suitability to serve an ICO will not be limited by the amendment.

ACT Courts can require the email and phone details of an offender who has been issued with a court fine

The Bill amends the *Crimes (Sentence Administration) Act 2005* (the CSA Act) to require a person who has received a court fine to provide their email address and/or phone number to the Court, to provide an update of such details to the Court where they change and provide evidence of such details. Failure to comply may result in a maximum penalty of up to 5 penalty units. The Bill also amends the CSA Act to provide that the Court can obtain the offender's email address and/or phone number from specified third parties (such as the ACT Housing Commissioner and the ACT Chief of Police).

The amendment engages and limits the right to privacy (section 12 of the HR Act), the right to equality and non-discrimination before the law (section 8 of the HR Act) and the right to the presumption of innocence (at section 22 of the HR Act).

The right to privacy; the right to equality and non-discrimination before the law; and the right to the presumption of innocence

1. Nature of the rights and the limitation (s 28 (2) (a) and (c))

Section 12 of the HR Act provides that everyone has the right to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. This includes the protection of personal information. The amendment engages and limits the right to privacy as it requires the recipient of a court fine to provide their email address and/or phone number (where such details exist) to the Court for the purposes of fine enforcement. The amendment also allows the Court to obtain such details from a specified third party.

The amendment engages and limits the right to equality and non-discrimination before the law because compliance with the requirement to update an email address and/or phone number may be particularly difficult for certain members of the community, in particular people experiencing homelessness, domestic or family violence and people living with mental illness.

The amendment engages and limits the right to the presumption of innocence because a 'reasonable excuse' exception will apply to the three offences at section 116D of the CSA Act (which provide a maximum penalty of up to 5 penalty units). The three offences at section 116D provide that it is an offence to fail to: provide an email address, phone number and home or postal address to the Court within 7 days of receiving a court fine; update such details within 7 days of them changing; and provide evidence of such details. The 'reasonable excuse' exception to these offences will place an evidential burden on the defendant, requiring them to point to evidence that they had a reasonable excuse for not providing, updating or giving evidence of their details. Requiring the defendant to raise facts in this way amounts to a reversal of the burden of proof and this may engage and limit the right to be presumed innocent.

2. Legitimate purpose (s 28 (2) (b))

The purpose of the amendment is to modernise the ACT Courts' approach to fine enforcement by allowing ACT Courts to use more up-to-date methods of communication to contact debtors and thereby increase compliance with payment of fines. The amendment will allow ACT Courts to intervene earlier and better provide people with the information they need to manage their fines.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between the purpose of supporting the administration of criminal sentences through increasing compliance with payments of fines and any limitation on the right to privacy, the right to equality and the right to be presumed innocent.

Most people use email and/or phone, as opposed to postal communication to administer their affairs. Allowing ACT Courts to access the email address and/or phone numbers of people who have been ordered to pay a court fine allows the ACT Courts to contact people through modern forms of communication and follow up outstanding fines from people who may have moved away from their home address or who no longer use a postal address.

By using modern communication methods to follow up outstanding court fines, offenders are more likely to be contacted about outstanding fines and more likely to pay them. Therefore, the amendment is likely to achieve its purpose and objective of reducing outstanding debt for court fines.

4. Proportionality (s 28 (2) (e))

Section 28 of the Human Rights Act provides that measures that limit human rights are permitted where the limitation is reasonable and proportionate to achieving a legitimate aim.

As the *Crimes (Sentence Administration) Act 2005* already allows the Court to obtain the postal/home address of an offender, it is not introducing a new power for the registrar or the Court. Rather, it seeks to allow the Court to use two contact methods that are in line with modern communication methods.

The amendment provides that where a person does not have an email address or phone number they are not required to provide these details.

The amendment provides a 'reasonable excuse' exception so that where a person has a legitimate reason for not providing, updating or giving evidence of their email address or phone number, they will not be penalised for this failure. A defendant only has an evidential burden in this regard so they must only point to evidence that they had a legitimate reason and then the prosecution must prove beyond reasonable doubt that they did not, in fact, have a legitimate reason for failing to provide, update or give evidence of these details. The evidential burden on the defendant is appropriate as whether a person has a reasonable excuse for not complying is a matter peculiarly within the knowledge of that person. Such persons are best placed to provide evidence as to whether the non-compliance was reasonable.

Further, the *Information Privacy Act 2014* (the IP Act) contains information privacy principles that regulate the collection, use, disclosure and management of personal

information by public authorities. The IP Act will apply to the ACTCT in relation to its collection, storage and use of email addresses and phone numbers of court fine recipients.

Summary disposal of offences of aggravated robbery and aggravated burglary) in the Childrens Court without the consent of the prosecution

The right to liberty and security of person; the right to a fair trial; rights in criminal proceedings; and the rights of children in the criminal process

The amendment will allow for the summary disposal of aggravated robbery and aggravated burglary matters in the Childrens Court without prosecution consent.

This amendment may engage and limit the right to liberty and security of victims of crime as it will limit the length of the maximum sentence to which a child or young person can be sentenced for these particular offences (section 18 of the HR Act).

The amendment will promote the right to a fair trial (section 21 of the HR Act), rights in criminal proceedings (section 22 of the HR Act) and the rights of children in the criminal process (section 20 of the HR Act) by ensuring that children and young people under the age of 18 cannot receive a maximum penalty of more than 2 years imprisonment for these offences, which will support the child/young person's rehabilitation. The amendment will also allow matters to be dealt with more expeditiously, reducing the impact of extended court processes on all parties, both victims and defendants. Any limitation on the right to liberty and security of victims of crime is therefore reasonably justified.

CRIMES LEGISLATION AMENDMENT BILL 2022

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Crimes Legislation Amendment Bill 2022**. In my opinion, having regard to the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

Crimes Legislation Amendment Bill 2022

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 Legislation Amendment Act 2022*.

Clause 2 — Commencement

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

Clause 3 — Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the *Crimes Act 1900*, *Crimes (Sentence Administration) Act 2005*, *Crimes (Sentencing) Act 2005* and the *Criminal Code 2002*.

Part 2 – Crimes Act 1900

Clause 4 – New section 375

This clause substitutes the old section 375 with new sections 375 and 375AA to provide that if a person is before the Childrens Court charged with any offence other than an offence punishable by imprisonment for life (including an offence against section 310 or section 312 of the *Criminal Code 2002* – aggravated robbery and aggravated burglary), the court may (without the consent of the prosecution):

- hear and determine the charge summarily, and may sentence or otherwise deal with the defendant according to law without the consent of the prosecution (new ss375AA(8); and
- sentence or otherwise deal with the defendant without the consent of the prosecution (new ss375AA(9)).

This clause also clarifies the meaning of the word ‘court’ by providing the process for summary disposal of certain cases in the Magistrates Court at new section 375 and separately, the process for summary disposal of certain cases in the Childrens Court at new section 375AA, to avoid any confusion.

Part 4 – Crimes (Sentence Administration) Act 2005

Clause 5 – Registrar to send penalty notice, Section 116C(3)(e)

This clause amends section 116C(3)(e) to omit ‘offender’s address’ and substitute ‘offender’s contact details’.

Clause 6 – Section 116D heading

This clause provides a new heading for section 116D: Offender to give registrar contact details.

Clause 7 – Section 116D(1)

This clause provides that for the purposes of the offence at section 116D(1) the offender must not only provide his or her home address and postal address within 7 days after a fine is imposed. Rather, they must provide their: home address; postal address; email address (if any); home phone number (if any); and mobile phone number (if any).

Clause 8 – Section 116D(2)

This clause provides that for the purposes of the offence at section 116D(2) the offender must not only update his or her home address and postal address. Rather, they must update their: home address; postal address; email address (if any); home phone number (if any); and mobile phone number (if any).

Clause 9 – Section 116D(3)

This clause provides that for the purposes of the offence at section 116D(3) the offender must not only provide evidence of his or her home address and postal address. Rather, they must provide evidence of their: home address; postal address; email address (if any); home phone number (if any); and mobile phone number (if any).

Clause 4 – New section 116D(4) and (5)

This clause provides that the offences at sections 116D(1), 116D(2) and 116D(3) do not apply if the person has a reasonable excuse. The note in this clause provides that the defendant has an evidential burden in relation to proving a reasonable excuse.

Clause 5 – Section 116E heading

This clause provides a new heading for section 116E: Registrar may ask other people for offender’s contact details.

Clause 6 – Section 116E(1)

This clause provides that for the purposes of section 116E(1), the registrar may ask a relevant person to give the registrar any of the contact details mentioned in section 116D(1) that they hold for a stated offender who is liable to pay a fine. The contact details mentioned in section 116D(1) are: home address; postal address; email address (if any); home phone number (if any); and mobile phone number (if any).

Clause 13 – Section 116E(3), new definition of *contact details*

This clause inserts a new definition of contact details at section 116E(3).

Clause 14 – Default notice, New section 116H(3)

This clause inserts a new section 116H(3) to provide that if an offender defaults in paying a fine, the director-general must send the fine defaulter a default notice to the fine defaulter's last-known postal address or email address.

Clause 15 – Form of default notice, Section 116I(1)(e)

This clause omits the word 'address' and substitutes 'contact details' for the purposes of section 116I(1)(e).

Clause 16 - Reminder notice, Section 116J(2)

This clause amends section 116J(2) to provide that a reminder notice at section 116J(1) must be sent to the fine defaulter's last-known postal address or email address.

Clause 17 – Sharing information, Section 116ZT, example

This clause amends the example at section 116ZT so that the example of sharing information is: the registrar giving the director-general contact details of a fine defaulter.

Part 4 Crimes (Sentencing) Act 2005

Clause 18 – Assessment of suitability – intensive correction order, Table 46D, item 7

This clause amends Table 46D to include an offender's residence outside the ACT as an indicator of unsuitability as such a circumstance may make administration of an intensive correction order, or the offender's compliance with an intensive correction order, impracticable.

Part 5 Criminal Code 2002

Clause 19 – New part 7A.1 heading

This clause inserts a new heading: Part 7A.1 Serious vilification.

Clause 20 – New parts 7A.2 and 7A.3

New Part 7A.2 – New offence of public display of Nazi symbols

This clause inserts a new Part 7A.2 which contains a new offence of public display of Nazi symbols. New section 752 provides that a person commits an offence if: the person displays a Nazi symbol; and the person knows, or ought reasonably to know, that the symbol is associated with Nazi ideology; and the display is other than in private. The offence is intended to capture not only the public display of a Nazi symbol at a physical location but also the online public display of a Nazi symbol.

The maximum penalty for the offence is 120 penalty units, imprisonment for 12 months or both.

The offence does not apply to people who display a Nazi symbol reasonably and in good faith: for genuine academic, artistic religious or scientific purposes; or for a genuine cultural or educational purpose; or in making or publishing a fair and accurate report of an event or matter of public interest; or in opposition to fascism, Nazism, neo-Nazism or other related ideologies.

The offence also does not apply to a Nazi symbol displayed on a person's body by means of tattooing or similar process.

New section 753 provides that a police officer may direct a person to remove a Nazi symbol from display if the police officer reasonably believes that the person is committing an offence against section 752 by displaying the Nazi symbol.

A police officer may direct a person to remove a Nazi symbol from display at premises. It is an offence for a person to fail to comply with such a direction, with a maximum penalty of 10 penalty units.

New Part 7A.3 – New offence of unauthorised entry of motor vehicle

The clause inserts new part 7A.2 which includes a new offence of unauthorised entry of a motor vehicle. A person commits the offence if: they enter a motor vehicle; and the vehicle belongs to some else; and the person does not have consent to enter the vehicle from a person to whom the vehicle belongs.

The maximum penalty for the offence is 10 penalty units.

The offence does not capture a person who has a reasonable excuse for unauthorised entry of a motor vehicle.

Clause 21 –Dictionary, notes 1 and 2

This clause substitutes notes 1 and 2 to the dictionary with a single note, which gives examples of definitions in the *Legislation Act 2001* that are relevant to the *Criminal Code 2002*.

Clause 22 – Dictionary, new definition of *Nazi symbol*

This clause inserts a new definition into the dictionary: Nazi symbol, for part 7A.2 (Public display of Nazi symbols) – see section 751.

Schedule 1 Consequential amendments

Part 1.1 Australian Crime Commission (ACT) Act 2003

[1.1] Section 5, new note

This clause inserts a new note 3 at section 5 of the Act.

[1.2] Section 23(5) etc

This clause omits the note in sections 23(5), 26(1), 26(3), 26(5), 28(1) and 49.

Part 1.2 Crimes Act 1900

[1.3] Section 374(6)

This clause substitutes current section 374(6) with new section 374(6).

[1.4] Section 375A(1)

This clause substitutes current section 375A(1) with new section 375A(1).

[1.5] Section 377

This clause omits the phrase ‘If the Magistrates Court has heard and determined a charge under section 374 or section 375’ and substitutes it with ‘If a court has heard and determined a charge under section 374, section 375 or section 375AA’.

[1.6] Section 378(1)

This clause omits the reference to ‘section 374 or section 375’ and substitutes it with ‘section 374, section 375 or section 375AA’.

[1.7] Section 378(2)

This clause omits the phrase ‘by the Magistrates Court of an information heard and determined by the court under section 374 or section 375’ and substitutes it with ‘by

a court of an information heard and determined by the court under section 374, section 375 or section 375AA’.

Part 1.3 Magistrates Court Act 1930

[1.8] Section 90A(2) and (7)(b)(v)

This clause omits the reference to ‘section or section 375’ and substitutes it with ‘section 374, section 375 or section 375AA’.

[1.9] Section 208(1)(b) to (d)

This clause substitutes current section 208(1)(b) to (d) with new section 208(1)(b) to (d).

[1.10] Section 208(1)(e), note

This clause omits the note at section 208(1)(e).

[1.11] Section 219B

This clause substitutes current section 219B with new section 219B.

[1.12] Section 288(2)

This clause substitutes current section 288(2) with new section 288(2).

[1.13] Section 291K(2)

This clause substitutes current section 291K(2) with new section 291K(2).

[1.14] Section 291Q(3)

This clause substitutes current section 291Q(3) with new section 291Q(3).

Schedule 2 Technical amendments

Schedule 2 contains technical amendments of legislation initiated by the Parliamentary Counsel’s Office. Each amendment is explained in an explanatory note in the schedule. The amendments include the correction of minor errors, such as typographical errors and outdated cross-references, updating language, updating and omitting notes, omitting redundant provisions, renumbering paragraphs and other minor changes to update or improve the form of legislation.