2019

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CRIMES LEGISLATION AMENDMENT BILL 2019

EXPLANATORY STATEMENT

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CRIMES LEGISLATION AMENDMENT BILL

Outline

Purpose of the Bill

The policy objective of this bill is to improve the operation and efficiency of the criminal justice system by making amendments to a range of criminal laws.

The Crimes Legislation Amendment Bill 2019 (the Bill):

a) creates statutory authority and process in the *Bail Act 1992* for a police officer to enter premises to effect an arrest when a person has failed, or is going to fail, to comply with a condition of their bail;

b) gives effect to the equitable sharing arrangements as agreed under the Inter-Governmental Agreement on the National Cooperative Scheme on Unexplained Wealth (the IGA);

c) clarifies the original policy intent for the definitions of choke, strangle and suffocate in the *Crimes Act 1900*;

d) provides that the sale and consumption of low THC hemp seeds as food will not be subject to criminal offences;

e) allows police officers at or above the rank of sergeant to take oaths or affirmations for affidavits of service in family and personal violence proceedings; and

f) removes, from a number of offences under the *Firearms Act 1996*, the element that a person is not authorised interstate to possess or use the firearm or ammunition in question, and instead introduces a defence which would require the defendant to prove that they were authorised interstate.

Human Rights Considerations

This human rights consideration will provide an overview of the human rights that may be engaged in this Bill.

Broadly, the Bill engages, and places limitations on, the following *Human Rights Act 2004* (the HR Act) rights:

- Section 12 – Right to privacy and reputation
- Section 22 – Rights in criminal proceedings

The Bill also engages, and supports, the following HR Act rights:

- Section 9 – Right to life
- Section 10 – Protection from torture and cruel, inhuman or degrading treatment

- Section 11 – Protection of family and children
- Section 12 – Right to privacy and reputation
- Section 22 – Rights in criminal proceedings

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HR Act contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

International human rights law places obligations on governments to "respect, protect and fulfil" rights. The obligation to respect means governments must ensure its organs and agents do not commit violations themselves; the obligation to protect means governments must protect individuals and groups from having rights interfered with by third parties and punish perpetrators; and the obligation to fulfil means governments must take positive action to facilitate the full enjoyment of rights.

The European Court of Human Rights has considered the positive obligation of governments to uphold rights in depth, noting government must put in place legislative and administrative frameworks to deter conduct that infringes rights, and to undertake operational measures to protect an individual who is at risk of rights infringement.[1]

For these reasons, this Bill takes measures to improve court processes in family and personal violence proceedings by improving accessibility for police swearing or affirming affidavits of service. This Bill also provides that the rights of victims of choking, strangulation or suffocation will be adequately safeguarded by clarifying the definitions of those terms and ensuring those acts – which often occur in a domestic violence setting – do not escape criminal sanction. This Bill enhances personal freedoms, by decriminalising the sale and consumption of low THC hemp seeds as food, recognising that they are a harmless and nutritious food.

International human rights jurisprudence has held that, in general, warrantless arrests in dwelling houses are not compatible with the right to privacy and the home.[2] That is why the entry power included for bail arrests under this Bill is not provided in the form of a general rule in favour of entry without justification – entry is allowed only when the person is on bail for some offences, and when the police officer can justify the action.

[1] Colvin, M & Cooper, J, 2009 *'Human Rights in the Investigation and Prosecution of Crime'* Oxford University Press, p.425. For more detail on positive obligations, see generally, Akandji-Kombe, J, 2007 '*Positive obligations under the European Convention on Human Rights'*, Council of Europe.
[2] *R v Feeney* [1997] 2 SCR 13

Additionally, case law has demonstrated that burdens on defendants in firearms possession matters are acceptable if they go to the purpose of protecting the community from the dangers posed by illegal firearm usage and possession.[3]

Section 28 of the HR Act requires that any limitation on a human right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim.

Whether a limitation is reasonable depends on whether it is proportionate. Proportionality can be understood and assessed as explained in *R v Oakes*[4]. A party must show that:

> *[f]irst, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance"*[5].

The limitations on human rights in the Bill are proportionate and justified in the circumstances because they are the least restrictive means available to achieve the various aims.

Detailed human rights discussion

Rights engaged and supported

The Bill engages and supports the rights of life (section 9 HR Act), the protection from cruel and degrading treatment (section 10 HR Act), protection of family and children (section 11 HR Act), privacy and reputation (section 12 HR Act), and to be tried without delay in criminal proceedings (section 22 HR Act). These are discussed briefly below.

The Bill's amendments to the Bail Act support the right to life under section 9 of the HR Act, for potential victims of alleged offenders, and for accused people to be arrested. By allowing early intervention without requiring compelling evidence of a direct threat to life, police officers will be able to justify entering premises when an individual is a known risk to the safety and life of another person. This will be most likely in a family violence context, where accused persons often have bail restrictions requiring them not to be at the premises of the alleged victim. A person's alleged or actual history of family violence will be highly relevant in deciding to enter, and current emergency entry provisions do not afford the required breadth in a bail context.

[3] *R v Williams* [2012] EWCA Crim 2162.
[4] [1986] 1 SCR 103.
[5] *R v Oakes* [1986] 1 SCR 103.

Further, the right to life of a person being arrested will be protected by not requiring a drawn out process of seeking authority where a person on bail refuses consent to police entering premises to effect an arrest. Such a scenario can lead to high intensity standoffs, or barricaded entry situations, where the force required to enter introduces a risk to life. The Bill avoids such a scenario by allowing entry at a stage of lesser intensity, before a situation escalates.

The protection of family and children is enhanced by reducing procedural difficulties in swearing or affirming affidavits of service in family and personal violence proceedings. Families and children will also be further protected by the amendments to the definitions of choke, strangle and suffocate, as these amendments are reflective of the serious health risks induced by a range of behaviours encapsulated in these new definitions; many of the situations where such offences are committed are in a family violence context. The strangulation amendments also support the protection from cruel and degrading treatment.

The recent decision in *Andrews v Thomson* established that police officers have the power to enter premises to arrest a person for a failure to comply with a condition of their bail under section 56A of the *Bail Act 1992*.[6] The ACT Court of Appeal concluded this on the basis of the normal principles of statutory interpretation, without reference to the HR Act.

The amendments to the Bail Act support the right to privacy. This is because in *Andrews v Thomson*, the court held that there was a power to enter premises in all circumstances to effect an arrest under section 56A of the Bail Act. The amendments at Part 2 limit this power, to ensure a proper process exists for entry and arrest and that police are required to consider alternatives to entry in appropriate situations.

The amendments to the *Firearms Act 1996* to establish a defence of interstate authorisation are directed at reducing long delays in proceedings as can currently occur. While discussed in detail below as to how these amendments can also be a limitation, the reduction in delays supports rights in criminal proceedings.

Rights engaged and limited

The amendments in the Bill primarily engage and limit the rights to the presumption of innocence in criminal proceedings because of the creation of a defence with a legal burden of proof on the defendant, and the right to privacy and the home because of the powers of entry to arrest for bail. For this reason, the limitations are discussed in detail below.

Other rights engaged and limited are discussed briefly below, or with reference to specific legislative amendments in the detail stage below.

[6] [2018] ACTCA 53.

Section 12 – Right to privacy and reputation

Section 12 of the HR Act states that:

> *Everyone has the right—*
>
> *(a) not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and*
>
> *(b) not to have his or her reputation unlawfully attacked.*

The nature of the right affected (s 28 (2) (a))

The right to privacy is limited in this Bill by granting police the authority to enter a person's home to arrest a person for a breach of bail. In *Director of Housing v Sudi*[7], Bell J stated the concept of home in human rights is autonomous and not based upon notions of legal or equitable title or rights.

General comment 16 from the Office of the High Commissioner for Human Rights describes this right as the right of every person to be protected against arbitrary or unlawful interference with their privacy, family, home or correspondence. The comment notes that the term 'unlawful' means that no interference can take place except in cases envisaged by the law.[8]

The term 'arbitrary interference' is described as intending to guarantee that even interference provided by law should be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.[9] Arbitrariness would include "interferences which, in the particular circumstances applying to the individual, are capricious, unpredictable or unjust and also to interferences which, in those circumstances, are unreasonable in the sense of not being proportionate to a legitimate aim sought."[10]

Therefore, it is reasonable to suggest that a person's right to privacy can be interfered with, provided the interference is both lawful (allowed for by the law) and not arbitrary (reasonable in the circumstances).

The importance of the purpose of the limitation (s 28 (2) (b))

The purpose of the limitation is to prevent people who have breached, or will breach, bail conditions escaping arrest by being on private premises. The risk that a person may be able to

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[7] *(Residential Tenancies)* [2010] VCAT 328 (31 March 2010).

[8] Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1988 'General Comment No.16: the right to respect of privacy, family, home and correspondence, and protection of honour and reputation', para 3. Available: (https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6624&Lang=en).

[9] (Communication no. 456/1991 *Ismet Celepli v Sweden*) Under the Optional Protocol, individuals who claim that any of their rights set forth in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Human Rights Committee for consideration.

[10] *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373, [85].

escape arrest poses a real threat to the possible safety of others, themselves, or court proceedings. It is key to the integrity of the bail system that people who need to be apprehended are not able to evade arrest.

The amendment allows an entry power for police, analogous to when arresting a person who is suspected of having committed an offence under section 220 of the *Crimes Act 1900*, to address the inability of police to enter a person's home to arrest them when they have breached bail conditions. It addresses an issue identified by the ACT Court of Appeal who concluded that if the arrest could be completely defeated simply by being indoors, "the section would be unworkable."[11] The limitation clarifies this point to provide for the logical ancillary powers.

While part of the purpose is to protect public safety, existing police powers are not sufficient for when there is a person already subject to a court order that recognises the possible risk a person may pose to the public. Under section 190 of the Crimes Act, a police officer may enter to prevent an imminent threat of danger to a person or property. These grounds may not be made out when, for instance, a person is on bail for a family violence offence, and is on a bail condition not to be at the partner's premises, but is found on the premises, apparently having reconciled with the partner. In such a situation, there may be no evidence of risk of imminent harm, but nonetheless, the circumstances would be cause for grave concern on the part of the police officer.

Nature and extent of the limitation (s 28 (2) (c))

Firstly, the imposition of an evaluative process on police officers to enter dwelling houses as provided by this Bill are a less extensive intrusion on the right to the home, family and privacy than the existing position under the common law.

The interference with the home, privacy and family, is only as much is as necessary for the apprehension of the person, who would be already subject to an arrest power. The interference would not extend beyond entry and necessary force to secure that entry. The amendment does not enliven any novel powers that do not normally attach to an arrest. The fact that the police officer is required to conclude that the entry is necessary in the circumstances and that it is not reasonable to arrest somewhere else provide for security against the arbitrary exercise of the power. This two-step evaluative process means that the exercise of the power is significantly constrained, and does not provide scope for the decision to be made in a capricious or unjust manner. The required evaluative steps mean that any proper exercise of the power would not be arbitrary.

The entry power is also subject to a number of important safeguards to limit the use of the power. The police officer would be first required to attempt to gain entry by consent for all premises. Consent would likely be given in most circumstances, or the person will agree to be arrested outside their home.

[11] *Andrews v Thomson* [2018] ACTCA 53, [30].

Additionally, the requirement generally not to enter at night hours is adapted from section 220(3) of the Crimes Act, as another important restriction on the limiting effects of this power, considering the increased distress that may result from entries where a person and their family are likely to be asleep. Further, the entry power would only exist when a person is on bail for a relevant offence, as defined by the Crimes Act to permit entry without warrant.

This tailoring to fit the circumstances where an entry would be necessary are in fact a less invasive power than the current law established by *Andrews v Thomson*, which permits entry without an evaluation of the necessity and reasonableness.

The power would directly conflict with an unlimited right to privacy and the home; however the power's circumstantial and evaluative restrictions result in an entry predicated on proper justification. The framing takes the proper steps to exclude arbitrary interference.

Relationship between the limitation and its purpose (s 28 (2) (d))

The limitation is rationally and necessarily connected to its purpose. Arresting a person in any circumstance requires physical access to that person. The Bail Act requires a person be returned to court in the event they fail to comply with a condition of their bail, in order for that person's conditional grant of liberty to be re-evaluated. The person to be arrested is already subject to an order of the court that their liberty is subject to the imposed conditions.

The police need to have physical access to a person is preferentially by consent, or alternatively with proper justification where it is required to uphold the purposes of a bail agreement.

Any less restrictive means reasonably available to achieve the purpose (s 28 (2) (e))

These amendments are proportionate to the aim of keeping the community safe and ensuring the integrity of a person's conditional grant of liberty and are the least restrictive means available in the circumstances.

Importantly, the arrest power itself is not being changed – merely reorganised. The only changes in this Bill are to introduce a power of entry, which is necessary, and can only be facilitated by a grant of physical powers, with appropriate oversight. There are no possible means of securing physical access to a person for the purposes of an arrest other than facilitating a way to enter premises.

An entry power predicated on obtaining a warrant would be somewhat less restrictive. However, this is not reasonably available in the context and it is inconsistent with existing powers to enter premises to effect an arrest for suspected offences.

The provisions of the Crimes Act that authorise police to arrest a person without a warrant also authorises them to enter premises without a warrant to effect that arrest. The availability of a means to enter premises and effect an arrest without a warrant for breach of bail is necessary for the same practical reasons that underlay arrest powers in relation to offences.

Once consensual entry has already been sought and refused, situations often escalate. This can lead to a situation where the person to be arrested has barricaded themselves indoors, giving rise to a highly dangerous situation for that person, any police involved, and any potential or suspected victims.

This is especially risky to personal safety when there is a family violence offence in question. Further, a warrant being issued would not likely provide for a different course of action, as the breach of bail must be evaluated, which must be preceded by an arrest, so a warrant would more likely to facilitate entry where it would not be justified under the Bill's proposal, rather than having any effect on the entries that would be permitted under this guided and proportionate model. That is, a warrant would be an addition, rather than an alternative.

In practice, a framework based on judicially authorised entry would involve police attending a residence to confirm their belief that a relevant person is present, withdrawing from the residence (or having to draw additional resources away from other calls for service to secure a premises), calling a magistrate or judge to apply for a search warrant by phone and then returning to the residence to execute the warrant to enter to effect an arrest. A phone warrant often takes at least 45 minutes to obtain, which would directly translate into 45 minutes of advance warning for a person already demonstrating an unwillingness to comply with the carrying out of a court order. Waiting outside the dwelling would also in many situations be more risky to all parties when there is no realistic likelihood that sufficient nearby support could be gained to properly monitor entry to and exit from a dwelling.

A barricaded scenario is one of the most dangerous situations police face in the community and disproportionately leads to the possibility of serious harm or death to victims, particularly in a family violence setting. When a person is barricaded in premises, death or injury become more likely, as more force will be reasonably required to enter.

Depending on the alleged breach, by delaying entry to apply for judicial oversight, there is also the increased risk of the destruction of evidence relating to any breach of bail conditions. ACT Policing is unable to identify any measure that would effectively address this elevated risk should a judicially authorised power of entry by default model be implemented.

Emergency powers can be used, but only once the situation has escalated to an imminently dangerous level, one which may have been created by the police cordoning the scene whilst awaiting a warrant. This does not address a very likely escalation in risk following initial withdrawal by police to obtain a warrant to enter the premises. A cordoned-off scenario can escalate very quickly, and the ability to intervene decisively and early before this escalation is critical to the successful resolution of hostile and often dynamic situations.

Section 22 – Rights in criminal proceedings

Section 22 of the HR Act states (relevantly) that:

> *(1) Everyone charged with a criminal offence has the right to be presumed innocent*

The nature of the right affected (s 28 (2) (a))

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.

In *Momcilovic v The Queen*,[12] French CJ discussed the nature of the presumption of innocence. The Chief Justice 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 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.'[13]

The importance of the purpose of the limitation (s 28 (2) (b))

This Bill limits the presumption of innocence in two ways. The significant limitation is the creation of a defence imposing a legal burden on the defendant in firearms offences cases. Less significantly, this Bill removes a defence under the *Road Transport (Alcohol and Drugs) Act 1977* in certain circumstances; that less significant limitation is discussed briefly in the section 22 discussion below. This analysis here only covers the firearms offences defence.

The *Firearms Act 1996* provides in section 5 that:

> *(1) The underlying principles of this Act are—*
>
> *(a) to confirm firearm possession and use as being a privilege that is conditional on the overriding need to ensure public safety; and*
>
> *(b) to improve public safety—*
>
> *(i) by imposing strict controls on the possession and use of firearms; and*
>
> *(ii) by promoting the safe and responsible storage and use of firearms; and*

[12] (2011) 345 CLR 1.
[13] (1980) 55 ALJR 5, 7.

(c) to facilitate a national approach to the control of firearms.

As provided in the detail stage for Part 10 of the Bill in this statement, the current arrangement of elements in a number of offences makes proceedings exceedingly long and technically difficult. The offences in question relate to the possession and usage of firearms and ammunition. This Bill would remove the requirement for the prosecution to prove that the defendant did not hold a licence or permit in any other state or territory. Instead, any defendant who wishes to claim they had an interstate licence or permit would have a defence if they prove they had an interstate licence.

The purpose is to ensure that firearms possession and usage are properly regulated, with the overarching goal of public safety. It is important that the controls on the possession and use of firearms are robust and do not contain exploitable weaknesses. The confirmation that possession and use are privileges underscores the importance for firearms owners to be aware of their responsibilities at all times, and be able to prove the exact source of authority for their firearms, especially when travelling interstate. This limitation is a key support to the underlying principles of the Act. These amendments are very important to prevent the cumbersome and damaging process of the prosecution having to prove a matter that is fully within the defendant's knowledge and capabilities.

Nature and extent of the limitation (s 28 (2) (c))

The limitation is not significant. Any defendant would still enjoy the presumption of innocence with respect to all the other elements of the offence (being the possession or use, and the defendant not holding a licence or permit in the ACT). The defendant holding an appropriate licence or permit is a simple fact, which any responsible firearms user should be able to prove without any difficulty. Any firearms user is already required to have their licence or permit in their physical possession unless they have a reasonable excuse not to. A requirement that a person with a licence or permit from interstate be able to prove the existence of that licence is a reasonable and minimal limitation on the presumption of innocence.

Relationship between the limitation and its purpose (s 28 (2) (d))

These amendments are responsive to problems with current arrangements, and are more in the character of remedying a departure from those principles than any new means pursued to further them. The relationship is direct and necessary, as the existence of these cumbersome arrangements now results in the corruption of a robust firearms regulatory scheme.

In evaluating the importance of firearms regulation, and whether that justifies the imposition of a legal burden relating only to interstate firearms, consideration should be given to *R v Williams*.[14] Davis LJ, Foskett and Sweeney JJ held that while a reverse burden with respect to a firearm did burden the presumption of innocence, that burden was justified and proportionate.

[14] [2012] EWCA Crim 2162.

The Court found at [41] that 'Firearms offences – any firearms offences – are a very serious problem. Where those firearms stand to be lethal… the need for the protection of the public is obvious.' Further, their Honours held at [42] that the limitation was even more justified when it 'involves facts readily available to the accused'.

The limitation only extends to relate to information that the defendant would have at their immediate availability. The same information would takes prosecution months to obtain, and is not necessarily perfect. The result is that the small limitation is justified by an overwhelming need for public safety.

Any less restrictive means reasonably available to achieve the purpose (s 28 (2) (e))

Immediately apparent when introducing a defence imposing a legal burden is the alternative that the defence could impose only an evidential burden. If the same set of defences were created, imposing an evidential burden only, this would be a marginally less limiting burden but would fail to achieve the purpose sought. The defendant would still be required to lead evidence that they lived interstate, or some other circumstance suggesting the presence of a licence or permit. If the person has the appropriate licence or permit, producing documentation to that effect would be approximately as burdensome. However, if only circumstantial evidence were produced, the prosecution would still be required to negate the defence through that other state's registry – the same time-consuming process causing the current issue. In that circumstance, the delay would occur part-way through the trial, causing significant delays when in reality any defendant validly claiming the defence could discharge their burden with direct and available evidence. This Bill's amendments would in fact operate to strengthen the rights of a defendant under section 22(2)(b) of the HR Act, as the status quo or an evidential burden would cause an unreasonable delay.

Rights additionally engaged and limited

Section 22 – Rights in criminal proceedings (Presumption of innocence)

This Bill engages this right through the amendments that limit the availability of the defence of mistake of fact for the strict liability offence in section 20 of the *Road Transport (Alcohol and Drugs) Act 1977* (RT (AD) Act). The defence would be unavailable where a person claims that the presence of delta-9-tetrahydrocannabinol is due to low THC hemp seeds (defined by this Bill as 'cannabis food products'). The unavailability of the defence reflects the strong scientific basis for concluding that the consumption of any reasonable amount of these food products would not lead to THC being present in the oral fluid or blood.[15] It is therefore not factual to claim that consuming cannabis food products would have sufficient THC to cause a person to be charged with an offence under section 20 of the RT (AD) Act. Circumstances of mistakenly consuming actual cannabis would still permit the defence.

[15] See Amie C Hayley et al, 'Detection of delta-9-tetrahydrocannabinol (THC) in oral fluid, blood and urine following oral consumption of low-content THC hemp oil' (2018) 284 *Forensic Science International* 101.

The **purpose of the limitation** is to exclude the defence in circumstances where it would ultimately not be successful. The **nature and extent of the limitation** is minimal, since these amendments merely avoid cumbersome procedures which would bear the same outcome. The Bill places the **least restrictive limitation** on this right as it is limited to clarifying the state of the law as supported by scientific evidence. Section 23 (3) of the Criminal Code provides that other defences may also be available for use for strict liability offences, which includes the defence of intervening conduct or event, as provided by section 39 of the Criminal Code.

Crimes Legislation Amendment Bill 2019

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 will be the *Crimes Legislation Amendment Act 2019.*

Clause 2 — Commencement

This clause provides that the Act will mostly commence 7 days after its notification day. The amendments in Part 2 will commence by default within 3 months of notification, or earlier if fixed by the Minister by written notice.

Clause 3 — Legislation amended

This clause provides that the legislation listed in parts 2-13 of the Bill is amended by this Bill.

Part 2 – Bail Act 1992

Clause 4 – Rights following grant of bail – Section 6 (3)

This is a technical clause to refer correctly to section 56A as renamed.

Clause 5 – Power in relation to bail—Magistrates Court – Section 20 (1) (b) (ii)

This is a technical clause to refer correctly to section 56A as renamed.

Clause 6 – Section 56A

This clause amends the existing section 56A, and inserts sections 56AA, 56AB, 56AC and 56AD. This clause operates to provide appropriate statutory authority to a police officer when arresting a person in relation to a failure to comply with a condition of their bail, in response to the decision in *Andrews v Thomson* [2018] ACTCA 53. The new sections do not alter the power of police to arrest without warrant. The amendments provide a framework for entering premises when the arrest power is enlivened. The new framework provides that when a person to be arrested is on private premises, the police officer is to gain consensual entry, or justify their entry as necessary and reasonable. The amendments relocate the post-arrest procedures to another section.

The framework is designed to provide for the appropriate process to enter a dwelling house when a person who can be validly arrested is inside. Entry without consent is available only for a person on bail for relevant offences as defined in the Crimes Act, and when justified as

reasonable and necessary. Additionally, entry during night hours is restricted unless justified on the basis of a risk to evidence, or that it would not be practicable to arrest at a later time.

New Section 56A isolates the arrest power as it currently exists, allowing the other mechanisms to be reorganised into appropriate separate sections.

New Section 56AA grants the entry power necessary for completing arrests under section 56A. Subsection (1) establishes the necessary circumstances for application of the power, and, at paragraph (b), provides that the power only applies to relevant offences within the meaning of the Crimes Act, section 220 (4). Subsection (2) is consequential on the existence of the entry power.

Subsection (3) provides the appropriate framework for determining the appropriateness of an entry power, based on reasonable beliefs held by the police officer. Paragraph (a) requires that the police officer believe on reasonable grounds that the entry is necessary in the circumstances of the persons failure or expected failure to comply. This is intended to allow for a holistic consideration of whether the entry is required in the circumstances, including any relevant circumstances indicating there may be a risk of some kind created by not entering. This may be affected by the particular background facts known to the police officer. Circumstances that are likely to justify an immediate entry are anticipated to include risks:

- to the safety or welfare of anyone;
- that the person will undertake further conduct in breach of their bail conditions;
- that the person may abscond or otherwise fail to appear as required in court;
- that the person may barricade themselves in the dwelling;
- that the person may commit an offence;
- that the person may harass or interfere with a witness or possible witness; and
- that the person may interfere with evidence.

Paragraph (b) requires that the police officer believe on reasonable grounds that it would not be reasonable to arrest the person somewhere else. This would require some justification of why it would not be reasonable to – for example – wait for the person to leave the dwelling in their day-to-day movements. This may also involve considerations of the purposes of bail as indicated in section 22 of the Bail Act, and whether not entering the dwelling to effect the arrest may adversely affect those purposes.

Paragraph (c) only applies when the entry would take place during hours that many people would be sleeping or at rest: between 9 pm and 6 am. This provision is modelled on the *Crimes Act 1900*, section 220(3). Additional justification is required due to the enlarged right to expect privacy when a person is likely to be asleep. This general rule against night-time

entry can be displaced by either a risk to evidence relating to the failure to comply, or if there is a reason to believe that it would not be reasonable or practicable to wait until daytime.

Subsection (4) provides appropriate definitions.

New Section 56AB provides an analogous process to direct the process for entry to premises for this type of arrest as is provided at section 241 of the *Crimes Act 1900*.

New Section 56AC provides the logically necessary guidance and powers relating to and following from arrests as they apply to arrests for offences.

New Section 56AD relocates the provisions from the current section 56A (3)–(5) to a new section.

Part 3 – Confiscation of Criminal Assets Act 2003

Most of Part 3 of this Bill contains the equitable sharing arrangements for the IGA on unexplained wealth. Clauses 7 and 8 are consequential amendments on the amendments discussed at Part 8.

On 10 December 2018, the national unexplained wealth scheme came into force with the commencement of the *Unexplained Wealth Legislation Amendment Act 2018* (Cth).

The scheme is a response to an Independent Panel on Unexplained Wealth that reported in February 2014 recommending 'that all Australian Governments agree to a referral of powers from the States and Territories to the Commonwealth to enable the unexplained wealth provisions in the *Proceeds of Crime Act 2002* (Cth) to be broadened to also apply where a link to a suspected State or Territory offence can be established'. The Panel found that arrangements for dealing with unexplained wealth laws were not working effectively across multiple jurisdictions due to constitutional limits.

Following the release of the report, a Working Group on Unexplained Wealth, made up of officials from the Commonwealth, States and Territories, was established and the Commonwealth worked with jurisdictions to develop the scheme.

The national scheme allows the Commonwealth to pursue unexplained wealth matters where they arise from Territory offences (in addition to referred or adopted State offences). Once fully adopted, the national scheme will enable all participating jurisdictions to work together to effectively deprive criminals of their wealth, irrespective of the jurisdictions in which they operate. The scheme also helps to facilitate cross-jurisdictional investigations and prosecution in relation to proceeds of crime matters.

The ACT and the Northern Territory were automatically bound by the scheme by virtue of section 122 of the Constitution. Section 122 provides the Commonwealth Parliament with a plenary power to legislate with respect to any aspect of the territories. New South Wales legislation referring power to the Commonwealth has come into force on 1 September 2018.

On 6 December 2018, the ACT Attorney-General, Gordon Ramsay MLA, signed the IGA, which gives operational effect to elements of the scheme. The IGA provides that proceeds of crime will be sharable among parties to the IGA where cross-jurisdictional cooperation has occurred and the amount of funds recovered is over $100,000. Additionally, in the case of the Commonwealth, if they have relied on a state or territory offence the proceeds will automatically be shared with the corresponding jurisdiction regardless of any operational involvement in the matter. This means that the ACT will automatically contribute to an unexplained wealth action where the Commonwealth relies on an ACT offence. Parties do not need to share proceeds where a matter was not cross-jurisdictional.

A Cross Jurisdictional Committee (the CJC) has been formed to exercise functions under the IGA. Following a successful cross jurisdictional confiscation proceeding, a committee comprising members of contributing parties will be established to decide how the money is to be shared (the CJC subcommittee). The CJC subcommittee will consider whether or not non-cooperating jurisdictions (jurisdictions not party to the IGA) have contributed to the operation and what percentage of proceeds they should be allocated. Following this the general rule is that remaining proceeds be split equally amongst the contributing parties unless the CJC subcommittee unanimously decide to vary the presumption.

By signing the IGA, the ACT committed to introducing amendments to insert the equitable sharing arrangements contained in the IGA into the *Confiscation of Criminal Assets Act 2003* (COCA). The current equitable sharing arrangements (section 129) already contained in the COCA have remained to guide the sharing of proceeds when the ACT is the only party to the scheme and participates in a cross-jurisdictional investigation with one or more jurisdictions who are not part of the scheme.

The Commonwealth has not made the IGA a publicly available document. People who will be required to use the provisions have access to the IGA - this includes law enforcement and relevant government agencies.

The amendments do not engage human rights as the legislation is limited to authorising certain Territory bodies to pay or receive proceeds of crime under the Scheme.

Clause 7 – Meaning of *narcotic substance* and *property* for div 7.3 – Section 90, definition of *narcotic substance*

This clause updates the definition of narcotic substance to exclude cannabis food products, as defined in the *Drugs of Dependence Act 1989*, section 6.

Clause 8 – New section 90 (2)

This is a technical clause to provide that the definition of a cannabis food product in this section is the same as in the *Drugs of Dependence Act 1989*, section 6.

Clause 9 – New division 10.1 etc

This clause provides important definitions for the equitable sharing provisions.

Clause 10 – Section 128 heading

This is a technical clause to rename section 128 appropriately.

Clause 11 – Section 128

This is a technical clause to appropriately refer to the division.

Clause 12 – Meaning of *equitable sharing program* – Section 129 (1)

This is a technical clause to appropriately refer to the division.

Clause 13 – Section 129 (2), new definition of *proceeds of an unlawful activity*

This clause provides a new definition of unlawful activity to take into account the new equitable sharing arrangements.

Clause 14 – Payments into trust fund – New section 131 (1) (j)

This clause allows payments into the trust fund from amounts paid to the Territory under the national cooperative scheme on unexplained wealth.

Clause 15 – Purposes of trust fund – New section 132 (1) (g)

This clause amends the purposes of the trust fund to include payments by the Territory under the national cooperative scheme on unexplained wealth.

Clause 16 – New division 10.3

This clause introduces the equitable sharing arrangements for the national cooperative scheme on unexplained wealth into the ACT.

Division 10.3 National cooperative scheme on unexplained wealth

Subdivision 10.3.1 – Important concepts

New Section 135A includes important definitions for the equitable sharing arrangements.

New Section 135B provides the meaning of the decision-making period.

Subdivision 10.3.1 – Important concepts

New Section 135C outlines the purpose of subdivision 10.3.2 which is to "set out the process under the national cooperative scheme for sharing with the Commonwealth or a State any corresponding proceeds of the Territory that are shareable."

New Section 135D provides that the proceeds of the Territory that are shareable with the Commonwealth or a State under the national cooperative scheme must be reduced by any amount payable under the following sections of the Act to provide the net amount:

- section 132 (1) (a), (d) and (e) (Purposes of trust fund);
- section 235 (Compensation).

New Section 135E provides that the CJC must establish a subcommittee (the CJC subcommittee) to decide matters under this division about the net amount. The CJC subcommittee must consist of the Territory and each contributing jurisdiction.

New Section 135F provides how to share the net amount with a non-participating non-cooperating state.

New Section 135G provides how to share the net amount with participating states, cooperating states and the Northern Territory.

New Section 135H provides that the CJC subcommittee can make a decision in relation to an amount before the amount is paid into the trust fund or becomes the net amount.

New Section 135I details the payment period.

Clause 17 – Dictionary, new definitions

This clause inserts new definitions into the dictionary.

Clause 18 – Dictionary, definition of *distributable funds* and *equitable sharing program*

This clause substitutes new definitions for distributable funds and equitable sharing program.

Clause 19 – Dictionary, new definitions

This clause inserts new definitions into the dictionary.

Clause 20 – Dictionary, definition of *reserved funds*

This clause substitutes the definition of reserved funds.

Clause 21 – Dictionary, new definition of *shareable*

This clause inserts a new definition of shareable.

Part 4 – Confiscation of Criminal Assets Act 2003

Clause 22 – Other narcotic substances – Schedule 1, new section 1.1

This clause updates the definition of cannabis in the schedule to exclude cannabis food products, as defined in the *Drugs of Dependence Act 1989*, section 6.

Clause 23 – Schedule 1, item 8

This is a technical clause to provide that the definition of a cannabis food product in this section is the same as in the *Drugs of Dependence Act 1989*, section 6.

Part 5 – Crimes Act 1900

The amendments to the Crimes Act amend provisions relating to the impact of strangulation, choking or suffocation on victims to align current practice to the original policy intent of the provisions.

The original policy intent was to recognise the serious impacts on long-term health and the increased risk of mortality when any pressure is applied to the neck. This is especially the case in domestic and family violence matters. The policy intent was designed to ensure that the prosecution is not required to prove that there was a significant restriction to the airways, however in the recent case of *R v Green (No 3)* [2019] ACTSC 96, it was held that the offence under section 28 required proof that the victim's breathing was stopped, not merely impeded or restricted. This was not the original policy intent and these amendments make that clear in legislation.

Irrespective of the change in definition, the elements of each offence are still required to be proved beyond reasonable doubt. So, as an example, for section 28 the prosecution would still be required to prove that the conduct was both intentional and unlawful. While the definition has been broadened in legislation, the element of the conduct being ‘unlawful’ addresses the issue of benign pressure to the neck. This is similar to the way that benign contact could constitute an assault if not for the term ‘unlawfully’.

Following further discussions with representatives from the DPP, ACT and a Forensic Medical Specialist from Canberra Health Services, the definitions include reference to obstruction, interference and pressure to the neck and respiratory systems to any extent.

The new definitions are designed to ensure that the offences reflect the medical and substantial harm to people caused by any degree of choking, strangling or suffocating a person. The new definitions act to remedy the narrow interpretation in *R v Green* to realign the provision with the original policy intent. The amendments make a minor change to clarify the interpretation of the definition of key terms associated with one course of conduct making up an ‘act endangering health’ or an ‘act endangering life’. At the commission of the offence, the accused would know that the behaviour they engaged in was liable to criminal penalty; either through other criminal offences or through the subject offence or through an attempt of

the subject offence. For that reason, the effect of the amendments do not make substantive changes to unlawful conduct that would have been punishable by an offence attracting a similar penalty for the same criminal behaviours. As a result, the amendments will apply to all proceedings from the date of commencement, regardless of when they were commenced or the date of the alleged offence.

Clause 24 – Acts endangering life etc – Section 27 (1), new definitions

This clause defines choke and strangle to include applying pressure to any extent to a person's neck. This clause also defines suffocate to broadly encompass obstruction of and interference with a person's respiratory system or accessory systems of respiration to any extent, and impeding a person's respiration to any extent.

Clause 25 – Acts endangering health etc – Section 28 (1), new definitions

This clause amends section 28 to refer to the definitions outlined in section 27.

Part 6 – Criminal Code 2002

Clause 26 – Definitions—ch 6 – Section 600, definition of *cannabis*

This clause updates the definition of cannabis to exclude cannabis food products, as defined in the *Drugs of Dependence Act 1989,* section 6.

Clause 27 – New section 600 (2)

This is a technical clause to provide that the definition of a cannabis food product in this section is the same as in the *Drugs of Dependence Act 1989,* section 6.

Part 7 – Criminal Code Regulation 2005

Clause 28 – Prohibited substances – Schedule 1, part 1.2, item 36

This clause updates the definition of cannabis oil in the schedule to exclude cannabis food products, as defined in the *Drugs of Dependence Act 1989,* section 6.

Clause 29 – Dictionary, new definition of *cannabis food product*

This is a technical clause to provide that the definition of a cannabis food product in this section is the same as in the *Drugs of Dependence Act 1989,* section 6.

Part 8 – Drugs of Dependence Act 1989

The amendments to the *Drugs of Dependence Act 1989* (DODA) are directed at protecting sellers and consumers of low THC hemp seeds.

On 28 April 2017, the Australian and New Zealand Ministerial Forum on Food Regulation agreed to amend the Australia New Zealand Food Standards Code to allow the sale of low THC hemp seeds as food. The changes came into effect on 11 November 2017. Approved hemp foods contain no or very low levels of THC, the psychoactive chemical compound normally found in cannabis. Thus the consumption of hemp foods does not impair drivers and the approval poses no risk to road safety.

These amendments give effect to the *Food Standards (Proposal P1042 – Low THC Hemp Seeds as Food) Variation*. The amendments are primarily located in the DODA, but required consequential amendments by reference back to the DODA in other pieces of legislation in this Bill: the COCA, the *Confiscation of Criminal Assets Regulation 2003*, the *Criminal Code 2002*, the *Criminal Code Regulation 2005*, the *Medicines, Poisons and Therapeutic Goods Act 2008*, and the *Road Transport (Alcohol and Drugs Act 1977*.

Clause 30 – New part 2 heading

This clause creates Part 2 in the Drugs of Dependence Act, to group existing section 5 and new section 6.

Clause 31 – New section 6

This clause inserts the necessary definitions to reflect the *Australia New Zealand Food Standards Code* as varied. Cannabis food product is the term chosen as the general term to be excluded from definitions of cannabis as used for drug-related offences.

Clause 32 – Dictionary, definition of *cannabis*, paragraph (b)

This clause updates the definition of cannabis to exclude cannabis food products, as defined in the *Drugs of Dependence Act 1989*, section 6.

Clause 33 – Dictionary, new definition of *cannabis food product*

This is a technical clause to provide that the definition of a cannabis food product in this section is the same as in section 6.

Part 9 – Family Violence Act 2016

The amendments to the *Family Violence Act 2016* and the *Personal Violence Act 2016* allow for police officers to swear or affirm an affidavit of service before a police officer of, or above, the rank of sergeant in proceedings under their respective Acts. This aims to improve efficiency and reduce burdens in family and personal violence proceedings that can be caused by limited access and availability of other officers authorised to take the affidavit.

Clause 34 – Giving evidence by affidavit for interim order – Section 62A (2) (b)

This technical clause corrects the wording of paragraph (b) to reflect the correct terminology used by the *Oaths and Affirmations Act 1984*.

Clause 35 – New section 70G

This clause creates a new section to allow a police officer of, or above, the rank of sergeant to take the oath or affirmation for an affidavit of service by another police officer under the *Family Violence Act 2016*.

Part 10 – Firearms Act 1996

The amendments to the *Firearms Act 1996* (the Firearms Act) are designed to resolve unnecessary complexities with the framing of possession and usage offences under the current Firearms Act. Currently, it is an element of the offences being amended by this Bill that the person charged was not authorised by a licence, permit, or otherwise under the Firearms Act. It is simple to prove that a person was not authorised by licence or permit, as this can be directly proven by the Registrar of Firearms or their delegate conducting a search of the ACT firearms register. However, the element that the person was not otherwise authorised includes interstate firearms recognition, and thus requires the prosecution to prove that the person did not hold any interstate licence or permit, requiring evidence firearms registries in the States and the Northern Territory. These amendments remove that general part of the element, and reframe it as a defence. The defendant is to bear a legal burden for proving they held the licence or permit, due to the abundance of direct evidence to which they would have access on that matter. The limitations under the HR Act have been outlined in detail above.

Amendments to the Firearms Act will exclusively make procedural changes to the way certain offences are prosecuted. The amendments do not make substantive changes to the offences, create a new a new offence or change the maximum penalties for the offences. As a result, the amendments will apply to all proceedings from the date of commencement, regardless of when they were commenced or the date of the alleged offence.

Clause 36 – Offence—unauthorised possession or use of prohibited firearms – Section 42 (b)

This clause amends paragraph (b) to remove the part of the element referring to authority "otherwise under this Act".

Clause 37 – Section 42, note

This is a consequential technical clause now that the section no longer refers to the Firearms Act.

Clause 38 – New section 42 (2)

This clause creates a new defence to the offence, available if the defendant proves that at the relevant time that they held an interstate licence or permit that would be covered by a recognition under the Firearms Act.

Clause 39 – Offence—unauthorised possession or use of firearms other than prohibited firearms – Section 43 (1) (b)

This clause amends paragraph (b) to remove the part of the element referring to authority "otherwise under this Act".

Clause 40 – Section 43 (1), note

This is a consequential technical clause now that the section no longer refers to the Firearms Act.

Clause 41 – New section 43 (1A)

This clause creates a new defence to the offence, available if the defendant proves that at the relevant time that they held an interstate licence or permit that would be covered by a recognition under the Firearms Act.

Clause 42 – Offence—disposal of firearms by unauthorised holders generally – Section 237 (1) (b)

This clause amends paragraph (b) to remove the part of the element referring to authority "otherwise under this Act".

Clause 43 –Section 237 (2), new note

This is a technical clause to reflect the operation of subsection (2) as an exception.

Clause 44 – New section 237 (3)

This clause creates a new defence to the offence, available if the defendant proves that at the relevant time that they held an interstate licence or permit that would be covered by a recognition under the Firearms Act.

Clause 45 – Offence—disposal of inherited firearms – Section 238 (b)

This clause amends paragraph (b) to remove the part of the element referring to authority "otherwise under this Act".

Clause 46 – New section 238 (2)

This clause creates a new defence to the offence, available if the defendant proves that at the relevant time that they held an interstate licence or permit that would be covered by a recognition under the Firearms Act.

Clause 47 – Offence—possessing ammunition generally – Section 249 (1) (b)

This clause amends paragraph (b) to remove the part of the element referring to authority "otherwise under this Act".

Clause 48 –Section 249 (2), new note

This is a technical clause to reflect the operation of subsection (2) as a list of exceptions.

Clause 49 –Section 249 (3), new note

This is a technical clause to reflect the operation of subsection (3) as a list of exceptions.

Clause 50 – New section 249 (5)

This clause creates a new defence to the offence, available if the defendant proves that at the relevant time that they held an interstate licence or permit that would be covered by a recognition under the Firearms Act.

Part 11 – Medicines, Poisons and Therapeutic Goods Act 2008

Clause 51 – Meaning of *prohibited substance* and *schedule 10 substance*—Act – Section 13, definition of *prohibited substance*, except note

This clause updates the definition of prohibited substance to exclude cannabis food products, as defined in the *Drugs of Dependence Act 1989*, section 6.

Clause 52 – New section 13 (2)

This is a technical clause to provide that the definition of a cannabis food product in this section is the same as in the *Drugs of Dependence Act 1989,* section 6.

Part 12 – Personal Violence Act 2016

Clause 53 – Giving evidence by affidavit for interim order – Section 57A (2) (b)

This technical clause corrects the wording of paragraph (b) to reflect the correct terminology used by the *Oaths and Affirmations Act 1984*.

Clause 54 – New section 64G

This clause creates a new section to allow a police officer of, or above, the rank of sergeant to take the oath or affirmation for an affidavit of service by another police officer under the *Personal Violence Act 2016*.

Part 13 – Road Transport (Alcohol and Drugs) Act 1977

This Part is consequential on Part 8 of this Bill and excludes the defence of mistake of fact from being pursued based on a claimed mistake that the presence of THC in a person's oral fluid or blood resulted from the consumption of a cannabis food product.

There is strong scientific evidence that eating hemp food does not carry a significant possibility of resulting in a positive roadside drug test, using the range of equipment employed across Australia. This amendment is designed to exclude the defence in circumstances where the claim would not be an honest or reasonable excuse, without having to call expert evidence. The amendment is designed so as not to exclude claims that a person reasonably and honestly believed they were consuming a cannabis food product, where in reality it was cannabis of a higher THC concentration.

As to cannabis detection generally, the Health Directorate has advised that oral fluid testing will confirm the presence of THC if it has been recently consumed by the user. THC is unlikely to be detected in oral fluid after a period of 12 hours from smoking, and if detected beyond that is likely to be the result of oral consumption. Other jurisdictions have publicly stated that it will take 9 to 12 hours for this to occur. However, in blood tests, THC levels are usually detectable following 12 hours for single use however chronic THC users are likely to still have levels of greater than 5 ng/mL (this is above the ACT Government Analytical Laboratory cut off level for reporting) after 2 days abstinence from THC. Oral consumption of THC will be detectable in blood for longer than consumption by smoking but show at lower levels.

The nature of THC is such that, while THC is stored in a person's fatty tissue and can leach into a person's blood and urine for up to 33 days after consumption, it does not leach back into a person's oral fluid after the initial 24-hour period.

Clause 55 – Prescribed drug in oral fluid or blood—driver or driver trainer – New section 20 (3A)

This clause inserts a new subsection to give the effect detailed above.

Clause 56 – Section 20 (5), new definition of *cannabis food product*

This is a technical clause to provide that the definition of a cannabis food product in this section is the same as in the *Drugs of Dependence Act 1989,* section 6.