2014

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

CRIMES LEGISLATION AMENDMENT BILL 2014

EXPLANATORY STATEMENT

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CRIMES LEGISLATION AMENDMENT BILL 2014

Outline

Purpose of the Bill

The Crimes Legislation Amendment Bill 2014 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:

a) create two new offences to expand the types of voyeuristic conduct already prohibited by the criminal law;

b) clarify the provision dealing with which director-general is responsible for certain young offenders subject to a good behaviour orders with a supervision condition.

c) add an example of when the Sentence Administration Board might reject a parole application to the *Crimes (Sentence Administration) Act 2005;*

d) allow a Victim Impact Statement to be in the form of a drawing or a picture;

e) correct a drafting error in the offence in the *Criminal Code 2002*, section 351 (False statement by officer of body);

f) prohibit the display of ice pipes, hash pipes and cannabis water pipes;

g) clarify that a surveillance device retrieval warrant ceases to have effect once fully executed;

h) amend the *Crimes (Forensic Procedures) Act 2000* to:

   i) provide for interview friends for Aboriginal and Torres Strait Islander people;

   ii) require the person carrying out or assisting in certain forensic procedures to be of the same sex as the subject of the procedure if practicable;

iii) remove inconsistency in language identified in sections 37, 77A and 77B to allow warrants and summonses to be issued by the Magistrates Court; and

iv) modify the terminology in section 77C to ensure any court may hear applications for a forensic procedure order;

i) amend the *Firearms Act 1996* to:

i) give authorised instructors a general authority to use club-owned firearms;

ii) allow licensees to use their firearms on club shooting ranges where they are registered for genuine reasons other than club use;

iii) clarify the existing restriction that a young person must be 12 years or older for possessing or using a firearm for the purposes of receiving instruction on a shooting range; and

iv) change the reference for power to destroy firearms from delegation by the director-general to delegation by registrar of firearms;

j) allow a delegate of the registrar of firearms to sign off on prohibited weapons evidentiary certificates;

k) provide appropriate authority for the Director-General of the Community Services Directorate or their delegate to bring a young person before a court for a civil proceeding.

Human Rights Considerations

The Crimes Legislation Amendment Bill 2014 engages a number of the rights in the ACT's *Human Rights Act 2004*.

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

- protection from torture and cruel, inhuman or degrading treatment (s10);
- the right to privacy and reputation (s 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 (s 11(2));
- the right to liberty and security of person (s 18); and

- presumption of innocence at (s 22(1)).

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

Crimes Legislation Amendment Bill 2014

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 2014*.

Clause 2— Commencement
This clause provides that the Act commence (other than s 32) the day after it is notified. Section 32 commences three months after the Act's notification day.

Clause 3— Legislation amended
This clause identifies the legislation amended by the Act.

Part 2 – Children and Young People Act 2008

Clause 4 – Orders to bring young detainees before court etc, Section 102 (2), new note
The clause inserts a signpost to new section 876A, described in detail at clause five.

Clause 5 – New section 876A

This clause provides authority for the Director-General of the Community Services Directorate or their delegate to bring a young person before a court for a civil proceeding and return them to the detention place in accordance with the order.

Currently, section 102 of the Children and Young People Act provides the ability for an order to bring a young detainee before a court 'or other entity' in criminal proceedings but not in civil proceedings.

The amendment mirrors the recently amended provision in relation to adults in the *Corrections Management Act 2007*.

Examples of the way this amendment may be used include if a domestic violence protection order or forensic procedure order is sought against the detainee or where the detainee is a witness who is the subject of a subpoena.

It is important to note that the amendment does not compel a young detainee to attend a civil proceeding. The amendment empowers the court to order the Director- General to comply

with a court order to bring a young person before the court where the young person consents to attend the civil proceeding.

Current provisions for young people attending civil proceedings would apply. In particular, see part 7A of the *Court Procedures Act 2004* which provides a range of protections and support for young people who are involved in or the subject of court proceedings, including civil proceedings.

Part 3 – Crimes Act 1900

Clause 6 – Offences against Act – application of Criminal Code etc, Section 7A, note 1

This clause indicates that the *Criminal Code 2002* applies to the new offences at clause 8.

Clause 7 – New section 61B

This clause inserts two new offences for intimate observations or capturing visual data etc.

<u>New offence – section 61B(1) observe or capture indecent content etc</u>

This amendment inserts a new offence of observing with a device or capturing visual data of another person where the content observed or captured is, in all the circumstances, an invasion of privacy and indecent.

The purpose of the amendment is to criminalise indecent observations or recordings of other people in situations where that person should be afforded privacy. The offence will ensure that the criminal law applies to conduct that amounts to an invasion of a person's privacy where the observing or capturing of visual data of the other person is, in all the circumstances, indecent. This reflects the community's expectation that certain private acts should not be subject to interference in this way.

The offences support the right to privacy at section 12 of the Human Rights Act which states that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily and not to have his or her reputation unlawfully attacked.

In the case of *Soderman v Sweden* the court considered Article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*; the right to respect for private and family life. The court held that a failure to implement legislation to prevent covert or non-

consensual filming or photographing of an individual is a violation of that individual's right to privacy.

As the range of acts that can potentially be covered is broad, the offence uses a number of mechanisms to limit its application as described below. The offence has been constructed to avoid inadvertent or accidental instances of the conduct. The Criminal Code, section 22 (Offences that do not provide fault elements) provides that a fault element of intention applies to a physical element that consists only of conduct. This means that the conduct of observing or capturing another person must be intentional.

The offence is also constructed to apply to behaviour involving emerging technology. The term 'capture visual data' is defined to include a recording, images that are capable of being distributed as well as any images capable of being transmitted in real time with or without retention or storage in a physical or electronic form. The offence is also intended to apply to conduct such as live streaming using the internet where no recording is being made in the typical sense as the content is live and ends once the streaming stops and cannot be retrieved.

Some examples of the behaviour this offence protects against include:

- observing someone in a private act at a distance using binoculars;
- intentionally setting a phone to record in a change room;
- streaming live data of a person in circumstances where they could reasonably expect to be afforded privacy; or
- taking photos of other people having sex.

The offence is limited to instances where the conduct would constitute an invasion of privacy. Technological advancements and the development of sophisticated equipment continue to pose an ongoing threat to individual privacy. Ascertaining the scope of the legal right to privacy is difficult due to the ongoing tension between freedom of expression and the privacy rights of an individual. As a result, it is not possible to define the concept as the characteristics of privacy change over time to remain consistent with community values.

It is neither possible nor appropriate to define privacy as the concept of privacy can mean different things to different people and in defining 'privacy' the concept would lose its relevance.

In *R v Broadcasting Standards Commission ex parte BBC*[1], Lord Mustill attempted to define the essence of privacy as follows:

> 'To my mind the privacy of a human being denotes at the same time the personal 'space' in which the individual is free to be itself, and also the carapace, or shell, or umbrella, or whatever other metaphor is preferred, which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolate.'

Furthermore, the observing or capturing of visual data must be indecent as assessed according to the common law definitions of indecency. In this regard, the level of indecency will be assessed according to what is "contrary to the ordinary standards of morality of respectable people within the community",[2] as well as the context of the "nature or quality of the act in itself"[3].

<u>New offence – section 61B(5) observe or capture genital or anal region</u>

This amendment creates an offence of observing with a device or capturing visual data of another person's genital or anal region, or female breasts when a reasonable person would in all the circumstances consider the observing or capturing of visual data to be an invasion of privacy.

This offence is intended to capture 'upskirting' and 'down-blousing' offences that now occur more often, in part due to advances in technology. As with s61B(1), The Criminal Code, section 22 (Offences that do not provide fault elements) provides that a fault element of intention applies to a physical element that consists only of conduct. This means that the conduct of observing or capturing another person must be intentional.
Some examples of behaviour covered by this provision include:

- using a hidden camera to take upskirting photos;
- using a mirror to look under a woman's skirt;
- directing and/or manipulating a security camera to be at such an angle that it shows female breasts (covered by underwear or bare);

[1] *R v Broadcasting Standards Commission ex parte BBC* [2001] QB 885 at 48.
[2] *Harkin v R* (1989) 38 A Crim R 269 at 299
[3] *Drago v R* (1992) 63 A Crim R 59 at 73

- recording another person's genital or anal region (covered by underwear or bare) using a video recorder; or
- live streamed and real-time upskirting video.

Purpose for observing with a device or capturing data – interaction with element of indecency

There is no requirement to prove that the image, however it was captured, was done for a sexual purpose. The reason for this is that the motivations for this conduct will only be known to the perpetrator, making it inappropriate to apply this element to the offence.

It is recognised that there is reasonable concern about people taking innocuous images and being charged with the offence at s 61B(1). In order to prevent this, the prosecution must prove, beyond reasonable doubt, that the content of the observation with a device or the capturing of visual data is indecent.

Indecency is to be assessed according to the common law definitions of indecent. In this regard, the level of indecency should be addressed according to what is "contrary to the ordinary standards of morality of respectable people within the community",[4] as well as the context of the "nature or quality of the act in itself"[5].

The case of *R v Harkin*[6], defined indecency to mean 'contrary to the standards of morality of respectable people within the community'[7]. The Court went on to determine that 'indecency' may 'derive directly from the area of the body of the girl to which the assault is directed, or it may arise because the assailant uses the area of his body which would give rise to a sexual connotation in the carrying out of the assault. The genitals and anus of both male and female and the breast of the female are the relevant areas… The purpose or motive of the appellant in behaving in that way is irrelevant' and the motive does not necessarily need to be sexual gratification'[8].

The definition of 'indecency' has intentionally been left to be defined by current case law to account for the fluidity of this concept. The importance of having a fluid definition of

[4] *Harkin v R* (1989) 38 A Crim R 269 at 299
[5] *Drago v R* (1992) 63 A Crim R 59 at 73
[6] (1989) 38 A Crim R 296
[7] (1989) 38 A Crim R 296 at 299
[8] R v Court [1989] 1 AC 28 at 35

‘indecency’ is to allow community values to properly determine what should and should not be considered indecent according to current community standards.

Although s 29 of the Human Rights Act states that the Act is only applied to Territory law, the Human Rights Act is applied to the overall offence. Consequently, s 30 of the Human Rights Act allows this offence to be interpreted though a human rights framework and it is expected that this will occur with all elements of the offence.

Strict and Absolute liability

Strict and absolute liability is appropriate for elements of an offence that require an assessment based on an objective standard of a reasonable person. It is noted that strict or absolute liability applies to *elements* of the offence and not to the offence as a whole, and that specific intent applies to the commission of the offence. A person must intend to make an observation or capture visual data of another person. Once specific intention of doing that act is proved, all other elements of the offence must also be proved.

Absolute liability applies to s 61B(1)(b)(ii) that a reasonable person would consider the observing or capturing of visual data is in all the circumstances indecent.

Strict liability applies to s 61(1)(b)(i) and s 61B(5)(b); that the observing or capturing of visual data was done in circumstances where a reasonable person would consider the observing or capturing of visual data to be an invasion of privacy.

It is likely that an invasion of privacy implies a lack of consent which should appropriately be determined by the court. However, to ensure that this offence does not capture innocent people engaging in consensual acts, there is also a defence for consent to each of the offences.

These amendments engage and limit the presumption of innocence at section 22(1) of the Human Rights Act.

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

The presumption of innocence is contained in article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) and is one of the guarantees in relation to legal proceedings contained in article 14.

The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Generally, consistency with the presumption of innocence requires the prosecution to prove each element of a criminal offence beyond reasonable doubt.

The circumstances in which absolute liability and strict liability are used are reasonable and proportionate. This is because the elements to which the absolute liability and strict liability apply are limited to elements where the question of the person's state of mind is not relevant. In these circumstances it is appropriate to place responsibility on a person filming another person to exercise caution and refrain from filming, to afford another person privacy. There are no less restrictive means reasonably available to achieve the purposes of protecting vulnerable members of the community by the use of absolute liability and strict liability.

In relation to the use of absolute liability for the element of indecency, in *Director of Public Prosecutions (ACT) v AW*, the court held that it is not an element of an offence under section 61(1) of the Crimes Act that the accused be aware that his or her act is indecent according to contemporary standards. The Court recognised that the test of indecency is an objective test, not a subjective test and as such, the fault element of absolute liability is appropriate for the element of indecency.

Including an objective test of 'reasonable person' at s 61B(1)(b) and s61B(5)(b) ensures that the conduct prohibited is conduct which a reasonable person would find breaches accepted notions of privacy and where a person would rightly expect their privacy to be protected by the criminal law.

However, it is noted that there can, in some situations, be an element of mistake of fact by the offender as to when the other person is in a private place or engaging in a private act and therefore their conduct could constitute an invasion of privacy. This is relevant to s 61B(1) (b)(i) and s 61B(5)(b) and as such, these clauses apply strict liability.

The policy objective behind the offence is to protect the community's privacy. In this regard, this particular element is seeking to protect other people's privacy by ensuring they are protected when they are in a private place or engaging in a private act. While this element

may create some limitations to the defendants right to the presumption of innocence at section 22(1) of the Human Rights Act, this is justified and balanced with the community's right to privacy at section 12 of the Human Rights Act.

Defence – legal burden to prove consent

A defence is available to an offender if they can prove that the victim consented to the observation, visual recording or capturing of visual data. This defence places a legal burden on the defendant to prove that they had a belief on reasonable grounds that the person they were observing, recording or capturing visual data of was consenting. This section is requiring the defendant to prove a matter that is solely within their knowledge.

South Australia has a similar defence for consent to their voyeurism offences, and Victoria uses consent as an exception to their voyeurism offences.

A legal burden is appropriate because the defence relates to a matter that is peculiarly within the defendant's knowledge and evidence about this question will not be available to the prosecution. It would be very rare that a victim would consent to an unknown person taking photos of them, and no longer be in contact to provide evidence in relation to the question and no other source of evidence is available about the subject's consent.

Voyeurism is by definition an offence which is conducted in relative secrecy. The nature of the offence means that the defendant may be the only person who is able to identify the victim or know if they consented.

This defence engages and limits the presumption of innocence at section 22(1) of the Human Rights Act as described in relation to absolute and strict liability above.

In *Momcilovic v The Queen*[9], Chief Justice French discussed the nature of the presumption of innocence. French CJ noted that 'the presumption of innocence is part of the common law of Australia, subject to its statutory qualification or displacement in particular cases'. French CJ noted that the nature of the presumption of innocence was concisely stated in *Howe v The Queen*:

> 'The presumption of innocence in a criminal trial is relevant only in relation to an accused person and finds expression in the direction to the jury of the onus of proof

[9] (2011) HCA 34

that rests upon the Crown. It is proof beyond a reasonable doubt of every element of an offence as an essential condition precedent to conviction which gives effect to the presumption[10].'

For example, for the offence at s 61B(1), before the defence is raised, the prosecution must prove, beyond reasonable doubt, that:

- the person who is being charged is the person who engaged in the conduct;
- the person observed with a device *or* captured visual data of another person;
- another person was intentionally observed or captured;
- a reasonable person in the place of the person being observed or captured would, in all the circumstances, consider the observation or capturing of visual data to be an invasion of that privacy; and
- the observing, recording or capturing of visual data is indecent in all the circumstances.

The above are all important matters to be proved and must be proved beyond reasonable doubt before the question of a defence in relation to consent arises.

Additionally, the penalty ensures that it is a strictly summary offence. The maximum penalty is 200 penalty units and/or a maximum of two years imprisonment. Only the most serious example of the offence including with no mitigating features would result in a sentence that imposes the maximum penalty of two years imprisonment. This defence strives to strike a balance between the general interests of the community and the rights of the individual and is therefore justified and reasonable.

The limitation on this right is important to ensure that the burden of adducing sufficient evidence to prove the defendant's reasonable belief that the subject consented to certain behaviour is placed on the defendant within whose particular knowledge such evidence is likely reside. The limitation exists to give effect to this purpose.

There are no less restrictive means reasonably available to achieve this purpose. In particular, if an evidential burden was adopted and placed on the defendant to prove that the defendant held a reasonable belief that the other person consented, the prosecution would then need to disprove that the defendant held such a reasonable belief. This approach would not achieve

[10] (1980) 55 ALJR 5 at 7.

the purpose of the offence as only the defendant (and not the prosecution) would have access to such information.

Defence – concept of 'consent'

As discussed above, consent is contained as a defence, rather than an element of the offence as the conduct captured by the offence represents a gross invasion of privacy and the onus should be on the observer or person capturing the visual data taker of the picture to ensure the subject is consenting.

The defence does not provide an age of consent to ensure that the application of this offence does not disproportionally impact on young people under 16 years of age who may elect to engage in sexualised behaviour using technology.

The concept of consent has remained undefined for two important reasons; to avoid inconsistency with existing legislation and to ensure that consent can be interpreted by the courts according to information provided by the defendant.

As a guide, the Australian Law Reform Commission recommended definition of consent indicates that consent should be considered to be based on 'free and voluntary agreement'[11]. Further, the concept of consent should be assessed by the trier of fact to have regard to all the circumstances of the case including any steps taken by the person to ascertain whether the other person consents, but not including any self-induced intoxication of the person'[12].

It goes without saying that if a person is taking a photo of themselves (for example 'sexting'), they have consented to the photo being taken. This offence does not prohibit the distribution of images to a third party although that behaviour may be covered by other offences.

Impact on children and young people

These offences are not intended to criminalise young people who are taking part in consensual activities. It is noted that young people need to be afforded an opportunity to use and experiment with digital media practices, including in the context of risk taking behaviour

[11] Family Violence—Improving Legal Frameworks (ALRC CPS 1); Recommendation 16-2.
[12] Ibid; Recommendation 16-4

as part of developing resilience[13]. In particular, they should be allowed the opportunity to make use of digital media within a safe and consensual environment.

This is not to say, however, that any use of digital exploration by children is automatically immune from prosecution as each participant must still consent.

The offences do not prescribe an age or circumstances where a person cannot consent to the conduct. In each circumstance, the consent should be determined by the court on the facts and the strength of the evidence. This offence can be particularly relevant to young people experimenting with social boundaries. If the behaviour is entered into with consent, it should be up to the court to assess the extent of that consent and if it was real consent or not.

The offence does not prescribe a heavier penalty for circumstances of aggravation involving a young person; whether as a defendant or the subject of observations, recordings or visual data. This is a factor that should be taken into account on sentencing pursuant to s 33 of the *Crimes (Sentencing) Act 2005*.

Young people may currently be prosecuted for other sexual offences. The age of criminal responsibility operates to protect children and young people aged between 10 and 14 who are not capable of forming criminal responsibility.[14] The burden of proving that a child knows that his or her conduct is wrong is on the prosecution.[15]

Exceptions – section 61B(8)

An exception applies to an observation made by viewing a recording or data that was previously recorded or captured. This exception makes clear that the offence only applies to the original person capturing the image or recording; and people who directly, intentionally view an original image. It also ensures that people disseminating previously obtained data and people accessing that data are not captured by an offence.

Inadvertent or unintentional conduct will not be caught by the offence, which is particularly relevant to young people.

[13] Third, A, Bellerose, D, Dawkins, U, Keltie, E and Phil, K (2014). *Children's rights in the digital age: A download from children around the world.* Accessed online at http://www.uws.edu.au/__data/assets/pdf_file/0003/753447/Childrens-rights-in-the-digital-age.pdf.
[14] *Criminal Code 2002*, section 26.
[15] *Criminal Code 2002*, section 26(3).

Exceptions to the offences also apply to an observation, visual recording or capturing of visual data made by a law enforcement officer acting reasonably in the performance of their duties. However, officers acting outside the scope of their daily duties, or abusing their position, may be guilty of an offence.

Exceptions also apply to a licensed security provider acting reasonably under the authorised security provider's licence and people acting reasonably in carrying out security of their premises. This provision exempts security providers and people who are legitimately engaged in protecting security of their premises, and should not be subjected to renegade behaviour.

A further exception also applies where a child or other person is incapable of giving consent in circumstances where a reasonable person would regard the observing, recording or capturing of visual data as acceptable. Scientific, medical or education purposes are also excluded from the offences.

Interaction with other offences

Nothing in this provision is intended to replace other offences. Notably, this offence is not intended to replace child pornography offences, maintaining sexual relationships with young people, 'grooming' offences, or any other existing offence within the criminal law.

This offence does not prohibit the dissemination of data that would be captured under this offence, and in those circumstances other offences may apply.

PART 4 – Crimes (Forensic Procedures) Act 2000

Clause 8 — Interview friend, Section 16 (1)

This clause amends section 16 to provide an interview friend to Aboriginal or Torres Strait Islander person who is a suspect, serious offender or volunteer under the Act. This amendment requires a number of consequential amendments to be made to the Act at sections 38, 39, 42, 49B, 57, 77C, 103 and 104.

Currently an interview friend must be provided for a child or incapable person at any hearing for or the carrying out of a forensic procedure. The issue of including Aboriginal or Torres Strait Islander people in this category of vulnerable persons was raised by the Chief Executive of the ACT Aboriginal Justice Centre and the Aboriginal Legal Service (ACT/NSW) in order to deal with a gap in the law that has been addressed in NSW.

Aboriginal and Torres Strait Islander people are a recognised class of vulnerable people who are over represented in our criminal justice system. It is fair and appropriate that they be afforded appropriate assistance and safeguards when involved in a justice process.

Clause 9 – Securing the presence of suspects at hearings – suspect not in custody, New Section 37 (1)

This clause removes any ambiguity from section 37(1) (b) by removing the term 'magistrate' and making it clear that, if a suspect is not in custody the Magistrates Court may, on the application of a police officer, issue a summons for the appearance of the suspect at the hearing of the application; or a warrant for the arrest of the suspect to bring the suspect before the court for the hearing of the application.

This will allow registrar to perform these functions consistent with similar administrative functions of the Magistrates Court.

Clause 10 – Section 37 (3) and (4)

This amendment is part of a series of amendments in the Crimes (Forensic Procedures) Act to allow the Court (rather than specifically a magistrate) to issue a summons or warrant to appear at an application seeking a forensic procedure order.

This approach will allow the court to adopt more efficient arrangements for the issue of a summons or warrant consistent with the approach taken for first instance and search warrants which may be issued by the registrar or deputy registrar.

Clause 11 – Procedure at hearing of application for order, Section 38 (3)

This section is amended to provide that if a suspect at a hearing for an application for a forensic procedure order is an Aboriginal or Torres Strait Islander person they must be represented by an interview friend.

Clause 12 – Action to be taken on making of orders, Section 39 (1) (d)

This section is amended to provide that if a magistrate makes an order for the carrying out of a forensic procedure and the suspect is an Aboriginal or Torres Strait Islander person the magistrate must inform the suspect's interview friend.

Clause 13 – Applications for interim orders, Section 42 (5)

This section is amended to provide that if an authorised applicant seeks an interim order authorising the immediate carrying out of a forensic procedure and the suspect is an Aboriginal or Torres Strait Islander person the suspect's interview friend must also be in the presence of the authorised applicant.

Clause 14 – Rules for carrying out forensic procedures – transgender and intersex people, Section 49B (3)

This section is amended to provide that if a transgender person or intersex person is an Aboriginal or Torres Strait Islander person their interview friend or lawyer may elect that the person be identified as a male or female.

Clause 15 –Section 54

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 or helping to carry out the procedure must be the same sex as the relevant person 'if practicable'.

Furthermore it provides that if a forensic procedure is to be carried out on a volunteer and the volunteer asks that a person other than a person of the same sex as the volunteer carry out or help carry out the procedure if practicable this request must be complied with.

If the relevant person is a child and the child wants a person of a particular sex to carry out or help carry out, the forensic procedure the request must be complied with 'if practicable'.

This amendment may limit the following human rights recognised by the Human Rights Act:

- protection from torture and cruel, inhuman or degrading treatment (s 10);
- the right to privacy and reputation (s 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 (s 11(2)); and
- the right to liberty and security of person (s 18).

Any limitation of these rights is justified and proportionate to ensure the effective operation of the criminal justice system. There is a significant risk that ACT Health, Clinical Forensic Medical Services (CFMS) will not be able to collect forensic medical evidence if a male

practitioner is not available and the relevant person refuses to consent. This may jeopardise prosecutions in serious matters and is contrary to the purposes of the criminal justice system.

Currently if an intimate forensic procedure was to be carried out on a relevant person, the relevant person has to consent to a person of the opposite sex carrying out or helping carry out the procedure.

The current obligation poses significant operational difficulties for CFMS, who are the agency tasked with undertaking such procedures, due to the lack of suitably qualified male practitioners and nurses in this field.

Most practitioners who are qualified to carry out such procedures are female. Most suspects, serious offenders or volunteers are male. 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 cases and other serious matters.

The amendment limits a person's right to choose or consent to a person of a certain sex conducting an intimate forensic procedure. 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.

It should be noted that if a person is a volunteer and does not consent to a person of a particular sex carrying out the procedure or helping carry out the procedure they are not under an obligation to undergo the procedure and may withdraw their consent as provided for under section 25.

Otherwise the intimate forensic procedure must only be carried out by order of a Magistrate who will have considered the matters required under the legislation for ordering a forensic procedure.

The term 'if practicable' is an objective test and CFMS forensic procedure would need to demonstrate consideration of what can be done in the circumstances and act accordingly. This would be a matter for internal administrative processes to record the steps taken to try and secure a same sex practitioner or person assisting if requested.

The ‘practicable’ test is commonly used in criminal legislation in recognition that obligations may require amelioration to make them reasonably achievable. For example, section 214 of the *Crimes Act 1900* requires a police officer to bring a person before a magistrate “as soon as practicable” after arrest.

Furthermore CFMS, as a public authority, must act consistently with human rights pursuant to section 40B of the Human Rights Act. This obligation provides a further safeguard for a relevant person undergoing a forensic procedure.

It is notable that Victoria, as a human rights jurisdiction, currently requires an intimate procedure to be carried out by a person of the same sex if practicable (s 464Z of the Victorian *Crimes Act 1958*).

When originally enacted in 2000, section 54 provided that a clinician of the same sex should carry out the forensic procedure ‘if practicable’ based on the provisions in a national model Bill. The obligation to provide a practitioner of the same sex as the relevant person was inserted in 2008 to address human rights concerns. The provision was further amended in 2013 to allow a person undergoing a forensic procedure to give consent to a practitioner of the opposite sex in an effort to balance the need to address operational difficulties identified by CFMS with the human rights limited by the provisions. However increased and continuing operational problems have made the 2013 amendment impracticable to maintain.

The ongoing amendments to section 54 evidence the government’s attempts to achieve the purpose of the provision in the least restrictive way possible that achieve the purposes of the provision.

Clause 16 – Presence of interview friend or lawyer while forensic procedure is carried out, Section 57 (1) and (3)

With respect to section 57 (1) this includes Aboriginal and Torres Strait Islander people as a category of people who must be accompanied by an interview friend or lawyer while a forensic procedure is carried out.

With respect to section 57 (3) it includes Aboriginal and Torres Strait Islander people as a category of people whose interview friend, other than a lawyer, may be excluded from the place where the forensic procedure is being carried out if the interview friend unreasonably interferes with or obstructs the carrying out of the procedure.

Clause 17 – Securing the presence of serious offender at hearing – offender in custody, Section 77A (2)

This amendment is part of a series of amendments in the Crimes (Forensic Procedures) Act to allow the Magistrates Court (rather than specifically a magistrate) to issue a summons or warrant to appear at an application seeking a forensic procedure order.

See clause 10 for further information.

Clause 18 – Securing the presence of serious offender at hearing – offender not in custody, Section 77B (2)

This amendment is part of a series of amendments in the Crimes (Forensic Procedures) Act to allow the Magistrates Court (rather than specifically a magistrate) to issue a summons or warrant to appear at an application seeking a forensic procedure order.

See clause 10 for further information.

Clause 19 – Section 77B (4) and (5)

This amendment is part of a series of amendments in the Crimes (Forensic Procedures) Act to allow the Magistrates Court (rather than specifically a magistrate) to issue a summons or warrant to appear at an application seeking a forensic procedure order.

See clause 10 for further information.

Clause 20 – Procedure at hearing of application for order, Section 77C (3)

This section is amended to provide that if a police officer makes an application under section 77 in relation to a serious offender who is an Aboriginal or Torres Strait Islander person they must be represented by an interview friend and may also be represented by a lawyer at the hearing of the application.

Clause 21 – Section 77C (5)

This clause modifies the terminology in section 77C to ensure any court may hear applications for a forensic procedure order.

Section 77C governs the procedure at the hearing of an application for an order for a forensic procedure to be carried out on a serious offender. Such applications are often heard in the

Supreme Court and the current use of the term ‘magistrate’ creates an unintended impediment to proceedings.

Clause 22 – Section 77C (6)

This clause modifies the terminology in section 77C to ensure any court may hear applications for a forensic procedure order.

See clause 21 for further explanation.

Clause 23 – Powers of lawyers and interview friends, Section 103 (1) (b)

This clause is amended to provide that a request made by a suspect, serious offender or volunteer who is an Aboriginal or Torres Strait Islander person under this Act may be made for the person by their interview friend.

Clause 24 – Obligation of investigating police officers relating to electronic recordings, Section 104 (2) (b)

This clause is amended to provide that if an investigating officer makes a video recording under the Act and the suspect, serious offender or volunteer is an Aboriginal or Torres Strait Islander person they must ensure that their interview friend has an opportunity to view the video recording.

Clause 26 – Dictionary, new definition of Aboriginal or Torres Strait Islander person

This clause provides a definition for Aboriginal or Torres Strait Islander person for the purpose of the Act.

PART 5 – Crimes (Sentence Administration) Act 2005

Clause 26 – Board may reject parole application without inquiry, Section 122 (2), new example

This clause provides an example of a situation where the Sentence Administration Board may reject a parole application without inquiry on the basis it is satisfied the application is frivolous, vexatious or misconceived.

Currently section 122 (2) of the Act provides two scenarios where the parole board may, without holding an enquiry, reject an application for parole by an offender. Firstly, if the

board is satisfied the application is frivolous, vexatious or misconceived or secondly, if the board previously refused to make a parole order for the offender within a 12 month period of the current application being made.

The Act currently does not include an example for the first scenario in terms of what may be considered a frivolous, vexatious or misconceived parole application. The addition of a further example is to provide guidance on where the board may exercise its discretion to reject a parole application without inquiry.

Part 6 – Crimes (Sentencing) Act 2005

Clause 27 – Victim impact statements – form and contents, New section 51 (5A)

This clause provides that a victim impact statement can contain photographs, drawings or other images.

Currently, victim impact statements may be provided either orally or in writing to the court and although this does not prevent statements being provided to the court in the form of drawings or pictures, it is intended that by having this practice expressly permitted through legislation, any question over the lawfulness of the practice will be addressed.

This proposed amendment is intended to reflect the current practice adopted in a small number of cases, normally involving young children. This amendment was considered and endorsed by the Family Violence Intervention Program Coordinating Committee.

Clause 28 – Meaning of supervision condition, Section 133U (2), definition of director-general, paragraph (b)

This amendment clarifies which director-general is responsible for young offenders subject to a good behaviour orders with a supervision condition.

This clause replaces the existing paragraph (b) and clarifies that, in cases where an offender is not under 18 years old and is not under the direction of director-general for the Children and Young People Act (CYP) when a direction is given or a requirement is made, director-general means the director-general responsible under the *Crimes (Sentence Administration) Act 2005* for the administration of the good behaviour order to which the direction relates.

Clause 29 – Meaning of accommodation order, Section 133Y (2), definition of director-general, paragraph (b)

This amendment clarifies which director-general is responsible for young offenders subject to an accommodation order with a supervision condition.

This clause replaces the existing paragraph (b) and clarifies that in cases where an offender is not under 18 years old and not under the direction of CYP director-general when an accommodation order is made by the court, director-general means the director-general responsible under the Crimes (Sentence Administration) Act for the offender to whom the direction relates.

Part 7 – Crimes (Surveillance Devices) Act 2010

Clause 30 – What must a retrieval warrant contain? New section 22 (4)

This clause inserts a new section 22 (4) which provides that a retrieval warrant remains in force for the period stated in the warrant until such time that it is either executed or revoked.

Currently section 22 of the Act outlines the necessary contents of a retrieval warrant for a surveillance device. These include a statement about the judge or magistrate's satisfaction with the basis for the warrant, administrative details pertaining to the warrant, the name and signature of the person issuing the warrant and administrative requirements for a warrant if issued on a remote location.

This amendment introduces the additional stipulation on a warrant as to the period of time it may remain in force following its commencement. The intention of the new section is to remove the current unnecessary requirement on police to apply for the revocation of a retrieval warrant even following the warrant's execution. A retrieval warrant is executed when the surveillance device and any associated evidence about its installation, use and maintenance has been retrieved.

Part 8 – Criminal Code 2002

Clause 31 – False statement by officer of body, Section 351 (1) (a)

This clause corrects a minor drafting error by replacing the conjunct 'or' with 'and'. The amendment provides that an officer of a body commits an offence if the officer dishonestly publishes or concurs in the publishing of a document containing a statement or account that is

false or misleading in a material particular 'and' the officer is reckless about whether the statement or account is false or misleading in a material particular, and the officer publishes or concurs in the publishing of the document with the intention of deceiving members or creditors of the body about its affairs.

This amendment provides that all three elements described in section 351 are required to correctly construct the specified offence.

Clause 32 – New part 6.4A

This clause introduces new part 6.4A into the Act, incorporating new section 621A 'Display of drug pipes'. The new section makes it an offence for a retailer or wholesaler to display drug pipes within or adjacent to their outlet.

This new offence balances the potential harmful impacts associated with allowing the display of drug equipment with the concern that prohibiting the sale of drug equipment could lead to potentially more harmful ways of consuming controlled drugs in conflict with the government's commitment to a harm minimisation approach to illicit drugs. It is noted that the display ban is consistent with the ban on the display of smoking products at a tobacco retailer and wholesaler under the *Tobacco Act 1927*.

The provision provides that a drug pipe is a device or components of a device that have the intended purpose or apparent purpose of being used to smoke, inhale or draw the smoke or fumes of a controlled drug. A controlled drug is a substance prescribed by schedule 1 of the *Criminal Code Regulation 2005*.

This section does not intend to capture smoking equipment, the primary purpose of which is for the purpose of smoking a smoking product, as defined in the Tobacco Act. This equipment is more properly dealt with in the Tobacco Act.

The provision does not prohibit a retailer or wholesaler displaying a sign that notifies customers that drug equipment is available to purchase from the outlet.

It is not an offence for the retailer or wholesaler to show a customer drug equipment on the customer's request.

This clause commences 3 months after this Act's notification day to allow sufficient time for wholesalers and retailers to be put on notice about the application of the new offence.

PART 9 – Firearms Act 1996

Clause 33 – Authority to possess and use firearms temporarily, New section 14 (2) (ba)

This clause inserts the requirement on a person to be at least 12 years of age in order to be authorised to possess and use a firearm on an approved shooting range for the purpose of receiving instruction in the use of the firearm.

This new age limit is in addition to the existing requirement that the person concerned is under the immediate supervision of an authorised instructor firearms instructor using a firearm that is owned by the authorised instructor or by the approved club and the authorised instructor is a registered user of the firearm.

The purpose of this amendment is to reflect the current position under the Act that a person cannot be the issued with a firearms licence until they are at least 12 years of age. This amendment also reflects the position in other jurisdictions with respect to the temporary possession and use of firearms.

Clause 34 – Section 14 (2) (c) (ii)

This clause provides a technical clarification in the section by removing the sentence ‘a registered user of the firearm’ and replacing it with ‘authorised under subsection (2A) to possess or use the firearm’.

Clause 35 – New section 14 (2A)

This clause provides that a person is authorised to possess or use a firearm for the purpose of giving instruction if they are;

- an authorised instructor for an approved club; and
- the firearm is owned by the approved club.

It is acknowledged that firearms instructors play an important role in educating new and prospective firearms licensees, by ensuring they practise safe and responsible handling of firearms.

This amendment intends to support that principle and provide authorised instructors general authority to use firearms registered to their respective club for the purpose of instruction and

in doing so remove the current administrative burden on clubs and the firearms registry, without compromising the overriding principles of the Act in ensuring public safety.

This amendment will have the effect of removing burdensome red tape on approved clubs.

Clause 36 – Unregulated firearms – forfeiture, Section 30 (2)

This clause amends the entity who can direct the destruction or otherwise of a forfeited unregulated firearm from the 'director-general' to the 'registrar'. The registrar is a police officer appointed by the chief police officer, for the purpose of the Act, who holds the rank of superintendent or above.

The current section delegates the function incorrectly to the director-general which is not appropriate given the chief police officers responsibilities under the Act.

Clause 37 – Authority conferred by licence – additional matters, New section 53 (2A) and (2B)

This clause, with respect to new subsection (2A), provides that a licence that authorises the licensee to have possession or use of a registered firearm also authorises that person to use the registered firearm at an approved shooting range to either test the firearm, adjust the sight of the firearm, develop and refine self loaded ammunition, receive instruction and certification in the use of the firearm for an employment related purpose, or any combination of these activities.

The clause provides an example of an 'employment related purpose' as being a person with an employee licence under the *Security Industry Act 2003* wanting to maintain that licence.

With respect to new subsection (2B), this clause provides that a licensee does not need to be a member of the shooting club that operates the approved shooting range that the licensee is lawfully using for any of these above-mentioned purposes.

Club shooting ranges would allow these licensees on their facilities on the basis already adopted for non-club members. This amendment reduces unnecessarily burdensome red tape.

Clause 38 – Return of forfeiture of things seized, Section 217 (4)

This clause provides for the correction of the entity type who can direct the destruction or otherwise disposal of things seized under this part, from the 'director-general' to the 'registrar'.

The current section delegates the function incorrectly to the director-general which is not appropriate given the chief police officers responsibilities under the Act.

Part 10 – Prohibited Weapons Act 1996

Clause 39 - Evidentiary provisions, New section 17 (2)

This clause provides that the registrar may delegate their function with respect to the signing of evidentiary certificates to a police officer.

Currently only the registrar can sign evidentiary certificates. These certificates do not require complex discretionary decision making and by delegating the function, the chief police officer's responsibilities under the Act can be managed more effectively.