2013

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CRIMES LEGISLATION AMENDMENT BILL 2013

EXPLANATORY STATEMENT

OCTOBER 2013

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Crimes Legislation Amendment Bill 2013

Outline

Purpose of the Bill

The Crimes Legislation Amendment Bill 2013 will provide amendments to address a number of criminal justice legislation issues that have arisen in the ACT. The Bill will amend criminal laws to make key improvements to the criminal justice system.

In summary, the Bill will:

- allow the prosecution of certain historic sexual offences by retrospectively repealing two statutory limitation periods relating to offences committed between 1951 and 1985;
- amend the default application date for chapter 2 of the *Criminal Code 2002* from 1 July 2013 to 1 July 2017;
- allow the Chief Police Officer to delegate their authority to apply for a prohibition order against a registered child sex offender to a senior police officer;
- amend the definition of 'stolen property' that applies to the offence of receiving stolen property at section 313 of the *Criminal Code 2002* so that it describes 'stolen property' as an appropriation of property;
- amend forensic procedure legislation to require that a suspect, serious offender or volunteer be asked for their consent to have an intimate forensic procedure carried out by a person of the opposite sex and informed that they may refuse consent;
- amend legislation to secure the attendance of a serious offender before court for a forensic procedure application hearing;
- provide that duties under non-ACT law (common law, Commonwealth law and law of other states and the Northern Territory) can constitute an omission for the purposes of a Criminal Code offence;
- exclude 16 and 17 year olds from certain safeguards relating to police custody where police propose to issue a criminal infringement notice under Part 3.8 of the *Magistrates Court Act 1930*;

- expand the operation of section 16 in the *Crimes (Assumed Identities) Act 2009* to include the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service;
- introduce a requirement to register firearm frames and receivers; and require applicants and licensees to obtain a permit to acquire before they are able to purchase a frame or receiver; and
- amend the *Drugs of Dependence Act 1989* by increasing the quantity that a simple cannabis offence notice can be issued for from 25 grams to 50 grams.

Human Rights Considerations

The Crimes Legislation Amendment Bill 2013 engages a number of the rights in the ACT's *Human Rights Act 2004* (the Human Rights Act).

The Bill engages, and places limitations on, the following Human Rights Act rights:

- protection from torture and cruel, inhuman or degrading treatment (section 10);
- the right to the protection needed by a child because of being a child, without distinction or discrimination of any kind (section 11(2));
- the right to privacy and reputation (section 12);
- the right to liberty and security of person (sections 18(1) and (2));
- the right of an accused child to be treated in a way that is appropriate for a person of the child's age who has not been convicted (section 20(2)); and
- the right to a fair trial and/or rights in criminal proceedings (including the right of anyone charged with a criminal offence to be tried without unreasonable delay and to examine prosecution witnesses) (sections 22(2)(c) and (g)).

The Bill also engages, and supports, the following Human Rights Act right:

- the rights of children in the criminal process (section 20); including
- the right of a convicted child to be treated in a way that is appropriate for a person of the child's age who has been convicted (section 20(4) of the *Human Rights Act 2004*).

A detailed discussion of human rights engagement in relation to particular amendments is in the detail section of this explanatory statement, below.

Crimes Legislation Amendment Bill 2013

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act would be the Crimes Legislation Amendment Act 2013.

Clause 2— Commencement

This clause commences the Act (other than part 5, sections 13, 15 and 16 and part 9, sections 24 to 27) on the day after it is notified on the ACT Legislation Register.

The remaining provisions commence on the 28th day after the Act's notification day to enable effective implementation of these provisions.

Clause 3— Legislation amended

This clause identifies the legislation amended by the Act.

Part 2 - Bail Act 1992

Clause 4 – Contravention of Act by police officers, Section 52(2)

This is a technical amendment to section 52 (2) of the Bail Act 1992, to omit the reference to the *Complaints (Australian Federal Police) Act 1981* (Commonwealth). This Act was repealed by the *Law Enforcement (AFP Professional Standards and Related Measures) Act 2006* (Commonwealth). That Act inserted a new part V in the *Australian Federal Police Act 1979* (Commonwealth) to deal with conduct issues. Complaints about the Australian Federal Police may also be dealt with under the *Law Enforcement Integrity Commissioner Act 2006* (Commonwealth) and the *Ombudsman Act 1976* (Commonwealth).

Part 3 - Crimes Act 1900

Clause 5 – Meaning of in the company of a police officer, Section 252F(3)

The *Crimes Act 1900* provides that a child or young person is 'under restraint' if the child or young person is 'in the company of a police officer'. This is an important concept to extend the circumstances where police must afford certain safeguards to children and young people. Currently, where a young person is being issued with a criminal infringement notice by a police officer for a minor criminal offence they are likely to be 'in the company of a police officer' and therefore 'under restraint'. Police are able to issue certain criminal infringement notices to 16 and 17 year olds.

Where a child or young person is 'under restraint' the police are obliged to contact the young person's parents and the young person must not be questioned about the alleged offence unless they are in the presence of a parent or other responsible adult. This would normally occur at a Regional Watchhouse following an arrest in relation to the offence.

Such protections, while appropriate for arrest of a child or young person for most criminal offences are not appropriate where the young person is alleged to have committed a minor criminal offence that can be dealt with by way of an infringement notice. A Criminal infringement notice may be issued to a 16 or 17 year old. Furthermore, issuing an infringement notice is less intrusive and traumatic for the young person than being arrested to allow questioning in relation to the offence.

The exemption created in new section 252F(3)(c) was originally inserted in the *Children and Young People Act 1999* (the CYP Act) but was not retained in amendments made in 2008 to the *Crimes Act 1900* and the CYP Act, in error.

This clause therefore amends the circumstances in which a young person is 'in the company of' a police officer. It excludes specific instances of contact between young people and police involving minor criminal offences that can proceed by way of an infringement notice as these instances are not of a nature that warrant extra protection.

Human Rights Discussion

This clause limits the rights of children in criminal proceedings in section 20(2) of the *Human Rights Act 2004*. The limitation arises because police will not have the same obligation to contact a young person's parents if they wish to issue an infringement for a minor offence. The importance of the limitation is to ensure that police are able to maintain public order on behalf of the community by issuing infringement notices for minor offences where appropriate. The limitation is also important because it will allow police officers to achieve this outcome with less intrusive contact with young people when dealing with minor offences.

The nature of the limitation is justified as the protections afforded to young people who are 'under restraint' are only being limited for the purposes of less serious criminal offences. Minor offences that are able to proceed by way of infringement notice include urinating in a public place (section 393A of the *Crimes Act 1900*), consuming liquor in certain public places (section 138 of the *Liquor Act 2010*), defacing private premises (section 120(1) of the *Crimes Act 1900*), or any other offence regulated to proceed by way of criminal infringement notice. This clause is comparable to current law which acknowledges that it is appropriate for police officers to be able to issue infringement notices to young people for road transport offences without first notifying the young person's parents (see section 252F(3) of the *Crimes Act 1900*).

It is also justifiable as an infringement notice penalty will only be a small proportion of the maximum penalty for the offence (at the most, a nominal amount of 20% of the maximum penalty), in accordance with ACT Government policy.

An important safeguard in relation to this amendment is that a young person issued with an infringement notice will always have the ability to dispute the notice. The process for dispute is displayed on the notice issued to the young person.

Allowing police the ability to issue an infringement notice to a young person without contacting the young person's parents balances the need for police officers to maintain public order for the benefit of the community as a whole (including children and young people) with

the need to treat young people appropriately when they are being issued with an infringement notice.

Legislation may currently require police officers to issue a summons or charge the young person for a minor offence that could proceed by way of infringement notice. The new amendments will allow officers to issue an infringement notice to a young person without requiring them to attend court or face the prospect of a criminal process and subsequent conviction. As a result, the clause also supports the rights of children in the criminal process at section 20 of the *Human Rights Act* by giving young people the opportunity to pay an infringement notice penalty without a requirement to attend court for minor offences. This also helps reduce the risk that a young person may inadvertently be convicted for a minor offence because payment of an Infringement Notice penalty does not result in a conviction.

Clause 6 – Section 252F(4), new definitions

This clause defines what an 'infringement notice' is and refers to the principles governing infringement notices in the *Magistrates Court Act 1930*, section 117.

Clause 7 – New sections 441 and 441A

Currently prosecution of certain historical sexual offences is prevented by limitation periods that came into force in 1951 and 1976.

The purpose of this clause is to retrospectively repeal these limitation periods so that certain historical sexual offences may now be prosecuted and other criminal proceedings brought in respect of these offences.

New section 441 provides that a criminal proceeding can be commenced for the following offences, as in force on 14 December 1951:

- Carnally knowing a girl between ten and sixteen;
- Attempt to carnally know a girl between ten and sixteen; and
- Indecent assault of girl under sixteen.

Currently the effect of the limitation period created in 1951 is that criminal proceedings for these offences that occurred between 14 December 1951 – 21 November 1985 (the latter date

being when the limitation period was repealed) must have commenced within 12 months of the offence occurring.

New section 441A(1)(a) provides that where the defendant to an offence against girls under sixteen (sections 71, 72 and 76) is not more than 2 years older than the complainant a criminal proceeding cannot be commenced against that defendant. This is appropriate as these offences are based on the age of the victim and do not otherwise require proof of a lack of consent. This also reflects current comparable sexual offences that provide a defence where the accused can show that they were not more than 2 years older than the alleged victim.

New section 441 also provides that a criminal proceeding can be commenced for the following offences, as in force on 8 November 1976:

- Buggery;
- Attempt to commit buggery; and
- Indecent assault of a male.

Currently the effect of the limitation period created in 1976 is that criminal proceedings for these offences that occurred prior to 21 November 1985 (the latter date being when the limitation period was repealed) must have commenced within 12 months of the offence occurring.

New section 441A(1)(b) provides that a criminal proceeding cannot commence for these offences unless the prosecution also alleges that the offence was committed in circumstances where the complainant did not consent or where the complainant and defendant were related (incest).

Another consequence of new section 441A(1)(b) is that the limitation period for these offences is not retrospectively repealed where the offence allegedly occurred (with a consenting non-relation) in a public place. The purpose of this provision is to ensure that consenting sexual acts between non – related adults cannot be prosecuted due to the retrospective repeal.

While the first 2 of these offences (buggery and attempt to commit buggery) refer to ‘bestiality with any animal’ the amendment does not retrospectively repeal the statutory limitation period for the purpose of allowing a criminal proceeding for an offence of

bestiality alone. This is because the offence of bestiality, as it was at the time, will not involve a victim in the same way as other offences covered by the amendments.

Human Rights discussion

(a) The amendment does not limit the right against retrospective criminal laws at section 25 of the *Human Rights Act 2004*.

The right states at section 25(1) that 'No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.' The retrospective repeal of the limitation periods proposed in this Bill will not have the effect that a person may be held guilty of a criminal offence due to conduct that was not a criminal offence when it was engaged in.

While the right to not have criminal proceedings brought against a person where a statutory limitation on such proceedings has accrued is not protected by the *Human Rights Act 2004* it warrants some discussion here. This right is limited by the amendment and the limitation is reasonable and justified.

The purpose of the amendment is to afford victims of historic sexual offences the opportunity to have a prosecution brought against the alleged offender, providing such victims with access to the justice system that was previously denied to them. It is particularly important to provide this opportunity to historic sexual offence victims as it is well-documented that sexual assault and abuse victims are likely to delay reporting of the crime for a number of reasons and would therefore not have been in a position to report the offence within the 12-month limitation period. The amendment would have the effect of placing both the victim and defendant in these historic sexual offences in the same position as victims and defendants in other historic sexual offence cases, where no limitation period applies.

The amendment would remove a defendant's accrued right to immunity from prosecution. This is essential to afford victims of certain historical sexual offences the opportunity to have criminal proceedings brought for those offences.

There are no less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

(b) In individual cases, the amendment may limit the right to a fair trial and/or rights in criminal proceedings (including the right of anyone charged with a criminal offence to be tried without unreasonable delay and to examine prosecution witnesses) at sections 22(2)(c) and (g) of the *Human Rights Act 2004* due to the delay in prosecution.

The amendment will be subject to a number of existing safeguards in both common and statute law which currently apply to other historic sexual offences (which are not subject to statutory limitations) and which address these concerns.

Firstly, at common law a trial judge is required to warn a jury where there has been a long delay in bringing a prosecution for a sexual offence, resulting in a perceptible risk of forensic disadvantage to the defendant: *Longman v The Queen* (1989) 168 CLR 79; *Crampton v The Queen* (2000) 206 CLR 161; *Doggett v The Queen* (2001) 208 CLR 343; *R v BWT* (2002) 54 NSWLR 241; *Dyers v The Queen* (2002) 210 CLR 285. Such forensic disadvantage may be the death of a crucial witness, the loss of documents that could identify the location of the defendant on a particular date or the lost opportunity of investigating the circumstances of the alleged offences.

Secondly, the ACT Supreme Court has the power under the Court Procedures Rules 2006 and the *Human Rights Act 2004* to permanently stay proceedings where the accused would not have a fair trial due to an inability to test facts in issue due to the passage of time.[1]

While a permanent stay is an exceptional remedy, it may be granted if the defendant's right to a fair trial has been prejudiced: *Jago v District Court* (1989) 168 CLR 23, for example, by undue delay amounting to abuse of process. The defendant must show that the effect of the delay is that he/she cannot receive a fair trial, despite the trial judge's powers to control procedure, exclude evidence, and give directions to the jury.[2]

Thirdly, there are a number of sentencing principles that protect an accused convicted of an historic sexual offence. A court is "...to take into account the sentencing practice as at the

[1] The interpretation of any ACT statutory provision concerning the grant of a stay must be conducted with section 22(2)(c) of the *Human Rights Act 2004* (the right to be tried without unreasonable delay) in mind: *R v Dennis Michael Nona* [2012] ACTSC 41.

[2] For an example of the circumstances in which a permanent stay will be granted due to an unreasonable delay see: *R v Kara Lesley Mills* [2011] ACTSC 109.

date of the commission of an offence when sentencing practice has moved adversely to an offender" (*R v MJR* (2002) 54 NSWLR 368). This means that a court will look to the sentencing range that existed at the time of offending and if that cannot be established, the court will "sentence the offender in accordance with the policy of the legislature current at the time of offending and consistently with the approach adopted by sentencing courts at that time" (*R v Roberts* [2003] NSWCCA 309, Howie J).

Delay may also be a mitigating factor in sentencing: "a delay in investigation and prosecution of an offence may, when lengthy, lead to a degree of leniency being extended" (*R v Todd* [1982] 2 NSWLR 517 at 519). Delay may affect fairness because of changed circumstances, further suspense or anxiety.

Finally, fairness to an accused is enhanced by new section 441A(1)(a) of the Bill which provides that a criminal proceeding cannot be brought against a defendant who is less than 2 years older than the complainant for the following offences:

- Carnally knowing a girl between ten and sixteen
- Attempt to carnally know a girl between ten and sixteen; and
- Indecent assault of girl under sixteen.

This is the law that applies today in the ACT to defendants of comparable sexual offences against children (for example, the offence of sexual intercourse with a young person under 16). This amendment will ensure that it also applies to defendants in proceedings for these historic sexual offences.

Part 4 - Crimes (Assumed Identities) Act 2010

Clause 8 – Making entries in register of births, deaths or marriages, Section 16(2)(a)(ii)
This clause amends section 16 of the *Crimes (Assumed Identities) Act 2009* (the Assumed Identities Act) to allow an intelligence agency to apply to the ACT Supreme Court to make an entry in a register of births, deaths and marriages.

The assumed identity laws create an efficient, transparent and accountable legislative regime for acquiring and using false identity documents for use in cross border investigations.

The purpose of the Assumed Identities Act is to provide a law to authorise assumed identities in the ACT that can also be used in other jurisdictions that have a corresponding assumed identities law. In turn the ACT recognises assumed identities authorised in other jurisdictions under corresponding laws.

Section 16 of the Assumed Identities Act provides discretion for the Supreme Court, on application by a relevant chief officer of a law enforcement agency, to order the registrar-general to make an entry in the register under the *Births, Deaths and Marriages Registration Act 1997* in relation to the acquisition of an assumed identity under an authority or corresponding authority. 'Law enforcement agency' is defined as the Australian Federal Police or the Australian Crime Commission.

An order under this section authorises the registrar to make any entries in a register of births, deaths or marriages that are necessary to give effect to the order. It may also be necessary to create entries in a register of births, deaths or marriages for fictitious "parents" and "relatives" of the assumed identity. This assists the law enforcement officer in substantiating his or her background and credibility.

Section 16 also allows a person who has acquired an assumed identity in another Australian jurisdiction to acquire evidence of the identity in the ACT.

The ACT legislation was the result of model laws developed in 2003 by a Joint Working Group of the then Standing Committee of Attorneys-General, which were included in the Cross-Border Investigative Powers for Law Enforcement Report (the Report). These model laws did not include intelligence agencies in the definition of 'law enforcement agency'.

The Commonwealth assumed identities provisions, in the *Crimes Act 1914*, extend their regime to intelligence agencies. This Bill amends section 16 of the ACT Assumed Identities Act to allow an intelligence agency to apply to the ACT Supreme Court to have an entry in a register of births, deaths or marriages.

Prior to this, intelligence agencies could not make an application as they do not fall under the definition of a law enforcement agency under the ACT legislation. These agencies require the

ability to seek evidence of a lawfully issued identity to perform their functions without creating an unnecessary risk to officers.

This sentiment mirrors the Report, in which it was noted that 'undercover operatives need to be able to substantiate their assumed identity with proper identification documents', and 'in the absence of verifiable identity the safety of undercover operatives can be jeopardised' (page 149).

This amendment corresponds with the aim of the national model for assumed identity laws to create an efficient, transparent and accountable legislative regime for acquiring and using false identity documents for use in cross border investigations (page 150 of the Report). Amending the legislation to allow intelligence agencies to seek evidence of a lawfully issued assumed identity ensures better transparency and accountability in intelligence operations.

Clause 9 – New section 16(6)

This clause defines an intelligence agency in section 16 as including the Australian Security Intelligence Organisation and the Australian Secret Intelligence Service.

Human rights discussion

The amendment to section 16 does not engage human rights as prescribed in the *Human Rights Act 2004.* The amendment to section 16 is consequential in nature and merely extends a power that already exists for law enforcement agencies to also include intelligence agencies. The Supreme Court may make the order if satisfied that the order is justified given the tasks of the controlled operation or the investigation contemplated by the authority. The amendment is necessary to ensure consistent national legislation in relation to assumed identities.

For a discussion of the human rights engaged by the assumed identities legislation as a whole see the Crimes (Assumed Identities) Bill 2009 Explanatory Statement.

Part 5 - Crimes (Child Sex Offender) Act 2005

These are technical amendment to the *Crimes (Child Sex Offender) Act 2005* designed to increase administrative efficiency and to remove ambiguity arising from previous amendments to the legislation. No human rights are limited by these amendments.

Clause 10 – Offence – offender in ACT must report change of details, Section 54(1)(c)
This clause removes ambiguity from section 54(1)(c) by allowing for the fact that an offender's reporting period may have ended either, within the 24 hour reporting period specified in section 54(1)(b)(i), or the 7 day reporting period specified in section 54(1)(b)(ii).

Clause 11 – New section 132AA
This clause confers power to the Chief Police officer to delegate their functions in relation to prohibition orders under Chapter 5A of the Act to a deputy chief police officer. This is consistent with the approach taken in the *Crimes (Assumed Identities) Act 2009*.

Clause 12 – Further amendments, new note
This clause notes the sections within Chapter 5A in relation to which the Chief Police Officer may delegate their functions.

Part 6 - Crimes (Forensic Procedures) Act 2000

Clause 13 – Securing the presence of suspects at hearings – suspect not in custody, New section 37(1A) and (1B)
This clause provides that where police officers seek a summons or warrant to secure the presence of a suspect not in custody at a hearing for a forensic procedure order they must make the application in writing and it must be supported by relevant evidence on oath or by affidavit.

The clause also provides that a magistrate may only issue a summons if satisfied that it is necessary to ensure the suspect's attendance or is otherwise justified.

The purpose of this clause is to provide appropriate requirements for summons and warrant applications in this context and to bring the law in the ACT in line with Commonwealth provisions.

This amendment also ensures consistent requirements for summons and warrant applications for both serious offenders and suspects.

Clause 14 – Sex of person carrying out or helping carry out forensic procedures, New section 54(6) and (7)

This clause provides that if an intimate forensic procedure is to be carried out on a suspect, serious offender or volunteer (a relevant person), the person carrying out the procedure and anyone asked to help carry it out need not be of the same sex as the relevant person where they consent to a person of the opposite sex carrying out, or helping to carry out, the procedure.

Currently a person carrying out, or helping to carry out an intimate forensic procedure must be the same sex as the relevant person.

An intimate forensic procedure includes examinations and the taking of a sample by swab, washing or suction from the external genital or anal area, the buttocks or breasts.

Most practitioners who are qualified to carry out such procedures are female. Most suspects, serious offenders or volunteers are male. This amendment will mitigate resourcing and practical impediments to the conduct of forensic procedures. Where qualified male practitioners are not available to carry out these procedures this may result in a delay in collecting evidence or in less qualified practitioners carrying out procedures, risking the collection of the best evidence possible and therefore risking the fairness of a trial. The amendment will therefore ensure that evidence is collected in a timely and appropriate manner so that the best and most reliable evidence is provided in sexual assault matters.

The amendment provides for a different approach in relation to children and young people, as outlined below under the Human Rights discussion.

<u>Human Rights discussion</u>

This amendment may limit the following human rights recognised by the *Human Rights Act 2004* (the Human Rights Act):

- protection from torture and cruel, inhuman or degrading treatment (section 10);
- the right to privacy and reputation (section 12);
- the right of every child to the protection needed by the child because of being a child, without distinction or discrimination of any kind (section 11(2)); and

- the right to liberty and security of person (section 18).

Any limitation of these rights is justified and proportionate as the suspect, serious offender or volunteer (the relevant person) must give their consent before a person of the opposite sex can carry out an intimate forensic procedure on them. The relevant person can refuse to give consent to the procedure being carried out by a practitioner of the opposite sex.

Where a relevant person elects to not consent a qualified person of the same sex would be required to perform the procedure. This approach would ensure that even where an intimate forensic procedure is carried out on a suspect or serious offender the procedure will afford the person as much dignity as possible.

The amendment may limit the right at section 11(2) of the Human Rights Act however any limitation is justified and proportionate as it provides that where the relevant person for the purposes of section 54 of the *Crimes (Forensic Procedures) Act 2000* (the FP Act) is a child or young person they be given the choice of the sex of the person carrying out or helping carry out the forensic procedure. If the child or young person doesn't exercise the choice then the person carrying out or helping carry out the forensic procedure must be of the same sex as the child or young person.

Clause 15 – Court order for carrying out of forensic procedure on serious offender, Section 77(3A)

This clause provides that where a police officer applies for an order for a forensic procedure to be carried out on a serious offender they must make the application in writing and it must be supported by evidence about relevant matters on oath or by affidavit.

The purpose of this clause is to provide appropriate requirements for forensic procedure applications in this context and to bring the law in the ACT in line with Commonwealth provisions.

This amendment also ensures consistency between forensic procedure applications for suspects and serious offenders.

Clause 16 – New sections 77A to77C

This clause will ensure that a serious offender is brought before the court for a hearing of a forensic procedure order application. The amendment was recommended by the DNA Forensic Procedures – Further Independent Review of Part 1D of the *Crimes Act 1914*.[3] Under the FP Act an intimate forensic procedure may be carried out on a serious offender by court order.

A forensic procedure may be carried out on a serious offender in order to obtain evidence relevant to unsolved crimes as experience in Australia suggests that a small percentage of the community is responsible for the majority of crimes. Forensic information is then entered onto the National Criminal Investigation DNA Database to be used by Commonwealth, State and Territory law enforcement agencies in criminal investigations.

While the FP Act provides measures to ensure a suspect can be brought before the court for a hearing of a forensic procedure order application no such provisions are available for a serious offender. The FP Act defines a serious offender as a person who is convicted of an ACT offence punishable by imprisonment for longer than 12 months or an offence against another jurisdiction punishable by imprisonment for 2 or more years.

The amendment provides that police officers may apply for a summons or warrant to secure a serious offender's attendance at such a hearing whether they are already in custody or not.

Police officers must apply in writing, stating the type of forensic procedure sought to be carried out and providing supporting evidence on oath or affidavit.

Where the application is for a summons it must address the following matters: that the issue of the summons is necessary to ensure the appearance of the serious offender at the hearing of the application; or that the issue of the summons is otherwise justified.

Where the application is for an arrest warrant the application must address the following matters: that the arrest is necessary to ensure the appearance of the serious offender at the hearing of the application; or that the serious offender might destroy evidence that might be

[3] *DNA Forensic Procedures – Further Independent Review of Part 1D of the Crimes Act 1914*, 30 June, 2010, Recommendation 6(d).

obtained by carrying out the forensic procedure; or that the issue of the warrant is otherwise justified.

Where a warrant is issued by the court for a serious offender already in custody the police officer must return the suspect to the place of the original custody:

- if the application for the order is refused – without delay; or
- if the order is made – without delay after the period after the order is that made that is reasonably necessary to carry out the forensic procedure.

Safeguards also exist where a warrant is issued for a serious offender not in custody. Firstly, a magistrate is empowered to issue a summons instead of a warrant to ensure the attendance of the offender.

A magistrate may issue a warrant only if satisfied: that the arrest is necessary to ensure the appearance of the serious offender at the hearing of the application; or that the serious offender might destroy evidence that might be obtained by carrying out the forensic procedure; or that the issue of the warrant is otherwise justified.

This amendment to ensure a serious offender is brought before a court for a hearing for a forensic procedure order application will bring ACT law into line with the Commonwealth law. New section 77C provides exceptions to the circumstances in which a serious offender must be present at the hearing of an application for a forensic procedure order.

The purpose of this clause it to provide that a hearing for a forensic procedure order may proceed where a serious offender is in custody and it is not practicable for them to be present by audio link or audiovisual link or where a notice of the hearing date has been served on the serious offender and they are not present.

This clause mirrors the approach taken in relation to a hearing for a forensic procedure order in relation to suspects. It contemplates the situation where a serious offender is in another jurisdiction and allows the court to order that the suspect may be present through audio link or audiovisual link.

The clause does not provide for evidence to be given by those means from within the ACT if the serious offender is in custody, as the geography of the ACT is such that is should always be possible for a serious offender to be before the court if they are in custody.

The clause also provides that a hearing may proceed where a serious offender is not in custody but has been served with a summons to attend the hearing and is not present.

The clause also provides safeguards for serious offenders at a forensic procedure order application hearing, including the right of a serious offender who is a child or incapable person to have an interview friend. This supports the right of a convicted child to be treated in a way that is appropriate for a person of the child's age (section 20(4) of the *Human Rights Act 2004*).

Human Rights discussion

The right to liberty and security of person at section 18 of the *Human Rights Act 2004* (the Human Rights Act) may be limited by the amendment as it provides for the possible arrest of a serious offender (in custody or not) for attendance at a hearing.

Section 18 of the Human Rights Act provides that:

- everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained (section 18(1));
- no-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law (section 18(2));
- anyone who is arrested must be told, at the time of arrest, of the reasons for the arrest and must be promptly told about any charges against him or her (section 18(3)); and
- anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful (section 18(6).

The right at sections 18(1) and (2) are limited. However, such limitation is justified and proportionate, as outlined in the discussion below. The arrest of a serious offender for attendance at a court hearing is not arbitrary and is in accordance with the procedures established by law as police officers must apply for an arrest warrant in writing, justifying the

need to arrest and a court must consider the application in accordance with relevant criteria before issuing such a warrant.

Section 18(3) is not limited as common law powers of arrest require police officers to tell arrested people of the reason for their arrest.[4]

Section 18(6) is not limited as prior to the serious offender being deprived of liberty by arrest a court must have already decided whether such detention is lawful as the amendment requires police officers to apply for an arrest warrant in writing, justifying the need to arrest and a court must consider the application in accordance with relevant criteria before issuing such a warrant.

Section 19 of the Human Rights Act is not limited by the amendment. Section 19 provides that: Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. As outlined below, common law powers of arrest, together with specific statutory requirements for children and young people who are under the restraint of police officers, will apply to arrest of a serious offender for attendance at a hearing.

Section 11 of the Human Rights Act is not limited by the amendment. Section 11(2) provides that: Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind. As outlined below, common law powers of arrest, together with specific statutory requirements for children and young people who are under the restraint of police officers, will apply to arrest of a serious offender who is a child or young person for attendance at a hearing.

The purpose of this amendment is to ensure that serious offenders attend any hearing where an application is made for a forensic procedure to be ordered to be carried out on the serious offender. It is generally not appropriate for this type of matter to proceed without the serious offender in attendance. As the Explanatory Notes for the Model Forensic Procedures Bill – DNA Database Provision states, there are matters the court may wish to be informed about in deciding the application:

> If the person does not consent to an intimate procedure, then they should have the right to have the issue considered by a court (it may be, for example, that it is the fifth time in a month that a sample is

[4] *Christie v Leachinsky* [1947] AC 573; [1947] 1 All ER 567 and *R v Kulynycz* [1971] 1 QB 367; [1970] 3 WLR 1029; [1970] 3 All ER 881 (CCA).

> sought, or there might be an argument that the person is not in fact a serious offender for the purposes of the legislation, or that the offence is so remote from the sort of offence which is likely to be relevant to forensic matching or that the person is in fact a suspect and argues he or she should be dealt with under the provisions that relate to suspects)....[5]

Extensive safeguards exist when arrest is actioned under a warrant as the terms of the warrant will largely govern what police can and cannot do. The amendment only provides that a court can issue a warrant (a) directing a person holding the serious offender in custody to deliver them into the custody of a police officer *for the hearing of an application for an order under this part*; or (b) for the arrest of the serious offender (not already in custody) *to bring the suspect before the court for the hearing of the application.*

The arrest power is proportionate and justifiable as a Magistrate may only issue a warrant if satisfied:

(a) that the arrest is necessary to ensure the appearance of the serious offender at the hearing of the application; or
(b) that the serious offender might destroy evidence that might be obtained by carrying out the forensic procedure; or
(c) that the issue of the warrant is otherwise justified.

The amendment also provides that an application for a summons or arrest warrant must be made in writing and supported by evidence on oath or affidavit dealing with the matters the Magistrate must consider before ordering such a summons or warrant.

Common law protections in relation to arrest by police officers under a warrant will apply. These protections include:

- a police officer must tell the serious offender why they are being arrested[6];
- a police officer must only use such force as is reasonably necessary to effect the arrest[7]; and
- the serious offender must be brought before a justice without unreasonable delay[8].

[5] *Model Forensic Procedures Bill – DNA Database Provisions,* Model Criminal Code Officers Committee, 2000, p.3
[6] *Christie v Leachinsky* [1947] AC 573; [1947] 1 All ER 567 and *R v Kulynycz* [1971] 1 QB 367; [1970] 3 WLR 1029; [1970] 3 All ER 881 (CCA).
[7] See *Williams v The Queen* (1986) 161 CLR 278; 60 ALJR 636; 28 A Crim R 1; 66 ALR 385
[8] See *R v Turner* [1962] VR 30 (FC)

The Act does not authorise the carrying out of an intimate forensic procedure on a serious offender who is a child or incapable person. A non-intimate forensic procedure on a serious offender who is a child or incapable person can only be authorised by order of a court under section 77 of the Act.

The new provisions will therefore apply to a hearing of an application for a *non-intimate* forensic procedure on a serious offender who is a child or incapable person.

The safeguards and restrictions on police powers of arrest of a child or young person at Division 10.7 of the *Crimes Act 1900* (ACT) will apply to an arrest by a police officer of a serious offender who is a child or young person under the new provisions. These safeguards and restrictions include:

- police must take reasonable steps to tell a responsible person (such as a parent) about the arrest.

Part 7 - Criminal Code 2002

Clause 17 – Definitions, applied provisions and default application date, Section 10(1)
This clause extends the default application date for applied provisions to 1 July 2017 so that offences that have not yet been re-drafted to comply with principles at Chapter 2 of the *Criminal Code 2002* can continue to operate effectively.

Clause 18 – Omissions, Section 16(b)
Under current ACT law an omission can only be a physical element of an offence if the law creating the offence makes it so or the law creating the offence provides that the offence is committed by a failure to perform an act that by law there is a duty to perform.

The High Court of Australia in *The Commonwealth Director of Public Prosecutions v Poniatowska* (2012) 282 ALR 201 held that 'by law there is a duty to perform' does not encompass common law duties to perform or duties imposed under laws of other states or territories.

The purpose of this clause is to ensure that duties under non- ACT law (common law, Commonwealth law and law of other states and the Northern Territory) can constitute an omission.

Clause 19 – Receiving, Section 313(3)(b)

This clause is a consequential amendment to clause 20 which re-defines the meaning of stolen property. This clause removes reference to 'original' stolen property to maintain consistency within the *Criminal Code 2002*.

Clause 20 – Section 314, meaning of stolen property

This clause amends the meaning of stolen property for the section 313 offence of 'receiving stolen property' to mean the 'appropriation of property' as defined in section 304. Appropriation of property is the assumption of the rights of an owner to ownership, possession or control of the property and is to be read in conjunction with section 18 of the *Criminal Code 2002*. The fault element for 'appropriation of property' is intention.

The purpose of this amendment is to bring the ACT into line with other jurisdictions which do not require a 'chain of title' to be proved in order to prove the s313 offence of 'receiving stolen property'. This amendment addresses the "difficulty of proving receiving" referred to in the ACT Court of Appeal in *Hill v R* [2011] ACTCA 5. This amendment does not limit the right to the presumption of innocence at section 22(1) of the Human Rights Act because it does not shift the evidential or legal burden of proof away from the prosecution.

Part 8 – Criminal Code Regulation 2005

Clause 21 – Definitions – Code, s10(1), def *default application date*

This part amends section 4A of the Criminal Code Regulation 2005 to omit the reference to the default application date. This is because this Bill is amending the default application date in section 10(1) of the *Criminal Code 2002* (see Part 7 above).

Part 9 - Drugs of Dependence Act 1989

Section 171A of the *Drugs of Dependence Act 1989* allows a police officer to serve an offence notice against a person in lieu of prosecution, if the officer reasonably believes the person has committed a simple cannabis offence, A simple cannabis offence is currently defined to include possession of less than 25 grams of cannabis and attracts a penalty of 1 penalty unit. It has been noted the most commonly purchased amount of cannabis for personal consumption in the ACT is greater than the threshold quantity of cannabis that can be dealt with under the current offence notice provision.

This clause would allow police officers to dispense with possession of up to 50 grams of cannabis under the offence notice scheme. This increase will improve access to early diversion away from the criminal justice system through police intervention and improve consistency with offence notice regimes in other States and Territories.

No human rights are limited by this amendment.

Clause 22 – Possessing prohibited substances, Section 171(1)(a)
This clause raises the simple cannabis offence threshold from 25g to 50g.

Clause 23 – Offence notices, Section 171A(7)(b)

This clause makes a minor consequential amendment arising from raising the simple cannabis offence threshold from 25g to 50g.

Part 10 - Firearms Act 1996

Clause 24 – Meaning of *firearm*, New section 6(1)(b)(vi)
This clause inserts firearm frames and firearm receivers within the definition of ‘firearm’ for the purposes of the *Firearms Act 1996.* This amendment brings the ACT into line with most Australian jurisdictions. The amendment supports the objects of the *Firearms Act 1996* as firearm frames and firearm receivers are core components from which complete firearms can be assembled using firearm parts that can be illicitly acquired.

The effect of this amendment is that a firearms licensee must not acquire or possess a firearm frame or receiver unless authorised to do so. In order to acquire a frame or receiver the licensee will be required to obtain a permit to acquire the item. Licensees will also be required to register firearm frames and firearm receivers.

Acquiring or possessing a firearm frame or firearm receiver without authority will become a serious criminal offence as a result of the change to the definition of firearm.

Clauses 25 and 26 - Adult firearms licences – genuine reasons to possess or use firearms
These clauses re-insert 'recreational hunting' as a genuine reason in table 61, item 2 of the *Firearms Act 1996.*

The *Crimes Legislation Amendment Act 2013* amended table 61, item 2 to remove reference to recreational hunting as ACT Parks and Conservation Service and ACT Forests have a policy to not permit recreational hunting in reserved areas. The intention of the amendment was not to remove recreational hunting as a genuine reason where the activities occur on rural land. The amendment addresses this error.

Clause 27 – New section 263A
This clause provides a three-month amnesty period for certain dealings with firearm frames and receivers.

The amnesty period applies to people who have acquired firearm frames or receivers before the commencement of clause 24. Where this is the case, the person does not commit an offence under division 7.1. These offences relate to unauthorised possession or use of firearms.

The amnesty allows the person to apply to the registrar of firearms to register the firearm frame or receiver. The amnesty period for the sale or disposal of firearm frame and receivers is limited to transactions undertaken by or through a firearms dealer or under the supervision of a police officer authorised by the registrar of firearms to supervise such transactions.
The purpose of the amnesty is to allow people who have previously acquired a firearm frame or receiver to comply with the new provisions through registration or disposal.

Clause 28 - Dictionary, definition of *firearm part*

This clause amends the dictionary definition of *firearm part* to remove reference to firearm frames and firearm receivers and to ensure consistency with new section 263A of the Act.