

**1993**

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY**

**CRIMES (AMENDMENT) BILL (NO. 2) 1993**

**EXPLANATORY MEMORANDUM**

Circulated by the authority of

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## CRIMES (AMENDMENT) BILL (NO. 2) 1993

### Outline

The purpose of the Bill is to provide a legislative framework for the sentencing of criminal offenders. The fundamental principle to be applied is that the punishment imposed must be just and appropriate in the circumstances. Within the context of this principle, rehabilitation of the offender and appropriate reparation to any victim of the crime are important considerations.

Punishment of criminal offenders has traditionally been an area which allows judges and magistrates to exercise great discretion. Whilst it is important to preserve that flexibility in regard to individual cases, it is also important to ensure that as far as possible there is consistency in approach to punishment and that the penalties in themselves are fair. This Bill sets out factors which, where relevant, must be considered by the court in determining the sentence. It also lists those factors which may not be taken into account so as to increase a sentence. While the lists are not intended to be exhaustive, they are intended to provide useful guidelines to both sentencers and legal practitioners.

Because the experience of imprisonment is destructive and the cost high, both in economic and social terms, the Bill gives effect to the widely recognised principle that a prison term should be the penalty of last resort. Significant punishment may in many cases be imposed by other means. Where a person is sentenced to a term of imprisonment and has been held in custody whilst awaiting trial or sentence, this period must also be taken into account in calculating the final penalty. Where a fine is imposed, the offender's financial circumstances must be taken into account insofar as they can be ascertained.

The Bill also prescribes the preparation, content and use of pre-sentence reports which are prepared at the Court's request by Corrective Services to assist in determining appropriate dispositions. A further clause prevents the imposition of community service as part of a condition of recognizance, on the grounds that it is important to preserve Community Service Orders as a separate sanction.

### Financial implications

There are no financial implications.

## NOTES ON CLAUSES

### Clauses 1, 2 and 3 Formal Clauses

These clauses contain the short title of the Act, a commencement provision and identification of the Principal Act.

### Clause 4 Sentencing guidelines

This clause establishes the purposes of criminal sentencing and general principles of sentencing, in a new Division of Part XII of the Principal Act.

Proposed section 429 establishes in legislation the common law principle of just deserts, that is, the overriding consideration that the punishment should be just and appropriate in the circumstances. Within this principle, appropriate reparation to the victim and rehabilitation of the offender are important considerations which should be encouraged where appropriate. The section is not intended to exclude other considerations which may be relevant in individual cases.

Proposed section 429A sets out those factors which should where relevant and known to the court be taken into account in determining an appropriate sentence, bearing in mind the basic principles set out in proposed section 429. The section is not intended to be an exhaustive list. Nor is it intended to exclude the common law principles which govern the relevance of the listed factors. Depending on the circumstances, certain of those factors may be either mitigating or aggravating (for example, consumption of drugs or alcohol).

Proposed section 429B lists those factors for which a court may not increase the sentence; however, they may where appropriate reduce the sentence which would otherwise have been applied. For example, if legislation shortly to commence were to significantly increase the applicable penalty for an offence, the court would not be able to take that factor into account to impose a more severe sentence. However, if an offence were shortly to be decriminalised, the court might take that into account in setting a lower penalty than might otherwise apply.

Proposed section 429C establishes that imprisonment is to be the punishment of last resort. Where a sentence of imprisonment is to be imposed, the court is to state the reasons for its decision that no other penalty is appropriate.

### Clause 5 - Fines

The purpose of proposed section 431A is to ensure as far as possible that those persons who receive a fine do not suffer undue financial hardship and consequently to decrease the likelihood of their subsequent imprisonment for fine default.

### Clause 6 - When sentence takes effect

This clause is to ensure that the existing section 441A which states that a sentence shall take effect from the date on which it is passed unless the Court otherwise orders does not contradict the new section 443 concerning presumptions of concurrent and cumulative sentencing.

## Clause 7 Cumulative sentences

This clause replaces section 443 of the Principal Act and provides a clear presumption of concurrent sentencing, unless the Court otherwise orders or in specified circumstances. The section which it replaces does not set out any such presumption. The presumption of concurrent sentences does not apply to terms of imprisonment imposed for default of payment of fines or other sums of money or for offences committed while in custody. In those cases the presumption is that the sentences shall be cumulative.

The purpose of proposed subsection 443(4) is to ensure that a prisoner will not be released at the end of his or her minimum term in regard to a sentence he or she is already serving, only to face return to prison at a later date when the subsequent sentence commences.

Proposed subsection 443(5) provides the court with the power to order that a sentence be partly cumulative on other sentences. This is to allow the court flexibility to ensure that the sum of the periods of imprisonment imposed in respect of various convictions arising out of the same circumstances does not exceed what is reasonable as a whole (the principle of totality of sentence).

Proposed subsection 443(7) ensures that an order of detention imposed on a juvenile, being a deprivation of liberty similar to that imposed by a prison sentence, is taken into account in a similar way as a term of imprisonment.

## Clause 8

Proposed section 449 is intended to allow the Director of Public Prosecutions to appeal against a reduction in sentence for promised cooperation with law enforcement authorities where that cooperation is not forthcoming. The practice of discounting a sentence for cooperation is well recognised; however, there must be safeguards to ensure that a person does not receive the benefit of a discount where he or she fails to cooperate as promised. The amount of reduction is required to be quantified by the sentencing judge or magistrate, so that if the person is subsequently re-sentenced he or she does not face a harsher penalty than would have been imposed initially if the promise had not been made.

Proposed section 450 requires the Court to explain to the offender the operation of a sentence of imprisonment where it includes a non-parole period or release by way of recognizance. This is to ensure that the implications of the sentence are not lost on the offender and to avoid confusion through a lack of understanding, particularly where the offender may not have a good grasp of English.

Proposed section 451 ensures that the time which a person has been held in custody before trial or sentence must be counted as time served, in recognition of the fact that some people are deprived of their liberty for extensive periods whilst awaiting the outcome of proceedings against them.

The purpose of proposed section 452 is to require the court to adjust a sentence of imprisonment to take into account the absence of reductions or remissions applicable in the State or Territory where the sentence is to be served. Because offenders in like circumstances should receive like penalties, a variation in the length of sentence caused by such policies must be taken into account.

Proposed Division 2 recognises in legislation the current provision by ACT Corrective Services of pre-sentence reports to assist the courts in determining the appropriate sentence. The aim of a pre-sentence report is to investigate and assess the offender's background, circumstances, prospects of rehabilitation and other factors. The proposed sections prescribe the content, preparation and use of pre-sentence reports, which may be either written or oral, and allow for cross-examination of the author of the report.

#### **Clause 9 - Conditional release of offenders**

This provision is aimed at ensuring that the Community Service Orders scheme administered by ACT Corrective Services is used as a sanction distinct from release on recognizance. Part XVA of the Principal Act provides that a Community Service Order should only be imposed as an alternative to imprisonment.