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

**CRIMES LEGISLATION AMENDMENT BILL 2011  
EXPLANATORY STATEMENT**

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# Crimes Legislation Amendment Bill 2011

## Outline

### Purpose of the Bill

The Crimes Legislation Amendment Bill 2011 (the Bill) makes amendments to the *Crimes (Sentencing) Act 2005*, the *Crimes Act 1900* and the *Criminal Code 2002*.

The amendment to the *Crimes (Sentencing) Act 2005* inserts a new consideration into section 33 (1) to which a court will have regard at sentencing. The purpose of this amendment is to ensure that a victim's special occupational vulnerability as a provider of an important public service is given appropriate weight at sentencing. It will apply to victims such as police officers, emergency services workers and care and protection workers.

The amendments to the *Crimes Act 1900* and the *Criminal Code 2002* make changes to the law of self-defence. The amendments will prevent people from pleading self-defence to an offence because of perceived unlawful imprisonment where the victim is a police officer, whether or not the perceived imprisonment was in fact unlawful, in circumstances where the police officer was acting in good faith.

The Bill will also address concerns about the frequency and severity of assaults against police in the ACT and encourage peaceful resolution in perceived unlawful arrest situations.

Currently, the law on self-defence allows a person to use reasonable force to resist what they reasonably believe to be an unlawful arrest.<sup>1</sup> This is the case even if the arrest was lawful or was unlawful for a technical reason and the police were acting in good faith.

This rule has its origins in 17<sup>th</sup> century England. The rationale for the rule is two-fold:

- an unlawful arrest was a 'provocation' that justified the use of force; and
- an unlawful arrest could lead to a long term of unlawful imprisonment before a trial was held.

This reasoning is no longer relevant to modern society. Now, an unlawful arrest results in an accused person spending a matter of hours in custody before being brought before a judicial officer to apply for bail and/or challenge the lawfulness of their arrest. Also, there are a number of remedies open to a person who is unlawfully arrested, such as lodging a civil claim for damages, making an application for any evidence obtained as a consequence of an unlawful arrest to be excluded in criminal proceedings, or making a complaint to the Professional Standards Unit of the Australian Federal Police (the AFP) or the Ombudsman.

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<sup>1</sup> *R v Ryan* (1890) 11 L.R. (NSW) 171; *McLiney v Minster* [1911] VLR 347.

The Bill amends section 45 of the *Criminal Code 2002* and inserts a new section into the *Crimes Act 1900* to limit the availability of self defence for people who assault police in the course of an arrest or while under police restraint. A defendant would not be able to raise self-defence if they assaulted police in response to perceived unlawful arrest or restraint. The defence would not be available even if the arrest or restraint was in fact unlawful as long as police were acting in good faith. However, the defence would still be available if the defendant assaulted police in response to harm or threat of harm by police.

It is not the intention of this Bill to broaden the circumstances in which a police officer may use force. Similarly, it is not the intention of this Bill that the amendments will excuse the use of excessive force against a person.

Rather, it is intended that this Bill and the proposed changes to the law on self defence will actually reduce the likelihood that police officers will use force. This is because the current rule of self defence may embolden the arrestee use violence, often forcing police to respond with a greater measure of force. In such circumstances, there is a real danger for events to quickly escalate.

The Bill does not restrict the remedies that are available to a person who believes that unreasonable force was used against them. In such situations, a person would be able to lodge a civil claim for damages, or make a complaint to the Professional Standards Unit of the AFP or the Ombudsman.

Notwithstanding, this Bill will not remove the requirement for a police officer to use force in a reasonable manner and in a way that is the minimum force reasonably necessary in the circumstances.

### Human Rights Considerations

The proposed amendments to the law on self-defence contained in this Bill engage a number of rights contained in the *Human Rights Act 2004* (HRA). The rights engaged are:

- right to life – section 9; and
- right to liberty – section 18.

Additionally, the right to recognition and equality before the law – section 8 (3) – may also be engaged by the Bill. An assessment of whether this right is engaged depends on the interpretation of the nature of the right at section 8 (3).

While the above human rights may be engaged by this Bill, the limitations placed on these rights are justifiable. Each right is discussed in greater detail below.

In order to assess whether the Bill is compatible with the HRA, it is necessary to assess whether each restriction on HRA rights is reasonable in accordance with section 28. Section 28 (2) provides:

- (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
- (a) the nature of the right affected;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relationship between the limitation and its purpose;
  - (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

### ***Recognition and equality before the law***

Section 8 (3) of the HRA provides:

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

### **Clauses 4, 6 and 7**

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

The right to equality before the law may be engaged by clauses 4, 6 and 7 (the limitation on self-defence if defendant under police restraint). This is because the availability of self-defence in response to perceived unlawful imprisonment is restricted where the victim is a police officer. This may have the effect of elevating the protection of one group in the community above that of other groups.

It is unlikely that this right is engaged as the right would appear to be directed toward the enforcement of the law. ‘Equality before the law’ has been essentially held to mean that judges and administrative officials must not act arbitrarily in enforcing laws.<sup>2</sup> In particular, it has been stated that ‘the principle of equality merely requires that objectively equal fact patterns be treated equally, but also objectively unequal fact patterns be treated unequally’.<sup>3</sup>

If the right is engaged, however, any limitation on the right to equality before the law is reasonable and justifiable. Article 26 of the *International Covenant on Civil and Political Rights*, from which section 8(3) derives, provides that a ‘differentiation based on reasonable and objective criteria does not amount to prohibited discrimination’. Accordingly, not all differences of treatment amount to discrimination.

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

The potential limitation of this right results from the importance of the purposes of the Bill in reducing assaults on police and encouraging peaceful resolution in arrest situations. It recognises the specific role that police play in maintaining order which puts them at greater

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<sup>2</sup> Nowak, M UN Covenant on Civil and Political Rights : CCPR Commentary, 2<sup>nd</sup> revised edition, N.P Engel, Publisher, 2005 at 606

<sup>3</sup> *ibid*

risk of violence. The purpose of clauses 4, 6 and 7 of the Bill are twofold. Firstly, the Bill aims to reduce the number and severity of assaults on police in the ACT. Secondly, by encouraging peaceful resolution in perceived unlawful arrest situations, the Bill will reduce the necessity for violence and/or use of force in arrest/restraint situations involving police officers.

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

The clause 4, 6 and 7 amendments limit the availability of self defence for people who assault police in the course of an arrest or while under police restraint. A defendant would not be able to raise self-defence if they assaulted police in response to a perceived unlawful arrest or restraint. The defence would not be available even if the arrest or restraint was in fact unlawful as long as police were acting honestly.

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

Arrest, by its very nature, places police officers in direct physical proximity to another person in a situation where it is very likely that the other person would perceive themselves as being in direct conflict with the police officer.

It is appropriate to single out police with respect to their provision of services to the public.

While section 218 of the ACT's *Crimes Act 1900* provides for a person who is not a police officer to arrest another person (without a warrant) in circumstances where the other person believes on reasonable grounds that the person is committing or has committed an offence, police officers are the only class of person who, by virtue of their occupation, are required to perform arrests.

When a police officer takes the oath or affirmation of office, he or she does so using a set of words in which they declare that they will uphold the law and serve and protect the community. Police officers are the only class of person on whom there is a requirement by their employer and an expectation by the community to perform arrests.

By limiting the availability of self-defence, the Government is addressing concerns about the frequency and severity of assaults against police in the ACT.

By limiting the availability of self-defence in very specific circumstances a message is sent that violent resolution of a misunderstanding or technical error (made in good faith) by police officers is not acceptable. This message, in turn, is likely to result in a reduction of violence and necessary use of force in restraint and arrest situations.

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

There are no less restrictive measures available as an appropriate alternative to clauses 4, 6 and 7. These clauses will limit the application of the law of self-defence for people who assault police in the course of an arrest or while under police restraint. A defendant will not be able to raise self-defence if they assaulted police in response to perceived unlawful arrest

or restraint. The defence will not be available even if the arrest or restraint was in fact unlawful as long as police were acting honestly.

The modification of the law of self-defence in the *Crimes Act 1900* and the *Criminal Code 2002* represents a small but very important change. The change is carefully framed to address a specific issue.

### **Clause 5**

The purpose of clause 5 is outlined above under ‘Purpose of the Bill’. In summary, clause 5 will ensure that a person’s special occupational vulnerability as a provider of a service to the public is given appropriate weight at sentencing.

Clause 5 of the Bill, which provides a new sentencing consideration, may engage the right to equality before the law as it could be said to elevate those providing a service to the public above others. The clause will provide for an additional sentencing consideration where the victim was providing a service to the public, and this service exposed the victim to an increased risk of the offence.

As discussed above, ‘equality before the law’ has been held to mean that judges and administrative officials must not act arbitrarily in enforcing laws. It is therefore unlikely that clause 5 engages the right. If it does, the clause is reasonable and justified.

The purpose of the clause is to recognise the particular danger to which persons engaged in an occupation involving service to the public are exposed and to allow that risk and vulnerability to be taken into account in sentencing. The clause is restricted in its potential limitation of the right to equality before the law as the amendment only provides a further sentencing consideration that the court must consider (if relevant and known to the court). It is important to note that the amendment does not in any way restrict the discretion of the court as to whether to take these circumstances into account in sentencing. In accordance with accepted principles of sentencing, which expect the application of individualised discretion by sentencing courts, section 33 of the Sentencing Act provides that:

The fact that any relevant factor is known to the court does not require the court to increase or reduce the severity of the sentence for the offence.

Section 33 of the *Crimes (Sentencing) Act 2005* (the Sentencing Act) enables the court to consider whether the offender knew of the victim’s occupation at the time of the offence and to take this into account in sentencing. If the defendant was not aware that the victim’s occupation involved providing services to the public then that circumstance may not be taken into account as a factor by the court in determining a sentence.

There are no less restrictive means available as an alternative to clause 5. The Bill acknowledges the danger that not only police officers, but also nurses, emergency services

members, child protection workers and others engaged in occupations providing services to the public are exposed to on a daily basis.

### ***Right to life***

Section 9 (1) of the HRA states:

- (1) Everyone has the right to life. In particular, no-one may be arbitrarily deprived of life.

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

It might be argued that clauses 4, 6 and 7 may limit the right to life because a person who has been arrested or restrained by police might be restricted in defending their life.

The Bill does not engage the right to life because it retains the right for a person to plead self-defence where they reasonably believe their actions were necessary to defend themselves, or someone else, against physical harm. The Bill only restricts the ability for the defendant to plead self-defence where the person is responding to perceived unlawful imprisonment.

Additionally, the right to life is supported by existing legislative arrangements governing the powers of police officers. Police are required by law to only use such force as is necessary and reasonable in the situation. Therefore, this Bill supports police in complying with this legal requirement, and by extension, the right to life enshrined by the HRA.

### ***Right to liberty and security of the person***

Section 18 of the *Human Rights Act 2004* provides that:

- (1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.
- (2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.

#### **The nature of the right effected (section 28 (2)(a) of the HRA)**

Clauses 4, 6 and 7 of the Bill may limit the right to liberty because a person who has been arrested unlawfully will not have the defence of self-defence available where they, for example, assault a police officer in response to the unlawful arrest.

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

As outlined above, the purposes of the Bill are twofold and seek to enhance both police officers' and arrested peoples' right to life.

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

The limitation is restricted and proportionate to the aims of the Bill. In particular, the Bill provides that while the defence of self-defence is not applicable where a police arrest may be technically unlawful, a defendant will still be able to plead self-defence where the police officer did not honestly believe that the arrest was lawful. This prevents police from relying on the provisions in this Bill where an arrest is made in bad faith.

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

In light of the purposes of the Bill in reducing violence between police officers and people arrested, it is proportionate to this aim to require everyone, whether arrested lawfully or not, to not commit unlawful acts themselves, particularly unlawful acts that may result in serious harm to other people.

It is often the case that it is unclear until the matter is considered in court whether an arrest is in fact unlawful. In many cases an arrest may technically be unlawful despite the fact that the arresting police officer has acted in good faith. A response of violence by a person being arrested and later reliance by that person on the fact of an arrest being technically unlawful in such a situation would seem inappropriate.

The Bill restricts limitation of the right to liberty by only omitting the defence of self-defence in relation to police officers. Under ACT law medical officers, emergency services officers and corrections officers are also empowered and expected to lawfully restrain people in certain circumstances. The Bill does not extend the application of clauses 4, 6 and 7 to this broader class of persons providing public services.<sup>4</sup> The clauses are restricted in their application to police officers only because police officers are in a unique position in that they are expected to go further than merely restraining a person and are actually expected to arrest them. Furthermore, police are expected to enforce the laws of the Territory generally.

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

Arrest and other restraining directions, by their very nature, place police officers in direct physical proximity to another person in situations where it is very likely that the other person would perceive themselves as being in direct conflict with the police officer. This, together with the requirement (by virtue of their employment) and expectation by the community that police officers will arrest people in certain circumstances means that it is appropriate to single police out in the application of clauses 4,6 and 7 of the Bill.

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<sup>4</sup> *Corrections Management Act 2007*, Part 9.7 (use of force); *Mental Health (Treatment and Care Act) 1994*, section 35 (powers in relation to detention, restraint etc); *Public Health Act 1997*, section 115A (public health direction-confinement) and 116 (public health direction- implementation); *Emergencies Act 2004*, section 34 (1)(a) (General powers of chief officers) and 168 (power to remove person obstructing response operation etc).

The Bill restricts limitation of the right to liberty by requiring that the person being arrested must be reasonably aware that the police officer is a police officer, in order for Bill to apply. This addresses potential situations where, for example, a person is arrested or restrained by a plain clothes police officer or where an accused is deaf and cannot hear the police officer identify themselves as a police officer.

In addition, ACT law provides safeguards to ensure that persons arrested or restrained by police officers are treated justly. A person who is arrested must be charged within 4 hours of being arrested (unless the period is extended by a Magistrate for up to 8 hours) and within 48 hours of being taken into custody must be brought before a court so the court can decide whether the person's detention is lawful or not. In addition, a charged person has a right to be considered for release on bail in accordance with the *Bail Act 1992*.

A person would also be able to lodge a civil claim for damages, or make a complaint to the Professional Standards Unit of the AFP or the Ombudsman in situations of unlawful arrest.

# Crimes Legislation Amendment Bill 2011

## Detail

### Part 1 — Preliminary

#### Clause 1 — Name of Act

Clause 1 is a technical clause that names the short title of the Act.

#### Clause 2— Commencement

Clause 2 commences the Act on the day after it is notified on the ACT Legislation Register.

#### Clause 3— Legislation amended

Clause 3 lists the legislation that the Act amends.

### Part 2 — Crimes Act 1900

#### Clause 4—New section 293

This clause inserts a new section into the *Crimes Act 1900* to limit the availability of self-defence in response to perceived unlawful imprisonment for people who commit offences, such as assault, against police in the course of an arrest or restraint by police.

The common law defence of self-defence in response to unlawful imprisonment is currently proven where: the defendant believes on reasonable grounds that an act making up the offence is necessary to prevent or end the unlawful imprisonment of the defendant or someone else.<sup>5</sup>

New section 293(1) provides that a person cannot plead self-defence for an offence where:

- the elements of the common law defence of self-defence in response to perceived unlawful imprisonment exist; and
- the perceived unlawful imprisonment arose out of restraint by a police officer; and
- it was reasonably clear that the person carrying out the restraint was a police officer.

New section 293(2) provides that section 293(1) does not apply to an act that occurred before the commencement of section 293(1). The purpose of this section is to clarify that section 293(1) does not apply retrospectively.

New section 293(3) provides that section 293(2) and section 293(3) expire 5 years after the day section 293(3) commences.

New section 293(4) defines terms used in new section 293.

**Restraint** is a term used in section 293(1). ‘Restraint’ by a police officer is defined so that it includes not only arrest but any restriction on a person’s liberty as a result of arrest or as a result of a direction by a police officer. The purpose of this definition is to apply

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<sup>5</sup> *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645

section 293(1) in situations where the person has not been arrested but is nevertheless restricted by a police officer's direction. For example, section 293(1) would apply where a person is directed by a police officer to submit to a random breath test.

**Direction** is a term used in the definition of 'restraint'. The effect of this definition is that section 293(1) will only apply if a direction given by the police officer is given in the honest belief that the direction could be lawfully given. While section 293(1) applies where the direction given by the police officer is unlawful, this definition ensures that section 293(1) does not apply where a police officer is acting maliciously or in bad faith in giving a direction.

**Under arrest** is a term used in the definition of 'restraint'. The effect of the definition is that section 293(1) will only apply if the police officer arresting the person holds an honest belief that the arrest could be lawfully made. While section 293(1) applies where the arrest by the police officer is unlawful, this definition ensures that section 293(1) does not apply where a police officer is arresting maliciously or in bad faith.

### **Part 3 — Crimes (Sentencing) Act 2005**

#### **Clause 5—Sentencing—relevant considerations**

##### **New section 33 (1) (ga)**

This clause amends section 33 (1) of the *Crimes (Sentencing) Act 2005* (the Sentencing Act) to add a requirement that the sentencing court give consideration (where relevant) to whether the victim was a member of a vulnerable or at-risk occupation providing services to the public.

In sentencing an offender, section 33(1)(d) of the Sentencing Act currently allows the court to consider the personal circumstances of any victim of the offence if those circumstances were known to the offender when the offence was committed. The amendment goes beyond this section as the defendant does not need to know of the victim's occupation for the new section to apply. Under the relevant considerations in section 33 the court will be able (although is not required) to consider whether the offender knew of the victim's occupation at the time of the offence and take this into account in sentencing.

The purpose of this amendment is to place emphasis on the seriousness of assaulting a police officer, or any other officer whose occupation is providing services to the public, as such occupation places them at particular risk.

Police officers and other community service workers such as nurses and emergency services workers like ambulance paramedics and care and protection workers deserve extra consideration as the providers of important social services. The Bill will ensure that the special occupational vulnerability of these workers is given appropriate weight in sentencing offenders for assaults against them.

## Part 4 — Criminal Code 2002

### Clause 6—Self-defence

New section 42 (3) (c)

This clause inserts a new section into the *Criminal Code 2002* to limit the availability of self-defence in response to perceived unlawful imprisonment for people who commit offences, such as assault, against police in the course of an arrest or restraint by police.

Clause 6 inserts a new section 42(3)(c) in the *Criminal Code 2002* so that section 42(2)(ii) does not apply in certain cases.

Section 42(2)(ii) provides that:

A person carries out conduct in self-defence only if the person believes the conduct is necessary to prevent or end the unlawful imprisonment of himself or himself or someone else and the conduct is a reasonable response in the circumstances as the person perceives them.

New section 42(3)(c) will provide that the person does not carry out conduct in self-defence if the person:

- is under restraint by a police officer or is with someone else who is under restraint by a police officer; and
- the person is responding to prevent or end the restraint because the person believes the restraint is unlawful imprisonment; and
- it is reasonable for the person carrying out the conduct to know the person carrying out the restraint is a police officer.

### Clause 7—New section 42 (5) to (7)

Clause 7 inserts new section 42(5). New section 42(5) provides that new section 42(3)(c) and new section 42(7) do not apply to conduct that occurred before the commencement of new section 42(5).

Clause 7 inserts new section 42(6). New section 42(6) provides that new section 42(5) and new section 42(6) expire 5 years after the day new section 42(6) commences.

Clause 7 inserts new section 42(7) which provides definitions for terms used in new section 42(3)(c).

**Restraint** is a term used in section 42(3)(c). ‘Restraint’ by a police officer is defined so that it includes not only arrest but any restriction on a persons’ liberty as a result of arrest or as a result of a direction by a police officer. The purpose of this definition is to apply section 42(3)(c) to situations where the person has not been arrested but is nevertheless restricted by

a police officer's direction. For example, section 42(3)(c) would apply where a person is directed by a police officer to submit to a random breath test.

***Direction*** is a term used in the definition of 'restraint'. The effect of this definition is that section 42(3)(c) will only apply if a direction given by the police officer is given in the honest belief that the direction could be lawfully given. While section 42(3)(c) does apply where the direction given by the police officer is unlawful, this definition ensures that section 42(3)(c) does not apply where a police officer is acting maliciously or in bad faith in giving a direction.

***Under arrest*** is a term used in the definition of 'restraint'. The effect of this definition is that section 42(3)(c) will only apply if the police officer arresting the person holds the honest belief that the arrest could be lawfully made. While section 42(3)(c) does apply where the arrest by the police officer is unlawful, this definition ensures that section 42(3)(c) does not apply where a police officer is arresting the person maliciously or in bad faith.