

**2020**

**LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES LEGISLATION AMENDMENT BILL 2020**

**EXPLANATORY STATEMENT  
and  
Human Rights Compatibility Statement**

*(Human Rights Act 2004, s 37)*

Presented by  
Shane Rattenbury MLA  
Attorney-General

# CRIMES LEGISLATION AMENDMENT BILL 2020

## Outline

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## **CRIMES LEGISLATION AMENDMENT BILL 2020**

The Bill is not a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004* (HR Act).

### **Overview and purpose of the Bill**

The policy objective of this bill is to address minor and technical issues to improve the efficacy and clarity of criminal justice legislation.

The Crimes Legislation Amendment Bill 2020 will:

- a) amend the *Confiscation of Criminal Assets Act 2003* (the COCA Act) to clarify the legislative provision that applies to applications for exclusion orders for property subject to an unexplained wealth restraining order;
- b) amend the *Crimes (Sentence Administration) Act 2005* (CSA Act) to create a clear mechanism to bring offenders before an appropriate court to consider whether to cancel an intensive correction order (ICO) where an offender has committed and been convicted or found guilty of a new offence that is punishable by imprisonment;
- c) correct an anomaly in the definition of ‘threatening act’ for the offence of serious vilification in the *Criminal Code 2002* (the Criminal Code); and
- d) amend the *Magistrates Court Act 1930* (Magistrates Court Act) to allow defendants to appeal against conviction in the Magistrates Court up to 28 days after sentence.

### **Consultation on the proposed approach**

Consultation on amending the appeal timeframe for Magistrates Court convictions includes the Standing Committee on Justice and Community Safety inquiry into sentencing (2013-2015) which took public submissions on this issue. The Justice and Community Safety Directorate (JACS) undertook further consultation with justice sector stakeholders in 2019 and 2020. Stakeholders have supported this proposal, as it will reduce fragmentation of appeals and be more efficient for the parties.

JACS undertook targeted justice system stakeholder consultation on the proposed amendments concerning: the consideration of ICO cancellation by a sentencing court; clarification of the applicable provisions for seeking exclusions from restraining orders,

amending the appeal timeframe for Magistrates Court convictions, and on correcting the definition of serious vilification. All comments were considered in the design of the Bill.

### **Consistency with Human Rights**

The Bill makes minor amendments to existing schemes. None of the amendments change the policy underpinning each of these schemes.

The amendments which engage human rights are discussed below.

#### ***Rights Engaged***

The purpose of the Bill is to address minor and technical issues to improve the efficacy and clarity of criminal justice legislation. Broadly, the Bill engages the following HR Act rights:

- Section 8 (3) – Right to equal and effective protection against discrimination
- Section 16 – Right to freedom of expression
- Section 18 – Right to liberty and security of person
- Section 22 (4) – Right to have a conviction and sentence reviewed by a higher court

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.

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. Section 28 prescribes factors to be considered to determine whether a limitation is reasonable:

- the nature of the right affected;
- the importance of the purpose of the limitation on human rights;
- the nature and extent of the limitation on human rights;
- the relationship between the limitation and its purpose; and
- any less restrictive means reasonably available to achieve the purpose that the limitation on human rights seeks to achieve (proportionality).

#### ***Rights Promoted***

Correcting the definition of serious vilification promotes the right to equal and effective protection against discrimination. Protection against discrimination on the basis of sexuality (or “sexual orientation”) is noted as an example under section 8 of the HR Act.

The new timeframe for appeals against convictions in the Magistrates Court engages and supports the right to have a conviction and sentence reviewed by a higher court. A defendant who has been sentenced is more able to make an informed choice about whether it is worthwhile to appeal against their conviction. The amendments do not affect a defendant's ability to apply for bail between conviction and sentence.

### ***Rights Limited***

The Bill engages and limits the right to liberty and security of person by clarifying the process for dealing with offenders serving ICOs who have been found guilty of crimes that attract a term of imprisonment.

- The amendments to sections 60 and 61 of the CSA Act will provide that if an offender is arrested for this form of ICO breach, they must be brought before a court instead of the Sentence Administration Board (the SAB).
- The amendment to section 65 of the CSA Act will provide that if an offender is convicted or found guilty of an offence that is punishable by imprisonment and their ICO breach must be referred to the Supreme Court (because the ICO was made or amended by the Supreme Court), the offender may be remanded in custody until they can be brought before the Supreme Court.

These limitations are discussed together in detail below.

The amendment to the offence of serious vilification (section 750 of the *Criminal Code 2002*) engages and limits the right to freedom of expression. This limitation is further described below.

No rights are engaged or limited by the Bill's clarification of the application process for exclusions from restraining orders. This amendment simply clarifies the sections of the Act under which applicants should apply for exclusions from such orders.

### **Detailed human rights discussion**

#### **The right to liberty and security of person**

Section 18 of the HR Act states that:

- (1) *Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.*
- (2) *No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.*
- (3) *Anyone who is arrested must be told, at the time of arrest, of the reasons for the arrest and must be promptly told about any charges against him or her.*
- (4) *Anyone who is arrested or detained on a criminal charge—*
  - a. must be promptly brought before a judge or magistrate; and*

- b. *has the right to be tried within a reasonable time or released.*
- (5) *Anyone who is awaiting trial must not be detained in custody as a general rule, but his or her release may be subject to guarantees to appear for trial, at any other stage of the judicial proceeding, and, if appropriate, for execution of judgment.*
- (6) *Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful.*
- (7) *Anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention.*
- (8) *No-one may be imprisoned only because of the inability to carry out a contractual obligation.*

***The nature of the right affected and the limitation (s 28 (2) (a) and (c))***

Section 60 of the CSA Act currently permits a police officer to arrest an offender without a warrant if the officer “believes on reasonable grounds that [the] offender has breached any of the offender’s intensive correction order obligations.” Currently, subsection 60 (3) requires police to bring the offender before the SAB, or before a magistrate if the SAB is not sitting.

The amendments proposed to sections 60 and 61 provide that if section 65 applies, the offender should be brought before the sentencing court instead of the SAB. The purpose of the amendments is to ensure that the offender can be dealt with in accordance with section 65 as efficiently as possible. The amendments retain the obligation on police to bring the offender to the SAB or, if section 65 would apply, the sentencing court, “as soon as practicable.” Similar to the operation of the previous subsection 60 (3), the new subsections 60 (4) and 61 (4) provide that if the SAB or sentencing court is not sitting the police officer must, as soon as practicable, bring the offender before a magistrate for a decision in relation to bail until the offender can be brought before the SAB or sentencing court. The note in sections 60 and 61 draws attention to the fact that the *Bail Act 1992* applies for remanding or granting bail to the offender. As an offender will be arrested before being brought before the SAB, sentencing court or magistrate, these measures engage and limit the right to liberty.

Section 65 of the CSA Act currently states that if an offender sentenced to an ICO has been found guilty of a new offence punishable by imprisonment, the court may cancel the ICO and order the offender to serve the remainder of their sentence by full-time detention.

If the Supreme Court originally imposed or amended the ICO, the Supreme Court is the appropriate court to consider cancelling the ICO. New section 65(2B) will explicitly allow the Magistrates Court to remand an offender in custody until the offender can be brought before the Supreme Court, which limits the offender’s right to liberty. Offenders can already be remanded in custody for other breaches (or suspected breaches) of ICOs. The new note in section 65 makes it clear that the *Bail Act 1992* applies for remanding or granting bail to the offender.

### ***Legitimate purpose (s 28 (2) (b)) and rational connection (s 28 (2) (d))***

The purposes of arresting a person in order to bring them before the SAB, sentencing court or magistrate and allowing the Magistrates Court to remand an offender in custody are to protect community safety and ensure that the integrity of the ICO scheme is maintained. Remanding the offender in custody could be appropriate if, for example, the offender would otherwise be likely to re-offend in the interim or abscond pending a decision on whether to cancel the ICO. The ability to remand a person pending the court decision is rationally connected to the objective of protecting community safety and ensuring the integrity of the ICO regime. Similarly, arresting an offender in order to bring them before the SAB, sentencing court or Magistrates court is also rationally connected to these objectives.

### ***Proportionality (s 28 (2) (e))***

The limitation on an offender's liberty is proportionate and consistent with the nature of ICOs. The limitation will only apply to offenders who have been permitted to serve a term of imprisonment through an ICO, and who have broken the terms of their ICO by committing a new offence punishable by imprisonment. The ability of courts and police to take an offender into custody under these amendments will apply when a less restrictive option (the ICO itself) has failed to prevent further offending.

The requirements in sections 60(3), 60(4), 61(3) and 61(4) that a police officer bring the offender before the board, sentencing court or magistrate 'as soon as practicable' operate as a safeguard to ensure an offender is brought before the SAB, sentencing court or Magistrate Court promptly.

A further important safeguard in this context is that the *Bail Act 1992* will apply to any bail or remand decisions made under sections 60, 61 or 65. Per section 8A(2) of the *Bail Act 1992*, the offender may be entitled to a presumption in favour of bail in some circumstances. This amendment does not impose any additional bail considerations or requirements. Judicial discretion, as well as the provisions of the *Bail Act 1992*, ensure detention under this amendment is not automatic.

## **Other rights engaged and limited**

### **The right to freedom of expression**

Section 18 of the HR Act states that:

- (1) *Everyone has the right to hold opinions without interference.*
- (2) *Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.*

The **nature of the right** to freedom of expression is broad, but not absolute. International law provides that a law which restricts freedom of expression may be enacted to protect and promote respect for the rights and reputations of others.

The **purpose of the limitation** imposed by the offence of serious vilification is to protect people from intentional threatening acts, including communications, reckless as to whether the act vilifies a person or group of people based on particular attributes. This limitation protects the right to equal and effective protection against discrimination (section 8 (3) of the HR Act).

The ACT Government employs a range of **less restrictive methods** to address discrimination against people on the grounds of sexuality, including supporting workplaces and schools to be safe and inclusive for LGBTIQ+ people, and improving support for LGBTIQ+ victims of crime. The offence of serious vilification is appropriate only for the most serious forms of discrimination, as reflected in the structure of the offence.

The amendment made by the Bill which rectifies an anomaly in the definition of “threatening act” – a component of the definition of the serious vilification offence – only restricts acts, including communications, which are intentional, threatening, and where the person committing the threatening act is reckless about whether the act incites hatred toward, revulsion of, serious contempt for, or severe ridicule of, a person or group of people based on particular characteristics. The offence can only be established if the communication was not private, and the person was reckless about that fact.



## Crimes Legislation Amendment Bill 2020

### **Human Rights Act 2004 - Compatibility Statement**

In accordance with section 37 of the *Human Rights Act 2004* I have examined the Crimes Legislation Amendment Bill 2020. In my opinion, having regard to the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA  
Attorney-General

# Crimes Legislation Amendment Bill 2020

## 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 2020*.

#### Clause 2 — Commencement

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

#### Clause 3 — Legislation Amended

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

- *Confiscation of Criminal Assets Act 2003*
- *Crimes (Sentence Administration) Act 2005*
- *Criminal Code 2002*
- *Magistrates Court Act 1930*

### Part 2 – Confiscation of Criminal Assets Act 2003

The amendments made to the COCA Act, by clauses 4 to 7, are to provide greater clarity about the applicable considerations for the court in relation to applications for exclusion orders for property subject to different types of restraining orders. Following the addition of provisions for unexplained wealth restraining orders, which commenced on 29 August 2020, these amendments clarify that applications for unexplained wealth restraining order exclusion orders can only be made under section 77A.

#### Clause 4 – Making of exclusion orders – ordinary offences – section 76 (1) (a)

This clause amends section 76 of the COCA Act. Section 76 sets out factors the court must consider in relation to an application for an exclusion order, where the property in respect of which the exclusion order is sought has been restrained in relation to an ordinary offence, or is the subject of an application for a restraining order in relation to an ordinary offence.

This clause amends section 76 (1) (a) to clarify that the exclusion order process and court considerations apply only to restraining order applications which are made under section 26 (Restraining orders over other property). This mirrors the amendment made by clause 6 to section 77 (1) (a).

### **Clause 5 – Section 76 (1) (b)**

This clause amends section 76 (1) (b) to clarify that exclusion orders for property restrained, in relation to an ordinary offence, apply only to restraining orders which are made under section 31 (Restraining orders over other property). This mirrors the amendment made by clause 7 to section 77 (1) (b).

### **Clause 6 – Making of exclusion orders – serious offences – Section 77 (1) (a)**

This clause amends section 77 (1) (a) of the Act. Section 77 sets out factors the court must consider in relation to an application for an exclusion order, where the property in respect of which the exclusion order is sought has been restrained in relation to a serious offence, or is the subject of an application for a restraining order in relation to a serious offence.

The clause amends section 77 (1) (a) to clarify that exclusion orders for property sought to be restrained, in relation to a serious offence, apply only to restraining order applications which are made under section 26 (Restraining orders over other property). This section is not intended to allow for exclusion order applications to be made in relation to property the subject of unexplained wealth restraining order applications.

Exclusion order applications for property the subject of unexplained wealth restraining order applications should be made under section 77A.

### **Clause 7 – Section 77 (1) (b)**

This clause amends section 77 (1) (b) to clarify that exclusion orders for property restrained in relation to a serious offence apply only to restraining orders which are made under section 31 (Restraining orders over other property). Section 77 is not intended to allow for exclusion order applications to be made in relation to property the subject of unexplained wealth restraining orders.

Exclusion order applications for property the subject of unexplained wealth restraining orders should be made under section 77A.

## **Part 3 – Crimes (Sentence Administration) Act 2005**

An offender serving an ICO may commit and be convicted of a new offence. If the new offence is punishable by imprisonment, the offender must be dealt with in accordance with section 65 of the *Crimes (Sentence Administration) Act 2005* (CSA Act). Section 65 requires the sentencing court (that is, the court that sentenced the person to the ICO), as soon as practicable after the offender has been convicted of the new offence, to cancel the ICO, unless cancellation is not in the interests of justice.

The amendments made by clauses 8 to 15 support the effective operation of this requirement, including by establishing mechanisms to bring the offender before the appropriate court. The new sections 65 (2A) and 2B, described in clause 14, will require the Supreme Court to consider cancelling an ICO in place of the sentencing court in some circumstances.

### **Clause 8 – Corrections officers to report breach of intensive correction order obligations – Section 59 (2)**

This clause amends section 59 of the CSA Act, which currently requires that a corrections officer report to the SAB, a belief that an offender has breached the offender's ICO. It amends the provision to add a pathway for a corrections officer to report directly to the sentencing court, if the offender should be dealt with in accordance with section 65.

### **Clauses 9, 10 and 11 – Arrest without warrant and Arrest with warrant – breach of intensive correction order obligations – Sections 60 and 61, new Sections 60 (3) and (4) and 61 (3) and (4) and amended Section 61(2)(d)**

Clauses 9, 10 and 11 amend sections 60 and 61 of the CSA Act. These sections currently provide for a police officer to arrest, without a warrant or with a warrant, an offender for a suspected breach of their ICO obligations and bring them before the SAB, or if the SAB is not sitting, before a magistrate.

Clauses 9, 10 and 11 amend these provisions so that if the breach involved is one to which section 65 applies, the police officer must bring the offender before the sentencing court rather than the SAB.

Sections 60 (3) (b) and 61 (3) (b) presently provide that if the SAB is not sitting, the offender must be brought before a magistrate. Clauses 9 and 11 substitute new sections 60 (4) and 61 (4) which will similarly provide that if police are unable to bring the offender before the relevant body (either the SAB or the sentencing court) because it is not sitting, police must bring the offender before a magistrate for a decision in relation to bail until the offender can be brought before the board or sentencing court.

The amendments preserve the notes to sections 60 and 61, which refer to the fact that the *Bail Act 1992* will apply to any bail or remand decision in these circumstances.

### **Clauses 12 and 13 – Board inquiry and Board powers – breach of intensive correction order obligations – Sections 62 (3) and 64 (2) (c), note**

Broadly, sections 62 and 64 describe the SAB's powers to conduct inquiries and take action for certain forms of ICO breaches. These sections each currently include a note about the requirement for the sentencing court to deal with offenders who have committed a further offence while subject to an ICO.

Clauses 12 and 13 make consequential amendments to the notes to these sections, reflecting the amendments made to section 65, which will allow for an offender's ICO to be cancelled by a court other than the court which originally imposed the ICO in some circumstances. These circumstances are described in clause 14.

### **Clause 14 – Cancellation of intensive correction order on further conviction etc – New section 65 (2A) and (2B)**

Existing section 65 (2) provides that if an offender breaches their ICO by being convicted of a new offence punishable by imprisonment, the “sentencing court” must consider cancelling the ICO. The “sentencing court” refers to the court which imposed the relevant sentence.

Clause 14 inserts new **section 65 (2A)** to provide for a different approach in circumstances in which the Magistrates Court imposed an ICO, and the Supreme Court convicts or finds the offender guilty of a new offence punishable by imprisonment. In these circumstances, the Supreme Court must deal with the offender both for the new offence and for the breach of the ICO. This amendment is to enable the courts to deal with the offender efficiently, instead of requiring referral to the Magistrates Court for consideration of the ICO breach.

Clause 14 also inserts new **section 65 (2B)**, which applies where a person who is serving an ICO which was made or amended by the Supreme Court is convicted or found guilty of an offence, punishable by imprisonment, by the Magistrates Court. In these circumstances, in addition to dealing with the offender for the new offence, the Magistrates Court must commit the offender to the Supreme Court so that it can consider cancelling the ICO under subsection 65 (2). The Magistrates Court can remand the offender in custody in the interim. The Magistrates Court is not required to remand an offender in custody.

The **note** to subsection 65 (2B) refers to the fact that the *Bail Act 1992* will apply to any bail or remand decision under this section.

#### **Clause 15 – New section 65 (6)**

On occasion the SAB may become aware that an offender serving an ICO has committed and been found guilty of a new offence outside of the ACT. Existing section 62 (3) makes clear that, if the new offence is punishable by imprisonment, the SAB is not able to conduct an inquiry in relation to the breach of the offender’s ICO.

Clause 15 inserts a new section 65 (6) to create a pathway so that if such circumstances arise, the SAB must refer the offender to the sentencing court, that is the court that imposed the ICO, for the breach to be dealt with.

### **Part 4 – Criminal Code 2002**

#### **Clause 16 – Serious vilification – Section 750 (2), definition of threatening act, paragraph (a)**

Section 750 of the Criminal Code establishes the offence of serious vilification on the ground of a range of attributes, listed in subparagraphs (1) (c) (i) to (vii). Subparagraph (1) (c) (vii) references the attribute of ‘sexuality.’

One of the elements of the offence of serious vilification is carrying out a “threatening act.” The definition of “threatening act,” located in subsection 750 (2), includes a cross-reference to the list of attributes.

This amendment corrects an error in the cross-reference, so that the definition of a “threatening act” includes a cross-reference to the full list of attributes, including the last-mentioned attribute (vii) – “sexuality”.

## **Part 5 – Magistrates Court Act 1930**

### **Clause 17 – Institution of appeal – Section 209 (1)**

Clause 17 amends the Magistrates Court Act to change the timeframe for appeals against Magistrates Court convictions and findings of guilt. This amendment does not change the timeframe for any other type of appeal.

Existing section 209(1) provides that an appeal must be instituted within the period of 28 days after the conviction was entered, the order or decision was made or the sentence or penalty imposed, or within any further time Supreme Court allows.

The effect of substituted section 209 (1) (a) is that a defendant may file a notice of appeal against a Magistrates Court conviction or finding of guilt in the 28 days following the date the sentence or penalty was imposed, or within any further time the Supreme Court allows. This means that the defendant will be able to await a sentencing decision before being required to decide whether to appeal against their conviction.