

2017

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**CRIMES (POLICE POWERS AND FIREARMS OFFENCE)
AMENDMENT BILL 2017**

EXPLANATORY STATEMENT

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Crimes (Police Powers and Firearms Offence) Amendment Bill 2017

Outline

Introduction

This explanatory statement relates to the Crimes (Police Powers and Firearms Offence) Amendment Bill 2017 as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the bill and to help inform debate on it. It does not form part of the bill and has not been endorsed by the Assembly. The Statement must be read in conjunction with the bill. It is not, and is not meant to be, a comprehensive description of the bill. What is said about a provision is not to be taken as an authoritative guide to the meaning of a provision, this being a task for the courts.

Purpose of the Bill

The Crimes (Police Powers and Firearms Offence) Amendment Bill 2017 (the Bill) provides:

- a specific offence to capture the conduct of a ‘drive by shooting’; and
- statutory crime scene powers.

New offence – ‘Drive by shooting’

Current offences in the ACT do not adequately cover the seriousness of an act of discharging a firearm into a building or conveyance.

For example, an act of endangering life under the *Crimes Act 1900* (the Crimes Act) requires the offender to discharge a loaded firearm at another person, so as to cause another person reasonable apprehension for his or her safety. If a drive by shooting takes place and there is no one inside the premises the offence can be difficult to make out. Equally if the victim is a member of an outlaw motorcycle gang (OMCG) or other criminal organisation they may not admit to feeling apprehension for their safety. An act endangering life is punishable by ten years imprisonment.

At the other end of the spectrum summary offences exist under the *Firearms Act 1996* (the Firearms Act) for discharging a firearm in a public place (punishable by 12 months imprisonment) and for discharging a firearm on leased (private) land without written consent

(punishable by 6 months imprisonment). These offences are aimed at the regulation of the safe and responsible use of firearms by licensed firearm owners and the penalties applicable reflect that purpose.

The offence contained in the Bill will capture people shooting at a building; including homes; whether from a car or otherwise. A particular person does not need to be the target of the shooting nor does a person need to have been injured for the offence to apply. Unlike the offence of an act endangering life the offence does not rely on a victim admitting fear or apprehension for their safety.

The offence is punishable by a maximum of ten years imprisonment which is the same penalty as for other acts endangering life.

Statutory crime scene powers

As the legislation currently stands, police have no express statutory power to establish and control a crime scene in a public place or private premises. While there are a number of common law powers to secure crime scenes these powers are limited in scope. For example, a police officer has the power to enter premises without a warrant where the officer is pursuing an offender who enters the premises.

The inability for police to secure a crime scene in a private premise while obtaining a search warrant under sections 194 or 205 of the Crimes Act is especially problematic in relation to OMCG related shootings where rival gangs, despite being the victim of a crime, will not consent to police entry as they do not want to be seen to be cooperating with investigations.

The inability to secure a crime scene in a public place means police have no power to exclude or remove persons who may be deliberately or inadvertently interfering with evidence. For example in February 2016, police received information from a source that a drive-by shooting had occurred at an OMCG member's property. Police attended the home and spoke with the victim who denied that a shooting had taken place and declined to give police consent to search. Police observed damage from what appeared to be shotgun pellets to several surfaces at the front of the home. Tradesmen were already on site in the process of removing and replacing the damage. Police considered applying for a search warrant under section 205 Crimes Act however it was apparent that any evidence would be destroyed by the time the warrant was issued. The application for the warrant was abandoned. A suspect was identified and during the execution of a later search warrant at the suspect's apartment, a shotgun was

recovered from a common area near his unit. In the absence of any forensic evidence from the scene of the offence, it was not possible to link the shotgun to the shooting.

Providing crime scene powers in statute will assist the public to understand the powers police have when establishing a crime scene and using crime scene powers. While in most instances a person will consent to the establishment of a crime scene the Bill provides certainty around the powers available and places a set of obligations on police officers to ensure rights are protected and where the powers are exercised it is in the least restrictive way. It also provides certainty in relation to the duration that crime scenes can be established.

The statutory crime scene powers are explained in detail in the clause by clause section of the explanatory statement.

Human Rights Considerations

This human rights consideration will provide an overview of the human rights which may be engaged by the two aspects of the Bill, together with a discussion on reasonable limits where appropriate.

The new offence

The introduction of the new offence for ‘drive by shootings’ is a targeted measure, which addresses a specific omission in the statute book. The new offence does not engage or limit rights under the Human Rights Act.

Crime scene powers

The crime scene powers provided by this Bill have been developed within a human rights framework and largely reflect, in statute, the operational procedures currently followed by ACT Policing in relation to crime scenes. The provisions of the Bill engage and place limitations on the following rights under the *Human Rights Act 2004* (the Human Rights Act):

- right to privacy and reputation (section 12);
- right to the protection of family and children (section 11); and
- right to freedom of movement (section 13).

Consideration has been given to whether the right to liberty and security of person (section 18) is engaged, but it is considered that this right is not engaged by the Bill.

Limitations on human rights – section 28 of the Human Rights Act

Section 28(1) provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

Section 28(2) states that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including the following:

- a) the nature of the right affected;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relationship between the limitation and its purpose; and
- e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

The right to protection of the family and children

Section 11(1) of the Human Rights Act states that the family is the natural and basic group unit of society and is entitled to be protected by society. Family has a broad meaning and includes all people who make up a family unit. This right has strong links, particularly in relation to the Bill, with the right to privacy (section 12).

General comment 19 from the United Nations Human Rights Council on article 23 (right to protection of the family) of the International Covenant on Civil and Political Rights (ICCPR), notes that when read with article 17 (right to privacy), the right to protection of the family establishes a prohibition of arbitrary or unlawful interference with the family unit.¹

The **nature of the right** is not absolute. The **right is limited** by the provisions of the Bill as a family may need to leave their property or may not be able to enter certain parts of their property to allow a crime scene to be established. The **purpose of the limitation** is to allow

¹ Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1990 'General comment 19: Protection of the family, the right to marriage and equality of spouses, para 1. Available: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6f97648603f69bcdc12563ed004c3881?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6f97648603f69bcdc12563ed004c3881?Opendocument).

police to secure the crime scene and ensure that evidence of the commission of the offence is not compromised, whether on purpose or incidentally.

The **nature and extent of the limitation** will depend on the circumstance of the crime scene. Under the Human Rights Act police officers are under an obligation to act consistently with human rights. Prior to establishing a crime scene at a private premises a police officer must seek consent from the owner/occupier of a premises first where it is practicable to do so. Where a police officer establishes a crime scene at a private place, the police officer, or another police officer, must take reasonable steps to notify the owner or occupier of the premises that a crime scene has been established, the offence to which the crime scene relates, and to the extent known, when the crime scene is expected to be released.

When securing a crime scene police officers will need to consider the least restrictive means of doing so. In circumstances where only part of the property needs to be cordoned off to preserve evidence, residents will be able to remain in the other parts of the property. There will be circumstance where an entire property will need to be cordoned and residents will need to leave the property. Currently when this occurs most people arrange to stay with family and friends until the crime scene ceases. When this is not an option arrangements already exist to provide alternative emergency accommodation in a variety of circumstances, most of which are provided by non-profit organisations. In worst case scenarios ACT Policing may allow the person to shelter in a soft interview room at a police station. This approach is **the least restrictive means** available to achieve the purpose of the Bill.

Ensuring that the least restrictive means is pursued by police officers will also be important when there are children are in the home. Section 11(2) of the Human Rights Act provides,

“Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind.”

ACT Policing practice is to ensure that actions taken by police in entering the home of a child, to investigate an offence, are done with consideration of the best interest of the child. This includes where offences of domestic violence, drug trafficking, and drive-by shootings, have occurred and irrespective of whether the home entered is that of the offender or the victim. In all cases involving the arrest of a parent or the search of a family home, police officers are conscious of the possible presence of children and the effect witnessing police actions may have on them. Considerable concessions can be made to investigative best

practice to ensure children are not traumatised or otherwise impacted unnecessarily. For example police may re-enter a crime scene at the risk of evidence loss, to retrieve items from the home that children require, such as shoes, warm clothes or their teddy bear.

The right to privacy and reputation

The right to privacy and reputation is contained in section 12 of the Human Rights Act and states that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. A home is the place where a person and/or his family live. In *Director of Housing v Sudi*² Bell J stated the concept of home in human rights is autonomous and not based upon notions of legal or equitable title or rights.

General comment 16 from the Office of the High Commissioner for Human Rights describes this right as the right of every person to be protected against arbitrary or unlawful interference with their privacy, family, home or correspondence. The comment notes that the term ‘unlawful’ means that no interference can take place except in cases envisaged by the law.³

The term ‘arbitrary interference’ is described as intending to guarantee that even interference provided by law should be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.⁴ Therefore, it is reasonable to suggest that a person’s right to privacy can be interfered with, provided the interference is both lawful (allowed for by the law) and not arbitrary (reasonable in the circumstances). The right to privacy is limited by the Bill’s provisions in light of the ability for police to restrict a person’s ability to enter their own property following a crime scene being established.

The **nature of the right** is not absolute as any interference must be unlawful or arbitrary to breach an individual’s human rights. The purpose of the limitation in each instance is again to allow police to secure the crime scene and ensure that evidence of the commission of the offence is not compromised, whether on purpose or incidentally with the **nature and extent of the limitations** being tailored to the circumstances of each crime scene as detailed above.

² (*Residential Tenancies*) [2010] VCAT 328 (31 March 2010)

³ Office of the United Nations High Commissioner for Human Rights, Human Rights Committee, 1988 ‘General Comment No.16: the right to respect of privacy, family, home and correspondence, and protection of honour and reputation’, para.3. Available:

([http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/23378a8724595410c12563ed004aeecd?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/23378a8724595410c12563ed004aeecd?Opendocument))

⁴ (Communication no. 456/1991 *Ismet Celepli v Sweden*) Under the Optional Protocol, individuals who claim that any of their rights set forth in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Human Rights Committee for consideration.

To ensure that any limitation on the right to privacy is proportionate and the **least restrictive** approach taken the Bill provides:

- a higher offence threshold for establishing a crime scene in a private premises compared to a public place where consent cannot be obtained;
- that a crime scene can be established at private premises for only as long as is reasonably necessary to protect and preserve evidence, and for no longer than six hours unless a search warrant is obtained;
- crime scene powers can only be used if there is an immediate need to do so to protect or preserve evidence; and
- obligations on police to take reasonable steps to notify the owner or occupier of the premises that a crime scene has been established, the offence to which the crime scene relates, and to the extent known when the crime scene is expected to be released.

The Bill makes no change to current requirements for a search of the place where a crime scene is established. A search of the premises cannot occur without a search warrant, meaning there is judicial oversight of any search undertaken by police officers.

Time frame for establishing a crime scene on private premises

The six hour threshold for establishing a crime at a private premises reflects the maximum time it has previously taken to get a search warrant under section 194 or 205 of the Crimes Act. Even for a section 205 “urgent” warrant police officers need to prepare a considered application and address the following matters for the Magistrate to base his or her decisions on:

- a) the full details of each premises and conveyance for which the warrant is to be issued;
- b) for each of the above, whether or not the officer has previously applied for warrants in relation to them;
- c) things which police intend to search for at the place. This list must be considered and comprehensive;
- d) the specific offence to which the warrant relates;
- e) the information which provides the basis for the search warrant. While this is not required to be a comprehensive outline of everything known to police, it must be

sufficient to transfer suspicion to the issuing officer who has not attended the scene and is unaware of the background of any of the parties involved;

- f) where any of the warrant subjects are a conveyance or person, whether they are or will be in the ACT;
- g) the reasons the warrant was made by electronic means and not in person;
- h) where any of the warrants relate to a premises or conveyance, whether police require a power to search persons, and if so, the justification for doing so, whether a frisk or ordinary search is required, and the justification for that search type;
- i) whether it will be necessary to use firearms to execute the search warrant, and if so why;
- j) whether police anticipate a claim of legal professional privilege or public interest immunity, and if so why, and how police intend to handle items over which such a claim is made; and
- k) whether it would be necessary to execute the search warrant between 9pm and 6am, because it would not be practical to conduct the search at another time, or it would be necessary to prevent the concealment loss or destruction of evidence, and the justification of why that is the case.

The phone call with the magistrate to obtain the warrant takes at a minimum, half an hour, as the applying officer must outline their responses to all of the above considerations, and the Magistrate must transcribe the information at their end. The magistrate will then dictate the details of each warrant back to the officer who prepares a hand written “form of warrant” as required by section 205.

Importantly the legislation provides that the crime scene can only remain in place for the period of time reasonably necessary to protect or preserve evidence if this is shorter than six hours. If a warrant application is denied within the six hour period the crime scene must cease. Also if a warrant is issued police must act in accordance with the powers provided by the warrant. This ensures the least restrictive timeframe for establishing a crime scene on private premises.

Crime scene powers

Providing crime scene powers in statute will assist the public to understand the powers police have when establishing a crime scene and using crime scene power reducing the potential for any limitation to be unlawful, as they will be more precise and circumscribed.

The crime scene powers available in the Bill reflect the powers available under a search warrant, except for the power to search the property. A key purpose of the legislation is to cover the grey area between police arriving at a crime scene and the issuing or refusal of a search warrant. Police officers, in keeping with best practice will continue to at first instance exercise powers with consent. However this becomes problematic where consent is not given or withdrawn requiring the powers to be provided in statute. Importantly the Bill provides that police may only exercise a power where it is immediately necessary to protect or preserve evidence.

For example, a bullet is fired into a tattoo shop at 2am, when the shop is closed and known to be unoccupied. Police know that there is a fired projectile of forensic value somewhere within the shop, but nobody is there so they wait outside. The owner arrives at 6am and asks to go inside. Police form the view that it is immediately necessary to exercise a power to prevent the owner entering his store as he may deliberately or inadvertently damage the forensic evidence. Of all the various crime scene powers available to police under new section 210G, **only** 210G(2)(c) is necessary and justified at that time. If the circumstances at the crime scene do not change there is **no need** to exercise any other power.

As highlighted above a search of private premises cannot occur without a search warrant meaning there is judicial oversight of any search undertaken by police officers. Crime scene powers however allow for a police officer to cover, move or photograph a thing at the crime scene. This can only be done if it is immediately necessary to protect or preserve the evidence. For example blood splatter outside may need to be covered if it is about to rain. Photographs may also be taken in case the cover does not protect the blood from the rain.

In relation to a frisk or ordinary search police will only undertake this if it is immediately necessary to protect or preserve evidence. An example of where this power has been required previously is below.

At approximately 11.15pm in July 2017, police attended a report of a drive-by shooting at a home in Waramanga ACT known to be the residence of at least three members of an OMCG. Police observed extensive gunshot damage to the front of the premises and vehicles on the lawn, later identified as being caused by a military style 7.62mm AK-47 assault rifle or similar weapon. Police raised an occupant and spoke to him at the door, however he declined to allow police to enter the premises or carry out a forensic examination of the scene. Police maintained watch on the exterior of the premises but were unable to secure evidence inside. Police obtained a search warrant, and commenced execution of that warrant about 8.30am. A male occupant asked if he could leave the scene. He was subjected to an ordinary search under the powers of the warrant, and police located a fired 7.62mm bullet in his pocket. This bullet was important evidence that could be used to link the shooting to a firearm if subsequently seized, and could have easily been lost, damaged or destroyed in the period between the incident and the execution of the search warrant.

As the new provisions sit under part 10 of the Crimes Act the requirements in relation to searches under that part apply to the new sections in particular the requirements in relation to the search of a transgender or intersex person.

The Bill also provides that crime scene powers end when a warrant is issued or refused. This ensures that powers exercised by Police are as quickly as possible exercised with judicial oversight based on all the circumstances at the place.

The Bill does not provide a requirement for police to have specific regard to a person's cultural, religious or socioeconomic background. Police officers currently exercise a wide range of powers that do not legislatively require them to have particular consideration of a person's religious, cultural or socioeconomic background. Despite this Police operate and exercise their powers having regard to these factors. Police undertake mental health and diversity training during recruit training. Further, ACT Policing utilise, where possible, appropriate services (mental health, disability care worker, interpreter etc.) to assist in engagement with the community and would do so where necessary and practicable in exercising crime scene powers.

The right to freedom of movement

Section 13 of the Human Rights Act states that everyone has the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT. The right to freedom of movement is linked to the right to liberty – a person's movement across borders should not be unreasonably limited by the state. It also encompasses freedom from procedural impediments, such as unreasonable restrictions on accessing public places.

The obligation requires not only that the state must not prevent people from moving freely, but also that the state must protect people from others who might prevent them from moving freely. General comment 27 describes the liberty of movement as an “indispensable condition for the free development of a person”.⁵

The **nature of the right** is not absolute. The right has inherent limitations, which are acknowledged at subsection (3) of article 12 of the ICCPR (the equivalent right to section 13 of the HR Act):

‘the rights to liberty and freedom of movement shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights or freedoms of others and are consistent with the other rights recognised in the Covenant’.

The **right to freedom of movement is limited** by the Bill’s provisions, as police can restrict people’s ability to move within a crime scene in a public place and control people’s access to private premises where a crime scene has been established.

The **purpose of the limitation** is to protect and preserve evidence of a criminal offence as soon as possible. Allowing people to continue to move within a crime scene can potentially contaminate evidence making it inadmissible in court proceedings.

The **nature and extent of the limitation** will vary depending on the crime scene. For example on a private premises the crime scene may be contained to one area of the house and residents will be able to continue to move freely within other parts of the premises. In other circumstances a whole home may be considered a crime scene and people’s access restricted from the premises for the period of the crime scene. These issues will be addressed through ACT Policing policies and procedures and relevant officers will receive training to

⁵ HR1/GEN/1/Rev.9 (Vol 1) page 223

ensure that they implement the legislation to ensure that the limitation on the right is **the least restrictive**.

The Bill provides limitations on the frequency of a crime scene being established. To ensure that a person's right to freedom of movement is not unreasonably interfered with the Bill provides that a crime scene may be established at private premises for an offence only once in a 24-hour period. This ensures "rolling" crime scenes cannot be established where a warrant is not issued.

The right to liberty and security of person

Section 18 of the Human Rights Act provides that everyone has the right to liberty and security of person.

Commentary on the ICCPR suggests that the right to liberty and security of person relates only to a very specific aspect of human liberty,⁶ namely the forceful detention of a person at a certain narrowly bounded location, such as a prison or other detention facility.

In *Celepli v Sweden* the United Nations Human Rights Committee considered the assigned residence of a Turkish citizen to a Swedish municipality for nearly seven years and his obligation to report to the police three times a week was an interference with his freedom of movement but not his personal liberty.⁷ As such it is not considered that restricting people to a certain part of their property or excluding people from their property for a limited period of time for the purpose of a crime scene will limit their personal liberty however as discussed above does limit their right to freedom of movement.

⁶ Murdoch J.L. (ed), 2005, Article 5 of the European Convention on Human Rights: The Protection of Liberty and Security of Person.

⁷ (Communication no. 456/1991 *Ismet Celepli v Sweden*) Under the Optional Protocol, individuals who claim that any of their rights set forth in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Human Rights Committee for consideration.

Crimes (Police Powers and Firearms Offence) Amendment Bill 2017

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

Clause 1 provides that the name of the Bill once enacted will be the *Crimes (Police Powers and Firearms Offence) Amendment Act 2017*.

Clause 2 — Commencement

This clause provides that the ‘drive by shooting’ offence commences on the day after the Act’s notification day. The crime scene provisions commence three months after the notification day of the Act. This will allow ACT Policing to provide training to officers on the operation of the new crime scene provisions.

Clause 3 — Commencement

Clause 3 states that the legislation being amended is the *Crimes Act 1900*.

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

This clause provides that the Criminal Code applies to the new offence of discharging firearm at a building or conveyance.

Clause 5 — New section 28B

This clause inserts the new offence of discharging a firearm at a building or conveyance. New section 28B of the Crimes Act provides that it is an offence if a person recklessly discharges a firearm at a building or a conveyance.

The offence does not require that a particular person be the target of the shooting nor does a person need to have been injured for the offence to apply. Unlike the offence of an act endangering life the offence does not rely on a victim admitting fear or apprehension for their safety.

While the fault element provided for the offence is ‘recklessness’ the Criminal Code provides that if recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness satisfies the fault element. This means regardless of whether a

person intends or is reckless in discharging a firearm at a building or a conveyance their behaviour will be captured by the offence.

The maximum penalty for the offence is imprisonment for 10 years.

Clause 6 — New division 10.4A

This clause inserts new division 10.4A ‘Crime Scene Powers’ into the Crimes Act comprising new sections 210A to 210L.

Section 210A provides the definitions relevant for the division.

This section defines a serious offence for the purpose of new division 10.4A as:

- a) an offence punishable by imprisonment for five years or longer; or
- b) an offence arising out of the use of a motor vehicle that has resulted in death or serious injury of any person; or
- c) a family violence offence within the meaning of the *Family Violence Act 2016*;
- d) an offence in another jurisdiction that would be a serious offence if committed in the ACT (for the purpose of section 210D).

Section 210B provides a definition of a public place. A public place means public unleased land or premises to which the public, or a section of the public, has access whether by payment or not. However public place does not include land that a person is authorised to use under a public unleased land permit or other premises a person is authorised to use as a residence or for another private purpose. For example a building leased for the purposes of running a retail shop would not be considered a public place.

A private premise is defined in section 210A as any premises other than a public place.

Section 185 of the Crimes Act provides that a premises includes a place and a conveyance.

Section 210C provides that a police officer may establish a crime scene at a public place if:

- a) they reasonably suspect that an offence punishable by a term of imprisonment has been or is being committed at the place or somewhere else in the ACT; and
- b) considers that it is reasonably necessary to immediately establish a crime scene to protect or preserve evidence relating to the offence.

The powers extend to all offences punishable by imprisonment in a public place to ensure that ACT Policing can thoroughly investigate all crimes that occur in a public place. It is in line with community expectations that public places are safe and there is an appropriate police response to any criminal behaviour which occurs in a public place, to allow a crime scene to be established in a public place for the purpose of a criminal investigation.

If it is not immediately necessary to establish a crime scene in a public place the police officer should apply for a search warrant under sections 194 or 205 of the Crimes Act or use a power under another Territory law.

Section 210D provides that a police officer may establish a crime scene at a private premises if:

- a) the police officer reasonably suspects that an offence punishable by a term of imprisonment has been or is being committed at the premises or somewhere else within or outside the ACT; and
- b) the police officer considers that it is reasonably necessary to immediately establish a crime scene at the premises to protect or preserve evidence relating to the offence; and
- c) the owner or occupier of the premises consents to the crime scene being established.

In relation to a private premises, the Bill takes a best practice approach, by requiring a police officer to obtain consent to establish the crime scene from the owner or occupier. In seeking consent the police officer must tell the owner or occupier of the premises the offence to which the crime scene relates and the expected duration of the crime scene. It is enough that the offence be described in general terms and it is not necessary to describe the offence precisely or using technical language.

If consent is not provided or impracticable to obtain a police officer can establish a crime scene at a private premises if:

- a) the officer reasonably suspects that the offence is a serious offence; and
- b) the officer—
 - (i) has made reasonable attempts to obtain the consent of the owner; or
 - (ii) considers that it is reasonably necessary in the circumstances to establish a crime scene without consent.

If the police officer establishes the crime scene at the premises without consent, the officer must take reasonable steps to tell the owner or occupier—

- a) that a crime scene has been established at the premises; and
- b) if reasonably appropriate in the circumstances—the offence to which the crime scene relates; and
- c) the expected duration of the crime scene.

Once again it is enough that the offence be described in general terms and it is not necessary to describe the offence precisely or using technical language.

It would be operationally impractical to further legislate the exact way police undertake this obligation as it will depend on the circumstances of each matter. For example if the owner/occupier is at the premises police officer will be able to speak to them face to face about the crime scene. If the premises is unattended the police officer will have to take reasonable steps to contact the owner/occupier. This may include, for example, asking neighbours if they have a mobile number for the person.

A higher offence threshold exists for establishing a crime scene in a private premises compared to a public place, where consent cannot be obtained, has been inserted to ensure that citizens are not exposed to unreasonable infringements on their privacy and limitations on human rights are proportionate.

If it is not immediately necessary to establish a crime scene at a private premises the police officer should apply for a search warrant under sections 194 or 205 of the Crimes Act or use a power under another Territory law.

In relation to new sections 210C and 210D the model provides that a crime scene can be established where there is evidence in a place of the commission of an offence that is being or was committed elsewhere, including an offence committed outside the Territory and it is immediately necessary to establish the crime scene to preserve and protect evidence. An example of where such a power has been required occurred in relation to a homicide at a set of flats in Canberra. The victim was stabbed in one unit, then the suspect attended another unit and washed blood from his hands and clothing in a sink. A forensic examination of the sink to show evidence of bloodstaining was important but the unit could not be properly secured until a warrant was obtained as the crime had not been committed in the second flat.

New section 210E provides that a crime scene is taken to have been established when

- a) if it is reasonably necessary to immediately start exercising crime scene powers at the place—a police officer starts exercising the crime scene powers; or
- b) in any other case—a police officer makes a record that a crime scene is to be established.

If a crime scene is established when a crime scene power is immediately exercised a police officer must make a record about the establishment as soon as practicable.

A record about the establishment of the crime scene power must include the:

- a) day and time the crime scene is established; and
- b) place where the crime scene is established; and
- c) reason for establishing the crime scene.

New section 210F provides that following the establishment of a crime scene a police officer must as soon as practicable, after establishing a crime scene, notify a senior police officer who is of or above the rank of sergeant. Operationally this allows the patrol constable, who is almost always the first on scene, and tends to have the most accurate first-hand knowledge of the circumstances of the incident to decide whether it is necessary to establish a crime scene. The constable can make a decision based on the evidence before them. The requirement to inform a senior police officer ensures that there is oversight of the decision by a more experienced officer.

New section 210G provides police with the powers they can exercise at an established crime scene. The powers include the ability to:

- a) enter the place, or any part of the place;
- b) enter any other premises to access the place;
- c) control the movement of people or things at the place;
- d) direct a person at the premises to give the police officer the person's name and home address;
- e) if the police officer reasonably suspects a person possesses evidence removed from the premises or has interfered with evidence at the premises—use reasonable and necessary force to detain, and conduct a frisk search or ordinary search of, the person;

- f) cover, move or photograph or appropriately record a thing at the place;
- g) if the place is a conveyance – remove the conveyance from its original location and take it to a secure place.

Each power can only be exercised where it reasonably necessary to immediately protect or preserve evidence related to the offence.

A police officer may use reasonable and necessary force when exercising powers under new section 210G.

This section does not give a police officer the power to search premises where a crime scene is established. If such a power is required, a warrant to search the premises must be applied for under section 194 or section 205 or be authorised under another Territory law. The power to search has not been included to ensure that the powers conferred on police are proportionate to a person's right to privacy and ensures that a search will generally be authorised with judicial oversight.

New section 210H provides for the duration of time that a crime scene can be established.

A crime scene takes effect when it is established under section 210E.

The Bill provides that a crime scene can be established at a private premise for only as long as is reasonably necessary to preserve evidence, and for no longer than six hours unless a search warrant is obtained. A crime scene will cease if that time elapses and a search warrant has not been obtained, if an application for a search warrant is not granted or if the reasonable suspicion to establish the crime scene no longer exists. If a search warrant is granted, a crime scene ceases and Police must exercise powers under the warrant.

A crime scene will also cease if the consent of the owner or occupier of the premises under section 210D (1) to establish the crime scene (other than in relation to a serious offence) has been withdrawn.

If the crime scene is or relates to a conveyance that has been removed from its original location and taken to a secure place the crime scene may last for up to 48 hours from the crime scene being established. This reflects in statute the current operational procedures of ACT Policing.

Crime scene powers can continue to be exercised despite the time limits in the Bill if the owner or occupier of the place consents to the crime scene continuing after the period of time.

New section 210I provides limitations on the frequency of a crime scene being established.

To ensure that a person's right to freedom of movement is not unreasonably interfered with the Bill provides that a crime scene may be established at private premises for an offence only once in a 24-hour period. However this does not prevent a subsequent crime scene being established on the same premises for the purposes of investigating a separate offence that is not related to the offence for which the initial crime scene was established.

New section 210J sets out crime scene obligations of police at all types of premises.

It provides that if a police officer gives a person at a crime scene a direction or proposes to detain and search a person they must tell the person:

- a) that a crime scene has been established at the premises; and
- b) if reasonably appropriate in the circumstances—the offence to which the crime scene relates.
- c) It is enough that the offence be described in general terms and it is not necessary to describe the offence precisely or using technical language.

The police officer must give the person a reasonable opportunity to comply with any direction.

The legislation does not provide a specific review mechanism for the use of powers under the new division. A review mechanism would have limited utility in relation to the use of these powers. Due to the nature of establishing a crime scene police officers will need to act quickly to secure a crime scene and exercise powers. There would not be sufficient time available for an occupier to seek review of the decision to establish a crime scene before a search warrant has either been granted or not granted and the crime scene ended.

Any person concerned about the exercise of police powers can raise concerns in one of a number of ways. Members of the public can make complaints against ACT Policing to the Australian Federal Police (AFP) Professional Standards. The Australian Commission for Law Enforcement Integrity (ACLEI) and the Law Enforcement Ombudsman have oversight of the

AFP complaint process. A person may report a corruption issue directly to ACLEI, which is an independent and proactive oversight body established to detect and prevent serious or systemic corruption. Alternatively, a person may complain directly to the Law Enforcement Ombudsman about the AFP, where there is a reason the person cannot approach the AFP about the complaint, or where the person is not satisfied with the way the AFP has handled the complaint process.

Further if Police act in a way that is inconsistent with legislation it may affect the admissibility of evidence and the successful prosecution of a matter. Police currently exercise a wide range of powers which do not have specific review mechanisms. As much of what police do is in aid of the ultimate goal of a prosecution, the normal process of cross-examination by defence provides for significant scrutiny against the misuse of police powers. Any misuse of powers whether deliberate or otherwise could be cause for evidence to be ruled inadmissible, including any and all evidence obtained “downstream’ from such an abuse.

New section 210K sets out the crime scene obligations of a police officer when a conveyance is removed from premises and taken to a secure place.

New section 210L makes it an offence for a person to fail to comply with a direction given by a police officer exercising a crime scene power.

The maximum penalty for the offence is 200 penalty units or imprisonment for 2 years or both.

It is a defence to a prosecution if the defendant proves that they were not given a reasonable opportunity to comply with the direction.

Clause 7 — Dictionary, new definitions

Clause 7 inserts definitions for the terms crime scene power, private premises and public premises, into the dictionary.