

2017

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES (FOOD OR DRINK SPIKING) AMENDMENT BILL 2017

EXPLANATORY STATEMENT

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Outline

Introduction

This explanatory statement relates to the Crimes (Food or Drink Spiking) Amendment Bill 2017 (the Bill). It has been prepared to assist the reader of the amendments and to inform debate on the Bill. It does not form part of the Bill and has not been endorsed by the Legislative 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 amendments. 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.

Purpose of the Bill

The purpose of the Bill is to introduce offences of food or drink spiking, without the need to prove intent of further offending. The introduction of these offences is intended to criminalise and deter antisocial behaviour.

The Australian Institute of Criminology (AIC) undertook research into drink spiking in 2004.¹ The AIC found an estimated 3,000 to 4,000 incidents of drink spiking in 2002-03, and one third of these had been linked to sexual assaults. The AIC also identified that four out of five victims are female.

Following the AIC research, the Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General examined the legislation around food or drink spiking across Australian jurisdictions and produced a report (the MCCOC report).² This report noted a legislative gap and recommended jurisdictions create an offence that criminalised the act of spiking food or drink without the need for proof that further offending was intended. The MCCOC report noted that while there was no empirical data around incidents of food spiking, the principle was the same as with drink spiking and there was no reason to distinguish between food or drink for the purposes of creating an offence of spiking food or drink.

The MCCOC model offence was intentionally broad, as food or drink spiking behaviour can take place in a number of different ways. The offences proposed in the bill in large part reflect the model offence proposed by the MCCOC report.

¹ Taylor, Prichard and Charlton, *National Project on Drink Spiking: Investigating the nature and extent of drink spiking in Australia* (Australian Institute of Criminology, November 2004).

² Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General, *Final Report – Drink and Food Spiking* (July 2007).

As with the model offence, the offences proposed in the Bill are not intended to capture behaviour that is a normal part of Australian social life and is not intended to cause harm. Because the new offences require a fault element of intention to cause harm, people providing extra alcohol in drinks provided to their friends would not be covered by the new offences. The definition of harm in the Bill includes impairment of the senses or understanding that the person might reasonably be expected to object to.

The defences available in the *Criminal Code 2002* will be available for these offences, including that if a person makes a mistake of fact they will not be criminally responsible.³ The Bill also creates a specific defence for medical practitioners who give an intoxicating substance in the course of practising a health profession.

Human Rights Considerations

The AIC research demonstrates that drink spiking is overwhelmingly a gendered crime, with women being the victim in 80% of cases. In Australia, one in three women experience gender-based violence in their lifetime. Gender-based violence cannot be eliminated through legislation alone; however, legal measures are an essential component of any response. The Bill balances the human rights of a person affected by changes in the law and the public interest in protecting an individual's right to safety within their home and in the community.

Section 8 of the *Human Rights Act 2004* (HR Act) provides the right to recognition and equality before the law. It is now widely accepted that gender-based violence is a form of discrimination against women and their children. The European Court of Human Rights (ECHR) has confirmed the importance of characterising gender-based violence against women as a form of discrimination that public authorities are required to eliminate and remedy⁴.

Federal, State and Territory governments are obliged, under the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Discrimination against Women, to protect the right to private and family life of victims of domestic, family and sexual violence, including through effective prosecution and punishment of offenders. In the ACT, that obligation is enshrined in section 12 of the HR Act (right to privacy and reputation).

The defence for medical practitioners is a legal burden that a defendant needs to prove on the balance of probabilities.⁵ It is reasonable that the burden for proving this factual scenario be placed on the defendant as the circumstances are within their personal knowledge.

³ *Criminal Code 2002* s 36.

⁴ *Case of Opuz v Turkey* [2009] ECHR, *Application no. 33401/02* (9 June 2009).

⁵ See sections 59 and 60 of the *Criminal Code 2002*.

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Detail

Clause 1 — Name of Act

The name of the Act will be the *Crimes (Food or Drink Spiking) Amendment Act 2017*.

Clause 2 — Commencement

This clause provides that the Act commences the day after it is notified.

Clause 3 — Legislation amended

The legislation to be amended by this Act is the *Crimes Act 1900*.

Clause 4 – Offences against the Act – application of the Criminal Code etc, Section 7A, note 1

This is a consequential amendment to insert a reference to new section 28AA into note 1 of section 7A. This identifies that the offences created in new section 28AA are subject to the provisions of the *Criminal Code 2002*.

Clause 5 – New section 28AA

This clause inserts two new criminal offences for food or drink spiking.

New offence – section 28AA(1)

This amendment inserts an offence of giving, or causing the consumption of, food or drink containing an intoxicating substance, which the other person is not aware of, where the offender intends a person to be harmed by the consumption. **Harm**, to a person, includes impairment of the senses or understanding that the person might reasonably be expected to object to in the circumstances (s 28AA(4)).

The offence is committed whether or not the harm actually occurs.

The offence does not require proof that the defendant added or substituted anything to the food or drink.

The definitions for this section are set out in subsection (4). They are drafted, in line with the MCCOC, to be purposefully broad because of the broad range of behaviour that can constitute food or drink spiking.

The purpose of the offence created in subsection (1) is to criminalise food or drink spiking where the person being given or consuming the substance is unaware of the intoxicating

substance. It is intended to cover situations such as where a sleeping tablet is added to a person's food or drink without their knowledge or consent.

The maximum penalty for this offence is 500 penalty units, imprisonment for five years, or both. The offence covers a wide spectrum of behaviour, some incidents of which could be very serious. A maximum imprisonment period of five years allows the prosecution to elect, based on the facts of each case, whether it would be more appropriate to deal with the offence summarily or by indictment.

New offence – section 28AA(2)

While the section 28AA(1) offence deals with the presence of a substance in food or drink, this offence deals with the quantity of the substance in the food or drink. The amendment inserts the offence of giving, or causing the consumption of, food or drink to a person that contains more of the intoxicating substance than the other person would reasonably expect it to contain.

This offence is intended to cover situations such as where a person expects to be given a drink containing alcohol, but is given a drink containing more alcohol than expected with the intent on the part of the offender to cause harm. As with section 28AA(1) the definition of **harm** to a person, includes impairment of the senses or understanding that the person might reasonably be expected to object to in the circumstances (s 28AA(4)).

The maximum penalty for this offence is 500 penalty units, imprisonment for five years, or both. The offence covers a wide spectrum of behaviour, some incidents of which could be very serious. A maximum imprisonment period of five years allows the prosecution to elect, based on the facts of each case, whether it would be more appropriate to deal with the offence summarily or by indictment.

Defence – section 28AA(3)

It is a defence to a prosecution for an offence against section 28AA(1) or (2) if the defendant proves that they are a health practitioner and the intoxicating substance was administered in the course of practising a health profession. The terms 'health practitioner' and 'health profession' are defined under the *Legislation Act 2001*, dictionary, part 1. Section 28AA(3) imposes a legal burden of proof which requires the defendant to prove the elements of the defence on the balance of probabilities.

Definitions – section 28AA(4)

This section defines the following key terms:

- **give** broadly to include preparing or making food or drink available for consumption, ensuring that a broad range of offending behaviour is captured

- ***harm*** to extend the definition of harm contained in the Criminal Code so that it also includes impairment of the senses or understanding that the person might reasonably be expected to object to in the circumstances, ensuring that the offences cover situations where alcohol or other drugs are added to the food or drink
- ***intoxicating substance*** to include any substance that affects a person's senses or understanding, which ensures that no particular existing substance or substances are specified so as to allow a broad range of offending behaviour to be covered
- ***impair*** to include further impairment, in order to capture situations where a person may have their drink or food spiked after already knowingly consuming alcohol or drugs

These definitions are in line with the definitions used in the MCCOC report's model provision.