2014

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CRIMES (SENTENCING) AMENDMENT BILL 2014

EXPLANATORY STATEMENT

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Crimes (Sentencing) Amendment Bill 2014

Outline

Purpose of the Bill

The Crimes (Sentencing) Amendment Bill 2014 (the Bill) alters the range of options a sentencing court has after sentencing an offender to imprisonment under the *Crimes (Sentencing) Act 2005*.

The Bill will provide that a sentencing court may no longer order that a person sentenced to imprisonment serve their sentence by way of both full-time detention and periodic detention. The court can only order that such a sentence be served either by full-time detention or periodic detention.

The Bill will also provide that a sentencing court may not order a person to serve a sentence of imprisonment by way of periodic detention beyond 30 June 2016.

The purpose of the Bill is to restrict the way in which a sentencing court can order a sentence of imprisonment be served by way of periodic detention (that is, together with full time detention or beyond 30 June 2016). This restriction is necessary to allow for periodic detention to cease operation as soon as possible after 30 June 2016 and to support its complete repeal once remaining periodic detention orders have been served. Ceasing the operation of periodic detention is necessary to allow for a more effective sentencing option to be adopted.

Periodic detention has been identified as a less effective sentencing option and as such the Government has committed to eventually abolish it and introduce a new community corrections sentencing option.

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Human Rights Considerations

The Bill may engage the right at section 25(2) of the *Human Rights Act 2004*, which provides that '[a] penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty for the offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.'

1. Is the right engaged and limited by the Bill?

Sentencing

It could be argued that the right is engaged and limited as the Bill will apply to offenders at the time they are sentenced, rather than at the time they commit the offence and therefore may affect the nature of the penalty that applied to the offence when it was committed.

It is the view of the Government, however, that the right is not engaged and limited by the Bill for the following reasons.

In *R v Secretary of State for the Home Department ex parte Uttley* [2004] UKHL 38, the House of Lords held that human rights law would only be infringed if a sentence imposed on a defendant exceeded the maximum penalty which could have been imposed under the law in force at the time the offence was committed. In that case, Lord Rodger of Earlsferry stated in a majority judgment that the purpose of Article 7 (the European Convention on Human Rights equivalent to section 25(2)) "is not to ensure that the offender is punished in exactly the same way as he would have been punished at the time of the offence, but to ensure that he is not punished more heavily than the relevant law passed by the legislation would have permitted at that time. So long as the court keeps within the range laid down by the legislature at the time of the offence, it can choose the sentence which it considers most appropriate. The principle of legality is respected." [para 42] This position has been endorsed by the European Court of Human Rights in *Kafkaris v Cyprus* (21906/04 [2008] ECHR 143; by the NZ Supreme Court in *Morgan v The Superintended, Rimutaka Prison* [2005] NZSC 26; and by the Privy Council in *Flynn v Her Majesty's Advocate* [2004] UKPC D1.

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The Bill will not have the effect of punishing an offender 'more heavily than the relevant law passed by the legislation would have permitted at that time' as it is already the case (and has been at least since 2005) that an offender may receive a sentence of imprisonment to be served by way of (a) full-time detention alone *or* (b) periodic detention to end by 30 June 2016.

The Bill only changes the way in which a sentence of imprisonment is served. It does not change the penalty itself, which is found in the actual sentence of imprisonment determined by the court and guidance provided by the maximum penalty available for the relevant offence. The change in the way the sentence is served is of an administrative rather than penal character.

The fact that under the *Crimes (Sentence Administration) Act 2005* the Sentence Administration Board (an administrative rather than judicial body) is empowered to cancel an order that an offender serve their sentence of imprisonment by way of periodic detention (but is not empowered to cancel a sentence of imprisonment) supports the view that a decision by a court as to the way a sentence of imprisonment is served is of an administrative rather than penal character.

This view has received implicit support from Refshauge ACJ in *Lewis* [2013] ACTSC 198 who, in the context of characterising the exercise of power to cancel periodic detention by the Sentence Administration Board, held that periodic detention is simply the authority for an offender to serve a term of imprisonment by weekend detention where a sentence of imprisonment has been imposed (para 47).

However, in *Uttley* Lord Rodger went on to say that "[O]f course, if legislation passed after the offences were to say, for instance, that a sentence of imprisonment was to become a sentence of imprisonment with hard labour, then issues would arise as to whether the article was engaged, even where the maximum sentence had been life imprisonment at the time of the offence. But in this case there is no suggestion that the actual conditions of the respondent's imprisonment changed."

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Baroness Hale of Richmond, also providing a majority judgment in *Uttley*, similarly stated that "[w]hen considering what are the 'limits fixed' by the law, the maximum duration of any permitted sentence of imprisonment (or the maximum fine which may be payable) may not be the only relevant factor. There may be changes in the essential quality or character of such a sentence which make it unquestionably more severe than any sentence which might have been imposed at the time of the offence. Examples might be the reintroduction of hard labour with every sentence of imprisonment or the automatic conversion of a sentence of imprisonment into a sentence of transportation. These may seem fanciful today. Less fanciful might be the replacement, for certain juvenile offenders, of committal to the care of a local authority with determinate sentences of detention in prison department establishments. The care order was ostensibly a welfare disposal, rather than a penalty, although of indefinite duration up to the age of 18. The detention order was unquestionably punitive in intent and effect, although of definite duration. There must, at the very least, be an argument that article 7 is engaged by such a change." [para 46]

The question as to whether the Bill will engage section 25(2) of the HRA would seem to be, then, whether the change to what a sentence of imprisonment can or cannot include will change the "essential quality or character" of a defendant's sentence of imprisonment. Arguably the change will not have this effect as the court can already sentence a person to imprisonment to be served by way of (a) full time detention or (b) periodic detention up to 30 June 2016. The maximum penalty is not made any harsher by the Bill.

On the other hand, if an offender had been sentenced to 'imprisonment' at the time of the offence (prior to the amendments commencing) this *could* have included (a) full time detention and then periodic detention; and/or (b) periodic detention (beyond 30 June 2016). After the Bill is passed the same sentence of 'imprisonment' could not include these options. Any sentence of imprisonment to be served by way of periodic detention could no longer be combined with a period of full time detention and could only run until 30 June 2016. The argument that such a sentence of imprisonment is different in its essential quality or character would arise from the fact that under the Sentencing Act and the *Crimes (Sentence Administration) Act 2005* 'full time detention' means being kept in full-time detention in a correctional centre and 'periodic detention' means attending and staying at a correctional centre periodically: 2 days per week only (in practice, usually from Friday evening until Sunday evening). As these two different ways of serving a sentence of imprisonment are

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different in terms of the amount of time actually spent in detention each week it is arguable that the quality or character of each is different and that a sentence of imprisonment at the time of the offence *could* therefore be qualitatively different to a sentence of imprisonment after the amendments commence. In fact, as PD cannot be ordered in conjunction with full-time imprisonment, and not beyond 30 June 2016, it is just as possible that a 'lighter' sentence may result.

However, the essential quality or character of a sentence of imprisonment is not made more 'heavy' or 'harsh' by the Bill as periodic detention is simply one way of serving a sentence of imprisonment.

As Lord Rodger of Earlsferry stated in *Uttley:* "...there are obvious difficulties in any attempt to interpret "applicable" as referring to the penalty that the court could in practice have been expected to impose for an offence at the time it was committed...[a]rticle 7 does not envisage such speculative excursions into the realm of the counter-factual. Its purpose is not to ensure that the offender is punished in exactly the same way as he would have been punished at the time of the offence..." [para 42].

Currently a person sentenced to 'a sentence of imprisonment' may be ordered by the court to serve that sentence by way of both full-time imprisonment and periodic detention combined or a sentence of periodic detention beyond 30 June 2016. These particular options will be removed by the Bill. However, it is to engage in a process of speculation to suggest that a court would necessarily have ordered the sentence of imprisonment to be served in one of these ways and that the sentence of imprisonment would therefore have been more lenient as a result.

Re-sentencing

The Bill applies to re-sentencing an offender in the same way as it applies to sentencing an offender. Section 75(1)(f) of the *Crimes (Sentence Administration) Act 2005* provides that the Sentence Administration Board may remit an offender for re-sentencing by the sentencing court where the Board decides the offender is unlikely to be able to serve the remainder of their periodic detention period by periodic detention.

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In such circumstances the analysis outlined above under ‘sentencing’ would apply, including the characterisation of an order to serve a sentence of imprisonment by way of periodic detention as administrative rather than penal. Additionally, it would be difficult for an offender, in these circumstances, to argue that a heavier penalty (if periodic detention were to be characterised as a penalty) was imposed at re-sentencing. The reasons for this conclusion are as follows:

1. First, an offender is only remitted for re-sentencing by the sentencing court if the Sentence Administration Board decides that “the offender is, for any reason, unlikely to be able to serve the remainder” of the periodic detention order having regard particularly to the offender’s health or any exceptional circumstances affecting the offender (section 75(1)(f)).
2. Second, the inability to serve the remainder of the periodic detention order indicates that the offender is unsuitable for periodic detention.
3. Therefore, if that inability to serve periodic detention continues when the offender comes before the sentencing court, the sentencing court is unlikely to re-sentence an offender to another periodic detention order.
4. This means that, in these circumstances, another periodic detention order would not constitute a reasonably expected outcome on re-sentencing.
5. As a result, it would be difficult for an offender, in these circumstances, to establish that the limitation of periodic detention or the removal of the periodic detention and full time detention combination sentence imposes a heavier penalty.

2. If the right is engaged and limited is the limitation reasonable?

Section 28(2) of the HRA provides that in deciding whether a limit 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;

e. any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

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The nature of the right affected is discussed above in the context of whether the right is engaged and limited by the Bill.

The Explanatory Statement to the HRA indicates that section 25 of the HRA should be understood as an absolute right analogous to the scope of the right under the International Covenant on Civil and Political Rights (ICCPR). However, there is no requirement to consider the Explanatory Statement in determining whether section 25 is limited by section 28 of the HRA (sections 141 and 142 of the *Legislation Act 2001*). Whether section 25(2) of the HRA may be limited in accordance with the criteria set out in section 28 of the HRA depends on the language, scope and object of the legislation as a whole (*Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 and the Legislation Act, s140). In this respect there is no distinction between the rights set out in Part 3 of the HRA. Schedule 1 to the HRA, however, sets out a table of HRA provisions and the corresponding ICCPR right. As such, it can be inferred that section 28 is not intended to apply to section 25(2) in the same way as it applies to derogable or qualified rights because the analogous right in the ICCPR (art 15) is non-derogable. It is therefore contestable whether an infringement of section 25(2) of the HRA may be justified as a reasonable limit pursuant to section 28 of the HRA.

However, as outlined above, it is the view of the Government that the Bill does not engage and limit the right.

The purpose of the limitation is to restrict the way in which a sentencing court can order a sentence of imprisonment to be served by way of periodic detention (that is, together with full time detention or beyond 30 June 2016). This restriction is necessary to allow for periodic detention to cease operation soon after this date and to be abolished entirely. Ceasing the operation of periodic detention by this date is, in turn, necessary to allow for a more effective sentencing option to be adopted.

Periodic detention has been identified as a less effective sentencing option and as such the Government has committed to abolish it and introduce a new community corrections sentencing option. Evidence of the relative ineffectiveness of periodic detention includes a recent report by the NSW Bureau of Crime Statistics and Research (the Impact of Intensive Corrections Orders on Re-Offending, December 2013) which states that "an offender on an

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Intensive Corrections Order had 33 per cent less risk of re-offending than an offender on periodic detention" (p.1). NSW abolished periodic detention as a sentencing option in 2010.

Submissions and evidence provided to the 2014 Standing Committee on Justice and Community Safety Inquiry into Sentencing also identified a range of problems with periodic detention, including concerns about the impact on a person and their family's emotional wellbeing as a result of spending weekend time in a prison environment. The limitations of periodic detention with respect to rehabilitation and access to programs, particularly for sex offenders, have also been noted.

The Government has concluded that removing periodic detention as a sentencing option will allow resources to be spent more fruitfully on an alternative sentencing option or options which will better support rehabilitation, a reduction in recidivism and ultimately the safety of the community.

The nature and extent of the limitation is minimal. The *Crimes (Sentencing) Act 2005* will continue to provide a very broad range of other sentencing options which may be applied alone or in combination by a sentencing court. In particular, a sentence of imprisonment may continue to include:

- full time detention (but not combined with periodic detention);
- periodic detention (for between 3 months – 2 years, but not beyond 30 June 2016);
- a suspended sentence order; and
- parole – if and when eligible.

The Sentencing Act also provides for sentencing options which can be made alone or in combination with sentences of imprisonment, such as:

- a good behaviour order (which may or may not include community service conditions or rehabilitation program conditions);
- a fine order;
- a driver licence disqualification order;
- a reparation order;
- a non-association order; and

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- a place restriction order.

In particular, a good behaviour order (GBO) may be a suitable non-custodial alternative to a sentence of imprisonment, which will continue to be available to the sentencing court after the Bill commences but before a new sentencing option is adopted. A GBO is a flexible option for the court as it can be tailored specifically to the particular offender. The Sentencing Act provides that under a GBO the following conditions can be imposed:

- offender or surety required to lodge amount of money with the court;
- offender perform community service;
- offender engage in a rehabilitation program;
- offender to be under the supervision of a corrections officer;
- offender to comply with reparation order;
- offender subject to any condition prescribed in regulations made by the Executive; and
- offender subject to any conditions the Court considers appropriate and consistent with the Sentencing Act and the *Crimes (Sentence Administration) Act 2005*.

Section 13(4) makes it clear that a court can make a GBO in place of imprisonment, or in combination with imprisonment.

It should be noted that the Bill will not affect the sentencing of young offenders to imprisonment as a sentencing court cannot order that a young offender serve a sentence of imprisonment by way of periodic detention (unless they are an adult at the time they are sentenced) (see section 77(2) of the Sentencing Act).

In *R v PM* [2009] ACTSC 24 Justice Refshauge considered the case of a young offender who was being considered for a custodial sentence. Section 127 of the *Children and Young People Act 1999*, which was operative at the date on which the accused committed the offences had subsequently been repealed. Section 127 had provided that the chief executive could reduce the period of detention stated by the court by up to 1/3 of the period, 'having regard to the young person's conduct and industry or to special circumstances'. It was argued that, as the section was no longer applicable, the young offender had been denied the benefit

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of the remissions and so was denied the benefit of a reduced penalty. Justice Refshauge concluded that in this case section 25(2) of the HRA was not relevant as eligibility for remission was most likely not part of the 'penalty'. His honour noted that "I am bound to ensure that, not only should the sentence be the shortest appropriate but it should allow for rehabilitation to play a significant part in the administration of the sentence. This I can do by partly suspending the sentence." [para 81]

R v PM highlights the continued flexibility the court will have in ensuring that the "actual conditions" or "essential quality or character" of a defendant's sentence of imprisonment are not any "heavier" than they would have been if the defendant had been sentenced at the time of the offence.

A further safeguard exists as a sentencing court is already obliged to interpret laws, including the *Crimes (Sentencing) Act 2005* in a manner which is compatible with the HRA so far as is possible (section 30, HRA).

The relationship between the limitation and its purpose: Restricting the application of periodic detention for sentences of imprisonment is necessary to remove an ineffective sentencing option from the Sentencing Act while allowing sufficient time for offenders currently serving sentences of imprisonment by way of periodic detention to complete those sentences.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve. The obvious less restrictive approach would be to only apply the amendments to offenders *from the date of the commission of the offence*. However, this would not achieve the purpose of the Bill which requires periodic detention to cease operation by 30 June 2016 to allow for resources to be dedicated to a more effective sentencing option.

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Crimes (Sentencing) Amendment Bill 2014

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 would be the Crimes (Sentencing) Amendment Act 2014.

Clause 2— Commencement

This clause commences the Act on the day after it is notified on the ACT Legislation Register.

Clause 3— Legislation amended

This clause identifies the legislation amended by the Act.

Clause 4 – Imprisonment, Section 10(3), examples for par (b), except notes

This clause amends the example for paragraph (b) of section 10(3) so that the court setting a period of a sentence of imprisonment to be served by periodic detention is no longer an example for paragraph (b), that is, the offender being released from full-time detention under the Act.

This is removed as an example as the Bill provides that it is no longer an option for a sentencing court to order that an offender serve a sentence of imprisonment by way of *both* full-time detention *and* periodic detention.

Clause 5 – Periodic detention, Section 11(2) and (3)

This clause provides that if an offender is convicted of an offence and sentenced to imprisonment for the offence the court may order that the sentence of imprisonment be served by way of periodic detention. It also provides that the periodic detention must be for a period of at least 3 months but must end before 1 July 2016.

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This clause amends the Sentencing Act so that the court can no longer order that an offender serve a sentence of imprisonment by both full-time detention and periodic detention. It also amends the Sentencing Act so that where a court orders that an offender serve a sentence of imprisonment by periodic detention the periodic detention must end before 1 July 2016.

This restriction is necessary to allow for periodic detention to cease operation by this date. Ceasing periodic detention by this date is, in turn, necessary to allow for a more effective sentencing option to be adopted.

Clause 6 – Combination sentences – offences punishable by imprisonment, Section 29(1)(a), except note

This clause provides that when a court sentences an offender to a sentence of imprisonment, the court can no longer order the offender to serve the sentence by way of a combination of periodic detention and full time detention.

The changes proposed in this clause do not affect any other type of combination sentence, and would not preclude the court from issuing, for example, a sentence of periodic detention for a minimum of three months with a good behaviour order attached to it.

The purpose of this clause is to ensure that offenders who are sentenced to periodic detention are afforded an opportunity to complete their sentence before 1 July 2016.

Clause 7 – Section 29(1), example 2, 1st dot point and **Clause 8 – Section 29(1), example 2, 2nd dot point**

These clauses amend the example for a combination sentence to reflect that a sentence of imprisonment cannot include full-time detention and periodic detention.

Clause 9 – Application - pt 5.2, Section 64(2), new note

This clause inserts a note at section 64(2) which deals with imprisonment and non-parole periods. The note clarifies that section 64(2) only has application to sentences of imprisonment imposed before the Bill commences as the Bill provides that a sentence of imprisonment given after commencement of the Bill cannot combine full-time detention and periodic detention.

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Clause 10 – Imprisonment – official notice of sentence, Section 84(2)(c)

This clause is a consequential amendment to reflect that periodic detention is not able to be part of a combined sentence with another term of detention.

Clause 11 – New chapter 12

This clause includes a new section 204 which provides that the Bill applies to the sentencing of an offender if the offender is sentenced for an offence on or after the commencement day. This means that the Bill will apply to offences committed *prior* to the commencement day. A full discussion of the application of the *Human Rights Act 2004* to this clause is outlined above at 'Human Rights Considerations'.

The clause also includes a new section 205 which provides that new Chapter 12 expires on 1 July 2016.

Schedule 1 Consequential amendments

Part 1.1 – Crimes (Child Sex Offenders) Act 2005

[1.1] -Section 83(b), example and note

This clause omits the example provided as part of section 83(b) of the *Crimes (Child Sex Offenders) Act 2005* to reflect that a period of full-time detention can no longer be combined with a period of periodic detention.

The omission of the example does not affect the operation of the provisions under the Crimes (Child Sex Offenders) Act, or the operation of the provisions under the Crimes (Sentencing) Act.

Part 1.2 – Crimes (Sentence Administration) Act 2005

[1.2] -Section 39

This clause amends section 39 of the Crimes (Sentence Administration) Act to state that the chapter applies to an offender sentenced to imprisonment if the court sentencing the offender sets a periodic detention period for the sentence.

The omission of the words 'all or part of' is a consequential amendment to reflect that a period of full-time detention will no longer be able to be combined with periodic detention.

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[1.3] -Section 116ZL(1)

This clause amends section 116ZL(1) of the Crimes (Sentence Administration) Act to reflect that a court may issue an imprisonment order for a fine defaulter (made under s116ZK) to be served by way of periodic detention.

The omission of the words 'all or part of' is a consequential amendment to reflect that a period of full-time detention will no longer be able to be combined with periodic detention. This means that the court will only be able to order full-time detention or an order of imprisonment to be served by way of periodic detention in respect of a fine defaulter.

[1.4] – Section 116ZL(2)(b)

This clause amends section 116ZL(2)(b) of the Crimes (Sentence Administration) Act to reflect that a court must not set a periodic detention period for the fine defaulter unless satisfied that it is appropriate for the defaulter to serve the sentence of imprisonment by periodic detention.

The omission of the words 'all or part of' is a consequential amendment to reflect that a period of full-time detention will no longer be able to be combined with a period of periodic detention.

Part 1.3 – Electoral Act 1992

[1.5] Section 71A(2), definition of *sentence of imprisonment*

Section 71A of the Electoral Act deals with the address of a person for the purposes of the Commonwealth electoral roll when they are serving a sentence of imprisonment. Section 71A(2) defines the term 'sentence of imprisonment' for the purposes of section 71A.

This clause will amend section 71A(2) to omit the words 'of the sentence'. This is a consequential amendment to reflect that a period of full-time detention will no longer be able to be combined with periodic detention.

Part 1.4 – Spent Convictions Act 2000

[1.6] Section 11(3)(a), definition of *sentence of imprisonment*, paragraph (a)

Section 11 of the Spent Convictions Act outlines the circumstances when a conviction can become spent and relies on a definition 'sentence of imprisonment' for that section.

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This clause amends section 11(3)(a) of the Spent Convictions Act by omitting the words ‘of the sentence’. This reflects that it will no longer be an option to order that a sentence of imprisonment be served by way of both periodic detention and full-time detention.

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