

2018

**LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

SENTENCING LEGISLATION AMENDMENT BILL 2018

EXPLANATORY STATEMENT

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SENTENCING LEGISLATION AMENDMENT BILL 2018

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This explanatory statement relates to the Sentencing Legislation Amendment Bill 2018 (the Bill) 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 to 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 primary purpose of the Bill is to improve the operation of the crimes sentencing scheme in the ACT, particularly in relation to Intensive Correction Orders (ICO) and community service work. Sentencing in criminal matters is an area of law which is constantly evolving, and the Bill reflects the government's ongoing monitoring of sentencing administration to ensure that sentencing law and practice is operating as intended.

The second purpose of the Bill is to update definition sections in the *Crimes Act 1900* and the *Road Transport (General) Act 1999* (minor technical amendments).

Administration of the ICO scheme

The ICO scheme was created in 2016 to ensure that the ACT's sentencing framework is modern and responsive. The ICO sentence is a sentence of imprisonment, served in the community under intensive supervision. As such, it sits just below a sentence of full-time imprisonment in the sentencing framework. It is a sentence of 'last resort' for offenders before full-time imprisonment.

The development of the ICO sentence scheme was informed by research, both academic and by Justice and Community Safety Directorate. The ICO was developed within a human rights framework, informed by the *United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)*.¹ The ICO scheme generally seeks to balance the rights of individual offenders and their families with the rights and interests of victims and the wider community. A detailed explanation of the scheme can be found in the Explanatory Statement to the Crimes (Sentencing and Restorative Justice) Amendment Bill 2015.

The ICO scheme is contained in the *Crimes (Sentencing) Act 2005* (Sentencing Act) and the *Crimes (Sentence Administration) Act 2005* (Sentence Administration Act) and this Bill proposes amendments to both Acts to improve the administration of the scheme.

¹ GA Res 45/110, UN GAOR, 45th sess, 68th plen mtg, Agenda Item 100, UN Doc A/RES/45/110 (14 December 1990).

The Bill aims to improve the administration of the ICO scheme by:

- a) ensuring that whether the warrant for an offender is issued by a judge or magistrate, or by the Sentence Administration Board (SAB) for failing to comply with an obligation to report to the SAB under an ICO, similar consequences apply.
- b) ensuring that if such a warrant is issued, the consequences that flow do not affect certain offenders in an arbitrary or discriminatory way;
- c) clarifying the orders that a court can make if an ICO is cancelled on commission of a further offence, following the Supreme Court's decision in *R v XH* [2017] ACTSC 236;
- d) requiring critical information to be notified to relevant agencies if the Supreme Court cancels an ICO due to further offending and commits the offender to full-time custody; and
- e) clarifying when a court may request that ACT Corrective Services (ACTCS) prepare an assessment of an offender's suitability for an ICO, and placing the functions of an ICO assessor on an express statutory footing.

These amendments are intended to clarify and improve the operation of the existing ICO scheme. The operation and effectiveness of the ICO scheme will be reviewed in the third year of its operation, and a report of that review will be presented to the Legislative Assembly in the fourth year of its operation (Sentence Administration Act section 81).

Community service work

Under the Sentencing Act, both ICOs and Good Behaviour Orders can contain a condition that the offender perform a certain amount of community service work.

Most Australian jurisdictions make specific provision for an offender to be able to accumulate community service work hours through participation in therapeutic or educational programs. The Bill aims to bring the ACT broadly into line with other Australian jurisdictions in this respect.

The purpose of this amendment is to increase completion rates for orders including community service work and to support people with high needs who are subject to the orders.

Human Rights Considerations

This human rights consideration will provide an overview of the human rights which may be engaged by the ICO aspects of the Bill, together with a discussion on reasonable limits where appropriate. Where necessary, a further human rights analysis is provided under specific provisions.

Administration of the ICO scheme

Sentencing measures of any description can be expected to impact on the human rights of offenders and in broad terms, 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 liberty and security of person (s 18);
- right to a fair trial (s 21);
- rights to privacy and reputation (s 12).

In addition, the prohibition against retrospective criminal laws (s 25) is considered. While not engaged, the Bill seeks to support that right.

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

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.

The list of factors in section 28(2) is non-exhaustive. Where it is accepted that a right is engaged and limited by the Bill's provisions in relation to the new sentence, these factors are addressed by referencing the factor in bold type followed by the explanation as to why the limitation is reasonable in relation to that factor.

The right to liberty and security of person

Section 18 of the HRA provides that everyone has the right to liberty and security of person. In the context of the ICO scheme as a whole, this right is engaged by the imposition of an ICO and may be both supported and limited. The right is supported in that the sentence of imprisonment imposed is not to be served in a prison or detention facility, but in the community.

However, the right may also be engaged and limited in the event an offender is found to be in breach of the ICO because the cancellation of an ICO will result in a period of full-time imprisonment. Section 18 requires particular consideration where an offender breaches an ICO and must consequently serve full-time imprisonment in custody.

The Sentencing Administration Act provides a legislative breach framework which responds proportionately to noncompliance with an ICO in accordance with section 28. This Bill clarifies the operation of one part of that framework in light of the Supreme Court's decision in *R v XH* [2017] ACTCS 236. In that decision, the Court noted the Act did not clearly set out the range of orders available to a Court following cancellation of an ICO if the Judge was of the view that the offender should be given an opportunity to serve less than the full remaining term of imprisonment in full time detention.

The Bill clarifies that if an ICO is cancelled because of further offending punishable by imprisonment, the offender may be given the opportunity to serve only part of the remaining term in full time detention if the Judge sets a non-parole period.

The **nature of the right** is not absolute and people who have been found guilty of serious crimes can properly be imprisoned provided it is in accordance with law and is proportionate. The **purpose of the limitation** is to ensure there are appropriate consequences to the commission of a further offence, which is punishable by imprisonment, while serving a sentence of imprisonment in the community by way of an ICO. The **nature and extent of the limitation** is reasonable because:

- it leaves in place the existing criteria for cancelling an ICO and the existing requirement that at least some of the remaining term of imprisonment will be served in full time detention if an ICO is cancelled;
- it retains a judicial discretion to determine, in appropriate cases, that the offender should be given a further opportunity to serve part of the sentence of imprisonment in the community (on parole); and
- in defining the circumstances in which the Judge may set a non-parole period on cancellation, the Bill strikes a balance between consistency with the existing parole regime and other parts of the existing ICO scheme. In the existing parole regime, only sentences of 12 months or more may have a non-parole period set. In the existing ICO cancellation regime, an offender whose ICO is cancelled by the SAB for another reason may not apply for reinstatement of the ICO until they have served at least 30 days of the remaining term of imprisonment.

There is **no less restrictive means reasonably available** to support compliance with an ICO in this context, because any less restrictive way of an offender serving only ‘part’ of their remaining term in full time detention would not be a proportionate response to the seriousness of breaching the ICO by further offending. As a sentence of imprisonment, the ICO order would have no effect as a penalty without the ultimate sanction of full-time detention in the event of non-compliance.

As part of the legislative breach framework for noncompliance with an ICO, an arrest warrant may be issued for an offender by a judge, a magistrate or the Sentence Administration Board (SAB) where the offender is suspected to have breached. Where a judge or magistrate issues the warrant, section 80(2) of the Sentence Administration Act operates (in effect) to suspend the operation of the ICO. That means that the sentence does not continue to be taken as served while the offender is at large. The Bill introduces a similar suspension in circumstances where the warrant has been issued by the SAB rather than a judge or magistrate.

Akin to existing section 80(2), new section 212A of the Sentence Administration Act will extend the ultimate duration of an ICO where a warrant has been issued on the basis of an

allegation the offender has breached their ICO. In relation to SAB warrants under section 206 of that Act, the new section 212A will only be triggered in two circumstances:

- a) where the offender was notified under section 63 they were required to attend the SAB to answer the breach allegation and they failed to appear; or
- b) where a judicial member of the SAB considered that an offender would not appear before the board to answer a notice under section 63.

The second circumstance is included to ensure that offenders who evade service of a section 63 notice do not obtain a benefit by absconding in breach of their ICO conditions.

In cases where the new suspension operates and the offender is later required to spend some of the remaining term in full time custody, this amendment also engages the right. The **nature of the right** is not absolute and people who have been found guilty of serious crimes can properly be imprisoned provided it is in accordance with law and is proportionate. The **purpose of the limitation** is to support compliance with an order of the court (the ICO), as without consequences, there would be no incentive for an offender to comply. The **nature and extent of the limitation** is reasonable to ensure that offenders in analogous circumstances are treated equally, regardless of the decision-maker issuing the warrant. There is **no less restrictive means reasonably available** because, as an alternative to full-time detention, the administration and integrity of the ICO scheme relies on offenders serving their term of imprisonment in the community under strict supervision. The new section does not apply where an offender is otherwise in custody or detained under the *Mental Health Act 2015*.

The right to a fair trial

Section 21 of the Human Rights Act provides that everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The Bill applies to an offender who has been tried and found guilty of committing an offence in accordance with criminal law and procedure.

Section 212A in the Bill (described above) may engage this right. The **nature of the right** may be absolute in itself, in that it can never be justified to hold an unfair trial, but many of the principles that characterise a fair trial are not absolute.² The right may be engaged and limited by the Bill, which provides that the period for which an offender is at large in the community after the SAB has issued a warrant in relation to an alleged ICO breach does not count as time served against the offender's sentence of imprisonment.

Generally speaking, the SAB has the primary responsibility to monitor and enforce the compliance of individual offenders with the terms of their judicial sentence to serve imprisonment by ICO. The rules and procedures of the Sentence Administration Board set

² *Brown v Stott* (2003) 1 AC 681

out in the Sentence Administration Act are designed to afford natural justice to offenders appearing before it.

The **purpose of the limitation** is to effectively administer the terms of the judicial sentence of imprisonment to be served by intensive correction, which requires the offender to consent to and comply with strict supervision in the community. If that consent is withdrawn, the ordinary consequence is that the SAB must cancel the ICO (Sentence Administration Act section 66) and the offender is automatically re-committed to full time detention for the remaining term of the sentence (section 69(4)).

The Bill achieves the purpose of effectively administering the ICO scheme by applying the same statutory consequences to the administrative decision to issue an arrest warrant, whether that decision is made by a magistrate, a judge or the SAB. The **nature and extent of the limitation**, as noted above, is to suspend the operation of an offender's sentence of imprisonment where the SAB issues an arrest warrant on the basis the offender is not complying with the conditions that allow them to serve their sentence of imprisonment in the community.

The limitation is the **least restrictive possible** to achieve a balance between allowing offenders a last opportunity to avoid full-time imprisonment, and providing a safe and secure community by encouraging compliance with the conditions of the ICO and discouraging behaviour that is in breach of the order. When offenders are sentenced to an ICO by a court, they are made aware of the conditions they will need to abide by under the order, including reporting to corrections officers,³ notifying the Director-General of any change in contact details,⁴ and complying with any notice under section 63 to attend hearings of the SAB.⁵ The new section does not apply where an offender is otherwise in custody or detained under the *Mental Health Act 2015*.

Rights to privacy and reputation

Section 12 of the HRA provides that everyone has the right not to have their privacy, family, home or correspondence interfered with unlawfully or arbitrarily. Rule 3.1 of the Tokyo Rules also requires respect for an offender's right to privacy and that of their family in the application of non-custodial measures. 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.⁶ The term 'arbitrary interference' is described as intending to guarantee that even interference provided by law should be in

³ *Crimes (Sentence Administration) Act 2005* s 42(1)(d), (e) and (j).

⁴ *Crimes (Sentence Administration) Act 2005* s 42(2).

⁵ *Crimes (Sentence Administration) Act 2005* s 42(1)(k).

⁶ 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.unhchr.ch/tbs/doc.nsf/\(Symbol\)/23378a8724595410c12563ed004aeecd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23378a8724595410c12563ed004aeecd?Opendocument))

accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances.⁷

The right to privacy may be engaged and limited by new section 46E in clause 16 of the Bill, which puts the functions and information-gathering powers of an ICO assessor on an express statutory footing. The new section enables an assessor to conduct investigations they consider appropriate, and request information from various entities, to prepare an intensive correction assessment (section 46E(1)).

The right is not absolute as any interference must be unlawful or arbitrary to breach human rights. The **purpose of the limitation** is to enable the assessor to carry out the Court's request to prepare an assessment of the suitability of the offender to serve any term of imprisonment in the community under supervision rather than in full-time detention. The **nature and extent of the limitation** is tailored to the purpose of preparing an intensive correction assessment, as the statutory authority to investigate and request information is conferred on the assessor 'in preparing the intensive correction assessment for the offender'. The matters for assessing the offender's suitability for intensive correction are not unbounded, but are set out in section 46D (which replicates existing section 79 of the Sentencing Act). There is no **less restrictive means** of preparing an assessment of suitability for an intensive correction order, as the assessment requires a detailed account of living circumstances, past compliance with supervision requirements, employment, and factors that would indicate an inability to comply with an ICO including medical unfitness or a major problem with alcohol or another drug. New section 46E replicates the existing powers of assessors in relation to preparing Pre-Sentence Reports (see Sentencing Act Chapter 4.2).

The prohibition on retrospective criminal laws

Section 25(2) of the Human Rights Act states 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.

As described above, the Bill clarifies the orders a court may make after cancelling an ICO due to the offender committing a further offence punishable by imprisonment. In particular, the Bill clarifies that the Court must activate the remaining term of imprisonment, but may order that eligible offenders be given a further opportunity to serve only 'part' of that term in full time detention by setting a non-parole period. The effect of this is to clarify the options available to a court on cancellation, which the Supreme Court held in *R v XH* [2017] ACTSC 236 were unclear. The clarification will apply prospectively to the question of cancellation that may arise in relation to any current ICOs, but will not apply retrospectively to affect any cases of past cancellation.

The issue of retrospective laws is discussed fully in the explanatory statement to the *Crimes (Sentencing) Amendment Act 2014* in the context of the provisions applying to offences sentenced (as opposed to committed) after commencement. As clearly set out in that explanatory statement, altering the sentencing options available, in the way proposed, does not engage the prohibition against retrospective criminal laws. In particular, there is no proposal to make the original judicial sentence 'heavier' as an ICO has always carried with it the prospect of cancellation on re-offending and the imposition of the full remaining term.

⁷ Ibid, at [4].

While the right is not engaged, the Bill's provisions seek to support section 25 of the HRA by requiring the court to set a non-parole period in circumstances akin to those that would have attracted a non-parole period had the original sentence been served in full-time detention from the outset. This will ensure that offenders are not disadvantaged in relation to accessing parole by their unsuccessful attempt to serve their sentence of imprisonment in the community.

Sentencing Legislation Amendment Bill 2018

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 *Sentencing Legislation Amendment Act 2018*.

Clause 2 — Commencement

This clause provides that the Act will commence on the day after the Act is notified.

Clause 3 — Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the *Crimes (Sentence Administration) Act 2005*, the *Crimes (Sentencing) Act 2005*, and (in Schedule 1) the *Crimes Act 1900* and the *Road Transport (General) Act 1999*.

Part 2 – Crimes (Sentence Administration) Act 2005

Clause 4 — New section 48A

This clause qualifies the effect of clause 11 (below).

In relation to offenders serving a sentence of intensive correction who are ordered to perform community service work, clause 4 (read with clause 11) limits the proportion of ‘community service work’ hours that may be counted from participation in educational and therapeutic activities to 25%.

The purpose of this clause is to retain the integrity of the ordinary meaning of ‘community service work’, by setting a limit to the proportion of educational and therapeutic activities that may count toward completing a community service work order.

Clause 5 – Cancellation of intensive correction order on further conviction etc Section 65 (2) and (3)

Following the decision of her Honour Justice Penfold in *R v XH* [2017] ACTSC 236, this clause clarifies the orders a Court may make if an intensive correction order is cancelled because the offender has been convicted of a further offence punishable by imprisonment. In *R v XH*, her Honour identified some ambiguity in the meaning of section 65, read in the context of the Act as a whole and the *Crimes (Sentencing) Act 2005*. As her Honour discussed at [14], because of the application of the *Human Rights Act 2004*, legislative wording which requires an offender to be subject to full-time imprisonment should be clear and unambiguous.

Under section 42(1)(a) of the *Crimes (Sentence Administration) Act 2005*, it is a condition of the ICO that offenders must not commit a further offence punishable by imprisonment. This means that where an offender has been convicted of a further offence punishable by imprisonment they are in breach of their ICO.

If an offender commits and is convicted of a further offence punishable by imprisonment, the sentencing court must cancel the ICO unless it is not in the interests of justice to do so. The Bill retains this criteria for cancellation in section 65(2)(a).

In sub-sections 65(2)(b) and 65(3)(b), the clause clarifies the orders the Court may make following ICO cancellation. The intention of the clarification is to retain two options for the Court; to order that an offender serve the full remaining term in full-time detention or, in appropriate cases, to set a non-parole period which will give the offender an opportunity to serve part of the remaining term otherwise than in full-time detention.

Proposed section 65(3)(b) allows the Court cancelling the ICO to set a non-parole period where the ICO sentence was more than 12 months, and the remaining period of full-time detention is more than 30 days. The first criteria is necessary to ensure that offenders sentenced to 12 months or more imprisonment to be served by intensive correction are not placed in a disadvantageous position compared to offenders who were sentenced to a similar term to be served in full-time imprisonment. The second criteria is necessary to ensure that offenders whose ICO is cancelled due to re-offending are not put in a more advantageous position than those whose ICO is cancelled by the SAB for another reason (cf section 73(2)(a)).

In sub-section 65(4), the clause clarifies that part 5.2 of the *Crimes (Sentencing) Act 2005* applies to any non-parole period set by the cancelling court under section 65(3)(b).

In sub-section 65(5), the clause retains the existing requirement to give reasons if the Court decides it is not in the interests of justice to cancel an offender's ICO notwithstanding the further offence.

New sub-section 65(3)(a) is an administrative provision that, read with clause 7, will assist to administer the remaining term of imprisonment to be served in full-time detention.

Clause 6 – Cancellation of intensive correction order – offender may apply for order to be reinstated

Section 73 (2) (b) (ii)

This clause is consequential to the amendment at clause 12.

Clause 7 – New section 78A

This clause inserts a new section requiring the court to provide information about the period of full-time detention to be served after an ICO is cancelled under section 65 to the offender and sentence administration authorities.

The purpose of this clause is to ensure that the offender is aware of the terms of their sentence and for the smooth administration of justice within the Territory, with all relevant parties aware of the practical effect of the Court's decision to cancel the ICO.

The clause notes (in sub-section 78A(4)) that failure to comply with new section 78A does not invalidate the section 65 cancellation order.

Clause 8 – Section 80

Section 80 of the Sentencing Administration Act applies when a judge or magistrate has issued a warrant on the basis of information that an offender has breached or will breach their ICO. Section 80(2) operates to 'stop the clock' in respect of those offenders serving their term of imprisonment in the community. The Bill amends this existing section to prevent it operating unfairly or arbitrarily on those who are unable to comply with their ICO obligations because they are detained. Clause 8 amends sub-section 80(2) so that it only applies during any period when the offender is not detained under the *Mental Health Act 2015* or otherwise remanded in custody under an Australian law.

Clause 9 – New section 93A

Clause 9 qualifies the effect of clause 11 (below).

In relation to offenders subject to a good behaviour order who are ordered to perform community service work, clause 9 (read with the amendment in clause 11) limits the proportion of 'community service work' hours that may be counted from participation in educational and therapeutic activities to 25%.

The purpose of this clause is to retain the integrity of the ordinary meaning of 'community service work', by setting a limit to the proportion of educational and therapeutic activities that may count toward completing a community service work order.

Clause 10 – New section 212A

This clause inserts a new section to align the consequences of certain warrants issued by the SAB with warrants issued by a judge or magistrate in similar circumstances. The new section applies if the SAB issues an arrest warrant under section 206(2) because an offender has either failed to appear before the SAB in accordance with a section 63 notice to appear, or because a judicial member of the SAB considers the offender will not appear to answer such a notice. A section 63 notice relates to an allegation the offender has breached their ICO conditions.

If the SAB issues a warrant for one (or both) of those reasons, then new section 212A(2) provides that any period for which the warrant is outstanding does not count as part of the offender's ICO sentence term. That consequence will only apply when the offender is not detained under the *Mental Health Act 2015* or otherwise remanded in custody under Australian law.

Clause 11 – Section 316

This clause amends the format and drafting language of existing section 316. In sub-section 316(1), the language of the existing regulation-making section is amended to use the word ‘includes’. The existing subjects that may be included as ‘community service work’ by regulation are re-formatted to appear in sub-sections 316(1)(a) and (b).

To align the Territory with other Australian jurisdictions, the Bill includes new sub-section 316(2) which deems that attendance at therapeutic or educational programs as directed by the Director-General is taken to be ‘community service work’.

As noted in the note to the amended section, sub-section 316(2) is qualified by clauses 4 and 9 (see above).

Clause 12 – Dictionary, new definition of *intensive correction assessment*

This clause inserts a new signpost definition to the existing definition of ‘intensive correction assessment’ in section 40.

Part 3 – Crimes (Sentencing) Act 2005

Clause 13 – Meaning of *offender*

Section 8, definition of *offender*, paragraph (b)

The clause modifies paragraph (b) of the definition of *offender* to include a signpost definition to offenders who are referred by the court for intensive correction assessment under new section 46B.

This is part of a suite of changes designed to clarify the process for obtaining an intensive correction assessment.

Clause 14 – New section 39A

This clause relocates the existing definition of ‘assessor’ from section 41(8) of the principal Act. This is part of a suite of changes designed to clarify the process for obtaining an intensive correction assessment, and rationalise the legislation as it relates to offender assessments.

Clause 15 – Pre-sentence reports – order

Section 41(8)

Consequential to clause 14, this clause removes section 41(8). This is part of a suite of changes designed to clarify the process for obtaining an intensive correction assessment, and rationalise the legislation as it relates to offender assessments.

Clause 16 – New part 4.2A

This clause inserts a new part, which deals exclusively with intensive correction assessments. The new part comes directly after Part 4.2, which sets out the provisions for obtaining pre-sentence reports. This is intended to improve the readability and access to the legislative requirements in this area.

This is part of a suite of changes designed to clarify the process for obtaining an intensive correction assessment, and rationalise the legislation as it relates to offender assessments.

Section 46A – Meaning of assessor – pt 4.2A

For clarity, this clause expressly defines ‘assessor’ in relation to intensive correction assessments. The definition is relevantly identical to the existing definition used in relation to pre-sentence reports (re-located to a stand-alone section by clause 14 above).

Section 46B – Application – pt 4.2A

Section 46B provides that Part 4.2A applies to an ‘offender’, defined for the purposes of this part as meaning a person a court finds guilty of an offence, or a person who has indicated to a court an intention to plead guilty to an offence. This is in the same terms as section 40, which applies to pre-sentence reports.

While the section is not expressly limited to adult offenders, a Court may only make an intensive correction order in relation to adult offenders (section 11(1)) and so it is not intended that intensive corrections assessments will be requested in relation to young offenders.

Section 46C – Intensive correction assessments – order

This section clarifies when a court may request the Director-General prepare an intensive correction assessment. The section is intended to enable an intensive correction assessment be requested at an early stage after an offender has pleaded or been found guilty.

The Bill provides that the procedural stage at which a Court may request an intensive correction assessment is similar to that at which a pre-sentence report may be requested. Given the time and resources required to prepare an intensive correction assessment, the aim of the new section is to minimise the delays that may occur if an assessment is ordered very late in the sentencing process.

Likewise, the section clarifies (in sub-section 46C(4), read with clause 20), that an intensive correction assessment should be requested before a sentence of imprisonment is imposed on the offender. The aim of this sub-section is to avoid a lacuna between the imposition of a sentence of imprisonment and a final decision about how that sentence is to be served.

The section maintains the existing content of an intensive correction assessment (section 46C(6) read with section 46D).

Section 46D – Intensive correction orders – intensive correction assessment matters

Section 46D re-locates existing section 79 to new Part 4.2A to allow the consolidation of provisions within the Act governing offender assessments.

Section 46E – Intensive correction assessments – powers of assessors

To standardise the provisions relating to pre-sentence reports and intensive correction assessments, section 46E puts the functions of intensive corrections assessors on an express statutory footing. The section is intended to align with section 43 of the Act (Pre-sentence reports – powers of assessors).

Section 46F – Intensive correction assessments – provision to court

To standardise the provisions relating to pre-sentence reports and intensive correction assessments, section 46F replicates the substance of section 44 of the Act (Pre-sentence reports – provision to court), allowing for the intensive corrective assessment to be given either orally or in writing. This section facilitates the provision of oral ‘update’ reports to the Court where necessary (see *Scheele v Watson* [2012] ACTSC 196 at [66]).

Section 46G – Intensive correction assessments – cross-examination

In order to standardise the provisions relating to pre-sentence reports and intensive correction assessments, section 46G replicates section 46 of the Act (Pre-sentence reports – cross-examination), allowing the prosecutor and the defence to cross-examine the assessor on the intensive correction assessment given to the court by the assessor. Subsection (2) ensures that subsection (1) applies whether or not the offender is legally represented.

Clause 17 – Application – pt 5.2

Section 64 (1)

This is a consequential amendment to give full effect to clause 5. The amendment clarifies that where an ICO is cancelled and the offender ordered to serve a remaining term of imprisonment under Sentence Administration Act section 65, the parole regime in the *Crimes (Sentencing) Act 2005* applies in respect of the remaining term. The amendment is intended to clarify any ambiguity about the application of parole following the Supreme Court’s decision in *R v XH* [2017] ACTSC 236.

Clause 18 – New division 5.4.1A, heading

This is a clause creates a new Division 5.4.1A to improve the structure of the legislation.

Clause 19 – Application – pt 5.4

Section 76

This is a clause moves section 76 to Division 5.4.1A to improve the structure of the legislation.

Clause 20 – Intensive correction orders – suitability
Section 78(1) and (2)

This clause amends section 78 to align with the clarification in clause 16 that an intensive correction assessment may be requested at an early stage, notwithstanding the assessment is not considered by the sentencing Court until a later stage.

Clause 21 – Section 78 (5)

This is a consequential amendment following from clause 16 and the re-location of table 79 to new section 46D.

Clause 22 – Section 78 (9)

This is a consequential amendment following from clause 16 and the re-location of section 78(9) to new section 46E(5).

Clause 23 – Intensive correction orders – intensive correction assessment matters
Section 79

This is a consequential amendment flowing from clause 16, which relocates existing section 79 to new section 46D.

Clause 24 – Intensive correction order – community service – suitability
Section 80D

Clause 24 makes a consequential amendment to sub-section 80D(1) to reflect the definition of intensive correction assessment in clause 28.

Clause 25 – Intensive correction orders – rehabilitation programs – suitability
Section 80J (1) (a)

Clause 25 makes a consequential amendment to sub-section 80J(1)(a) to reflect the definition of intensive correction assessment in clause 28.

Clause 26 – Dictionary, note 2

This clause adds ‘Magistrates Court’ and ‘Supreme Court’ to the list of items that are defined in Part 1 of the Dictionary to the *Legislation Act 2001*.

Clause 27 – Dictionary, definition of *assessor*

This is a consequential amendment flowing from the insertion of section 46A in clause 16. As the term ‘assessor’ now is defined in relation to both pre-sentence reports and intensive correction assessments, the signpost definition in the dictionary is amended to include both sections.

Clause 28 – Dictionary, new definition of *intensive correction assessment*

Clause 28 enacts a new single definition of intensive correction assessment in the dictionary. The definition is consistent with the existing meaning of intensive correction assessment, which currently appears in several places throughout the Act.

Schedule 1 – Other amendments

Part 1.1 – Crimes Act 1900

[1.1] – Dictionary, definition of *lawful custody*

This is a technical amendment. The signpost definition of ‘lawful custody’ at present refers to section 157, which previously defined ‘lawful custody’ for the purposes of periodic detention. Section 157 was removed when periodic detention was removed as a sentencing option by the *Crimes (Sentencing and Restorative Justice) Amendment Act 2016*. As that section has been omitted, the signpost definition is redundant.

Part 1.2 – Road Transport (General) Act 1999

[1.2] – Section 61A, definition of *automatic disqualification provision*, new paragraph (i)

This is a consequential amendment. The section 61A definition of ‘automatic disqualification provision’ sets out the provisions of various Acts which can lead to an automatic disqualification. The *Road Transport Legislation Amendment Act 2013* inserted a new subsection with an automatic disqualification into section 32 of the *Road Transport (Driver Licensing) Act 1999*, but did not update the list in section 61A. This clause adds that subsection to the list.