

2017

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

CRIMES LEGISLATION AMENDMENT BILL 2017

EXPLANATORY STATEMENT

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CRIMES LEGISLATION AMENDMENT BILL 2017

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CRIMES LEGISLATION AMENDMENT BILL 2017

Outline

This explanatory statement relates to the Crimes Legislation Amendment Bill 2017 (the Bill) as presented to the ACT 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 is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

Purpose of the Bill

The Bill amends the *Crimes (Sentence Administration) Act 2005* (the Sentence Administration Act) and the *Crimes (Sentencing) Act 2005* (the Sentencing Act) to retrospectively delegate functions of the Director-General (DG) of the Justice and Community Safety (JACS) Directorate in relation to Intensive Correction Orders (ICOs) to appropriate ACT Corrective Services staff (ACTCS staff). Specifically, the functions under the Acts are delegated to ACTCS staff that had responsibility for the supervision of an offender on an ICO.

ICOs became a sentencing option in the ACT on 2 March 2016.

An ICO allows an offender to serve their sentence in the community, remain in employment and maintain community ties. The conditions of the order can be tailored by the courts to suit the circumstances of the offence and the offender but are still sufficiently structured to ensure every order places appropriate demands on an offender. A core condition of an ICO, established in section 42 of the Sentence Administration Act, is that the offender must comply with any direction given to the offender by the DG under the Sentence Administration Act or the *Corrections Management Act 2007* (the CMA).

ICOs are supported by clear and robust consequences if an offender breaches a condition of their order. If one or more of the conditions is breached the Sentence Administration Board (SAB) is authorised to conduct a hearing in relation to the breach. The SAB has power to act quickly and innovatively, by imposing a short period of full-time imprisonment as well as other more traditional consequences, such as a cancellation of the order and remittance to full time custody. SAB hearings are initiated by ACTCS staff providing a report, alleging a breach of the ICO, by an offender.

The DG of JACS has functions in relation to ICOs under both the Sentence Administration Act and the Sentencing Act. It is usual practice for certain functions of the DG to be delegated to ACTCS staff for reasons of operational effectiveness. Due to an administrative oversight, the functions of the DG under these Acts were not delegated to ACTCS staff when the new sentencing option commenced. The appropriate delegations were not in place from 2 March to 9 November 2016 or from 2 March 2016 to 11 November 2016 (the relevant periods).

The Sentence Administration Act provides that the DG may exercise functions and powers relating to the supervision of an offender's ICO obligations. As a result of certain delegations not being in place, certain directions given to offenders serving an ICO by ACTCS staff may have been outside the scope of the ACTCS staff members' authority. These include, for example, a direction that an offender provide a test sample for the purpose of alcohol and drug testing (test sample direction), a direction to undertake community service work or directions in relation to a rehabilitation program.

The Sentencing Act includes functions exercised by the DG relating to the assessment of offenders for their suitability for ICOs, which would usually be delegated to ACTCS staff. Any assessment prepared by an ACTCS staff member to whom certain delegations had not been given may have been outside the scope of that ACTCS staff member's authority.

This Bill amends the Sentence Administration Act and the Sentencing Act to retrospectively delegate the functions of the DG of JACS to the appropriate ACTCS staff to validate their actions.

Human Rights Considerations

The Bill engages, and places limitations on, the right to liberty and security of person at section 18 of the *Human Rights Act 2004* (the HR Act).

The **nature of the right** is not absolute and people who are guilty of serious crimes can be properly imprisoned provided it is in accordance with law and is proportionate. In retrospectively delegating functions under the Sentence Administration Act, this Bill limits any possible right of offenders whose ICO was suspended or cancelled in direct relation to an ACTCS staff direction to claim compensation for unlawful imprisonment. Amendments to the Sentencing Act do not engage rights.

The **purpose of the limitation** imposed by the Bill is to rectify the administrative oversight that led to certain delegations not being in place when the ICO sentencing option commenced.

The nature and extent of the limitation imposed is reasonable and consequential of a Bill that is largely administrative in nature. It is important that limitations imposed by an ICO are considered as separate to the purpose of the Bill. The absence of the correct delegations does not affect the courts' ability to impose an ICO as a sentencing option or the conditions of the order that an offender has agreed to abide by.

The very nature of an ICO both supports and limits the right to liberty and security of person. This has been discussed previously in the explanatory statement accompanying the *Crimes (Sentencing and Restorative Justice) Amendment Bill 2015* and can be accessed online at http://www.legislation.act.gov.au/es/db_53082/20151119-62373/pdf/db_53082.pdf.

If an offender is found eligible and suitable to serve their sentence by way of an ICO, the sentencing court must fully explain the nature and obligations of the ICO as well as the consequences of breaching a condition. An offender must then consent to serving their sentence by way of an ICO. Following this, administrative arrangements established by ACTCS ensure that an offender's obligations and possible sanctions for proven breach actions under an ICO are once again effectively communicated to the offender through an obligatory induction process.

The Bill limits any possible right for offenders serving an ICO to claim compensation for any period of detainment served because of being proven to be in breach of a condition of the order in relation to a direction issued by ACTCS staff during the relevant period. This limitation is just and reasonable in the circumstances for a number of reasons.

Firstly, an offender found to be in breach of conditions under their order has not become liable to any overall greater sentence by imprisonment under full-time detention than that already imposed by the sentencing court.

Secondly, an offender fully understands and agrees to the conditions of their ICO in advance of sentencing, including to follow directions given by ACTCS staff. Any periods of detention served as a result of breach action would be properly imposed but for the lack of delegation.

Lastly, ACTCS staff were unaware that certain delegations had not been made. During the relevant period, ACTCS staff were held out by the Government as having authority and acted and made directions under an implied and assumed authority to do so.

There are no **less restrictive means reasonably available** beyond doing nothing to rectify the administrative error. This would not meet the purpose of the Bill.

As the Bill does not create a new criminal offence, nor amend current penalties, the Bill does not engage the rights at section 25 (Retrospective criminal laws) of the HR Act.

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Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the Act the *Crimes Legislation Amendment Act 2017*.

Clause 2 — Commencement

This clause provides that amendments in the Act commence the day after the Act is notified.

Clause 3 — Legislation amended

This clause identifies the legislation amended by the Act.

Part 2 – Crimes (Sentence Administration) Act 2005

Clause 4 – New chapter 21

Clause 4 inserts new chapter 21 (Delegation) in the Act. Chapter 21 consists of new sections 1000 and 1001.

New section 1000 provides that the provisions of the Crimes Sentence Administration Act, that relate to a function of the director-general mentioned in column 2 of the table, for the period mentioned in column 3 (the delegation period) are taken to have been delegated to a person who during the delegation period occupied a position with a position number mentioned under column 4.

New section 1001(1) provides that chapter 21 expires on the day it commences.

Section 1001(2) provides that section 88 (Repeal does not end effect of transitional law etc) of the *Legislation Act 2001* applies to new chapter 21.

Part 3 – Crimes (Sentencing) Act 2005

Clause 5 – New chapter 13

Clause 5 inserts new chapter 13 (Delegation) in the Act. Chapter 13 consists of new sections 206 and 207.

New section 206 provides that the provisions of the Sentencing Act, that relate to a function of the director-general mentioned in column 2 of the table, for the period mentioned in column 3 (the delegation period), are taken to have been delegated to a person who during the delegation period occupied a position with a position number mentioned under column 4.

New section 207(1) provides that chapter 13 expires on the day it commences.

Section 207(2) provides that section 88 (Repeal does not end effect of transitional law etc) of the Legislation Act applies to new chapter 13.