

2004

**THE LEGISLATIVE ASSEMBLY FOR
THE AUSTRALIAN CAPITAL TERRITORY**

**CRIMES (RESTORATIVE JUSTICE) BILL 2004
EXPLANATORY STATEMENT**

**Circulated by the authority of
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Outline

In the *ACT Criminal Justice Strategic Plan 2002-2005* the Government expressed its commitment to examine restorative justice options for the ACT.

A Restorative Justice Sub-committee of the ACT Sentencing Review Committee was established to examine the extension of existing restorative justice options and to determine an appropriate model of restorative justice for the ACT.

Currently, only ACT Policing can provide restorative justice, through pre-court diversionary conferencing in operation since 1994. The number of conferences conducted by ACT Policing has been fewer than 50 per year.

In October 2003 the Restorative Justice Sub-committee released a discussion paper for consideration by the community and criminal justice stakeholders. Community submissions on the paper were called for and 16 contributions were received. The government also consulted directly with the community and criminal justice stakeholders.

The government also facilitated focus groups comprised of interested members of the public who responded to the discussion paper advertisement. The government also consulted appropriate advisory bodies, such as the ACT Community Crime Prevention Committee.

Following consultation, the Restorative Justice Sub-committee made recommendations to the government to establish a centralised restorative justice scheme that can be accessed throughout the criminal justice process. The sub-committee's recommendations also set out the kind of restorative justice scheme the Territory should adopt.

Throughout the sub-committee's deliberations, the interests of victims of crime were of primary importance. The Australian community places high expectations on victims of crime. Victims of crime are expected to report the crime to police; to provide witness statements; to cooperate with investigators and prosecutors; and to perform as effective witnesses at criminal trials. However, in the context of the prosecution of an offence a victim may have no opportunity to address their needs in relation to the impact of the crime.

As New Zealand's *Information on Court Referred Restorative Justice* booklet noted, people who have experienced crime often want a real voice in the process. Victims want the offender to take responsibility for their actions. Victims also want their family, the offender and the community to understand the impact of the crime.

Restorative justice does not have a precise, scientific, definition. Restorative justice is a methodological tool which aims to address unresolved issues and emotions experienced by victims, offenders and their families which cannot be addressed by the court because of the objective nature of the court's role.

The starting point of the government's Bill is victims of crime. The restorative justice method used in the Bill aims to provide the victim with a means to better understand the crime and the offender's behaviour; to enable the victim to regain confidence (or

restore their emotional balance) by experiencing the offender in a context where the offender is unable to hold power over the victim; and to allow the victim to express the effect of the crime in a formal setting.

The restorative justice scheme also aims to have a constructive impact upon the offender. The Bill would require offenders to take responsibility and to engage constructively to make amends for their wrongdoing. It provides offenders with an opportunity to re-engage with the community through redemptive action with the victim, public administration and people closely associated with the victim and the offender.

The key tool used in the government's Bill to achieve the objectives of restorative justice is a facilitated conference between the victim and the offender to discuss the offence, the impact of the offence and what can be done to repair the harm to the victim, the community, or both.

The scheme enables restorative justice to augment the existing criminal justice system. The scheme is envisaged to operate in conjunction with the normal processes of charging, prosecuting and trying criminal offences.

As a means of protecting the rights of victims, the community and offenders, access to restorative justice will be qualified by:

- the nature of the offence;
- the eligibility of people to participate; and
- the suitability of people to participate.

The scheme distinguishes between serious offences and all other offences. The scheme allows access to restorative justice for less serious offences at all points of the criminal justice system: prior to charges, after charges, prior to a hearing, after a conviction, and during or after completing a sentence.

Access to restorative justice for serious offences (technically classified as indictable only offences) is only permitted after a guilty plea or a finding of charges proven.

Government agencies involved in criminal justice and the courts will be able to refer offences to restorative justice. The process of restorative justice will be managed by a Restorative Justice Unit established by the Executive. It will be the unit's responsibility to assess the suitability of the offence, the victim and the offender for restorative justice.

Clauses

Part 1 Preliminary

Clause 1: Name of Act

This is a technical clause which names the short title of the Act.

Clause 2: Commencement

This clause enables the Act to commence on a day nominated by the Minister in a commencement notice. The provisions for a commencement notice are set out in section 77 of the *Legislation Act 2001*.

If the Minister does not commence the Act six months after the Act is notified on the Legislation Register, then the Act automatically commences the following day. The provisions for automatic commencement are set out in section 79 of the *Legislation Act 2001*.

The Crimes (Restorative Justice) Bill 2004 envisages two phases. The first phase is foreshadowed for approximately the calendar year of 2005. During the first phase the scheme will involve offences committed by juveniles only. The second phase is expected to begin in 2006. The second phase will involve offences committed by juveniles and adults.

The first phase commences when the Act commences, the mechanism to commence the second phase is at clause 15. Clause 15 enables the Minister to commence the second phase by notifiable instrument.

Clause 3: Dictionary

This is a technical clause identifying the dictionary and explaining conventions used to define words and terms.

Clause 4: Notes

This is a technical clause explaining the status of notes to the Act.

Clause 5: Offences against Act — application of Criminal Code etc

This clause makes it clear that the *Criminal Code 2002* applies to the Act.

Part 2 Underlying principles

Clause 6: Objects of Act

Clause 6 sets out the objects of the Act and informs the model of restorative justice the Territory has composed.

Central to the objects of the Bill are victims. The scheme augments the criminal justice process without replacing criminal justice. In this way victims' needs can be attended to without distorting the prosecution of a crime.

Restorative justice may also have a positive impact upon the offender by enabling the offender to express contrition or remorse in a meaningful way. Offenders might also take the opportunity to make amends to the victim and the community. Restorative justice might also provide the offender's family and support networks with a means to help the offender change their behaviour. However, these other positive aspects of restorative justice are not outlined in the objects of the Act because the starting point of the scheme is victims. The government intends the Act to speak to the needs of victims first.

Clause 6(a) addresses the needs of victims to have a voice in relation to the offence and the offender.

Clause 6(b) points to the interaction of victims and offenders to facilitate restorative justice.

Clause 6(c) indicates the government's intention that in applying the Act victims' needs are given the highest consideration.

Clause 6(d) makes it clear that the restorative justice model developed by the ACT is not a substitute for the traditional system of prosecution or trial. Nor does the scheme intend to alter or change the traditional system of prosecution or trial.

Consistent with the scheme's accessibility at any stage of the criminal justice process, clause 6(e) intends to leave no doubt that agencies which have a role in the criminal justice system can refer matters to restorative justice. Agencies such as youth justice, corrections, the police, the Director of Public Prosecutions, and the courts are all examples contemplated by the Bill.

Clause 7: Application of restorative justice

Clause 7 provides agencies involved in the criminal justice process with a discretion to refer offences to restorative justice.

Clause 7(2) provides that the scheme does not intend to affect any powers held by the referring agency. The scheme does not intend to place any obligation upon the normal processes of investigation, charging, prosecution, trial or sentencing.

Clause 8: When restorative justice is available

Clause 8 is an overview of when restorative justice is available for an offence. Clause 8(a) refers to an eligible victim or parent, which is discussed at clauses 17 and 18.

Clause 8(b) refers to an eligible offender, which is discussed at clause 19.

Clause 8(c) refers to a referring entity, namely an agency involved in the criminal justice process. Referring entities are discussed at clause 22.

Clause 8(d) refers to the chief executive of the agency responsible for administering restorative justice and the decision that an offence is suitable for a restorative justice process. The suitability of offences is discussed at clauses 32 and 33.

Clause 9: No obligation to participate

Clause 9 states that there is no legal obligation upon a victim or an offender to participate in restorative justice. A victim or offender may decline to participate at all, or cease participation at any time.

This clause does not prevent victims or offenders from later changing their mind and agreeing to participate.

Part 3 Key concepts

Clause 10: Definitions — restorative justice

Clause 10 defines ‘eligible victim’, ‘eligible parent’ and ‘eligible offender’ by referencing clauses 17, 18 and 19 respectively. These clauses are discussed below.

In clause 10 ‘referred’, means a reference from an agency, — referring entity — contemplated by the Bill at clause 22.

The agencies that may refer offences to restorative justice are each defined as a ‘referring entity’. Referring entities are generally defined in clause 22 and table 22, which is discussed below. Referring entity has a specific definition in part 8, clause 38 of the Bill. The specific definition for part 8 is to identify any agency that administers a sentence or punitive order made by a court. For example, a corrections agency. The specific definition for division 9.2 is the same as the definition for part 8.

‘Restorative justice’ is defined as the form of restorative justice provided by the Bill and not restorative justice in general.

Suitability for restorative justice is set out in part 7 of the Bill and is discussed at clauses 29 to 36 below. The definition of ‘suitable’ is based upon the determination of suitability in part 7.

Consistent with section 156 of the *Legislation Act 2001*, these definitions apply to the entire Bill.

Clause 11: Definitions — *victim, child victim and parent*

The definitions in clause 11 provide certainty of who may participate in restorative justice and in what capacity somebody may participate.

A ‘child victim’ is a victim of an offence who is under 18 years of age.

The definition of ‘parent’ is referenced to a person with parental responsibility in part 2.3 of the *Children and Young People Act 1999*. This includes a person who is the

mother, or who is the father; a person who by court order is the parent; and a person exercising parental responsibility on the authority of the *Children and Young People Act 1999*.

A ‘victim’ has the same definition as the *Victims of Crime Act 1994*.

The *Victims of Crime Act 1994* defines victim as:

- (a) a person (the **primary victim**) who suffers harm —
 - (i) in the course of, or as the result of, the commission of an offence; or
 - (ii) in the course of assisting a police officer in the exercise of the officer’s power to arrest a person or to take action to prevent the commission of an offence; or
- (b) where a primary victim dies as a result of the commission of an offence — any person who was financially or psychologically dependent on the primary victim immediately before his or her death; or
- (c) a person who witnesses the commission of an offence in circumstances in which it is probable that he or she would suffer harm; or
- (d) a primary victim, a related victim or an eligible property owner within the meaning of the *Victims of Crime (Financial Assistance) Act 1983*.

For the purposes of the Bill, the meaning of ‘victim’ also applies to people who would be victims of alleged offences. The definition covers both offences proven and alleged offences because restorative justice may take place before the issue is tested by a court.

Consistent with section 156 of the *Legislation Act 2001*, these definitions apply to the entire Bill.

Clause 12: Definitions — offences and offenders

The definitions in clause 12 provide certainty of who may participate in restorative justice and what is an offence that can be referred to restorative justice.

An ‘adult offender’ is a person who was over 18 years old when the offence, or alleged offence, was committed.

The definition of ‘commission’ in relation to an offence is also an allegation that an offence has been committed.

The definition of ‘domestic violence offence’ draws upon the *Protection Orders Act 2001*. Section 9(1) of the *Protection Orders Act 2001* sets out the meaning of domestic violence. Section 9(2) refers to approximately 51 criminal offences that are taken to be domestic violence when they are committed in a domestic context.

In essence, a person’s behaviour is domestic violence if the behaviour:

- causes, or threatens, physical injury to a relevant person;
- causes, or threatens, damage to the property of a relevant person;

- is directed, or threatened to be directed, at a relevant person and is a domestic violence offence; or
- is harassing or offensive towards a relevant person.

A relevant person, in relation to the *Protection Orders Act 2001*, is either a domestic partner; a relative; a child of a domestic partner; or someone who normally lives, or normally lived, in the same household (other than as a tenant or boarder).

The definition of ‘less serious offence’ is any offence that has a punishment of less than 14 years for money or property offences, or 10 years for other offences. This is discussed further below in relation to the definition of ‘serious offence’.

‘Offence’ means an offence against ACT laws, or an alleged offence against ACT laws. The definition covers both offences proven and alleged offences because restorative justice may take place before the issue is tested by a court.

Akin to the definition of offence, the definition of ‘offender’ means a person convicted, found guilty, or alleged to have committed an offence. The definition covers both offences proven and alleged offences because restorative justice may take place before the issue is tested by a court.

If an offender has been acquitted of the offence by a court, or a court has dismissed proceedings for that offence, then the person is no longer an offender for that offence.

‘Serious offence’ is akin to the traditional category of indictable only offences. ‘Serious offence’ is based upon section 375 of the *Crimes Act 1900*, which distinguishes between indictable only offences and other offences. Indictable only offences are money and property offences which hold a penalty of imprisonment exceeding 14 years, or offences against the person and other offences which hold a penalty of imprisonment exceeding 10 years.

‘Young offender’ is a person who was between the age of 10 and 18 when an offence was committed, or alleged to have been committed, by the person. The definition covers both offences proven and alleged offences because restorative justice may take place before the issue is tested by a court.

Clause 13: Definition — sentence related order

Clause 13 provides for a comprehensive definition of ‘sentence related order’.

Examples given for the section demonstrate the kinds of orders regarded as a sentence related order. The clause contemplates orders made under the *Rehabilitation of Offenders (Interim) Act 2002*; the *Periodic Detention Act 1995* and the *Crimes Act 1900*.

Clause 13(a)(ii) includes orders under the *Crimes Act 1900* that can be made by the court to conditionally release offenders without conviction (section 402) and conditional release of offenders with conviction (section 403).

Likewise, in clause 13(b) ‘sentence related order’ includes a range of dispositions available to the court under sections 96, 98(2)(a) and 98(2)(b) of the *Children and Young People Act 1999*.

Part 4 Application of Act

Clause 14: Application of Act — young offenders and less serious offences

Clause 14 stipulates that the Act will apply to less serious offences committed by a young offender. Less serious offences are defined in clause 12 as any offence that has a punishment of less than 14 years imprisonment for money or property offences, or 10 years for offences against the person and other offences.

Clause 14(2) enables access to restorative justice for young offenders who committed an offence before the commencement of the foreshadowed Act.

By the operation of clause 14(3), clause 2, and clause 15(4) restorative justice will only be accessible for less serious offences during the first phase of the scheme. Clause 14(3) also prohibits access to restorative justice for any domestic violence or sexual offences in the first phase of the scheme. These offences are not limited to serious offences.

Clause 14(4) states that when the second phase of restorative justice begins, clauses 14(2) to (6) will expire.

Clause 14(5) makes clear that section 88 of the *Legislation Act 2001* applies to clauses 14(2) to (6) to ensure that even though these transitional clauses are repealed their declaratory or validating effect does not end.

For clarity, clause 14(6) defines sexual offences by listing the offences. Restorative justice will not be available for these offences during the first phase of the scheme.

Clause 15: Application of Act — generally

Clause 15(1) empowers the Act to deal with less serious offences committed by adults. By the operation of clause 15(4) this will not occur until the second phase of the scheme. See clause 2 for further explanation on commencement and phases of the scheme.

Clause 15(2) authorises the Act to apply to serious offences in the second phase of the restorative justice scheme. Serious offences are defined in clause 12. The second phase of the scheme is discussed at clause 2 (above). Restorative justice will be available for serious offences only if the offender pleads guilty to the offence or has been found guilty of the offence. An exception for serious domestic violence offences committed by young people is discussed in clause 16.

Clause 15(3) states that the clause does not deal with domestic violence offences. These offences are addressed in clause 16.

The effect of clause 15(4) will be to exclude adults from the first phase of the scheme and serious offences from the first phase of the scheme. It also enables the Minister to begin the second phase of the scheme by notice.

Clause 15(5) enables restorative justice to apply to serious offences and adult offenders where the offence was committed before the start of the second phase of the scheme but the restorative justice is happening after the start of the second phase. For example, restorative justice will apply to an adult offender completing a five-year

prison sentence for a serious offence provided the second phase of the scheme has commenced. The fact that the offence occurred years before the commencement of the Act would not prevent access to restorative justice.

Clause 15(6) is a technical provision. It enables the Minister to commence the second phase of the scheme using a notifiable instrument. See also clause 2 above regarding commencement.

Clause 15(7) ensures that section 79 of the *Legislation Act 2001* does not automatically commence clause 15(2) and 15(3).

Clause 15(8) states that when the second phase of restorative justice begins, clauses 15(4) to (9) will expire.

Clause 15(9) makes clear section 88 of the *Legislation Act 2001* applies to clauses 15(4) to (9) to ensure that even though these transitional clauses are repealed their declaratory or validating effect does not end.

Clause 16: Application of Act — domestic violence offences

Clause 16(1) enables the Act to apply to domestic violence offences committed by young offenders.

Clause 16(2) clarifies that a charge of domestic violence would not have to be laid for the Act to apply to these offences.

Clause 16(3) authorises the Act to apply to domestic violence offences in the second phase of the restorative justice scheme. Domestic violence offences are defined in clause 12. Restorative justice will be available for any domestic violence offence only if the adult offender pleads guilty to the offence or has been found guilty of the offence. The clause does not distinguish between serious and less serious domestic violence offences: any domestic violence offence can only be applied if the offender pleads guilty or has been found guilty.

Clause 16(4) stipulates that the Act will not apply to domestic violence offences until phase two of the scheme. During the first phase of the scheme, restorative justice will not be available for any domestic violence offence.

Clause 16(5) enables restorative justice to apply to domestic violence offences where the offence was committed before the start of the second phase of the scheme but the restorative justice is happening after the start of the second phase. For example, restorative justice will apply to an offender completing a five-year prison sentence for a domestic violence offence provided the second phase of the scheme has commenced. The fact that the offence occurred years before the commencement of the Act would not prevent access to restorative justice.

Clause 16(6) ensures that section 79 of the *Legislation Act 2001* does not automatically commence clause 16(1), (2) and (3).

Clause 16(7) states that when the second phase of restorative justice begins, clauses 16(4) to (9) will expire.

Clause 16(8) makes clear section 88 of the *Legislation Act 2001* applies to clauses 16(4) to (9) to ensure that even though these transitional clauses are repealed their declaratory or validating effect does not end.

Clause 16(9) directs the meaning of phase two application day back to clause 15(4), which authorises the Minister to begin the second phase of the scheme.

Part 5 Eligibility for restorative justice

Part 5 sets out the criteria for eligibility of victims and offenders. Eligibility is assessed in the first instance by referring agencies. If an agency wishes to refer an offence to restorative justice the agency must simply assess the victim and offender against the criteria in part 5.

Clause 17: Eligible victims

Clause 17(1) stipulates that to be eligible for restorative justice a victim must be at least 10 years old and be intellectually capable of agreeing to participate in restorative justice. A victim is only eligible for restorative justice if the offence endured by the victim is one the Act authorises to access restorative justice. The offender must also be an offender contemplated by the Act, consistent with phase one of the scheme applying to juveniles and phase two of the scheme applying to both juveniles and adults. (See clause 2 above.)

Taken as a whole with the definition of ‘victim’ discussed at clause 11 above, the clause contemplates people who have a personal relationship with victims who have an intellectual disability, where the person with an intellectual disability does not have the capacity to consent to restorative justice. The clause does not contemplate people who have professional relationships with victims who have an intellectual disability, unless the professional person is also a victim because of the commission of the offence.

Clause 17(2) extends the meaning of eligible victims to enable immediate family members of a victim under 10 years old to be eligible to participate in restorative justice.

Clause 17(3) denotes that a victim who meets the eligibility criteria is an ‘eligible victim’.

Clause 17(4) informs clause 17(2) by defining ‘immediate family member’. The definition also includes examples of siblings and makes it clear that immediate family members also include siblings in a composite family involving the same guardian or foster parent.

It is intentional that clause 17 does not require the referring agency to seek the victim’s agreement to participate in restorative justice at this stage. It is intended that in practice indicative consent will be sought from the offender first. This will enable the victim to make the choice to participate in restorative justice with the advantage of knowing that the offender has indicated consent to participate. It will also enable the victim to reserve their decision for a later time. Conversely, if the victim was asked to indicate their consent first, the offender would be in a position of advantage in relation

to whether to agree to participate in restorative justice. Given that the scheme is fundamentally for the benefit of victims, the advantage in making the decision is balanced in the victim's favour.

Clause 18: Eligible parents

Clause 18 contemplates circumstances where the victim is a child who may not be capable of comprehending the experience of crime, for whatever reason, or the child has died. Under these circumstances clause 18 enables a parent to be assessed for eligibility for restorative justice in lieu of the child.

Akin to clause 17, clause 18(1)(c) requires the parent to be intellectually capable of agreeing to participate in restorative justice. The parent is only eligible for restorative justice if the offence endured by the victim is one the Act authorises access to restorative justice.

The meaning of parent and child victim is discussed at clause 11.

Clause 18(2) denotes that a child victim's parent, who meets the eligibility criteria, is an 'eligible parent'.

Clause 19: Eligible offenders

Clause 19 stipulates that for an offender to be eligible for restorative justice the offender must be at least 10 years old and intellectually capable of agreeing to participate in restorative justice. An offender is only eligible for restorative justice if the offence conducted, or alleged to have been conducted, by the offender is one the Act authorises access to restorative justice. The offender must also be an offender contemplated by the Act, consistent with phase one of the scheme applying to juveniles and phase two of the scheme applying to both juveniles and adults. (See clause 2 above.)

To be eligible the offender must also accept responsibility for the commission of the offence. Accepting responsibility is not equal to pleading guilty — see clause 20 below.

Clause 19(1)(b)(iv) also provides that the offender must agree to take part in restorative justice to be eligible for restorative justice. It is intended that in practice indicative consent will be sought from the offender first. This will enable the victim to make the choice to participate in restorative justice with the advantage of knowing that the offender has indicated consent to participate. It will also enable the victim to reserve this decision for a later time. Conversely, if the victim was asked to indicate their consent first, the offender would be in a position of advantage in relation to whether to agree to participate in restorative justice. Given that the scheme is fundamentally for the benefit of victims, the advantage in making the decision is balanced in the victim's favour.

Clause 19(2) denotes that an offender, who meets the eligibility criteria, is an 'eligible offender'.

Clause 20: Accepting responsibility for offences

Clause 20(1) explicitly provides for separating the concepts of accepting responsibility from a plea of guilty. An offender who accepts responsibility for the purposes of restorative justice under the Act is free to plead not guilty at a trial of the offence. This part of clause 20 enables the offender to participate in restorative justice without prejudicing their trial.

Clause 20(2) provides for the neutral disposition of the restorative justice process towards the deliberations of a court when sentencing. If an offender accepts responsibility in the context of restorative justice, the Act does not oblige the court to take this into account when calculating a sentence.

Note 2 in clause 20 refers to a consequential amendment prepared for the *Crimes Act 1900* that will ensure a neutral disposition towards sentencing if an offender chooses not to participate in restorative justice. See clauses 77 and 78 below.

Part 6 Referral for restorative justice

Part 6 sets out who can refer matters to restorative justice and at what stage of the criminal justice system particular matters can be referred to restorative justice.

Part 6 contains explicit provisions regulating the use of restorative justice for diversionary conferencing. It is the government's intention that as a matter proceeds through the stages of the criminal justice system, prior to trial, the restrictions on diversion should be greater. The government intends that the scheme predominantly augments the criminal justice system.

Part 6 frequently uses the term 'the chief executive'. Throughout the Bill the term 'the chief executive' means the chief executive who is foreshadowed to administer the scheme. It is envisaged that the chief executive will establish a restorative justice unit within the department administered by the chief executive. The Bill also makes reference to other chief executives who administer other functions of the Territory. The terms labelled to describe the office and function are used in the Bill in lieu of specific agency names because firstly, the names of agencies may change, and secondly, it is in deference to the Administrative Arrangements instrument made under the *Public Sector Management Act 1994*.

Division 6.1 Preliminary

Clause 21: Referral definitions

Clause 21 defines some terms used specifically for part 6.

The terms labelled, 'chief executive (children and young people)', 'chief executive (corrections)' and 'chief executive (restorative justice)', are used lieu of specific agency names because firstly, the names of agencies may change, and secondly, it is in deference to the Administrative Arrangements instrument made under the *Public Sector Management Act 1994*.

The meaning of 'court referral order' is set out in clause 27(2).

‘Referring entity’ has the same meanings as explained in clause 22.

‘Section 24 referral conditions’ means the referral conditions set out in clause 24.

Division 6.2 General

Clause 22: Referring entities

Clause 22(1) enables the agencies responsible for an area of the criminal justice system to refer offences to restorative justice. A relevant agency may only refer matters to restorative justice at the stage of the criminal justice system associated with the agency’s role. A further explanation of table 22 is provided below.

Clause 22(2) defines the meaning of the labelled references to the various chief executives and the application of these labels to table 22.

‘Chief executive (children and young people)’ means the chief executive administering an agency responsible for the *Children and Young People Act 1999*. In current terms this would include an agency responsible for youth justice.

‘Chief executive (corrections)’ means the chief executive of an agency administering a sentence related order. The meaning of a sentence related order is discussed in clause 13. In current terms a relevant agency would include ACT Corrective Services.

‘Chief executive (restorative justice)’ means the chief executive of the agency administering the foreshadowed *Crimes (Restorative Justice) Act*.

The example provided with the clause demonstrates the importance of the labels when the chief executive is a person responsible for a number of functions.

The note also clarifies that throughout the Bill the term ‘the chief executive’ means the chief executive who is foreshadowed to administer the scheme. It is envisaged that the chief executive will establish a restorative justice unit within the department administered by the chief executive.

Clause 22(2) also defines ‘prosecution referral’ to include the range of instruments and actions which initiate a prosecution. This definition helps to precisely identify the different stages of the criminal justice process in table 22.

Table 22: Referring entities

In item 1, after an offender is cautioned or apprehended and prior to the issue of a Voluntary Agreement to Attend Court, a Court Attendance Notice, a summons or an arrest and charge is made, the referring entity is ACT Policing under the auspices of the Chief Police Officer. At this stage the chief executive administering restorative justice and the chief executive for children and young people can also refer to restorative justice.

In item 2, after the issue of a Voluntary Agreement to Attend Court, a Court Attendance Notice, a summons or an arrest and charge is made, and prior to a second mention hearing by the court, the referring entity is the Director of Public Prosecutions.

In item 3, between the second mention hearing and before the end of the case management hearing, the court is the referring entity.

Between the end of the case management hearing and either a plea of guilty, or a guilty finding, the court (or any other agency) cannot refer the offence to restorative justice.

In item 4, between a plea of guilty and completion of sentencing, or a finding of guilt and completion of sentencing the court may refer matters to restorative justice.

In item 5, after a court has made a sentence-related order and prior to the expiry of the order, the chief executive of the Sentence Administration Board may refer matters to restorative justice, or the Sentence Administration Board itself may refer matters to restorative justice. Under current arrangements, the chief executive in this situation would mean the chief executive of ACT Corrective Services. The chief executive administering restorative justice may also refer matters to restorative justice.

Item 6 enables the Executive to make regulations authorising other agencies to refer matters to restorative justice and stipulating the relevant stage of the criminal justice process.

Clause 23: Referral procedure

Clause 23 requires referrals to be made to the chief executive responsible for administering the foreshadowed *Crimes (Restorative Justice) Act*.

Clause 23(2) requires a referral to be in writing and state the grounds for referral.

This clause also authorises the court to use a number of existing orders to make a referral to restorative justice in addition to the new power to refer — a court referral order — discussed in clause 27 below.

Clause 23(3) makes it clear that the chief executive does not have to refer matters to themselves if they are one and the same person.

Clause 24: Referral power

Clause 24 empowers relevant agencies to refer an offence to restorative justice if the conditions are met.

In order to refer: there must be an eligible victim or eligible parent of a victim; the offender must be an eligible offender; and an explanation of restorative justice to the eligible victim or parent and the eligible offender must be given.

Clause 24(2) authorises the Executive to make guidelines about referrals.

Clause 24(3) qualifies clause 24 by direction to other clauses that qualify referral for particular offences or under particular circumstances.

Clause 25: Explanation of restorative justice

Clause 25 obliges referring entities to explain restorative justice to eligible victims, parents and offenders prior to referral. The agency must explain the purpose and nature of restorative justice. In doing so the agency must explain the restorative

justice conference, who may participate in the conference and the restorative justice agreement. The agency must inform eligible victims, parents and offenders that there is no obligation to participate in restorative justice and that accepting responsibility does not prejudice a not guilty plea.

Item (c) in clause 25 ensures that the required participants in a restorative justice conference are advised to seek independent legal advice about participating in a restorative justice conference.

Item (f) makes it clear that the Act intends to have a neutral disposition towards the sentencing process.

Clause 26:

Referral by DPP — domestic violence offences committed by young offenders

Clause 26 contemplates referrals of serious domestic violence offences committed by young offenders to restorative justice, where the referral is not diversionary.

Clause 26(2) sets out the restrictions on the DPP referring a serious domestic violence offence committed by a young offender to restorative justice, namely:

- the referral conditions in clause 24 must apply; and
- the DPP has consulted with each victim or parent of the victim(s).

Clause 26(3) makes it clear that access to restorative justice for domestic violence offences does not occur in phase one of the scheme.

Clause 26(4) enables restorative justice to apply to domestic violence offences where the offence was committed before the start of the second phase of the scheme but the restorative justice is happening after the start of the second phase. For example, restorative justice will apply to an offender completing a five-year prison sentence for a domestic violence offence provided the second phase of the scheme has commenced. The fact that the offence occurred years before the commencement of the Act would not prevent access to restorative justice.

Clause 26(5) ensures that section 79 of the *Legislation Act 2001* does not automatically commence clause 26(1) and (2).

Clause 26(6) states that when the second phase of restorative justice begins, clauses 26(3) to (8) will expire.

Clause 26(7) makes clear section 88 of the *Legislation Act 2001* applies to clauses 26(3) to (8) to ensure that even though these transitional clauses are repealed their declaratory or validating effect does not end.

Clause 26(8) directs the meaning of ‘phase two application day’ back to clause 15(4), which authorises the Minister to begin the second phase of the scheme.

Division 6.3 Referral by courts

Clause 27: Referral during court proceeding

Clause 27 contemplates referrals to restorative justice by courts. Specifically, clause 27(1)(a) provides for court referrals at the stage of the criminal justice system after the second mention hearing and before the end of a case management meeting. This corresponds with item 3, in table 22, discussed at clause 22 above.

Clause 27(1)(b) stipulates that the prosecution and the defence must agree that the offence should be referred to restorative justice.

Clause 27(1)(c) stipulates that the court must be satisfied that the conditions discussed in clause 24 are met, or if those conditions have not been met then restorative justice has been explained to the victim, parent, or offender in accord with clause 25, and is appropriate for the offence.

If clause 27(1) is met, then clause 27(2) enables the court to make a ‘court referral order’ to restorative justice. In doing so the court must adjourn proceedings. Application for a diversionary referral may only be made by the DPP. Application for a referral which is not diversionary may be made by the prosecution or the defence.

Clause 27(3) provides for copies of the court referral order to be given to the relevant parties listed.

Clause 27(4) authorises court referral of serious domestic violence offences allegedly committed by young offenders if the court considers exceptional circumstances justify the referral.

Clause 27(5) makes it clear that access to restorative justice for domestic violence offences does not occur in phase one of the scheme.

Clause 27(6) enables restorative justice to apply to domestic violence offences where the offence was committed before the start of the second phase of the scheme but the restorative justice is happening after the start of the second phase. For example, restorative justice will apply to an offender completing a five-year prison sentence for a domestic violence offence provided the second phase of the scheme has commenced. The fact that the offence occurred years before the commencement of the Act would not prevent access to restorative justice.

Clause 27(7) ensures that section 79 of the *Legislation Act 2001* does not automatically commence clause 27(4).

Clause 27(8) states that when the second phase of restorative justice begins, clauses 27(5) to (10) will expire.

Clause 27(9) makes clear section 88 of the *Legislation Act 2001* applies to clauses 27(5) to (10) to ensure that even though these transitional clauses are repealed their declaratory or validating effect does not end.

Clause 27(10) directs the meaning of ‘phase two application day’ back to clause 15(4), which authorises the Minister to begin the second phase of the scheme.

Clause 28: Court referral orders — reports

Clause 28 requires reports on the outcome of the court referral order to restorative justice.

The chief executive administering the foreshadowed Act and Restorative Justice Unit must provide the report for the court.

Clause 28(3) sets out what must be in a report to the court. The report must state whether or not the victim, parent (if applicable) and offender are eligible for restorative justice. If eligibility is met, the report must state whether or not the victim, parent (if applicable) and offender are suitable for restorative justice. It is not the government's intention that the report would have to explain, or reason, why suitability is met or not. The report must simply state if the parties are suitable or not.

The report must also state whether or not a restorative justice conference was held. If a conference was held, the report must state if the conference met the objectives of restorative justice and if a restorative justice agreement was made.

Clause 28(4) requires a copy of any agreement from a restorative justice conference to be provided with the report. Conference agreements are discussed below at clauses 49 to 55.

Clause 28(5) ensures that copies of the report must be given to the parties mentioned in the clause.

Part 7 Suitability of restorative justice

Part 7 covers the assessment of suitability for restorative justice. The Bill is structured to provide for the centralised assessment of suitability for restorative justice. The government intends to establish a Restorative Justice Unit to conduct suitability assessments. Suitability is a prerequisite for a restorative justice conference. The Restorative Justice Unit and conference convenors will need to exercise their skill and discretion when assessing if the interaction of participants will result in a constructive conference or a negative experience for victims. Conferences are discussed at part 8 below.

Clause 29: Meaning of personal characteristics for part 7

'Personal characteristics' means any characteristics of potential participants in a restorative justice conference that could affect the nature of the conference. The definition and its examples also contemplate different life experiences.

Clause 30: Suitability — eligibility requirement

Clause 30 ensures that victims, parents, offenders and the offence itself can only be assessed for suitability if eligibility for restorative justice is met. Eligibility is discussed at part 5 above.

Clause 31: Finding of eligibility by referring entity

Clause 31 contemplates a referral made by a relevant agency. Referrals are discussed at clauses 21 to 28 above. Clause 31(2) provides the Restorative Justice Unit with the discretion to confirm for itself whether or not a victim, parent or offender is suitable for restorative justice.

Clause 32: Suitability — decision

Clause 32(1) refers to the chief executive responsible for administering the foreshadowed *Crimes (Restorative Justice) Act*. It will be the role of the Restorative Justice Unit, delegated by the chief executive, to assess suitability for restorative justice.

In making a decision on suitability, the chief executive must consider clause 33, clause 34, clause 35, and clause 36.

If the chief executive determines that restorative justice is suitable, then the chief executive must ask the people listed in clause 32(3)(a) and (b) for their written consent to participate in a restorative justice conference. The government intends to make an approved form for this purpose which will explain the restorative justice process, draw potential participants' attention to their rights and seek relevant consents in relation to privacy matters.

Clause 33: Suitability — general considerations

Clause 33 requires the chief executive to consider the contextual issues of the offence and the relationships between the potential participants of a restorative justice conference.

Clause 33(1)(a) enables the chief executive to determine that an offence is not suitable for restorative justice if it would undermine a policy governing the treatment of particular offences. For example, if providing restorative justice for a family violence offence would undermine the current Family Violence Intervention Program, then the chief executive may decide that the offence is not suitable for restorative justice.

Clause 33(1)(b) enables the chief executive to consider the dynamics of the offence itself. The severity of the offence, or the way in which the offence occurred, might make it inappropriate for restorative justice.

Clause 33(1)(c) permits the chief executive to determine that access to restorative justices at a particular point in the criminal justice process is inappropriate.

Clause 33(1)(d) enables the chief executive to consider the power relationships between the potential participants of the conference. A conference which simply re-victimises the victim, or persecutes the offender, would not meet the objects of the foreshadowed Act.

Clause 33(1)(e) ensures that the chief executive considers the safety of potential participants in the conference, whether it be physical or psychological.

Clause 33(2) stipulates that the chief executive must be satisfied that exceptional circumstances exist in relation to the referral of a domestic violence offence to warrant access to restorative justice.

Clause 33(3) makes it clear that access to restorative justice for domestic violence offences does not occur in phase one of the scheme.

Clause 33(4) enables restorative justice to apply to domestic violence offences where the offence was committed before the start of the second phase of the scheme but the restorative justice is happening after the start of the second phase. For example, restorative justice will apply to an offender completing a five-year prison sentence for a domestic violence offence provided the second phase of the scheme has commenced. The fact that the offence occurred years before the commencement of the Act would not prevent access to restorative justice.

Clause 33(5) ensures that section 79 of the *Legislation Act 2001* does not automatically commence clause 33(2).

Clause 33(6) states that when the second phase of restorative justice begins, clauses 33(3) to (8) will expire.

Clause 33(7) makes clear section 88 of the *Legislation Act 2001* applies to clauses 33(3) to (8) to ensure that even though these transitional clauses are repealed their declaratory or validating effect does not end.

Clause 33(8) directs the meaning of ‘phase two application day’ back to clause 15(4), which authorises the Minister to begin the second phase of the scheme.

Clause 34: Suitability — victims

Clause 34 sets out what the chief executive must consider when assessing a victim’s suitability for restorative justice.

The chief executive must consider the personal characteristics of the victim. Clause 29 defines ‘personal characteristics’.

The victim’s motivation for participating in restorative justice must be considered. If the victim intends to harm the offender, for example, or persecute the offender, the chief executive would consider the victim unsuitable for restorative justice.

The chief executive must also consider the victim’s perception of the impact of the offence.

Clause 35: Suitability — eligible parents

Clause 35 sets out what the chief executive must consider when assessing an eligible parent’s suitability for restorative justice.

The chief executive must consider the relationship between the parent and child, and their respective personal characteristics. Clause 29 defines ‘personal characteristics’.

The parent and child victim’s motivation for participating in restorative justice must be considered. If the parent intends to harm the offender, for example, or persecute

the offender, the chief executive would consider the victim unsuitable for restorative justice.

The chief executive must also consider the parent and child victim's perception of the impact of the offence.

Clause 36: Suitability — offenders

Clause 36 sets out what the chief executive must consider when assessing an eligible offender's suitability for restorative justice.

The contrition or remorse of the offender must be considered. An offender who shows no contrition or remorse would be unsuitable for restorative justice.

The chief executive must consider the personal characteristics of the offender. Clause 29 defines 'personal characteristics'.

The offender's motivation for participating in restorative justice must be considered. If the offender intends to harm the victim, or persecute the victim, for example, the chief executive would consider the offender unsuitable for restorative justice.

The chief executive must also consider the offender's perception of the impact of the offence.

If the perception of the impact of the offence is markedly different between the victim and offender then the offence might not be suitable for restorative justice.

Part 8 Restorative justice conferences and agreements

Division 8.1 General

Clause 37: Definitions — part 8

Clause 37 provides definitions for part 8.

The meaning of 'required participant' is set out in clause 42. A required participant is a suitable victim, suitable parent, or substitute participant for the victim and a suitable offender.

A 'substitute participant' is a person who takes part in a restorative justice conference on behalf of a victim or parent, as set out in clause 43.

Clause 38: Meaning of referring entity — part 8

Clause 38 modifies the meaning of referring entity in clause 22 by specifying that if a referral for restorative justice is made by a sentence related order, then the referring entity is the chief executive responsible for administering the order. At the time of this Bill, the chief executive of ACT Corrective Services would be an example.

Clause 39: Decision to call conference

Clause 39 authorises a restorative justice conference to be convened provided that the chief executive has assessed that the offence is suitable for restorative justice (see clause 32) and the required participants consent to participate.

Clause 39(2) requires the chief executive to assign a convenor to prepare and convene a conference.

Division 8.2 Convenors**Clause 40: Appointment of convenors**

Under clause 40 the chief executive may appoint convenors, consistent with part 19.3 of the *Legislation Act 2001*. Appointments may be made of people who are within the ACT Public Service or external to the public service.

Clause 40(2) specifies that convenors must have any appropriate qualifications or experience identified in the regulations and have legal training that is suitable to advise participants in restorative justice of their legal rights and duties.

A convenor does not have to be a lawyer, but regulations may be made requiring convenors to be lawyers.

Clause 41: What a convenor does

Clause 41 sets out the convenor's role in preparing for, and convening, a conference.

Clause 41(1)(b) enables convenors to invite people other than the required participants to a conference. A relevant police officer, or friend of the victim, are examples. This is discussed further at clause 44.

Clause 41(1)(f) enables the convenor to contemplate the issues arising from the offence and how these issues might be addressed at the conference. The convenor may decide to expand or narrow the issues depending upon the circumstances.

Clause 41(1)(k) requires the convenor to undertake any other functions in any relevant regulations made by the Executive.

Clause 41(2) places an obligation on the convenor to carry out their tasks in clause 41 in a manner that respects everyone's rights, dignity and safety.

Division 8.3 Conduct of conference**Clause 42: Required participants**

For a restorative justice conference to proceed clause 42 stipulates that the required participants must take part. The required participants are: a suitable victim, or suitable parent, or substitute participant for the victim or parent; and a suitable offender.

Clause 42(2) defines the participants qualified in clause 42 as 'required participants'.

Clause 43: Substitute participants

Clause 43 enables suitable victims or parents to ask someone else to participate in a restorative justice conference on their behalf. A substitution can only occur if the victim or parent requests, or agrees to the substitution and the convenor also agrees to the substitution.

In the conference itself the substitute person would have the right to participate and formulate an agreement as if they were the victim.

Clause 44: Invited participants

Clause 44 empowers the convenor to invite other people to participate in the conference. This power is commensurate with the government's restorative justice policy, which views the process as serving both the victim and the community.

Item (a) in clause 44(1) enables the informing police officer to be invited to the conference.

The items in (b) to (e)(i) of clause 44(1) set out people who may be invited because of their relationship to the victim or offender.

Item (e)(ii) of clause 44(1) provides the convenor with the discretion to invite people who may assist the process. A person who could liaise on cultural matters is an example. An interpreter is another example.

Clause 44(2) requires the convenor to favourably consider invitations of people in close relationship to the victim or offender to the conference. However, the convenor has a clear discretion not to invite a person, or to withdraw an invitation to a person, if the convenor reasonably believes that the person's participation would negatively affect the conference.

Clause 44(3) prohibits professional advocates from participating in restorative justice conferences in their professional capacity. Examples include lawyers, advocates, lobbyists, etc. The conference is not a forum to test the culpability of the offender or to determine a sentence. Nor is the conference a forum for policy debates on the needs or interests of victims or offenders in general. Conferences are intended to focus on the specific experience of the victim(s) and their particular situation.

Clause 44(4) provides a definition of 'domestic relationship' for the clause by referring to section 3 of the *Domestic Relationships Act 1994*:

domestic relationship means a personal relationship between 2 adults in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other and includes a domestic partnership but does not include a legal marriage.

Clause 45: Explanation for participants

Clause 45 stipulates what must be explained to each conference participant before the conference begins. The objects of the act are discussed at clause 6.

There is no legal obligation upon a victim or an offender to participate in restorative justice. A victim or offender may decline to participate entirely, or cease participation at any time. This does not prevent victims or offenders from later changing their mind and agreeing to participate.

As discussed at clause 20(1), the scheme explicitly provides for separating the concepts of accepting responsibility from a plea of guilty. An offender who accepts responsibility for the purposes of restorative justice under the Act is free to plead not guilty at a trial of the offence. This enables the offender to participate in restorative justice without prejudicing their trial.

Clause 46: Form of conference

Clause 46 provides the convenor with the discretion to work out the best way and means to conduct the conference. In some cases a face to face meeting will not be appropriate, hence the leeway is provided to use other means.

Clause 47: Discontinuance of restorative justice

Clause 47 provides the convenor with the discretion to cancel or stop a conference.

The convenor can decide to cancel or stop a conference if they reasonably believe the objects of the Act will not be met if the conference proceeds.

Clause 47(3) obliges the convenor to cancel or discontinue a conference if any of the required participants withdraw their agreement to participate in the conference.

Clause 47(4) requires the convenor to provide a notice of the decision to cancel or stop a conference to the participants of the conference and the referring entity.

Clause 48: Report to referring entity about outcome

Clause 48 empowers the convenor to report the outcome of a conference to the referring agency.

Division 8.4 Restorative justice agreements

Clause 49: Application — division 8.4

Division 8.4 applies to restorative justice agreements.

Clause 50: Agreement as object of conference

Clause 50 stipulates that developing an agreement is a primary goal of a restorative justice conference. However, in some cases the conference participants may feel that an agreement is unnecessary because the conference itself has achieved the objective of restorative justice.

Clause 51: Nature of the agreement

Clause 51 sets out what may be included in a restorative justice agreement to repair the harm caused by the offence.

Clause 51(2) lists the types of measures that can be included in an agreement.

Clause 51(3) requires the conference convenor and the participants to ensure that the agreement is fair and reasonable. For example, if a victim seeks financial reparation for a stolen lawnmower that is 10 years old, it would be unreasonable to require the offender to purchase a new ride-on mower for the victim.

Clause 51(4) prohibits an agreement from requiring the offender, or anyone else, to: act unlawfully; be detained; be humiliated; or to endure distress.

Clause 51(5) stipulates that agreements cannot be longer than six months. This provides a timeframe for the agreement.

Clause 52: Form of agreement

Clause 52 stipulates the form the agreement should take. The required participants must sign the agreements. Substitute participants' signatures are to be regarded as if the victim themselves signed the agreement.

Clause 53: Explanation of effect of agreement

Clause 53 obliges the convenor to explain a restorative justice agreement to the required participants.

There is no obligation upon any required participant, or any participant, to sign the agreement.

If the agreement includes a statement that the offender accepts responsibility for the offence, the statement will not prevent the offender from pleading not guilty. Alternatively, a statement will not oblige an offender to plead guilty.

Clause 54: Notice of agreement

The convenor must provide a copy of the agreement to the required participants, or any substitute participants, and the referring agency.

Clause 55: Amendment of agreement

Clause 55 enables the restorative justice agreement to be amended. A required participant who signed the agreement may ask the convenor to change the agreement. Alternatively, the convenor may consider an amendment is necessary.

The agreement can only be amended to address a change of circumstances or to correct an error. The convenor must consider that the change is necessary or convenient.

Clause 55(2) informs, but does not limit clause 55(1) by allowing an amendment to be made under clause 55(1) to increase the term of the agreement, including to over 6 months, or to reduce the term of the agreement.

Clause 55(3) requires the convenor to consult with the victim, the parent or the substitute participant before deciding to amend an agreement.

If an agreement is amended, clause 55(4) requires the convenor to provide a copy of the amended agreement to the required participants, or any substitute participants, and the referring agency.

Clause 55(5) clarifies that the meaning of ‘change in the situation’ is about practical and logistical issues not about an offender or victim changing their mind about participating in the agreement.

Division 8.5 Monitoring compliance with restorative justice agreements

Clause 56: Application — division 8.5

Clause 56 makes it clear that division 8.5 applies to a restorative justice agreement for an offence referred for restorative justice.

Clause 57: Monitoring compliance — chief executive

Clause 57(1) allows the chief executive to do anything reasonable to check an agreement is being complied with. An example is provided to illustrate what ‘monitoring compliance’ means. The example may extend, but does not limit the meaning of this provision.

Clause 57(2) obliges the chief executive to report to the referring entity any failure to comply with an agreement the chief executive is aware of.

Clause 57(3) contemplates situations where an offender has participated in a conference agreement in good faith, but the whole agreement cannot be completed, or is not completed. The chief executive has the discretion to advise that the agreement has been substantially complied with or completed.

Clause 57(4) makes clear subsections (2) and (3) do not apply where the chief executive is the referring entity if the chief executive is engaged in the administration of this Act. Note 2 explains what happens if the chief executive is one and the same person administering the Act and other referring entities.

Clause 58: Monitoring compliance — referring entities

Clause 58(1) allows the referring entity to do anything reasonable to check whether an agreement is being complied with. It includes a reference to the example used in clause 57(1), to illustrate what ‘monitoring compliance’ means.

Clause 58(2) obliges the referring entity to report to the chief executive any failure to comply with an agreement the referring entity is aware of.

Clause 58(3) contemplates situations where an offender has participated in a conference agreement in good faith, but the whole agreement cannot be completed, or is not completed. The referring entity has the discretion to advise the restorative justice unit that the agreement has been substantially complied with or completed.

Clause 58(4) makes clear this section does not apply if the referring entity is the chief executive if the chief executive is engaged in the administration of this Act. Note 2 explains what happens if the chief executive is one and the same person administering the Act and other referring entities.

Division 8.6 Evidence of statements made at conferences

A restorative justice conference will be more effective if all parties feel they can speak freely. However, statements made during a conference may assist, if admissible, in court proceedings, or in the prevention of future offences. This division endeavours to balance those two competing interests.

Clause 59: Evidence of offences

Clause 59 contemplates the situation where, during a restorative justice conference or in a restorative justice agreement, an offender makes a statement in relation to the commission of an offence.

Clause 59(2) provides that such a statement may not be admitted in court where the offence involved is a less serious offence (defined in clause 12).

In some circumstances evidence of a statement may be admissible in court in a proceeding in relation to a serious offence, and it will be irrelevant whether or not the offence, which is the subject of the conference is a serious offence or not. Territory law that deals generally with the admission of evidence in criminal proceedings would apply.

Clause 59(3) qualifies subsection (2) and allows a court, in sentencing an offender for any offence, to consider a statement made by the offender during a restorative justice conference, or in a restorative justice agreement.

Clause 60: Evidence of future offences

Clause 60 contemplates the situation where, during a restorative justice conference or in a restorative justice agreement, an offender makes a statement about an offence proposed to be committed in the future.

Clause 60(2) makes clear that evidence of such a statement is admissible in court in a proceeding relating to that future offence.

Part 9 Administration

Division 9.1 General administration

Clause 61: Restorative justice guidelines

This clause allows the chief executive to issue guidelines outlining procedures for a range of processes. Guidelines must not be inconsistent with the Act, and can deal with matters also dealt with elsewhere in the Act.

Guidelines are disallowable instruments, and so must be notified and presented to the Legislative Assembly under the *Legislation Act 2001*.

Referring entities must comply with the guidelines.

Clause 62: Police participation in restorative justice

Clause 62 allows the chief executive to make arrangements with the chief police officer for:

- police officers to participate in the administration of the Act, and
- police officers to be appointed to convene restorative justice conferences.

Clause 63: Information sharing

The chief executive may ask a referring entity for information about a victim, the parent of a victim, an offender or any other person if it is reasonably necessary for the administration of the Act.

A referring entity is required to do everything reasonable to comply with such a request.

Clause 64: Secrecy

It is the intent of this clause to prevent an unprincipled use of civil or administrative law proceedings to affect the operation of the criminal justice system. The government intends for the foreshadowed Crimes (Restorative Justice) Act to be part of the criminal justice system. It should not be used as a means to procure information for civil or criminal proceedings.

This position is supported by section 38 of the *Freedom of Information Act 1989*. It is also supported by case law regarding the intersection of criminal proceedings and civil or administrative proceedings. In both *Jarrett v Seymour* (1993) 46 FCR 557 at 565-8 and *Right to Life Association (Inc) v Secretary, Department of Human Services and Health* (1994) 128 ALR 238, the court made clear it is only in the most exceptional circumstances that courts dealing with administrative or civil matters should interfere with matters relating to the criminal process.

Clause 64(1) provides definitions for ‘secret-keeper’ and ‘protected information’ under the Act. This is to ensure clarity, and protect the privacy of those involved and the integrity of the restorative justice process.

A secret-keeper is a person who is or has exercised a function under the Act. A number of examples are provided to assist in the interpretation of this section.

Protected information is information about a person that is disclosed to, or obtained by, a secret-keeper in the exercise of their functions under the Act. It does not include information disclosing who attended a restorative justice conference or information in a restorative justice agreement. Examples of protected information are provided to assist in the interpretation of this section.

Clause 64(2) makes it an offence for a secret-keeper to make a record of protected information or disclose such information.

Clause 64(3) provides an exception to subsection (2) in circumstances where the record is made or the information disclosed:

- under the Act or any other Act; or

- in relation to the exercise of a function, as a secret-keeper, under the Act or any other Act.

Clause 64(4) provides another exception to subsection (2) where the secret-keeper has the consent of the relevant person.

Clause 64(5) prevents a secret-keeper from disclosing or producing protected information to a court for a civil proceeding.

Clause 64(6) provides that a secret keeper, in a criminal proceeding, is not required to reveal protected information unless to do so is necessary under the Act or any Territory or Commonwealth law.

Clause 65: Secrecy about information acquired under other acts

Clause 65 provides that where information is obtained under other acts, the restrictions and obligations of secrecy required by those other acts are applicable, as are the restrictions and obligations of the Act. Where there is a conflict in the restrictions and obligations, clause 65(3) provides this does not prevent the Act from being followed.

Clause 66: Protection from liability

Clause 66 protects persons in the exercise of a function under the Act from incurring personal liability, as long as the function was performed honestly and without negligence. If the function is not one under the Act, a person may still be protected if they held a reasonable belief that the act or omission was in the exercise of a function under the Act.

Any liability that, apart from clause 66(1), would attach to a person attaches instead to the Territory.

Division 9.2 Reporting and records

Record keeping and effective, accessible data will be crucial to the evaluation of restorative justice. This data will also play an important role in the overall analysis of criminal justice in the ACT. Division 9.2 has been drafted with these goals in mind.

Clause 67: Meaning of *referring entity* — division 9.2

This clause defines the meaning of referring entity for this division.

Clause 68: Quarterly reporting by chief executive

Clause 68 requires the chief executive to report quarterly on the progress of restorative justice. It provides precise guidelines on the timing of reports and what should be included in those reports.

Clause 69: Record-keeping by referring entities

Clause 69 requires the referring entity to ensure appropriate records are kept in relation to the referral, progress and outcome of restorative justice for an offence.

The referring entity must ensure a copy of any restorative justice agreement for the offence is kept as part of those records.

The records must be kept as part of the administrative or court records normally maintained by the referring entity in relation to the offence.

Clause 70: Record-keeping by chief executive

Clause 70 requires the chief executive to keep records of:

- each referral for restorative justice;
- any assessment of suitability for restorative justice;
- each offence for which a restorative justice conference is convened;
- each restorative justice conference held, cancelled or discontinued;
- each restorative justice agreement that is reached at a conference; and
- the offender's compliance with each restorative justice agreement.

Clause 71: Restorative justice database

Clause 71 requires a database be kept of information in the records required under clause 70. This is to enable research, analysis and evaluation of restorative justice.

Clause 71 also provides for the making of regulations in respect of the database. Such regulations may allow access to database information by anyone for research, analysis and evaluation, but must protect the identity of anyone taking part in restorative justice.

Part 10 Miscellaneous

Clause 72: Exercise of functions by chief executive

Clause 72 contemplates the circumstance where a chief executive has two or more responsibilities, which are mentioned in the Act. The clause ensures that referrals and reports are produced and exchanged between agencies or delegates when there is one chief executive managing two or more functions. An example is provided to illustrate the potential operation of this clause.

Clause 73: Approved forms

Clause 73 allows the Minister to, in writing, approve forms for the Act.

Clause 74: Regulation-making power

Clause 74 allows the Executive to make regulations for the Act. Regulations must be notified and presented to the Legislative Assembly under the *Legislation Act 2001*.

Clause 75: Ministerial reviews

Clause 75 stipulates the Minister must conduct a first phase review and a second phase review on the operation of restorative justice. Time frames and performance indicators are also provided in this clause.

Clause 76: *Administrative Decisions (Judicial Review) Act 1989*, schedule 1, new clause 9

This clause amends the *Administrative Decisions (Judicial Review) Act 1989* to preclude it from applying to decisions made under the foreshadowed Crimes (Restorative Justice) Act.

The Restorative Justice Unit will be making recommendations and decisions that would normally be reviewable under the *Administrative Decisions (Judicial Review) Act 1989*. However the new Act is part of a suite of criminal justice legislation. It is intended to form part of the criminal justice process. Accordingly any review should be in the context of appeals under the criminal justice system.

This position is supported by case law regarding the intersection of criminal proceedings and civil or administrative proceedings, particularly judicial review. In both *Jarrett v Seymour* (1993) 46 FCR 557 at 565-8 and *Right to Life Association (Inc) v Secretary, Department of Human Services and Health* (1994) 128 ALR 238, the court made clear it is only in the most exceptional circumstances that courts addressing administrative or civil matters should interfere with matters relating to the criminal process.

Where a case is before the court, the court can order restorative justice despite any decision or recommendation of the Restorative Justice Unit, provided the offender and victim consent (see also clause 27). The court also has the power to review its own decisions in relation to restorative justice.

The normal operation of the *Ombudsman Act 1989* will apply to the new scheme.

Clause 77: *Crimes Act 1900*, section 342(1)(u)

Clause 77 amends the *Crimes Act 1900* to allow a court to regard the fact that an offender participated in restorative justice when engaged in sentencing. Note, however, the Bill does not oblige the court to take any disposition towards the quantum of a sentence. See clause 20(2).

Clause 78: *Crimes Act 1900*, section 344(1)(f)

Clause 78 amends the *Crimes Act 1900* to oblige the court not to take into account the fact that an offender chose not to participate, or ceased participation, in restorative justice when engaged in sentencing.

Clause 79: *Crimes Act 1900*, section 364(1)(k)

Clause 79 amends the *Crimes Act 1900* to ensure that, as far as practicable, in a pre-sentence report an authorised officer gives an opinion as to whether it would be

appropriate to refer the offender for restorative justice under the *Restorative Justice Act 2004*.

Dictionary

A dictionary is provided. The dictionary lists terms used in the Act that are already defined in the *Legislation Act 2001*. The remaining terms in the dictionary refer to relevant clauses in the Bill.