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**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES (DISRUPTING CRIMINAL GANGS) LEGISLATION AMENDMENT BILL  
2019**

**REVISED**

**EXPLANATORY STATEMENT**

Presented by  
Gordon Ramsay MLA  
Attorney-General

**CRIMES (DISRUPTING CRIMINAL GANGS) LEGISLATION AMENDMENT BILL  
2019**

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## **Purpose of the Bill**

The purpose of this bill is to introduce a range of measures to improve public order and safety in the Territory, including where criminal activity occurs in the context of criminal organisations.

The *Crimes (Disrupting Criminal Gangs) Legislation Amendment Bill 2019* (the Bill) will:

- a) Introduce new tiered offences of serious affray
- b) Amend the penalties for offences of fighting (section 391 of the *Crimes Act 1900*) and offensive behaviour (section 392 of the *Crimes Act 1900*)
- c) Increase maximum penalties for specified offences committed in connection with a criminal group or committed by a person associated with a criminal group
- d) Introduce an exclusion order scheme to exclude certain people from specified licensed premises through a civil mechanism
- e) Introduce cancellation of a licence under the *Liquor Act 2010* or the *Construction Occupations (Licensing) Act 2004* on the basis of a person's criminal activities.

## **Human Rights Considerations**

The Bill's provisions address significant public safety issues, particularly when connected with organised crime. In doing so the Bill balances the rights of individuals with those of the broader public who are entitled to protection from the impact of public disorder incidents and organised crime.

This section provides an overview of the human rights which may be engaged by the Bill, together with a discussion on reasonable limits where appropriate. Where necessary, a further human rights analysis is provided in relation to specific provisions.

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

- Section 8 – Recognition and equality before the law
- Section 12 – Right to privacy and reputation
- Section 13 – Freedom of movement
- Section 15 – Peaceful assembly and freedom of association
- Section 21 – Right to a fair trial
- Section 22 – Rights in criminal proceedings.

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

- Section 21 – Right to a fair trial.

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, in depth, the positive obligation of governments to uphold rights, 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.<sup>1</sup>

The measures contained in this Bill aim to deter conduct that infringes the rights of others, both in relation to public disorder and organised crime.

Offences involving violence or the threat of violence, such as affray, impact innocent bystanders who are often frightened, distressed and unable to go about their lawful activities. The amendments in the Bill reflect that the larger the public disorder incident is the more severe the impact on bystanders.

The social structure of organised criminal groups is often characterised by a ready disregard for rules, laws and general social order<sup>2</sup> with these groups embodying ‘a deliberate, considered and persistent defiance of the authority of the law’.<sup>3</sup> While incidents involving offending that can be directly attributed to organised crime, including to outlaw motorcycle gangs (OMCGs), are rare in the ACT there remains a public safety risk to communities through OMCG links to criminality, the use of violence and an ability to create fear in the community.

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<sup>1</sup> 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.

<sup>2</sup> James Finckenauer, ‘Problems of Definition: What Is Organized Crime?’ (2005) 8(3) *Trends in Organized Crime* 63, 71.

<sup>3</sup> Taskforce on Organised Crime Legislation, Department of Justice and Attorney-General (Qld), Final Report (2016) 14.

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*.<sup>4</sup> 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”.*<sup>5</sup>

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 purpose of addressing the issue of public safety, particularly in the context of organised criminal activity.

### **Detailed human rights discussion**

#### **Rights engaged and supported**

The Bill engages and supports the right to a fair trial (section 21) in respect of the sentencing of offences connected with a criminal group or while associated with a criminal group. It is acknowledged that the right to a fair trial is also engaged and limited by the provisions and this is addressed in detail below.

The sentencing of offences with a criminal group constitute a post-conviction scheme. This requires a sentencing court, on application of the director of public prosecutions, to consider whether an offender committed a schedule offence in connection with a criminal group or whether the offender committed a schedule offence while associated with a criminal group. The standard of proof is beyond reasonable doubt.

These provisions support the right to a fair trial by virtue of creating a post-conviction scheme. This means that a court judicial officer (in the case of a Magistrates Court trial or trial by judge alone in the Supreme Court) will not learn of an offender’s alleged involvement with a criminal group during the trial process. This avoids the significant risk, particularly in the case of trial by jury, of the decision of guilt or innocence being impacted by allegations of involvement with organised crime.

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<sup>4</sup> [1986] 1 S.C.R. 103.

<sup>5</sup> *R v Oakes* [1986] 1 S.C.R. 103.

### **Rights engaged and limited**

The amendments in the Bill primarily engage and limit the right to a fair trial (section 21). For this reason, the limitation is discussed in detail below.

Other rights engaged and limited are discussed briefly below, or with reference to specific legislative amendments in the detailed explanations of amendments made by the Bill.

#### ***Section 21 and Section 22 – Fair Trial and Rights in Criminal Proceedings***

Sections 21 and 22 are closely connected. Section 21 provides a right to a fair trial broadly, in which criminal charges are decided by a competent, independent and impartial court or tribunal after a fair and public hearing. Section 22 provides that anyone charged with a criminal offence is entitled to a number of minimum guarantees.

Section 21(1) of the HR Act states that:

Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Section 22(2)(a) of the HR Act states that anyone charged with a criminal offence is entitled:

To be told promptly and in detail, in a language that he or she understands, about the nature and reason for the charge (section 22(2)(a)).

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

The right to a fair trial includes all proceedings in a court or tribunal and all stages of proceedings. It is concerned with procedural fairness, that is, the right of all parties in proceedings to be heard and respond to any allegations and the requirement that the court be unbiased and independent. The nature of right may be absolute in itself, in that it can never be justified to hold an unfair trial, but many of the principles that characterise a fair trial are not absolute.<sup>6</sup>

The right to a fair trial is a basic human right. Article 10 of the *Universal Declaration of Human Rights* states:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

This right is also captured in the International Covenant on Civil and Political Rights (ICCPR) which states at Article 14.1:

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<sup>6</sup> *Brown v Stott* (2003) 1 AC 681

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

An accused is entitled to know the case against them, and be provided with particulars that identify the charge, including the time, place and manner of an alleged offence. This allows a complainant to identify and respond to the allegation made against them, and lessens the risk of duplicitous charges.

The United Nations Human Rights Committee (UNHRC) has said, by implication, that the rights guaranteed by Article 14 could only be derogated from in exceptional circumstances. The circumstances must be so exceptional that even in times of public emergency, a State must make sure the ‘derogations do not exceed those strictly required by the exigencies of the actual situation’.<sup>7</sup>

Penfold J of the ACT Supreme Court said the object of section 22(2)(a) of the HR Act is to ensure that ‘participants in the criminal justice system should not be placed at risk of being **misled or confused by the processes and forms** adopted by those who administer that system’ (emphasis added).<sup>8</sup>

The UNHRC explained that:<sup>9</sup>

the specific requirements of subparagraph 3(a) may be met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based.

In Australian courts, issues in relation to particularisation of a charge sheet or indictment are usually resolved by reference to common law standards of natural justice, instead of reference to a specific human right.<sup>10</sup> The High Court has stated that ‘in framing the particulars of an offence the prosecution cannot be more precise than the evidence available for tender at the trial will permit’.<sup>11</sup> The Court then went further to say that ‘if no greater specificity than that was necessary to identify the case the appellant had to meet, no basis was identified for requiring that the chosen span of dates whatever its width be treated as an element of the offence’.<sup>12</sup>

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<sup>7</sup> United Nations Human Rights Committee, *General Comment No. 32 – Article 14: Right to equality before courts and tribunals and to a fair trial*, 21 August 2007 [6].

<sup>8</sup> *William Kevin Stone v Les Brien & Itshak Yosef* [2009] ACTSC 6 (18 February 2009).

<sup>9</sup> Above n 3, [31].

<sup>10</sup> See, eg, *WGC v The Queen* (2007) 233 CLR 66.

<sup>11</sup> *Ibid* 103 [129].

<sup>12</sup> *Ibid* 104 [132].

In *DPP (Vic) v R S*,<sup>13</sup> the Victorian County Court ruled that section 25 (2) (a) of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) was not engaged in a 'course of conduct' charge if the DPP was required to provide all particulars the DPP would rely on, to the greatest possible extent. Section 25(2)(a) of the Victorian Act is substantially similar to section 22(2)(a) of the ACT's HR Act.

Based on a decision of the Victorian County Court,<sup>14</sup> it was suggested that while section 25(2)(a) requires the prosecutor to inform an accused of the 'nature' of their charge, which includes information about the particulars of the charge, the level of detail required in those particulars will depend on the charge brought.

Importantly, where a charge permits particulars that are unavoidably vague, the right may not be engaged.

The common law principle of natural justice may not be co-extensive or wider than what Article 14(3) of the ICCPR contemplates, but both have highly similar requirements as to the particularisation of charges.

The UN International Criminal Tribunal for the former Yugoslavia (ICTFY) said the following:<sup>15</sup>

In a case based upon individual responsibility where the accused is alleged to have personally done the acts pleaded in the indictment, the material facts must be pleaded with precision – the information pleaded as material facts must, so far as it is possible to do so, include the identity of the victim, the places and the approximate date of those acts and the means by which the offence was committed. Where the prosecution is unable to specify any of these matters, it cannot be obliged to perform the impossible. Where the precise date cannot be specified, a reasonable range of dates may be sufficient. Where a precise identification of the victim or victims cannot be specified, a reference to their category or position as a group may be sufficient. Where the prosecution is unable to specify matters such as these, it must make it clear in the indictment that it is unable to do so and that it has provided the best information it can. (citations omitted)

This paragraph was quoted by the United Nations Special Court for Sierra Leone (SCSL) in *Prosecutor v Norman - Decision on the Second Accused's Motion for Service and Arraignment on the Consolidated Indictment* (6 December 2004).

The views of both the ICTFY and the SCSL are applicable here because the relevant parts of their Statutes are almost identical to Article 14 of the ICCPR. The Statutes set out the rules

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<sup>13</sup> *DPP (Vic) v R S* [2016] VCC 1464 [53]—[59].

<sup>14</sup> Judicial College of Victoria, *Victorian Charter of Human Rights Bench Book* (10 May 2016) <<http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/57448.htm>>.

<sup>15</sup> *Prosecutor v Brdanin – Decision on Objections by Momir Talic to the Form of the Amended Indictment* (20 February 2001) Trial Chamber, United Nations International Criminal Tribunal for the former Yugoslavia.



and procedures of both Tribunals and were created by United Nations resolutions. Article 17(4) of the Statutes for SCSL and Article 21(4) of the Statutes of ICTFY are very similar to Article 14(3) of the ICCPR (upon which section 22(2)(a) of the HR Act was based).

The right is engaged and limited by the Bill in relation to the criminal group provisions and the criminal intelligence provisions in relation to cancellation of construction occupational licences, criminal group sentencing provisions, and decisions under the Liquor Act including a decision to cancel a liquor licence.

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

The purpose of the limitation is to deter people from becoming or remaining involved with organised crime. Increasing maximum penalties for people who committed certain offences in connection with a criminal group or while associated with a criminal group sends a clear message that offending in those circumstances is more serious than in the ordinary course of events.

Determining the issues through a post-conviction process both supports and limits the rights to a fair trial. The limitation is that the offender is precluded from having the criminal group issue explored as part of the trial process.

The purpose of the limitation imposed by the criminal intelligence provisions is to ensure that the director of public prosecutions or the chief police officer can use criminal intelligence information in relation to a relevant application where appropriate, without the need to disclose this information if it would prejudice a criminal investigation, enable the existence or identity of a confidential source of information to be discovered, or endanger life or physical safety.

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

The nature of the limitation is that the ‘criminal group’ consideration will occur after a plea of guilty or finding of guilt. The extent of the limitation is to remove the issue from the trial process and restrict determination of the issue to the sentencing process. However, the criminal group issue will still be determined according to the rules of evidence and the court must be satisfied beyond reasonable doubt.

The concept of the courts having the power, following a proceeding, to include as a relevant sentencing factor the fact that a person committed an offence in connection with or while associated with a criminal gang may, on its face appear to limit the right to be told promptly and in detail about the nature and reason for the charge. However, the nature and reason for the charge would be defined well prior to sentencing. It is merely the matter of the possibility of an additional factor to be taken into consideration upon sentencing that will be determined. The accused person will be provided with the particulars of the charge at an early stage. Additionally, if the accused is not convicted of the schedule offence (to the standard of

beyond reasonable doubt), the aggravated sentencing factor will not apply as the accused will not be sentenced.

In terms of the criminal intelligence provisions, while the right to a fair trial is primarily concerned with an accused person's rights during criminal trials, it also encompasses rights that an individual may have under civil or administrative law. Accordingly, the right is limited in that the person subject to a licence or permit cancellation or potential sentencing in relation to a criminal group may not have access to the criminal intelligence information that is used in the application. The court or the ACT Civil and Administrative Tribunal (ACAT) can, on application by the director of public prosecutions or the chief police officer, determine that information is criminal intelligence and consider the information without disclosing it to the convicted person or licence holder. While this is a limit on the right to a fair trial, it is balanced by the fact that the court or ACAT may find that it is not criminal intelligence and can be disclosed. At this juncture the director of public prosecutions or chief police officer is given the opportunity to withdraw the information before disclosure, which maintains the protective purpose of criminal intelligence.

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

The limitation is intended to prevent prejudice to an offender who has been convicted of a schedule offence by ensuring that the criminal group issue is determined separately to the issue of guilt or innocence of the offence.

The limitation imposed by the criminal intelligence provisions is intended to provide a fair and reasonable structure to judicially determine whether information is criminal intelligence for the purpose of balancing prevention of prejudice to ongoing criminal investigations and a person's right to a fair trial.

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

The restriction is proportionate to the purpose as it is limited to the point in proceedings at which the criminal group issue is decided.

The restriction imposed by the criminal intelligence provisions is proportionate as it provides for judicial determination, and also provides an option for the withdrawal of information if found that it is not criminal intelligence.

#### **Other rights engaged and limited**

#### **Section 8 – Recognition and equality before the law**

This right requires that no legislation should discriminate against an individual, but formal equality may create unfair outcomes and so the **nature of the right** is not absolute. Different treatment is not prohibited if the criteria for the different treatment are reasonable and objective, and if the aim is to achieve a legitimate purpose.

The right is engaged and limited by the provisions in the Bill relating to increased penalties for specified offences committed with a criminal group and cancellation of liquor and

construction licences. This is because people who are found to be involved or connected with organised crime may be treated differently from other people.

The UNHRC has recognised that ‘not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant’.<sup>16</sup> The preamble to the Covenant acknowledges that individuals have duties to other individuals and to the community to which that individual belongs. The purpose of the limitation created by the Bill’s provisions is to ensure public safety and protection against the criminal activities of organised groups.

OMCGs are ‘one of the most high-profile manifestations of organised crime’<sup>17</sup> and members may be involved in a range of criminal activities including; drug production and trafficking; firearms trafficking; serious fraud; money laundering; property crime; and offences of violence. The Australian Crime Commission has noted that OMCG chapters do not usually engage in organised crime as a collective unit, but generally the threat arises from small numbers of members leveraging off the OMCG and conspiring with other criminals for a common purpose.<sup>18</sup>

The **purpose of the limitation** is to discourage people from joining or remaining involved in criminal groups, which is important to achieving a law-abiding society. In 2016-17 the cost of serious and organised crime in Australia was estimated to be between \$23.8 billion and \$47.4 billion.<sup>19</sup>

The **nature of the limitation** is that it is restricted to adults who have an involvement or connection with organised crime. For offences with a criminal group, the offender will have been convicted of a specified criminal offence and then have their involvement in organised crime established to the criminal standard of proof. For the cancellation of a liquor or construction licence, this will only occur on the basis of criminal activities and will not impact on law-abiding licence holders.

These restrictions are proportionate to the purpose as they are focused on individuals who choose to be involved in criminal groups and activities. As such they are the **least restrictive possible**.

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<sup>16</sup> International Covenant on Civil and Political Rights.

<sup>17</sup> Australian Crime Commission website < <https://crimecommission.gov.au/organised-crime/organised-crime-groups/outlaw-motor-cycle-gangs>>.

<sup>18</sup> Australian Crime Commission, Crime Profile: Outlaw Motorcycle Gangs (July 2013) 2.

<sup>19</sup> Smith R 2018. *Estimating the costs of serious and organised crime in Australia 2016-17*. Statistical Reports no.9. Canberra: Australian Institute of Criminology.

## ***Section 12 – Right to privacy and reputation***

Section 12 of the HR Act provides that everyone has a right not to have his or her reputation unlawfully attacked. Section 12 gives effect to Article 17 of the ICCPR and UNHRC’s General Comment No. 16 which states:

The term “unlawful” means that no interference can take place except in cases envisaged by the law. Interference authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.<sup>20</sup>

This right may be engaged and limited by the criminal group provision, which increases the maximum penalty for offences committed by a person while associated with a criminal group. The right may also be engaged and limited by the provisions allowing for a decision to cancel an occupational licence or permit to be made public. The **nature of the right** is not absolute in that it may be limited by law. That limitation must not be arbitrary. Where a person is associated with a criminal group and commits an offence, a sentencing court must be satisfied beyond reasonable doubt that the person was associated with a criminal group. If the chief police officer applies for the cancellation of an occupational licence, the ACAT will have regard to a number of reasonable statutory factors, including whether the cancellation will minimise the possibility of criminal activity in the construction industry.

**The purpose of the limitation** in relation to criminal groups is to discourage people from joining or remaining involved in organised crime. In terms of the occupational licensing provisions, the purpose of publishing information about a cancellation order is to ensure that steps are taken to prevent the person from continuing to work as though they are licensed and that the public is appropriately notified of cancellations. **The nature and extent of the limitation** is that making a person subject to an increased maximum penalty for an offence will mean remaining associated with a criminal group is less desirable as the disadvantages will outweigh the advantages for that person. For occupational licensing, publication of a cancellation decision provides an additional incentive for licensee’s not to engage in criminal activity . The extent of the limitation also aligns with current practice under the Construction Occupations (Licensing) Act to publish licence cancellation information. These restrictions are the **least restrictive means possible** to diminish the perceived benefits of being associated with criminal groups and prevent engagement in criminal activity while holding an occupational licence, which presents an unacceptable risk to community safety.

## ***Section 13 – Freedom of movement***

This right is engaged and limited by the exclusion order scheme introduced by the Bill as a person who is the subject of an exclusion order will not be permitted to go to certain licensed

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<sup>20</sup> UN Human Rights Committee, *General Comment 16: The right to respect of privacy, family, home and correspondence, and the protection of honour and reputation (Art 17)*, UN Doc CCPR General Comment 16 (1988), para 3.

premises. The **nature of the right** is not absolute and so may be subject to reasonable limitations pursuant to section 28 of the HR Act. The **purpose of the limitation** is to prevent violent conduct by people who are part of a group at licensed premises and so protect the public. The **nature and extent of the limitation** is to create an offence for contravening an exclusion order which is proportionate to the risk posed by those who engage in violent conduct at licensed premises. The limitation is the **least restrictive possible** in that the court is given the authority to specify individual premises that are not included in the exclusion order where the person has a legitimate need to be on the premises and being there would not pose a risk to public safety.

### *Section 15 – Peaceful Assembly and Freedom of Association*

The right to freedom of association protects the right to form and join associations to pursue common goals and is engaged and limited by a number of the Bill’s provisions. The right to peaceful assembly relates to protest peacefully and is not relevant to this Bill.

The **nature of the right** is not absolute and can be restricted by laws including those which are necessary in the interests of public safety and public order or which protect the rights and freedoms of others.<sup>21</sup>

In relation to offences with a criminal group the **purpose of the limitation** is to discourage people from involvement in criminal groups. The **nature and extent of the limitation** is to create consequences for those who associate with others with the objectives which relate to the commission of indictable offences. The limitation is the **least restrictive possible** in that it only operates in respect of people who engage in conduct with the objective of committing offences.

In relation to exclusion orders, the **purpose of the limitation** is to reduce violent group conduct at licensed premises. The **nature and extent of the limitation** is to prohibit people who behave in this way from going to a range of licensed premises which will impact on a person’s freedom to associate with others but will reduce public order incidents and disrupt group violence undertaken in the context of criminal gangs. This approach is the **least restrictive possible** in that it focuses on people who have demonstrated behaviours that justify limiting their access to specified places that serve alcohol.

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<sup>21</sup> Article 22(2), International Covenant of Civil and Political Rights

# Crimes (Disrupting Criminal Gangs) 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 (Disrupting Criminal Gangs) Legislation Amendment Act 2019*.

#### Clause 2 — Commencement

This clause provides that Section 3 and Part 4 of the Act will commence on the day after notification. The remaining provisions will commence on a day fixed by the Minister by written notice, or automatically, not later than six months from notification.

#### Clause 3 — Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the:

- *Construction Occupations (Licensing) Act 2004*
- *Construction Occupations (Licensing) Regulation 2004*
- *Crimes Act 1900*
- *Crimes (Sentencing) Act 2005*
- *Liquor Act 2010*.

### Part 2 – Construction Occupations (Licensing) Act 2004

#### Clause 4 – New part 5A

This clause inserts a new Part 5A which introduces a cancellation scheme for construction licences due to the criminal activity of the licensee. The provisions create an authorising law under the *ACT Civil and Administrative Tribunal Act 2008* and so should be read together with that Act.

#### *Division 5A.1 Cancellation orders*

#### New Section 65— meaning of cancellation order – div 5A.1

This section defines cancellation order as an order made under section 67.

### New Section 66 – Application for cancellation order

This section outlines that the chief police officer may apply to the ACT Civil and Administrative Tribunal (ACAT) for a cancellation order for a licence. At least two days before applying for the cancellation order, the chief police officer must notify the commissioner of fair trading of the intention to apply for the order.

The chief police officer must also provide a copy of the application to the licensee.

### New Section 67 – Cancellation order

This section sets out the grounds for making a cancellation order. On application under section 66, ACAT may make an order if it is satisfied that the licensee presents an unacceptable risk to community safety due to that licensee's criminal activity. In making the decision, ACAT may consider the need to minimise the possibility of criminal activity in the construction industry, whether the licensee has been previously found guilty or convicted of a relevant offence and non-conviction information about the licensee. This does not limit the consideration of other relevant information, such as criminal intelligence information.

If ACAT makes a cancellation order for a licence, the chief police officer must provide a copy to the registrar.

Subsection 67 (4) includes relevant definitions for this section.

### New Section 68 - Revoking cancellation order

This section provides that ACAT may revoke a cancellation order where satisfied that as a result of a change in circumstances the person to the whom the cancellation order applies is no longer engaged in criminal activity that would present an unacceptable risk to the community if the person was a licensee.

### ***Division 5A.2 Criminal intelligence***

This division ensures that if the chief police officer wishes to submit criminal intelligence as part of the evidence to be considered by ACAT, this information is appropriately treated.

### New Section 69 – Meaning of criminal intelligence – div 5A.2

This section defines the term 'criminal intelligence' for the purposes of division 5A.2

### New Section 70 – Disclosure of criminal intelligence

The section specifies that criminal intelligence can only be disclosed to the commissioner, ACAT, a court or an entity to whom the chief police officer authorises its disclosure.

### New section 71 – Whether information is criminal intelligence – application and decision

This section provides that where an application is made by the chief police officer for a cancellation order on the basis of information classified by the chief police officer as criminal intelligence, an application must be made to ACAT as to whether the information is criminal intelligence.

This application need not be served on anyone else.

Where ACAT decides the information is not criminal intelligence, the applicant must be told and given the opportunity to withdraw the information from the proceeding.

### New section 72 – Confidentiality of criminal intelligence –ACAT

This section states that information must be treated confidentially, until a decision about whether it is criminal intelligence is made, and where it is decided that the information is criminal intelligence.

This is qualified by subsection (2) which permits ACAT to allow a party or representative of a party to have access to or inspect information that is criminal intelligence if it is in the public interest. ACAT can impose conditions on the access or inspection and, under subsection (3) must give the chief police officer the opportunity to withdraw the information prior to the information being disclosed.

Where the information is withdrawn from a proceeding by the chief police officer following an application under s 71, ACAT must maintain the confidentiality of the information.

Confidentiality of the information need not be maintained where ACAT finds it is not criminal intelligence and the information is not withdrawn.

### New section 73 – Confidentiality of criminal intelligence – courts

This section provides that where a court deals with a decision by ACAT about whether information is criminal intelligence, the Court must maintain the confidentiality of the information and must not give any reason for making a finding in relation to the information, other than public interest.

Where it finds that the information is not criminal intelligence, and the information is not withdrawn by the chief police officer, confidentiality is not required, and reasons may be given for the finding.

### New Section 74 – Delegation by chief police officer

This section states that the chief police officer may delegate functions under this division to a senior police officer.



## **Clause 5 – Register – public information**

### **New section 107A (2) (aa)**

This section inserts a cancellation order under part 5A into the existing section 107A (2) and so requires the registrar to update the public register in respect of the cancellation order not later than the end of the next working day after the chief police officer gives the registrar the order.

### **Clause 6 – New section 107A (6) (ca)**

This section provides that information that the registrar must place on the public register is limited to a statement that the cancellation order has been made in relation to the licensee.

Under section 107A(2)(d), if the registrar receives a direction from ACAT or a court, then the registrar must record or remove information from the register in accordance with that direction.

### **Clause 7 – Dictionary, new definitions**

This clause signposts definitions in the dictionary.

## **Part 3 – Construction Occupations (Licensing) Regulation 2004**

### **Clause 8 – New section 11A**

This section inserts new section 11A into the Regulations to the effect that if a person's licence is cancelled by cancellation order made under the Act, the person is not eligible to be licensed for a period of five years after the order was made unless the order is revoked under section 68.

## **Part 4 – Crimes Act 1900**

### **Clause 9 – Affray**

#### **Section 35A (2) and (3)**

This clause amends the offence of affray to create a tiered offence.

Overall, both new offences build on the initial offence of affray (section 35A (1)) and add the additional element of people being present and engaging in the conduct.

The first offence requires that two or more other people are present and also engaging in the violent conduct (or threat of violence) and has a maximum penalty of five years imprisonment.

The second offence requires five or more other people are present and also engaging in the violent conduct (or threat of violence) and has a maximum penalty of 10 years imprisonment.

Subsection (4) contains important clarifying terms for what specific elements of the offence should include. The violence, or the threat of violence must involve more than words and need not be carried out in common purpose with any other person.

A person towards whom the violence or threat of violence is directed does not need to be involved in the violence or threat.

A reasonable person does not need to be, or be likely to be, present at the place where the conduct happened. It is not necessary to prove that a particular person actually feared for their safety.

The definition of ‘engage in conduct’ is taken to have the same meaning as section 13 of the *Criminal Code 2002*.

### **Clause 10 – New sections 35AA and 35AB**

This clause inserts new sections 35AA and 35AB

#### New section 35AA – Affray – alternative verdicts

This section allows alternative verdicts for the new tiers of affray if the trier of fact is satisfied beyond reasonable doubt that the defendant committed another offence against section 35A carrying a lesser penalty.

#### New section 35AB – Review – affray provisions

This section provides that the operation of sections 35A(2) and (3) and section 35AA must be reviewed by the Minister as soon as practicable after the end of their 3<sup>rd</sup> year of operation. The Minister must then present a report of the review within 6 months.

### **Clause 11 – Fighting**

#### **Section 391, penalty**

This clause updates the maximum penalty for the offence of ‘fighting’ under section 391 to 20 penalty units. Previously, this offence was punishable by \$1,000 which is not in line with best practice.

### **Clause 12 – Offensive behaviour**

#### **Section 392, penalty**

This clause updates the maximum penalty for the offence of ‘offensive behaviour’ under section 392 to 20 penalty units. Previously, this offence was punishable by \$1,000 which is not in line with best practice.

## **Part 5 – Crimes (Sentencing) Act 2005**

### **Clause 13 – New part 4.6**

This clause inserts a new part 4.6 in the *Crimes (Sentencing) Act 2005*.

### **Part 4.6 Sentencing—schedule offence with criminal group**

#### ***Division 4.6.1 General***

##### **New Section 61A – Objects – pt 4.6**

This section sets out the objects of the part. The purpose of the objects is to provide a clear statement that the provisions of the chapter are intended to address the problem of organised crime while still ensuring that human rights are supported.

The objects are included to guide both the director of public prosecutions and the courts in applying the provisions of the chapter. In particular, the director of public prosecutions will have regard to the objects when exercising his discretion to make an application under the chapter. The sentencing court, as decision-maker, will also be guided by the objects in making a determination.

##### **New Section 61B – Definitions – pt 4.6**

This section defines the key concepts of court, criminal intelligence, offender and schedule offence for this part.

##### **New Section 61C – Meaning of *criminal group* – pt 4.6**

Criminal group is defined in this section as a group of 2 or more people and the group has as an objective engaging in conduct which constitutes an indictable offence or obtaining a benefit for the group (or someone in the group or someone else). The group may be operating outside the ACT, but any offence will need to be committed in the ACT for jurisdictional purposes.

##### **New Section 61D – Application – pt 4.6**

This section makes clear that this part only applies to a schedule offence committed after commencement. This does not preclude the activities of a criminal group being considered even if they occurred prior to the offence being committed.

##### **New Section 61E – Review – pt 4.6**

This section inserts a review requirement. The Minister must review the operation of this part as soon as practicable after the end of its third year of operation and present a report of the review to the Legislative Assembly within 6 months after the review is started.

### ***Division 4.6.2 Schedule offence—criminal group***

#### **New Section 61F – Schedule offence and criminal group – application**

This section relates to the process for making an application to a court for a decision that an offender committed a schedule offence either in connection with a criminal group or while associated with a criminal group. It requires a prosecutor to give the court oral notice immediately after the offender was found guilty of, or pleaded guilty to, the schedule offence. This ensures that both the court and offender (and his or her representative) will be made aware, as soon as possible, of the prosecution's intent to make an application. The application must be filed with the court within 7 days and served on the offender. While there is a requirement for the application to set out information in support of the application this does not require the director of public prosecutions to disclose criminal intelligence.

#### **New Section 61G – Schedule offence and criminal group – offender's response**

This section permits an offender to file a response to the application but does not require them to do so. Any response must be filed within 14 days.

#### **New Section 61H – Schedule offence and criminal group – when application must be heard and decided**

This section provides that a court must hear and decide an application under section 61F before an offender is sentenced. The court must also explain the consequences of a decision that the schedule offence was committed in connection with a criminal group or while associated with a criminal group in terms of the increased maximum penalty.

#### **New Section 61I – Court decision – in connection with criminal group**

This section requires a court to make a decision whether a schedule offence was committed in connection with a criminal group.

Subsection (2) provides the criteria for finding the offence was committed with a criminal group namely that the offence was committed for the benefit of the group, or at least 2 people in the group, or the offence was committed at the direction of a person in the criminal group or the offence was committed to further the objectives of the group.

Subsection (3) directs that the rules of evidence apply to the decision-making process and that the court must be satisfied beyond reasonable doubt.

Subsections (4) and (5) state that the court must record the reasons for its decision if it decides the offence was committed in connection with a criminal group but that failure to do so will not invalidate the decision or sentence.

#### **New Section 61J – Court decision – while associated with criminal group**

This section requires a court to make a decision whether a schedule offence was committed by an offender while associated with a criminal group.

Subsection (2) provides the criteria for making the decision. The court may be satisfied the schedule offence was committed while associated with a criminal group if the person is found to have recruited to the group, engaged in conduct supporting the group, occupied a position of leadership or management, or was able to direct the activities of the group. In addition, the court may be satisfied if the offender identified themselves in some way as associated with the group, even if they were not a member.

Subsection (3) directs that the rules of evidence apply to the decision-making process and that the court must be satisfied beyond reasonable doubt.

Subsections (4) and (5) state that the court must record the reasons for its decision if it decides the offence was committed in connection with a criminal group but that failure to do so will not invalidate the decision or sentence.

#### New Section 61K – Maximum penalty for schedule offence

This section changes the maximum penalty for schedule offences. The maximum penalty is increased by 25% if the offence was committed by an offender in connection with a criminal group. The maximum penalty is increased by 10% if the offence was committed while the offender was associated with a criminal group.

#### ***Division 4.6.3 Criminal group—criminal intelligence***

#### New Section 61L – Disclosure of criminal intelligence

This section provides that information that the chief police officer classifies as criminal intelligence must not be disclosed for this chapter to anyone other than the director of public prosecutions or a court.

#### New Section 61M – Court must decide whether classified information is criminal intelligence

This section sets out the process to be followed in determining whether information is criminal intelligence.

Sub-section (1) provides that if information classified by the chief police officer as criminal intelligence is proposed to be used in a proceeding for the sentencing of an offender for a schedule offence, the director of public prosecutions must apply to the court for a decision about whether the information is criminal intelligence.

Sub-section (2) states that the application need not be served on anyone unless the court otherwise orders on its own initiative.

Sub-section (3) requires the court to decide whether the information is, or is not, criminal intelligence.

Sub-section (4) provides that if the court proposes to decide that the information is not criminal intelligence, the director of public prosecutions must be told about the proposal and given the opportunity to withdraw the information from the proceeding. This allows

information to remain protected if the director of public prosecutions considers it should be but means that the information will not be able to be used in the proceedings.

Sub-section (5) requires the application must be heard in closed court. This is to protect the classified information until a decision has been made.

#### New Section 61N - Confidentiality of criminal intelligence

This section is concerned with protecting the confidentiality of criminal intelligence.

Sub-sections (1) and (2) together require a court which has decided information is criminal intelligence to maintain the confidentiality of the information.

Sub-section (3) states the court may take any steps it considers appropriate to maintain the confidentiality of the information.

Sub-section (4) prohibits the court from giving any reason for making a finding in relation to the information, other than public interest.

Sub-section (5) clarifies that if the court finds that information is not criminal intelligence, and the information is not withdrawn then there is no requirement to maintain confidentiality. In addition, the court may give reasons for its finding. This applies to any other court dealing with the information.

Sub-section (6) makes section 61N subject to section 61O which deals with disclosure of criminal intelligence to an offender.

#### New Section 61O - Disclosure of criminal intelligence to offender

Sub-sections (1) and (2) set out that where criminal intelligence is to be used in a proceeding and is not withdrawn then the court must hear submissions about whether the defence should be given access to the information.

Sub-section (3) allows the court, when satisfied the defence should have access to the information, to order access in a form and on any condition the court considers appropriate.

Sub-section (4) provides an opportunity for the prosecution to withdraw the information at this stage. This will mean the information is no longer available to be used in the proceedings by the prosecution.

Sub-section (5) defines ‘defence’ as being a lawyer representing the offender or the offender themselves if they are not legally represented.

#### **Clause 14 – New schedule 1**

This clause inserts a new schedule of offences. A schedule offence is defined by section 61B. The offences listed in the schedule have been selected in consultation with law enforcement on the basis of their potential to be committed in connection with a criminal group or while an offender is associated with a criminal group.

## **Clause 15 – Dictionary, new definitions**

This clause signposts definition for part 4.6.

## **Part 6 – Liquor Act 2010**

### **Clause 16 – New section 69A**

This clause inserts new section 69A into the Liquor Act to provide that where a person's licence or permit was cancelled by a cancellation order that was made under part 11B of the Act on the basis, or partly on the basis, of criminal activity by the person, the person is not suitable to hold, or be involved with, a licence or permit for five years after the order was made.

### **Clause 17 – New division 8.10**

This clause inserts a new division 8.10 after division 8.9 in relation to exclusion orders.

#### ***Division 8.10 Exclusion orders***

##### New Section 143C – Definitions – div 8.10

New section 143C signposts to definitions of 'exclusion order', 'exclusion period' and 'excluded person' in new section 143D.

##### New Section 143D – Meaning of *exclusion order*, *excluded person* and *exclusion period*

This section explains the new concept of an exclusion order as an order prohibiting entry or remaining on licensed premises. The person who is the subject of an order is the 'excluded person' and the length of the order is the 'exclusion period'.

##### New Section 143E – Application for exclusion order

New section 143E establishes the process for the chief police officer to make an application to a magistrate for an exclusion order.

The application must be in writing and include a statement of the grounds on which the application is made and information to support those grounds.

The chief police officer must notify the commissioner of his intention to make an application at least 2 days prior. The chief police officer must give a copy of the application to the person for whom the order is sought and tell the person the time and date when the application is to be heard.

The application may be heard and decided in the absence of the person provided the person has been told by the chief police officer about when the application will be heard.

### New Section 143F – Making of exclusion order

New section 143F provides the grounds and process for the magistrate to make an exclusion order.

A magistrate may make an exclusion order if satisfied that the person has, in company with others and on 1 or more occasions in the 12 months before the application was made, engaged in violent conduct on or in the immediate vicinity of any licensed premises. The magistrate must be satisfied that making an exclusion order will reduce the risk to public safety.

An exclusion order applies to all licensed premises operated under a general licence, a licence that is for a bar or nightclub, a club licence and a special licence unless otherwise determined by the magistrate. On application by the chief police officer or the person to be excluded, the magistrate may decide the exclusion does not apply to particular licensed premises if satisfied that the person has a legitimate and genuine need to be on the premises and allowing the person to be on the premises would not pose a risk to public safety.

The exclusion order lasts for 12 months unless the magistrate determines that a shorter period is more appropriate in consideration of the nature and seriousness of the person's conduct.

The exclusion order must state the name of the excluded person, that the order applies to all licensed premises mentioned in subsection (2) and any excluded premises, and the exclusion period.

The magistrate must give a copy of the exclusion order to the excluded person, the chief police officer and the commissioner for fair trading.

### New Section 143G – Offence – excluded person on premises contrary to exclusion order

New section 143G provides that it is an offence if a person subject to an exclusion order enters or remains on the premises named in an exclusion order, and the person is reckless about whether the premises are licensed premises that the person may not enter or remain in under the exclusion order. The offence does not apply where the person has a reasonable excuse.

The maximum penalty for this offence is 100 penalty units, imprisonment for 12 months or both.

The policy intent behind this is to ensure that exclusion orders are enforceable and that a person subject to an exclusion order does not enter or remain at a premises they are excluded from. This offence is critical to ensuring the integrity of the operation of the exclusion order scheme.

### New Section 143H – Display of notice about effect of exclusion order

New section 143H provides that the licensee of premises operated under a general licence, an on licence that is for a bar or nightclub, a club licence or a special licence must display a



notice at or near the entrance to the licensed premises telling people about the effect of section 143H. Section 143H provides the offence provision where an excluded person remains on premises contrary to an exclusion order.

#### New Section 143I – Amending or revoking exclusion order

This section permits an excluded person to apply to a magistrate to amend or revoke the order. Amendment is restricted to changing the premises to which the exclusion order applies.

The application must be in writing, state the grounds and provide information to support those grounds.

To amend an order the magistrate must be satisfied that there has been a change of circumstances, there is a legitimate and genuine need to be on the premises and that allowing them to be there would not pose a risk to public safety.

To revoke an order the magistrate must be satisfied that there has been a change of circumstances that means the person being on the premises would not pose a risk to public safety.

#### **Clause 18 – Ground for occupational discipline – licensee**

##### **New section 183 (1 )(k)**

This clause provides new grounds for occupational discipline. This includes where the licensee has allowed a person of concern to do 1 or more of the following in relation to the business operated under the licence:

- exercise a significant influence in relation to the conduct of the business; or
- take part in a directorial, managerial or executive decision for the business; or
- elects or appoints a person as an executive officer in the business.

##### **Clause 19 – New section 183 (4)**

This clause inserts a definition of the term ‘person of concern’. A person is a ‘person of concern’ in relation to a licence if:

- a cancellation order for the licence has been made under part 11B; and
- the order was made on the basis, or partly on the basis, of the criminal activity of the person.

## **Clause 20 – Grounds of occupational discipline – commercial permit holder**

### **New section 184 (1) (k)**

This clause creates a new ground for occupational discipline by inserting new section 184 (1) (k). The ground is that the a permit-holder has allowed a person of concern to do 1 or more in relation to the business operated under the permit: exercise a significant influence in relation to the conduct of the business; take part in a directorial, managerial or executive decision for the business; or elect or appoint a person as an executive officer in the business.

### **Clause 21 – New section 184(3)**

This clause inserts a new sub-section (3) defining a person of concern in relation to a commercial permit if a cancellation order for the permit was made under part 11B and the order was made on the basis, or partly on the basis, of the criminal activity of the person.

### **Clause 22 – New part 11B**

This clause inserts a new Part 11B in relation to cancellation of a liquor licence or permit. The provisions create an authorising law under the ACT Civil and Administrative Tribunal Act 2008 and so should be read together with that Act.

## **Part 11B – Cancellation of licence or permit for criminal activity**

### New Section 187H – Definitions

New section 187H provides the definition of the term ‘cancellation order’. This is a signpost definition as the term is defined as an order made under section 187J.

The section also provides the definition of the term ‘involved’ in relation to both a liquor licence and permit.

A person is ‘involved’ with a licence if the person is:

- the licensee; or
- a close associate of the licensee; or
- if the licensee is a corporation—an influential person for the corporation; or
- if someone other than the licensee has day-to-day control of the business operated under the licence—a person who has day-to-day control.

A person is ‘involved’ with a permit if the person is:

- the permit-holder; or
- a close associate of the permit-holder; or
- if the permit-holder is a corporation—an influential person for the corporation; or
- if someone other than the licensee has day-to-day control of the business operated under the permit—a person who has day-to-day control.

### New Section 187I – Application for cancellation order

New section 187I provides that the chief police officer may apply to ACAT for a cancellation order for a licence or permit. The chief police officer must give a copy of the application to the licensee or permit-holder.

At least 2 days before applying for the cancellation order, the chief police officer must notify the commissioner for fair trading of the chief police officer's intention to apply for the order.

The chief police officer must give a copy of the application to the licensee or permit-holder.

### New Section 187J – Cancellation order

New section 187J provides the grounds for ACAT to make an order to cancel a licence or permit.

ACAT may make a cancellation order if satisfied that, because of the licensee's criminal activity the person's continuing to hold a licence or permit presents an unacceptable risk to community safety. Sub-section (2) states that in making its decision ACAT may consider the need to minimise the possibility of criminal activity in the liquor industry, whether a person involved with the licence or permit has been convicted or found guilty of a relevant offence or had an exclusion order made for them; non-conviction information about a person involved with the licence or permit; and the harm minimisation and community safety principles.

Sub-section (3) prohibits ACAT from making a cancellation order on the basis of the criminal activity of an involved person unless the licensee has been told about the criminal activity and who the involved person is and the licensee is given a reasonable time to take steps to ensure the person ceases to be involved with the licence. Identical provisions are included for permit-holders.

Sub-section (4) requires the chief police officer to give a cancellation order to the commissioner for fair trading.

Sub-section (5). provides the definition of the term 'non-conviction information' which means information about whether the person:

- has been charged with a relevant offence but a proceeding for the offence is not finalised; or the charge has lapsed, been withdrawn or discharged, or struck out; or
- has been acquitted of a relevant offence; or
- has had a conviction for a relevant offence quashed or set aside; or
- has been served with an infringement notice for a relevant offence; or
- has a spent conviction for a relevant offence.

The section also provides the definition of the term 'relevant offence' which means any of the following:

- an offence punishable by imprisonment for 5 years or longer; or

- an offence against the *Crimes Act 1900*, section 26 (Common assault) or section 35A (1) (Affray); or
- an offence involving fraud or dishonesty; or
- an offence against the Liquor Act or a law of another jurisdiction substantially corresponding to the Liquor Act.

#### New Section 187K – Cancellation order - revocation

This section allows ACAT to revoke a cancellation order when satisfied there is a change of circumstances and the person to which the order applies is no longer engaged in criminal activity which would present an unacceptable risk to community safety.

#### New Section 187L – Offences – cancellation order – involvement of person engaged in criminal activity

New section 187L provides that it is an offence where a person who was previously involved with the licence or permit, and a cancellation order was made for the licence or permit on the basis, or partly on the basis, of the criminal activity of the person, does 1 or more of the following in relation to the business operated under the licence or permit that was cancelled:

- exercises a significant influence in relation to the conduct of the business; or
- takes part in a directorial, managerial or executive decision for the business; or
- elects or appoint a person as an executive officer in the business.

The maximum penalty for this offence is 100 penalty units, imprisonment for 12 months or both.

The policy intent behind this is to ensure a person engaged, or previously engaged, in criminal activity under the scheme does not continue their involvement with the operation of the business or to indirectly operate the business. This offence is critical to ensuring integrity in the operation of the cancellation order scheme.

#### **Clause 23 – Disclosure of criminal intelligence—chief police officer**

##### **Section 222B (1)**

This clause provides that information that is classified by the chief police officer as criminal intelligence may now be disclosed to ACAT. Previously this information was only permitted to be disclosed to the commissioner, the Minister, a court or an entity to whom the chief police officer authorises its disclosure.

#### **Clause 24 – Whether information is criminal intelligence—application and decision**

##### **New section 222D (1A)**

New section 222D provides that ACAT may determine whether information is criminal intelligence on receipt of an application from the commissioner or chief police officer.

This clause inserts new section 222D (1A) to provide that section 222D now also applies where the chief police officer applies to ACAT for a cancellation order under part 11B. An application by the chief police officer must be made because, or partly because of, information that is classified by the chief police officer as criminal intelligence.

#### **Clause 25 – Confidentiality of criminal intelligence—commissioner and ACAT**

##### **New section 222F (2A) and (2B)**

New section 222F (2A) provides that where ACAT is due to determine whether information is criminal intelligence following receipt of an application from the commissioner or chief police officer, ACAT may allow a party or a representative of a party to have access to or inspect information that is criminal intelligence if ACAT thinks it would not be contrary to the public interest to do so. This may be on conditions ACAT considers appropriate.

New section 222 (2B) provides that if ACAT proposes to allow access or inspection of criminal intelligence information then the chief police officer must be given an opportunity to withdraw the information.

#### **Clause 26 – Dictionary, new definitions**

This clause inserts the definition of the terms cancellation order, involved with a licence and involved with a permit into the dictionary of the Liquor Act.