

2016

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES LEGISLATION AMENDMENT BILL 2016

EXPLANATORY STATEMENT

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Introduction

This Explanatory Statement is for the Crimes Legislation Amendment Bill 2016 (the Bill) as presented in the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Overview of the Bill

The policy objective of the Bill is to improve the operation of a range of criminal justice provisions in the ACT.

The Bill will amend:

- a) the *Crimes (Child Sex Offenders) Act 2005* (the CSO Act) so that police officers can apply for an immediate entry and search warrant for the purpose of investigating a registrable offender's breach or likely breach of a prohibition order under chapter 5A of the Act;
- b) section 149 of the *Crimes (Sentence Administration) Act 2005* so that a parole order will not be cancelled unless a 'breaching offence' is committed by a parolee while the parole order is in force;
- c) the *Crimes (Sentencing) Act 2005*, part 3.4 to provide that a court can make a non-association and place restriction order for serious firearm offences and the offence of money laundering to better address serious organised crime;
- d) the *Criminal Code 2002* to provide statutory alternative verdicts for aggravated burglary and aggravated robbery;
- e) the *Firearms Act 1996* to provide that firearms seized under any Territory law can be disposed of under section 262;
- f) the *Firearms Act* to clarify it is an offence to be under the influence of alcohol or a drug only when a person has *physical* possession of a firearm; and
- g) the *Firearms Act* to clarify that a firearms dealer can test a firearm on property other than the registered premises.

Human Rights Considerations

a) Immediate entry and search warrant – Crimes (Child Sex Offenders) Act 2005

Section 116C of the CSO Act provides that a senior police officer can apply for an entry and search warrant for a registrable offender with a supporting affidavit setting out the grounds for the warrant. Pursuant to S116F a magistrate may issue a warrant if satisfied on reasonable grounds that: (a) the registrable offender has incorrectly reported, or is likely to incorrectly report, personal details; or (b) if the registrable offender is subject to an order under chapter

5A (Orders prohibiting offender conduct) – the offender has breached or is likely to breach the order.

Subsections 116C(3) and (4) of the CSO Act provide that an officer who believes that immediate entry and search is necessary and that there is no time to prepare an affidavit may still apply for a warrant verbally and, if a warrant is granted, provide the affidavit to the court as soon as possible afterwards (an ‘immediate entry warrant’). Currently section 116C(3) only allows for an immediate entry warrant where the applicant believes that such a warrant is necessary to verify the offender’s personal details. It does not provide for an immediate entry warrant where the applicant believes that such a warrant is necessary because the registrable offender is subject to an order under chapter 5A (Orders prohibiting offender conduct) and the offender has breached or is likely to breach the order. This is an oversight in the CSO Act.

The entry and search warrant provisions were inserted into the Act by the *Crimes (Child Sex Offenders) Amendment Act 2015*. The explanatory statement to that amending Act makes no indication that an immediate entry warrant is only available to verify the offender’s details.

The amendment to section 116C (3) of the CSO Act provides that an immediate entry and search warrant may also be sought and issued where the applicant believes and the Magistrates Court is satisfied that such a warrant is necessary because the registrable offender is subject to an order under chapter 5A (Orders prohibiting offender conduct) and the offender has breached or is likely to breach the order.

The explanatory statement to the *Crimes (Child Sex Offenders) Amendment Act 2015* discusses the compatibility of entry and search warrant applications with the Human Rights Act.

b) Cancellation of parole

The amendment to section 149 of the *Crimes (Sentence Administration) Act 2005* does not engage or limit any human rights.

c) Non-association and place restriction orders

The expansion of non-association and place restriction orders may engage and limit the right to freedom of movement and freedom of association at sections 13 and 15 of the Human Rights Act. The Bill will allow the court to order a non-association and place restriction order (NAPRO) for people convicted of firearms trafficking or manufacturing offences (punishable by imprisonment for 20 years) and the offence of money laundering (punishable by imprisonment for 10 years). A non-association order prohibits an offender from being with a named person or communicating with the person. A place restriction order prohibits an offender from being in, or within a stated distance of, a named place or area or attempting to be in, or within the stated distance, of the place or area.

The *Crimes (Serious and Organised Crime) Act 2016* amended part 3.4 of the *Crimes (Sentencing) Act 2005* to expand the offences to which a NAPRO can apply. Currently the court can order a NAPRO for people convicted of serious drug offences, serious property offences, personal violence offences and serious administration of justice offences (defined as offences punishable by imprisonment for five years or longer), and ancillary offences such as conspiracy and attempt.

It is appropriate that an offender has restrictions placed on their movements and contacts in certain circumstances when subject to a sentence imposed by a court of a good behaviour order or an intensive correction order (ICO). The purpose of the limitation on the right to freedom of movement and association is to protect the safety of members of the community by enhancing ACT Policing's ability to disrupt organised crime in the ACT, with a specific focus on the activities of outlaw motorcycle gangs. The limitation will also assist in protecting certain victims from the convicted offender and will be instrumental in removing negative influences from the offender's life, providing them with an opportunity to rehabilitate.

The nature and extent of the limitation is proportionate to the risk posed by members of organised criminal groups, or other serious offenders, being with other people or in a location that has the potential to facilitate further offending. It is reasonable that an offender convicted of a serious firearm or money-laundering offence should be subject to restrictions on their movements and associations while on a good behaviour order or an ICO. An aim of these orders is also to prevent an offender from harassing or endangering the safety or welfare of anyone and if there is a risk of further offending, the limitation on these rights is arguably not extensive in comparison.

Additionally, NAPROs require that the nature and period of the NAPRO must not be unreasonably disproportionate to the purpose for which the order is to be made, providing a further safeguard on the limitation.

The relationship between the limitation and its purpose has been carefully balanced to ensure that any engagement is as minimal as possible in circumstances that potentially carry a significant risk to the community, and also to the convicted offender in terms of potential reoffending. The limitation on the right to freedom of association and movement is legitimate to ensure that the convicted offender is given the best chance possible to rehabilitate, and to protect community safety. Bearing the purpose of the limitation in mind, there are no less restrictive means reasonably available to achieve this purpose.

d) Statutory alternative verdicts

The amendment to provide statutory alternative verdicts for aggravated burglary and aggravated robbery does not engage or limit any human rights. All elements of the offences of burglary and robbery are contained in the aggravated offences so the prosecution must still prove all elements of robbery and burglary beyond reasonable doubt before the defendant can be convicted of these alternative offences.

e) Seized firearms

The amendment to allow the court to order the disposal of firearms seized or surrendered under any Territory law does not engage or limit any human rights.

f) Possession of a firearm

The amendment to the definition of possession of firearms does not unreasonably apply to a person under the influence of alcohol or drugs and does not engage or limit any human rights.

g) Testing firearms on other properties

The amendment to clarify that a firearms dealer can test a firearm on property other than the registered premises does not engage or limit any human rights.

Crimes Legislation Amendment Bill 2016

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This technical clause names the short title of the Act. The Act will be the *Crimes Legislation Amendment Act 2016*.

Clause 2 — Commencement

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

Clause 3 — Legislation amended

This clause identifies the legislation amended by the Act.

Part 2 – Crimes (Child Sex Offenders) Act 2005

Clause 4 – Entry and search warrant – application

Section 116C(3)(a)

This clause amends section 116C(3) of the *Crimes (Child Sex Offenders) Act 2005* to provide that police may apply for an entry and search warrant without a supporting affidavit if they believe that the immediate use of an entry and search warrant is necessary because a registrable offender (who is subject to an order under chapter 5A (orders prohibiting offender conduct) has breached, or is likely to breach, the order.

Part 3 - Crimes (Sentence Administration) Act 2005

Clause 5 – Automatic cancellation of parole order for ACT offence

Section 149(1)

This clause amends section 149 of the *Crimes (Sentence Administration) Act 2005* so that a parole order will not be cancelled unless a ‘breaching offence’ is committed by a parolee while the parole order is in force.

Part 4 – Crimes (Sentencing) Act 2005

Clause 6 – Non-association and place restriction orders – when may be made

Section 23(4), definition of *relevant offence*, paragraphs (a) to (c)

This clause amends part 3.4 of the *Crimes (Sentencing) Act 2005* to allow the court to order a non-association and place restriction order (NAPRO) for people convicted of: an offence

against the *Firearms Act 1996* that is punishable by imprisonment for 20 years or a money laundering offence under section 114B of the *Crimes Act 1900* (punishable by imprisonment for 10 years).

A non-association order prohibits an offender from being with a named person or communicating with the person. A place restriction order prohibits an offender from being in, or within a stated distance of, a named place or area or attempting to be in, or within the stated distance, of the place or area.

Part 5 – Criminal Code 2002

Clause 7 – New sections 369A and 369B

This clause amends division 3.9.2 of the *Criminal Code 2002* to include robbery as a statutory alternative verdict to aggravated robbery.

This clause amends division 3.9.2 of the Criminal Code to include burglary as an alternative verdict to aggravated burglary.

These amendments address the comments of Justice Burns in *R v Donnelly* [2016 ACT SC149]. In that case Justice Burns drew attention to the lack of an alternative statutory verdict of burglary, which could have been returned had the aggravating factor for aggravated burglary not been established by the prosecution.

Part 6 – Firearms Act 1996

Clause 8 – Offences against Act – application of Criminal Code etc

Section 4, note 1, 7th dot point

This clause is consequential to the amendment at clause 9, which remakes the offence at section 242(1) of the *Firearms Act 1996* in Criminal Code compliant form.

Clause 9 – Restrictions where alcohol or other drugs concerned

Section 242(1)

This clause amends the offence at section 242(1) of the Firearms Act so that it doesn't unreasonably apply to a person under the influence of alcohol or other drugs. Previously, a person committed an offence if they were under the influence of alcohol or another drug and had a firearm in their possession (possession includes merely having the firearm stored on premises owned by the person).

This clause provides that a person commits an offence only if they are under the influence of alcohol or another drug and either have a firearm in their *physical* possession or use a firearm.

Clause 10 – New section 242(4)

This clause provides that for section 242 of the Firearms Act ‘physical possession’ has the meaning given at section 10(1)(a) of the Act.

Clause 11 – Disposal of surrendered or seized firearms**Section 262(1)**

This clause amends section 262(1) of the Firearms Act to allow the court to order disposal of a firearm seized or surrendered under any Territory law.

Clause 12 – Licence categories and authority conferred**Schedule 3, item 7, column 5**

This clause amends schedule 3, item 7, column 5 of the Firearms Act to clarify that a firearms dealer can test a firearm on property other than the registered premises.

Schedule 3 of the Firearms Act provides the authority conferred for each licence category under the Act. Item 7, column 5 provides the authority conferred by licence for firearms dealers. Currently it is unclear whether or not a dealer can test a firearm on property other than the registered premises. Firearms dealers, in particular manufacturers, need to test firearms in a number of environmental conditions to ensure they are fit for purpose. Some of this testing cannot practically occur on registered premises, such as testing the firearm in rain or after being dropped in mud.

Schedule 3, item 7, column 5 is amended to clarify that a dealer can test a firearm at a shooting range or on suitable land. Dealers will be responsible for ensuring they have the appropriate permissions to test firearms on the land, for example, permission of the owner or the occupier of rural land. Dealers will also be responsible for ensuring safety provisions in the Act (including safe storage) are complied with to ensure the safety of the community when testing is taking place.