2005

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CRIMES (SENTENCE ADMINISTRATION) BILL 2005

EXPLANATORY STATEMENT

Circulated by authority of the
Attorney General
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Crimes (Sentence Administration) Bill 2005

Outline

The Crimes (Sentence Administration) Bill 2005 consolidates existing sentencing laws set out in a number of different statutes. The Bill also sets out the administration of the new sentencing options provided by the Crimes (Sentencing) Bill 2005.

The Bill creates a standard model for administering each sentencing option. The Bill sets out the obligations upon offenders for each type of sentence: full time detention; periodic detention; and good behaviour orders. Apart from full-time imprisonment, the Bill also sets out the consequences for any offender failing to meet their obligations.

The supervision of probation, community service and rehabilitation are under the auspices of good behaviour orders, consistent with the structure of these orders in the Crimes (Sentencing) Bill 2005. The Bill includes simplified procedures for dealing with breaches of good behaviour orders, periodic detention, parole and release on licence.

The Bill requires the Sentence Administration Board to supervise critical aspects of periodic detention, parole and release on licence, such as breaches and amendment of conditions. Consistent with these changes, the Bill includes modern provisions for the Board's proceedings and inquiries. The aim of the new provisions is to enable the Board to increase its workload through more flexible division of labour and clearer decision making obligations.

The Bill restates existing provisions dealing with the interstate transfer of prisoners and the interstate transfer of community-based sentences. The provisions have been modernised, but remain substantially the same as they reflect national schemes agreed upon by all jurisdictions.

Crimes (Sentence Administration) Bill 2005

Detail

Preamble

The Bill's preamble is an expression of the fact that the executive arm of government does not have unlimited power when managing the sentences of convicted offenders, or the remand of alleged offenders.

In order to maintain the community's confidence in the criminal justice system, the government is bound to ensure that people found guilty of breaking the law are themselves treated lawfully.

The rule of law and the protection of human rights are inseparably linked. People are protected against arbitrary acts of public authorities only if their rights are laid down in law that is publicly known, equally applied and effectively enforced.

As with the limitations on government power, the rights of an individual are also limited within the context of a community. The rights of an individual and the interests of the community are sometimes in harmony and sometimes in conflict. Few rights are absolute and, within defined boundaries, certain limits placed on rights are necessary as part of balancing competing needs.

The ACT's *Human Rights Act 2004* protects fundamental rights. Limits on these rights is permissible only if the limit is authorised by a Territory law is reasonable and demonstrably justifiable in a democratic society.

The preamble refers to key principles that may assist determining the boundaries between lawful administration of sentences and unlawful treatment of offenders and alleged offenders. Conversely, the government considers the Bill's provisions that are directive to offenders' obligations to be consistent with the principles expressed in the preamble. The limitations imposed upon offenders rights are regarded as reasonable and justifiable in our democratic society.

In Australia, courts interpret a preamble as part of an Act. The ACT's *Legislation Act 2001* enables this common law presumption about Acts to apply in conjunction with the *Legislation Act 2001.*

Although the preamble is recognised as part of the Act, in *Bowtell v Goldsbrough, Mort & Co Ltd* (1905) 3 CLR 444 and *Wacando v Commonwealth of Australia and the State of Queensland* (1981) 148 CLR 1 the High Court recognised the preamble as a means to assist in the interpretation of a provision of the Act. The preamble cannot be relied upon to restrict or "cut down" unambiguous provisions of an Act.

Chapter 1 — Preliminary

Clause 1 — Name of Act

This is a technical clause which names the short title of the Act. The name of the Act would be the *Crimes (Sentence Administration) Act 2005.*

Clause 2— Commencement

This clause enables the Act to commence upon the Commencement of the Crimes (Sentencing) Bill 2005. The Crimes (Sentencing) Bill 2005 was introduced to the Assembly on 7 April 2005.

The Crimes (Sentencing) Bill 2005 commences 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.* Consequently, if the Crimes (Sentencing) Act commences automatically then the Crimes (Sentence Administration) Act will also commence.

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 as does the *Legislation Act 2001* dealing with penalty units.

Chapter 2 — Objects and principles

Clause 6 — Main objects of Act

The principal object of the Bill is to lawfully carry out and supervise sentences imposed by the courts. The Bill sets out the framework for the lawful implementation of sentences.

Clause 7 — Treatment of sentenced offenders

Former president of South Africa, Nobel Peace Prize winner, and prisoner for over 27 years, Nelson Rolihlahla Mandela, said that “no one truly knows a nation until one has been inside the jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones”.

Clause 7 provides that the Bill's functions are to be implemented in a manner that upholds human rights. Consistent with section 28 of the *Human Rights Act 2004,* the Bill sets out reasonable limitations upon a sentenced offender's human rights, or a detainee's rights, consistent with the object of the Bill.

This clause makes it clear that there is no arbitrary power or right for the government to inflict additional punishments on prisoners. Prisoners and detainees retain their rights as human beings with the exception of those rights lost as a consequence of their sentence or remand.

Clause 7(2) ensures that the totality of the conditions of the sentence or remand do not create a further form of punishment or cruel treatment beyond the sentence itself. For example, the purposeful creation of hot conditions, conditions resulting sleep deprivation etc.

Clause 8 — Treatment of remandees

Akin to clause 7, clause 8 ensures that the Bill's functions in relation to remandees are consistent with human rights. In addition to the provisions of clause 7, clause 8 ensures that a remandee's right to be presumed innocent is upheld and that the circumstance of detention is not a punishment of the person.

Clause 8(3) and (4) contemplate remandees who are convicted for of the offence in question or imprisoned for another offence. In these cases detention may be regarded as punishment and a presumption of innocence does not apply to offences proven.

Clause 9 — Treatment of other people in custody

Clause 9 ensures that anyone held in custody is recognised and that any of the Bill's functions applicable to this category of person are to be implemented in a manner that upholds human rights.

Clauses 7, 8 and 9 reflect the guiding principle in the Standard Guidelines for Corrections in Australia 1996, endorsed by Corrective Services Ministers in Melbourne 1996, that correctional programs are by the deprivation of liberty to varying degrees. The deprivation of liberty is the punishment and any correctional program should not aggravate the suffering inherent in the punishment.

Chapter 3 — Imprisonment and remand—committal

Part 3.1 — Imprisonment

In *Judge Frederico; Ex parte Attorney General* [1971] VR 425, Justice Gowans noted that the relevant Victorian legislation to implement sentences of imprisonment was "the link between the jurisdiction to determine the sentence vested in the courts and the machinery for the implementation of the sentence by the Executive". [at 426]

Part 3.1 provides the link for the ACT between the courts' jurisdiction to determine and impose sentences of imprisonment and the executive government's role to carry out and supervise the sentence.

Clause 10 — Application of part 3.1

Clause 10 groups the sources of authority to determine, impose and re-impose sentences of imprisonment under the concepts of committal order and committing authority. Clause 10(1) contemplates the court's authority to determine and impose a sentence; the sentence administration board's authority to suspend or cancel periodic detention, or cancel parole, and hence re-impose an existing sentence; and the board's power to cancel a release licence and hence re-commit an offender to prison.

Clause 10(2) ensures that a committal order includes a committal to prison for fine defaulters by a registrar of the Magistrates Court under the *Magistrates Court Act 1930.*

The note in clause 10 refers to the *Judiciary Act 1903.* Section 68(2) invests courts of a State or Territory with federal jurisdiction akin to their domestic jurisdiction in relation to federal offences when the State or Territory courts exercise jurisdiction of summary conviction, examination and commitment for trial on indictment or the trial and conviction on indictment.

Section 68(1) of the *Judiciary Act 1903* applies State and Territory procedural law to federal prosecutions in state and territory courts. This includes explicit references to bail, summary conviction etc. Section 79 states that the law of the relevant state or territory is binding on courts exercising federal jurisdiction — unless Commonwealth exceptions apply.

The High Court has determined that 'conviction' includes the imposition of a sentence. Following *R v Loewenthal* (1974) 131 CLR 338, in *Putland v R* (2004) 204 ALR 455 Justices Gummow and Heydon affirmed that section 68(2) of the Judiciary Act 1903 gave a State or Territory:

> . . . like jurisdiction with respect to persons charged with offences against the laws of the Commonwealth to that with respect to 'the trial and conviction on indictment' of persons charged with offences against the laws of the [state or territory]. The expression 'the trial and conviction on indictment' has to be read in the light of the primary meaning of the word 'conviction'. This denotes the judicial determination of a case by a judgement involving two matters, a finding of guilt or acceptance of a plea of guilty followed by sentence. [at 464]

Part 1B of the *Commonwealth Crimes Act 1914* sets out relevant exceptions, but also explicitly incorporates particular State and Territory sentencing and sentencing procedure laws.

Clause 11 — Effect of a committal order

Clause 11 provides the relevant chief executive under the administrative orders with the authority and obligation to take custody of the convicted offender and imprison the offender until the operation of the law authorises the offender's release.

The *Australian Capital Territory (Self-Government) Act 1988* (Cth) and the *Public Sector Management Act 1994* authorise the ACT Government of the day to allocate the administration of Territory Acts to Ministers and departments via the administrative orders.

Part 19.4 of the *Legislation Act 2001* enables the function allocated to the chief executive to be delegated.

Clause 12 — Warrant for imprisonment

Clause 12 provides for an official document, a warrant, to be issued by a committing authority, such as a court or the sentence administration board. A warrant assists the chief executive to determine the validity and terms of the order to imprison an offender and represents a transmission of the offender into the chief executive's custody.

Any forms approved by the court or another committing authority to be used as warrants for imprisonment must be used.

Clause 13 — Custody of sentenced offender

Clause 13 stipulates that it is the chief executive's obligation to take custody of the convicted offender under the terms of the foreshadowed Act, administer the imprisonment consistent with the foreshadowed *Corrections Management Act 2005,* and release the offender according to the law.

Clause 14 — Imprisonment not affected by want of proper warrant

Clause 14 ensures that if there is something incorrect with the warrant issued under clause 12, the imprisonment is not affected. If there is a discrepancy between the terms of the sentencing order and the warrant, the order prevails as it is the source of authority to imprison.

Part 3.2 — Remand

This part provides the authority of the chief executive to detain remandees, as distinct from prisoners. In some cases the remandee will be both a prisoner and a remandee if the person is serving a sentence and is required to attend a hearing.

Clause 15 — Application of part 3.2

Clause 15(1) groups a number of entities that have the authority to remand a person into the concept of a 'remanding authority'.

Clause 15(2) clarifies that part 3.2 contemplates any periods of remand ordered by a remanding authority.

Clause 16 — Effect of remand order

Clause 16 provides the chief executive responsible for administering the foreshadowed Act to take custody of the remanded person and keep that person in custody until the remanding authority orders the person back.

Clause 17 — Warrant for remand

To assist the chief executive responsible for remand to validate the remanding authority's order, clause 17 provides for the remanding authority to issue a warrant.

Clause 17(2)(b) enables a person authorised by the remanding authority to sign a remand warrant. For example, a registrar authorised by a court, or the Secretary of the Sentence Administration Board.

Clause 17(3) enables the remanding authority to draw any particular considerations to the attention of the chief executive. The chief executive will be able to take these considerations into account when allocating the remandee to an appropriate facility. The chief executive's authority to make this decision, and the factors that might be taken into account, are set out in clause 18 below.

Clause 18 — Custody of remandee

Clause 18 qualifies that the chief executive must keep the remandee in custody in accordance with the terms of the foreshadowed Act and the foreshadowed *Corrections Management Act.*

Clause 18 empowers the chief executive to allocate the remandee to the appropriate facility. The effect of clause 18(2) is to create a clear division of power between remanding authorities and the chief executive responsible for administering remand. Remanding authorities will have the power to remand and recall a person, but not the power to determine where a person is to be remanded. The chief executive will have the power to allocate a person to an appropriate facility, but not the power to determine when the person must be returned to the remanding authority.

Clause 18(3) ensures that the chief executive can weigh up the particular circumstances of the case and the logistical pressures of remand when making a decision to allocate a remandee to a facility. In some cases it will not be possible to reconcile all of the considerations. For example, the chief executive may not have an appropriate place in the ACT to remand a person who is also a prisoner serving a sentence in NSW. In this example the chief executive may have to organise the person's transport between a NSW prison and the ACT remanding authority to ensure the person is before the remanding authority at the time ordered.

Another example may be a person who soon after being remanded becomes too mentally unwell for the remand centre to manage. The chief executive will have the authority to allocate the person to an appropriate secure health facility designated to be a remand centre.

The list in clause 18(3)(a) reflect the most common considerations, some of which are competing pressures. Clause 18(3)(b) enables the chief executive to consider other things that are relevant.

Clause 19 — Remand not affected by want of proper warrant

Clause 19 ensures that the chief executive has the authority to carry out the remanding authority's order if there is a discrepancy between the order and the warrant.

Part 3.3 — Committal — miscellaneous

Clause 20 — Directions to escort officers

An escort officer is defined in the Bill's dictionary as a police officer or a person delegated with the powers of an escort officer under the foreshadowed *Corrections Management Act.*

Clause 20 authorises the chief executive responsible for convicted offenders and remandees to direct escort officers to take custody of a person and take the person to a place. The escort officers are provided with the necessary power to give effect to the directions in clause 20(2).

Consistent with clause 18 above, the chief executive and the escort officers directed by the chief executive, are authorised to move remandees and prisoners between facilities during the period of remand or imprisonment.

Clause 21 — Orders to bring offender or remandee before court etc

Clause 21 clarifies that the government intends chapter 3 to be interpreted in a way that does not oust or impede any powers of a court or tribunal to bring a person before the court or tribunal.

In the context of clause 21(1), clause 21(2) affirms that the chief executive is legally bound to organise a person to be brought before a tribunal or court, if the tribunal or court orders it so. The chief executive is only obliged to do so if the person is in the custody of the chief executive and the tribunal or court in question has the legal authority to make such an order.

Chapter 4 Full-time detention

Chapter 4 provides laws that apply to people in full-time detention and to the chief executive responsible for full-time detention. People in full-time detention are both prisoners and remandees. However, it should be noted that other provisions in this Bill and the foreshadowed Corrections Management Bill distinguish between the treatment of prisoners and remandees. Chapter 4 the features that are common to both remandees and prisoners.

Part 4.1 — General

Clause 22 — Application of chapter 4

Chapter 4 applies to prisoners and remandees.

Chapter 4 applies to offenders committed to imprisonment, and hence in the chief executive's custody, consistent with clause 11 above.

Chapter 4 also applies to remandees. In accordance with clause 16 above, remandees are also in the chief executive's custody.

The term 'full-time detainee' is used to denote both remandees and prisoners for the purposes of chapter 4.

Clause 22(2) and (3) clarifies that the terms 'offender' and 'remandee' are used as explicit sub-categories of 'full-time detainees' within chapter 4.

Clause 23 — Definitions for chapter 4

The term 'recommitted' is used to denote where a person is ordered to return to a sentence of imprisonment or commence a sentence of imprisonment. This circumstance arises when an offender is not in prison full-time because of periodic detention, parole, or release on licence and the Sentence Administration Board determines the offender has breached obligations that allow the person to be at liberty. Following a breach, the Sentence Administration Board may order that the person return to full-time imprisonment or commence full-time imprisonment.

'Release date' is the day that the term of a sentence of imprisonment ends. Terms of imprisonment set by a court will be subject to Territory and Commonwealth laws relevant to imprisonment and the management of sentences. For example, clause 31 below, would authorise up to 14 days early release of an offender for operational reasons.

Part 4.2 — Serving full-time detention

Clause 24 — Full-time detention obligations

Prisoners and remandees are still subject to the law while detained: they are both protected by the law and obliged to abide by the law. Prisons and remand centres do not exist in a legal vacuum.

Consistent with the rule of law applying to prisoners and remandees, clause 25 sets out the legal obligations of prisoners and remandees as a consequence of serving full-time detention.

Clause 24(1) and (2) provides explicit requirement for an offender to serve imprisonment according to the provisions of the Bill and the foreshadowed *Corrections Management Act.* 24(3) includes complying with directions.

Clause 24(4) requires remandees to abide by the provisions of the Bill and the foreshadowed *Corrections Management Act* during their period of remand. 24(5) includes complying with directions.

Clause 25 — Full-time detention — chief executive directions

Clause 25 is an overarching power for the chief executive to give directions to a full-time detainee. The directions can be oral or in writing.

Clause 26 — Full-time detention in ACT or NSW

Historically, people sentenced to imprisonment under ACT law have been committed to NSW to serve their sentence. The committal to prison required a specific order and warrant issued by a Court or other sentencing authority.

Consistent with part 3.1 above, the Bill creates a clear division of power between sentencing authorities and the chief executive responsible for administering sentences. A court or other sentencing authority will have the power to sentence a person to

imprisonment, but not the power to determine where that person must serve the sentence. The chief executive will have the power to allocate a person to an appropriate prison, whether the prison is in NSW or the ACT.

The foreshadowed ACT prison will inverse the current number of ACT offenders serving sentences in NSW. Once the prison is commissioned, the number of ACT offenders serving their sentence in NSW will be a minority, not the majority.

Clause 26(1) provides the chief executive with the power to allocate a full-time detainee to an ACT facility or a NSW facility.

Clause 26(2) ensures that directions regarding an allocation of a detainee to an ACT facility or a NSW facility is in writing.

Clause 27 — Guidelines — allocation of detainees to correctional centres

Clause 27 enables the chief executive to make guidelines about the allocation of full-time detainees to correctional facilities. For example, the chief executive could set out security ratings as a guide to allocating a prisoner to NSW.

A guideline is a notifiable instrument, meaning that under the *Legislation Act 2001* it must be notified on the ACT's electronic legislation register in order to be lawful.

Clause 28 — Work and activities by full-time detainee

This clause distinguishes between offenders serving a sentence of imprisonment and remandees.

Clause 28(1) authorises the chief executive to give directions to an offender to engage in an activity, do work at a correctional centre or community service work. The Bill's dictionary defines 'activity' as including education, counselling, personal development etc.

If the offender is not able to do the work, they are not required to do it. Clause 28(2) is not prescriptive about what may inform an offenders incapacity to do the work. The onus is upon the offender to explain or demonstrate why they are incapable of doing the work whether for medical reasons or otherwise.

Clause 28(3) enables the chief executive to give remandees permission to engage in work at the remand centre or as community service.

Clause 29 — Custody of full-time detainee — lawful absence from correctional centre

Clause 29 stipulates that if a full-time detainee is lawfully absent from a facility the full-time detainee is still in the custody of the chief executive and hence any escort officer.

In clause 29 an example of lawful absence is community service, discussed at clause 28(1) above. Likewise, transport to court or another relevant place is also lawful absence.

Clause 30 — Unlawful absence by offender — extension of sentence

Clause 30 applies to offenders.

Clause 30 clarifies that any unlawful absence of an offender from a prison or other correctional centre is discounted from time served to complete a sentence of imprisonment.

For example, a prisoner is sentenced to 24 months imprisonment and begins their sentence on 2 January 2006. On 2 January 2007 the person escapes and is at large until 2 February 2007. The person is then taken as having 12 months imprisonment remaining to complete their sentence. The sentence would nominally finish on 2 February 2008.

Clause 31 — Early release of offender

Clause 31 provides for early release of offenders completing a sentence of over six months imprisonment.

If the sentence is less than one year, the chief executive may release the person up to seven days before the release date. If the sentence is greater than one year, the chief executive may release the person up to 14 days before the release date.

This clause is not intended to serve as an administrative form of remissions or early release scheme. The clause provides the chief executive with some flexibility to manage operational and logistical pressures by enabling, for example, the early release of some offenders to allow space for new admissions.

Clause 31(3) provides the chief executive with some criteria to make an early release decision, if necessary. Early release is not an entitlement. An offender may be granted early release if there is some circumstance that genuinely warrants early release.

Clause 32 — Release at end of sentence

Clause 32 requires a sentence offender to be released on the release date at the end of their sentence. However, an offender can be released at any time on the day of release.

If releases do not occur on weekends, clause 32(3) enables the chief executive to release the person on the last working day before the person's release date.

Clause 33 — Offender not to be released if serving another sentence etc

Clause 33 stipulates that if an offender is subject to another sentence of imprisonment under ACT law, the person must not be released from custody having completed the first sentence.

Clause 33(2) ensures that any offender subject to a sentence of imprisonment, or otherwise required to be in custody, under the laws of another Australian jurisdiction must not be released upon the completion of their ACT sentence.

Part 4.3 — Full-time detention in NSW

Clause 34 — Application of part 4.3

Clause 34 stipulates that part 4.3 addresses full-time detention in NSW, following a direction in clause 26 above.

Clause 35 — Removal of full-time detainee to NSW

Clause 35 provides the explicit authority for a full-time detainee to be taken to a NSW correctional centre if the chief executive has directed so.

Clause 36 — Full-time detention in NSW

Clause 36(1) authorises a full-time detainee to be kept in a NSW prison or other relevant facility until their lawful release.

Clause 36(2) authorises the laws governing the NSW correctional system and the management of sentences to apply to ACT offenders serving a sentence in NSW.

However, clause 36(3) ensures that ACT offenders allocated to NSW prisons are not completely severed from ACT sentence administration. Items (i) to (viii) in clause 37(3)(a) list the relevant laws that apply to the management of sentences served in NSW.

Clause 37 — Full-time detention — return from NSW

Clause 37 empowers the chief executive to direct the return of a full-time detainee to the ACT. The purpose of this power is to facilitate the attendance of detainees at a court or tribunal, or to release the person in the ACT at the end of a sentence. The authority to direct the return of a person is also authority for escort officers to transport the person. (See part 3.3 above.)

At clause 37(5) the authority to direct the return of a person from NSW is also authority to return the person to NSW from the ACT. For example, a prisoner who is to appear at an ACT hearing on another criminal matter may be returned to NSW upon the direction of the chief executive. The chief executive would be required however, to ensure the prisoner is brought to the court for each and every hearing as required by the court.

If a person is transferred to NSW under the reciprocal transfer arrangements between States and Territories the person becomes a NSW prisoner under all of the applicable laws in NSW. Chapter 11 in this Bill (below) re-states the existing transfer of prisoners provisions.

Clause 38 — Full-time detention — release in NSW

Clause 38 enables a person released from prison in NSW, but sentenced in the ACT, to have travel costs provided by the ACT.

Chapter 5 — Periodic detention

Periodic detention is part-time imprisonment. An offender is in full-time custody for a period of a week, usually over the weekend. This arrangement allows both the

imposition of a custodial sentence and the maintenance of an offender's positive contribution to the community such as family life, work or study.

The government has opted for a form of periodic detention linked to a sentence of imprisonment. As noted in the explanatory statement to the Crimes (Sentencing) Bill 2005, a court may set a period of periodic detention if a sentence of imprisonment is imposed. ACT Corrective Services has the responsibility of implementing the periodic detention and the Sentence Administration Board has the responsibility of addressing any breaches of periodic detention and if necessary reverting the offender to full-time imprisonment.

Part 5.1 — Preliminary

Clause 39 — Application of chapter 5

Clause 39 stipulates that chapter 5 applies to sentenced offenders that have a periodic detention period set by the sentencing court. Clause 11 of the Crimes (Sentencing) Bill 2005 would enable a court to set a period of imprisonment that may be served by way of periodic detention.

Clause 40 — Definitions for chapter 5

Clause 40 defines some terms used in chapter 5.

An 'additional condition' is a condition not written into the Bill but applies because it was made via a recommendation by the sentencing court or made by the Sentence Administration Board managing the periodic detention.

A 'core condition' is a condition of periodic detention written into the Bill at clause 43 below.

A 'detention period' is the unit of time spent in detention during a weekly cycle. The sentenced offender entitled to periodic detention must serve the relevant number of times in detention to reach the commensurate number of weeks that make up the sentence. A detailed definition is in clause 41 below.

The 'finishing time' is the end of one unit of time spent in detention during a weekly cycle. Clause 52 specifies the unit of time and the end of the unit of time.

'Periodic detention' is the process of serving periodic detention.

'Periodic detention obligations' are the obligations in clause 42 that detainees must abide by when serving periodic detention.

'Periodic detention period' is that period of a sentence nominated by the court that the offender must complete to fulfil that part of the sentence. To clarify the distinction between 'periodic detention period' and 'detention period': a court can set a period of imprisonment, known as the 'periodic detention period', that may be served by periodic detention (six months for example); in order to satisfy this sentence of imprisonment an offender must complete 26 weeks (six months) worth of 'detention periods'.

'Reporting day' is the first day of periodic detention nominated by the court or nominated by the chief executive under clause 52 if the court's date is not able to be given effect.

'Reporting place' is either the corrections centre where the person is to be taken into custody for each detention period or another place where the person must report, such as a place where community service work is to be undertaken.

'Reporting time' is the time the offender must report for a detention period. Clause 52 specifies the reporting time as 7pm (usually a Friday evening). The reporting time can be changed by the chief executive but the length of the detention period must remain the same.

Clause 41 — Periodic detention — meaning of *detention period*

Clause 41 provides a detailed definition of detention period.

A detention period is the unit of time spent in detention during a weekly cycle. Presently a detention period starts at 7pm on a Friday night and finishes at 4.30pm on a Sunday afternoon. Clause 41(1) encapsulates this time-span when read in conjunction with clause 52. Rather than only prescribe time over a weekend, the Bill enables the same time-span to be used over any days during the week.

The traditional family holidays of Christmas Day, Good Friday and Easter Sunday are excluded from periodic detention. Clause 41(2) also enables the Executive to prescribe other days excluded from periodic detention.

Part 5.2 — Serving periodic detention

Clause 42 — Periodic detention obligations

Consistent with the rule of law applying to prisoners and remandees, clause 42 sets out the legal obligations upon offenders serving a term of imprisonment by way of periodic detention.

The obligations in clause 42(2) focus primarily on the performance of each detention period but are not limited to detention periods, as clarified by clause 42(3).

Part 5.3 (below) sets out the reporting requirements and elements of performance related to attending periodic detention.

The core conditions are discussed in clause 43 below.

The offender performing periodic detention must comply with any additional conditions. An additional condition is a condition not written into the Bill but applies because it was made via a recommendation by the sentencing court or made by the Sentence Administration Board managing the periodic detention.

Clause 42(2)(d) obliges a person subject to both periodic detention and a non-association order or place restriction order to comply with the latter orders. For

offenders subject to periodic detention, the ultimate sanction for a breach of a non-association order or place restriction order will be re-committal to full-time imprisonment.

In clause 42(2)(e) requires an offender in periodic detention to abide by any relevant provisions under the foreshadowed *Corrections Management Act*. The *Corrections Management Act* will provide for the management of good order within custodial settings.

Clause 43 — Periodic detention — core conditions

Clause 43(1) sets out the core conditions that apply to an offender performing periodic detention.

Under (a) the offender must not commit a criminal offence that holds a penalty of imprisonment. This does not cover offences that hold a penalty of a fine, but no imprisonment.

Under (b) the offender must report any charges laid against them within two days of becoming aware of the charges. Non-reporting of charges will be a breach of obligations.

Under (c) the offender must report any change in their contact details within two days of the details changing. Contact details are defined in clause 43(2).

Under (d) the offender must comply with any direction given to the offender under the law that would be established by this Bill and the foreshadowed *Corrections Management Act.*

Under (e) if the offender registers a positive test to alcohol or drugs upon reporting for periodic detention or during the detention period the person is in breach of this condition.

Under (f) if the offender vouches to appear at an inquiry conducted by the Sentence Administration Board and does not comply with the agreement, the offender is in breach of this condition. Likewise, if the offender is required to appear and does not appear, a breach has occurred.

Clause 43(1)(g) enables the Executive to prescribe further conditions.

Clause 44 — Periodic detention — chief executive directions

Clause 44 is a general authority for the chief executive or their delegate to give directions to an offender serving periodic detention.

Clause 45 — Periodic detention — alcohol and drug tests

Clause 45 authorises alcohol and drug testing of periodic detainees. The provisions of the foreshadowed *Corrections Management Act* would apply to taking and testing samples.

Clause 46 — Periodic detention — personal searches

Clause 46 authorises the searching of an offender when the offender reports for periodic detention. The provisions of the foreshadowed *Corrections Management Act* would apply to searches.

Clause 47 — Periodic detention — custody of offender

Clause 47 clarifies that when an offender is performing a detention period the offender is in the custody of the chief executive. This includes being on the site of community service work during a detention period or being transported during a detention period.

Clause 47(2) and (3) mean that if an offender is in custody for a reason other than periodic detention the time in custody does not count towards the completion of periodic detention. For example, if Jo was completing a term of periodic detention for a property offence and she was arrested and remanded for assault, Jo's remand for assault would not be counted as periodic detention. Conversely, if Jo was arrested and remanded for allegedly breaching her periodic detention obligations and it was found she did not breach the obligations, the remand time may count as a detention period.

Clause 48 — Periodic detention — end of

There are two ways a term of a sentence to be served by way of periodic detention can end. Firstly, if the offender completes the term; secondly, if the term is cancelled under part 5.4 (discussed below). A term of periodic detention can be cancelled by the Sentence Administration Board as a sanction for breaching the obligations or because some new circumstance prevents the performance of periodic detention.

Part 5.3 — Performing periodic detention

Clause 49 — Periodic detention — reporting for etc

An offender must report for each detention period within the term of their sentence to be served by way of periodic detention. They must report at the correct time on the correct day. They must report in accord with any directions given by the chief executive.

Offender are also obliged to undertake any work or activities authorised by part 5.3.

Clause 50 — Periodic detention — reporting places

The chief executive may tell the offender where to report for periodic detention: either at a centre or another relevant place.

Clause 51 — Periodic detention — reporting day

Clause 51 stipulates that the first reporting day is the day nominated by the sentencing court. Clause 51 also enables the chief executive to change that day to another day.

This does not enable the sentence to be shortened, as the clause requires the same term to be fulfilled if the first day changes: a change in the starting time does not change the length of the term.

If the chief executive makes a decision to change the first day, the chief executive must inform the offender in writing.

Clause 52 — Periodic detention — reporting and finishing times

As discussed at clause 41 (above) periodic detention usually begins at 7pm on Friday evening and finishes at 4.30pm on Sunday afternoon. The time in detention is 45.5 hours for each detention period.

Clause 52 states that the reporting time is 7pm and the finishing time is 4.30pm. The chief executive may fix different reporting and finishing times as long as the length of the detention period (45.5 hours) does not change.

If the chief executive changes the reporting and finishing time, the offender must be notified in writing.

Clause 53 — Periodic detention — activities and work

Clause 53 authorises the chief executive to direct an offender to undertake an activity, program, training or work at a centre or in the community. The Bill's dictionary ensures that activity has a broad meaning. An activity may be a life skills program or an anger management program etc.

If the offender is not able to do the work directed, they are not required to do it. Clause 53(2) is not prescriptive about what may inform an offenders incapacity to do the work. The onus is upon the offender to explain or demonstrate why they are incapable of doing the work whether for medical reasons or otherwise.

Clause 53(3) provides that a direction takes effect on the day or at a later day that is in the direction.

Clause 54 — Periodic detention — activities or work outside correctional centres

Clause 54 expands upon the direction to engage in activities or work outside a correctional centre.

The direction must include what the work or activity is, where the offender must report, who the offender's work supervisor is and the corrections supervisor the offender must report to if the activity or work can't be done.

Clause 54(3) authorises the work supervisor to give the offender directions in relation to the activity or work.

In some cases the work supervisor won't be a corrections officer, while the manager should always be a corrections officer. Consequently, clause 54(4) requires the offender to notify the assigned manager if the activity or work can't be done.

Clause 55 — Periodic detention — approval not to perform etc

In some circumstances it may be appropriate for the chief executive to allow the offender to arrive late for detention or to miss a detention period. However, these provisions for leave are not entitlements. Clause 55 authorises the chief executive to

exercise a discretion to allow an offender to arrive late or give an offender leave not to attend a detention period.

Clause 55(1)(b) only authorises an offender to be up to four hours late. If an offender cannot report within four hours of the reporting time, they must apply for leave.

Clause 55(2) provides the chief executive with the discretion to approve leave if they believe it is appropriate.

Clause 55(3) limits how many times leave may be approved for every six months of a term of periodic detention. Only two occasions of leave may be approved within a six-month period. Occasions of leave applies to any combination of leave: late or non-attendance. The leave is not cumulative. If an offender is given leave twice in the fourth month of an eighteen month term of periodic detention the offender cannot be given leave in month five. The offender would not be eligible for further leave until the tenth month of the term.

Clause 55(4) ensures that leave can be given during a detention period or during the part of the week the offender is not in detention.

Clause 55(5) stipulates that the leave is subject to any conditions made by regulation or stated by the chief executive. This provision does not set aside any existing periodic detention conditions or obligations.

Clause 55(6) ensures that additional conditions for the purposes of leave are consistent with existing conditions.

It should be noted that only serious medical conditions would warrant approval for leave. Medical conditions that would normally be managed in a work or home setting will not be grounds enough for leave.

Clause 56 — Periodic detention — application for approval not to perform detention etc

Clause 56 stipulates what must be in an application for leave to report late or not attend a detention period.

Clause 57 — Periodic detention — making up for approved nonperformance etc

If an offender has leave not to perform detention the offender's periodic detention period is automatically extended by one week.

Clause 58 — Failing to perform detention — extension of periodic detention period

Clause 58(1) sets out the events that will automatically extend the term of the sentence to be served by periodic detention by one week. The events prescribed are deemed to be a failure to perform periodic detention.

The following events result in automatic extension:

- Failing to report for the detention period;
- reporting more that four hours late to the reporting place.

Clause 58(2) obliges the chief executive to direct an offender not to perform detention if an offender arrives at the gate of the detention centre more than four hours late. If an offender is more than four hours late they should not be admitted to the centre.

Clause 58(3) provides the chief executive with the authority to direct an offender not to perform periodic detention. If an offender is directed not to perform periodic detention the term of periodic detention is extended by one week.

The following events may result in a direction not to perform detention:

- reporting less than four hours late without approval;
- failing to comply with reporting requirements;
- testing positive to alcohol or drugs when reporting for detention.

It should be noted that if the chief executive admits an offender to the detention centre under the circumstances in (3) the periodic detention period cannot be extended by one week.

Clause 58(4) clarifies that each detention period not performed under the circumstances set out in clause 58, results in an automatic extension of one week.

Clause 59 — Failing to perform detention — referral to board

The chief executive is obliged to initiate breach proceedings against an offender if any of the circumstances under clause 58 occur for a second time. For example if one week an offender fails to attend the detention, and then on another occasion the offender is directed not to attend the detention because they did not have leave to attend late.

Clause 60 — Offender not fit for detention — extension of periodic detention period

Clause 60 provides the chief executive with the discretion to direct an offender not to perform periodic detention on health grounds.

The direction does not change the term of the sentence to served by periodic detention, clause 60(3) automatically extends the term for each weekly cycle not performed by the offender.

Clause 61 — Change to periodic detention period — effect on combination sentence

The *Crimes (Sentencing) Bill 2005* provides for combination sentences. The Court will have the flexibility of imposing any number of orders as part of a whole sentence. For example, the Court may impose a sentence of full-time imprisonment with a period of periodic detention, followed by a good behaviour order with a community service conditions.

Combination sentences rely on coordination between the elements of the sentence either over a sequence of time or a sequence of events. To ensure a combination sentence remains in sequence, clause 61 provides for the automatic adjustment of a term of imprisonment served by way of periodic detention.

Clause 61(2) lists the relevant clauses that trigger automatic adjustment.

Clause 62 — Periodic detention activities and work — reports

Programs for offenders and community service work are usually provided by third parties by agreement, contractual or otherwise, with the Territory.

Clause 62 obliges the chief executive to ensure that the third party will provide reports to the Territory about the offender's participation in the activity or work.

Part 5.4 — Supervising periodic detention

The supervision of periodic detention is divided into two distinct themes. The first theme addresses breaches of periodic detention. The breach provisions are designed to ensure that the community retains confidence in the option of periodic detention as an alternative to full-time detention. The government is of the view that allegations of breaches must be determined using a prompt procedure. To this end the government has assigned the Sentence Administration Board with the task of determining breaches of periodic detention. To assist in this task and other tasks assigned to the Sentence Administration Board, the Bill also provides for a new, harmonised decision making process. This decision making process is discussed at chapter 8 below.

The second theme provides a means of reviewing, adjusting or cancelling periodic detention if an offender's circumstances have changed, or new information has come to light since the sentence was imposed that may prevent the offender from performing periodic detention.

Division 5.4.1 — Breach of periodic detention obligations

Clause 63 — Corrections officers to report breach of periodic detention obligations

Clause 63 requires the relevant corrections officer to report breaches of periodic detention.

In order to prevent 'word against word' in breach proceedings, clause 63(2) and (3) ensures reports must be in writing and any written records supporting the report or the existence of a breach must be provided. For example, a day-book record, a file note, a copy of a leave form etc.

Examples of breaches of periodic detention are provided.

Clause 64 — Arrest without warrant — breach of periodic detention obligations

Clause 64 provides police with an explicit authority to arrest a person, without warrant, on reasonable grounds that the person has breached their periodic detention obligations. Clause 43 sets out the obligations of periodic detention and is discussed above.

Following arrest, clause 64(3) requires the police officer to bring the person before the Sentence Administration Board or a magistrate if the board is not sitting. If the person is taken before a magistrate the *Bail Act 1992* applies. If the person is taken before the Sentence Administration Board and remanded by the board, the person is

still entitled to test the lawfulness of the remand via an application under section 8A of the *Bail Act 1992*.

Clause 65 — Arrest warrant — breach of periodic detention obligations

This clause authorises the issue of a warrant to arrest a person suspected of breaching their periodic detention obligations, or it is suspected that the person will breach their obligations.

The warrant must contain the details in clause 65(2).

Following arrest, clause 65(3) requires the police officer to bring the person before the Sentence Administration Board or a magistrate if the board is not sitting. If the person is taken before a magistrate the *Bail Act 1992* applies. If the person is taken before the Sentence Administration Board and remanded by the board, the person is still entitled to test the lawfulness of the remand via an application under section 8A of the *Bail Act 1992*.

Clause 66 — Board's inquiry — breach of periodic detention obligations

Clause 66 provides the Sentence Administration Board with a flexible power to determine if an offender has breached their periodic detention obligations.

Clause 66 clarifies that the board can inquire into a breach before the periodic detention begins or in conjunction with another inquiry under division 5.4.2.

By clause 66(3) the board can inquire on its own initiative or upon application by the chief executive. This enables the board to address any obvious breaches in the course of another inquiry.

Clause 66(4) is an imperative to ensure that allegations of breaches are addressed quickly if a person is arrested.

Clause 67 — Notice of inquiry — breach of periodic detention obligations

Clause 67 obliges the Sentence Administration Board to issue a notice of a breach inquiry.

The notice must include the reasons for conducting the inquiry. Consistent with the new method of conducting inquiries, the notice must invite the offender accused of breaching their obligations to make a written submission to the board.

The offender, the chief executive and the director of public prosecutions must be notified of the breach inquiry.

Chapter 8, below, provides for board proceedings and inquiries. This clause corresponds to the inquiry procedure set out in chapter 8.

Clause 68 — Board's powers — breach of periodic detention obligations

If the Sentence Administration Board has completed an inquiry into a breach and determined the breach occurred, clause 68 provides the board with a number of options to address the breach.

Clause 68(2) empowers the board to:

- take no action;
- warn the offender to comply;
- direct the chief executive to supervise the offender in a particular way;
- impose additional or amended conditions;
- suspend the offender's periodic detention for a period of time; or
- cancel the offenders periodic detention.

If the offender's periodic detention is suspended for a period of time the offender is obliged to serve that period of time during the sentence by way of full-time detention. For example, the board decides that Alexis breached her periodic detention obligations and suspends her periodic detention for two weeks. Alexis must serve that time in prison before returning to the cycle of periodic detention. Time in prison during suspension of periodic detention is counted towards the completion of the period of imprisonment set by the sentencing court.

If the offender's periodic detention is cancelled, the offender must be re-committed to prison for the remainder of the sentence of imprisonment set by the sentencing court. It should be noted that under the Crimes (Sentencing) Bill 2005 periodic detention is linked to a sentence of imprisonment. A court may set a period of periodic detention if a sentence of imprisonment is imposed.

Clause 68(4) ensures that the board's powers can be exercised in conjunction with any other power triggered as a consequence of another inquiry under division 5.4.2.

Clause 69 — Cancellation of periodic detention on further conviction etc

Clause 69 provides for the mandatory cancellation of periodic detention if a person has been convicted of an indictable offence in the ACT or an equivalent in another Australian jurisdiction.

The board must determine if in fact the person has been convicted of an indictable offence or equivalent.

If the fact is established, clause 69(2) obliges the board to cancel the periodic detention. Consequently, the person will be re-committed to full-time detention for the remainder of the sentence of imprisonment.

Division 5.4.2 — Review of decisions about performing periodic detention

Clause 70 — Review of chief executive decisions under Part 5.3

Clause 70 provides the Sentence Administration Board with the authority to review the chief executive's decisions not to grant leave to arrive late or leave to not attend periodic detention. It is also authority to review a decision to extend the term of periodic detention as a consequence of a direction not to perform periodic detention.

Clause 70(2) only entitles the offender to apply for review.

Clause 70(3) requires the board to give notice of its inquiry setting out the grounds of the application and an invitation to the chief executive to make a submission.

The board may exercise this power in conjunction with any other inquiry under the chapter. This enables the substance of the events to be considered concurrently. For example, if the offender is also subject to breach proceedings the offender may submit to the board that the chief executive was wrong to deny leave, which lead to a breach.

Clause 70(5) authorises the board to confirm the original decision, amend the original decision, or set the decision aside and make another decision the chief executive would be entitled to make.

Again, the board may exercise this power in conjunction with any other power as a consequence of another inquiry under the chapter.

Clause 71 — Application for review of chief executive decisions under Part 5.3

Clause 71 enables an offender to apply for a review of:

- a decision not to grant leave to miss a detention period (clause 55);
- a decision not to grant leave to arrive late (clause 55); and
- a decision to direct an offender not to perform periodic detention and hence automatically extend the term of periodic detention (clauses 58 and 60).

Clause 71(2) requires the offender to apply for a review within 10 working days of being notified of the decision.

The Sentence Administration Board may extend the period allowed for the application by up to 14 days.

Clause 71(4) ensures that an application for review does not stay, or set aside, the offenders obligations to perform periodic detention, particularly in relation to a detention period that may be subject to review.

Clause 71(5) authorises the board to reject vexatious or frivolous applications.

If the board extends the application time or dismisses an application, the offender must be notified.

Division 5.4.3 — Management of periodic detention

Clause 72 — Board inquiry — management of periodic detention

Clause 72 enables the board to review periodic detention of an offender. The review can occur if there are any changes in circumstances that may affect the offender performing periodic detention that is not intentional conduct to undermine periodic detention.

The offender's behaviour during custody may also warrant grounds for review, and this is contemplated by clause 72(2)(b). The issue of discipline is mentioned in this clause because the board may need to consider cancelling the periodic detention if the person's behaviour warrants the cancellation. In most cases discipline will be a

custody issue alone, to be managed according to the terms of the foreshadowed *Corrections Management Act.* This Bill does not intend to make custodial discipline an inherent reason for reviewing periodic detention. However, in some cases this may be necessary.

As with other provisions in this chapter, clause 72(3) enables the board to conduct a review before the periodic detention period begins and in conjunction with any other review.

Clause 72(4) lists who can initiate a review.

Clause 73 — Notice of inquiry — management of periodic detention

Clause 73 obliges the Sentence Administration Board to issue a notice of a review into an offender's periodic detention.

The notice must include the reasons for conducting the inquiry. Consistent with the new method of conducting inquiries, the notice must invite the offender and the chief executive to make a written submission to the board.

The offender, the chief executive and the director of public prosecutions must be notified of the review.

Chapter 8, below, provides for board proceedings and inquiries. This clause corresponds to the inquiry procedure set out in chapter 8.

Clause 74 — Board powers — management of periodic detention

Having reviewed an offender's periodic detention, clause 74 empowers the board to take no action, change the way the offender is supervised, change the offenders obligations or cancel the periodic detention.

Any additional conditions must be consistent with the core conditions at clause 44 above.

Clause 74(3) examines the decisions the board can take in relation to cancellation. In (a) if the board agrees with the offender's case for cancelling periodic detention, it may do so. In (b) the board may consider the that the person is no longer suitable for periodic detention in accord with the criteria in table 79, clause 79 of the Crimes (Sentencing) Bill 2005.

(In the Crimes (Sentencing) Bill 2005 clause 79 augments the matters that must be considered in a pre-sentence report, if the Court orders that an assessment for periodic detention is included in a pre-sentence report. Clause 79 provides a table of matters that must be addressed in a pre-sentence report contemplating periodic detention.)

The board may exercise this power in conjunction with any other power as a consequence of another inquiry under the chapter.

Part 5.5 — Change, suspension and cancellation of periodic detention

Clause 75 — Application of division 5.4.4

Division 5.4.4 applies to breach proceedings conducted by the board and review proceedings conducted by the board.

Clause 76 — Notice of board's decisions about periodic detention

If the board decides to take action on a breach of periodic detention, a review of a decision by the chief executive in relation to leave, or a review of periodic detention, clause 76 requires the board to give an offender, the chief executive and the director of public prosecutions notice about its decision, the reasons for the decision and the date of effect of its decision.

Clause 77 — When changes to periodic detention takes effect

Clause 77 stipulates that a board decision to change an offender's obligations must be in a notice and state when it is to take effect. The date of effect is either the date of the notice or a later date set in the notice.

Clause 78 — Periodic detention — effect of suspension or cancellation etc

If the board has decided to suspend or cancel periodic detention the board must give the offender a notice that tells the offender when the decision takes effect, and where and when the offender must report for imprisonment.

The date of effect is either the date of the notice or a later date set in the notice.

Clause 78(3)(a) obliges the offender to serve the suspension time by way of full-time detention.

Clause 78(3)(b) ensures that suspension of periodic detention itself is not regarded as a secondary breach of periodic detention obligations. Hence, during the period of full-time detention the person is taken to be complying with their obligations. However, the offender will be subject to the obligations imposed upon full-time detainees.

Clause 78(3) establishes that upon cancellation the offender must serve the remainder of the sentence of imprisonment set by the court that could have been served by way of periodic detention but for the cancellation.

For example, a court set a sentence of imprisonment for 12 months: six months is full-time detention and six months the court authorises could be served by way of periodic detention. If after three months of periodic detention the board cancels the periodic detention, the offender must serve the remaining three months in full-time detention.

Clause 79 — Periodic detention — effect of suspension or cancellation of periodic detention

Clause 79 authorises the board to cancel or suspend concurrent or consecutive periodic detention periods if one periodic detention period is cancelled.

The intent of this clause is to enable the board's decisions to have a meaningful effect rather than nominal only.

Clause 80 — Periodic detention — effect of suspension or cancellation on parole

In the rare circumstance that a person is both on parole and serving periodic detention, clause 80 authorises the board to change the parole order in any way if the board has suspended or cancelled periodic detention.

Clause 81 — Suspension or cancellation of periodic detention — recommittal to full-time detention

If an offender's periodic detention is suspended or cancelled, clause 81 requires the Sentence Administration Board to order the offender to be placed in custody to serve full-time detention.

An offender whose periodic detention is suspended must serve full-time detention for the time nominated by the board.

An offender whose periodic detention is cancelled must serve the remainder of the sentence of imprisonment set by the court that could have been served by way of periodic detention but for the cancellation.

Clause 81(3) enables the board to issue a warrant of re-committal, while (4) and (5) provides for the execution of the warrant.

Chapter 6 — Good behaviour orders

Good behaviour orders replace recognisances and options available currently under section 403 of the *Crimes Act 1900*. The Crimes (Sentencing) Bill 2005 contemplates these orders to be used in conjunction with other orders, such as suspended sentences, combination sentences, periodic detention, non-conviction orders etc. Rather than existing as a stand-alone dispositions, probation, community service and rehabilitation will all be available as conditions of a good behaviour order. Consequently, the supervision of all of these conditions under the single format of a good behaviour order is simplified.

Good behaviour orders can also be used in relation to non-conviction orders. However, a good behaviour order cannot include a condition that amounts to a sentence.

Chapter 6 provides for the obligations, conditions and machinery for the supervision of good behaviour orders.

Part 6.1 Undertaking good behaviour

Clause 82 — Application of chapter 6

Chapter 6 applies to good behaviour orders.

Clause 83 — Definitions for chapter 6

Clause 83 provides definitions for chapter 6.

An ‘additional condition’ can be:
(a) a condition for probation, community service, rehabilitation, or other appropriate condition, imposed by a court when making a good behaviour order;
(b) a condition imposed as a consequence of the chapter; and
(c) an amended condition.

A ‘community service condition’ is a requirement to perform community service for a stated number of hours as part of a good behaviour order.

Core conditions are set out in clause 85 below.

‘Good behaviour obligations’ are set out in clause 84 below.

‘Good behaviour order’ is the authority that the court would have to impose non-custodial orders with conditions in lieu of a custodial sentence or in lieu of a conviction. This authority is set out in the Crimes (Sentencing) Bill 2005.

The term ‘interested person’ is used throughout the chapter to refer to the people and entities listed.

‘Rehabilitation program condition’ is a condition that the offender engages in a rehabilitation program as part of a good behaviour order.

Clause 84 — Good behaviour obligations

Under the terms of the Crimes (Sentencing) Bill 2005 an offender must sign an undertaking to comply with a good behaviour order made by a court. Clause 84 in this Bill sets out the obligations the offender must comply with under a good behaviour order.

The offender must comply with the core conditions set out in the Bill and any additional conditions.

If the offender is subject to a non-association order or place restriction order, the offender is obliged to comply with the order.

The offender is also obliged to comply with the requirements of the Bill and the foreshadowed *Corrections Management Act.*

Clause 85 — Good behaviour — core conditions

The core conditions of a good behaviour order evoke the existing requirement of a recognisance to abide by the law, both inside and outside the Territory. It is a condition that any charge against the offender must be reported to corrections officers.

The offender must report any changes to their home or work address, and corresponding phone numbers.

The offender must comply with any direction by corrections officer. It is implicit that the exercise of a corrections officer’s powers must be lawful.

Positive tests of drugs and alcohol in the context of carrying out community service work is a breach of the offender's conditions. This does not include prescribed medication or medication available from chemists.

If the offender is subject to probation, the offender must not leave the Territory for more than 24 hours, or another time prescribed in regulations — following the definition in clause 85(2).

Any agreement the offender makes to voluntarily attend court as a consequence of an alleged breach of a good behaviour order is also itself a condition of the good behaviour order.

Clause 85(1)(h) authorises the Executive to make regulations prescribing further conditions of good behaviour orders.

Clause 85(2) provides definitions for clause 85(1). 'Probation condition' is a condition imposed by the court that requires the offender to be supervised during the good behaviour order.

Clause 86 — Good behaviour — chief executive directions

Clause 86 provides an explicit power for the chief executive to give directions to offenders subject to good behaviour orders.

Clause 87 — End of good behaviour order

Good behaviour orders end when the term of the order set by the court is complete or if the order is discharged or cancelled.

Part 6.2 — Good behaviour — community service work

Clause 88 — Application of part 6.2

Part 6.2 applies to community service conditions of good behaviour orders.

Clause 89 — Compliance with community service condition

To remove any doubt, clause 89 stipulates that to comply with a community service condition the offender must comply with part 6.2 of this Bill.

Clause 90 — Community service work — chief executive directions

Clause 90 provides the chief executive with the authority to give the offender directions about the instances of work the offender must do to fulfil the obligation to do community service work.

The direction can be in writing or given orally. Flexibility in this regard is necessary as the frequency, type and availability of community service varies. In most cases it is not logistically possible to schedule community service well in advance. It is envisaged that most offenders would be notified by phone of the requirements the day before work.

In clause 90(2) the offender must be told what work is to be done, where the offender must report, who the work supervisor is and who the correction supervisor is.

Clause 90(2) distinguishes between a work supervisor and a corrections supervisor. Community service relies heavily on the availability of third parties (volunteer organisations, community associations, non-government organisations etc) to facilitate community service. In each instance of work, clause 90 envisages that a work supervisor might be a person associated with a third party who would direct what work should be done. The corrections supervisor would be the relevant corrections officer overseeing the community service and if necessary supervising offender's compliance with community service work.

It should be noted that offenders subject to community service are not in the custody of the chief executive, and in most instances of corrections officers will not be in attendance for most of the time.

Under clause 90(6) if the offender is not able to do the work directed, they are not required to do it. This clause is not prescriptive about what may inform an offender's incapacity to do the work. The onus is upon the offender to explain or demonstrate why they are incapable of doing the work whether for medical reasons or otherwise.

If the offender is already working or studying, the community service work should be scheduled around work hours or mandatory hours at an educational institution.

Clause 90(7) requires offenders to comply with the directions of a work supervisor, who is likely to be a third party facilitating the community service.

If for any reason the offender cannot comply with a direction to work, the offender must notify the correction supervisor as soon as possible to seek instructions. For example, the place of work may be a place the offender is prohibited from being within under a place restriction order. Another example, the offender may be required to work in a library yet be unable to read.

Clause 91 — Community service work — failure to report etc

Clause 91(1) stipulates that the offender must report to the place of work with the appropriate attire etc as required and do the work required.

Clause 91(2) authorises the chief executive to direct the offender to leave the place, if the offender is failing to do the work as directed.

Clause 92 — Community service work — maximum daily hours

Clause 92 prohibits any more than eight hours of community service work per day. The prohibition applies to the chief executive and the offender alike. An offender cannot be credited with more than eight hours of work, even if the offender upon their own volition works beyond the eight hours for the day. This prohibition does not prevent less than eight hours work being completed in a day.

Clause 92(2) stipulates that only actual work time and approved breaks can be counted towards community service. 92(2)(b) provides a simple way of calculating the value of any portion of an hour's work: any portion is counted as one hour.

The examples provided contemplate portions of an hour. The following is an example of working out eight hours of community service in a day. A work team is required to clean the grounds of a voluntary organisation. Work is scheduled for between 9am and 5pm with 40 minutes for lunch and two ten minute breaks. The day constitutes eight hours community service work. Darryl is under a good behaviour order and is rostered onto the work team. Darryl is given permission to leave between 10.30am and noon in order to hand in an educational assignment. The time Darryl is absent from work cannot be counted towards community service hours.

Clause 93 — Community service work — health disclosures

Clause 93 obliges the offender to tell the chief executive about any health conditions that affects the ability of the offender to work safely.

If the offender fails to do this when they could have reasonably known about the condition, the offender could be in breach of their obligations. However, if the offender could not have reasonably known about the condition or the impact of the condition upon work, the offender would not be in breach of their obligations.

Clause 94 — Community service work — alcohol and drug tests

Clause 94 authorises the chief executive to direct an offender to provide a test sample for the presence of drugs or alcohol.

The testing scheme from the foreshadowed *Corrections Management Act* would apply.

Clause 95 — Community service work — frisk searches

Clause 95 authorises the chief executive to direct an offender to submit to a frisk search.

The provisions for frisk searches in the foreshadowed *Corrections Management Act* would apply.

Clause 96 — Reports by community service work entities

As noted above in clause 90, community service relies heavily on third parties. Clause 96 ensures that any agreement with a third party, or indeed another entity of the Territory, must include a requirement to report to the chief executive about offenders' participation in work.

Part 6.3 — Good behaviour — rehabilitation programs

Clause 97 — Application of part 6.3

Part 6.3 applies to any condition of good behaviour orders that requires an offender to participate in a rehabilitation program.

Clause 98 — Compliance with rehabilitation program condition

To remove any doubt, clause 98 stipulates that to comply with a rehabilitation program condition, the offender must comply with part 6.3 of this Bill.

Clause 99 — Rehabilitation programs — chief executive directions

Clause 99 authorises the chief executive to give the offender directions about the rehabilitation program the offender must attend.

In clause 99(2) the offender must be told what program to attend, where to attend the program, when to attend the program and who the offender must report to.

Clause 100 — Reports by rehabilitation program providers

Clause 100 ensures that any agreement with a provider of rehabilitation programs must include a requirement to report to the chief executive about offenders' participation in the program.

Part 6.4 — Good behaviour — supervision

Clause 101 — Corrections officers to report breach of good behaviour obligations

If a corrections officer reasonably believes that an offender is in breach of the good behaviour obligations, the officer must report the alleged breach to the relevant court. The obligations are discussed at clause 84 above.

Clause 101(3) enables a corrections officer to report anything else to the sentencing court, whether they believe it to be a breach or not.

Clause 102 — Arrest without warrant — breach of good behaviour obligations

Clause 102 provides police with an explicit authority to arrest a person, without warrant, on reasonable grounds that the person has breached their good behaviour obligations.

Following arrest, clause 102(3) requires the police officer to bring the person before the sentencing court or a magistrate if the sentencing court is not sitting. If the person is taken before a court the person may apply for bail under the *Bail Act 1992.*

Clause 103 — Arrest warrant — breach of good behaviour obligations etc

Clause 103 authorises the issue of a warrant to arrest a person suspected of breaching their good behaviour obligations, or it is suspected that the person will breach their obligations.

The warrant must contain the details in clause 103(2).

Following arrest, clause 103(3) requires the police officer to bring the person before the sentencing court or a magistrate if the sentencing court is not sitting. If the person is taken before a court the person may apply for bail under the *Bail Act 1992.*

Clause 104 — Good behaviour — agreement to attend court

Following an alleged breach of good behaviour obligations, a police officer may opt to secure an offender's presence at court by requesting the offender to sign a voluntary agreement to appear before the sentencing court.

Clause 105 — Good behaviour — summons to attend court

Clause 105 provides for a summons to be issued to an offender to secure the offender's attendance at court in relation to a breach of good behaviour obligations.

Copies of the summons must go to any sureties under the good behaviour order, the chief executive and the director of public prosecutions.

Part 6.5 — Breach of good behaviour order

Clause 106 — Offence committed while under good behaviour order

Committing an offence while on a good behaviour order is a breach of the good behaviour obligations. Clause 106(1) and (2) specifies which forum must address the breach of the good behaviour order if a particular court finds a person subject to a good behaviour order guilty of another offence.

Clause 106 empowers the Magistrates Court to remand an offender who is to appear before the Supreme Court for adjudication on the breach of good behaviour. Under these circumstances the offender may apply for bail under the *Bail Act 1992.*

Clause 107 — Court powers — breach of good behaviour obligations

Clause 107 provides courts with the powers to impose appropriate sanctions or make appropriate directions if the court finds the offender has breached their good behaviour obligations.

Clause 107(2) enables the court to take no action, to warn the offender, to direct the chief executive to supervise the offender in a particular way, to change or add a condition to the order, to enforce any security made as part of the order or cancel the order.

Cancelling the order requires the court to re-sentence the offender under clause 107(3). The terms of the foreshadowed *Crimes (Sentencing) Act* would be enlivened by clause and the court would determine the sentence that should be applied to the offender.

Clause 107(4) is a direction to clause 112, which sets out the limitations in relation to amending orders.

Clause 107(5) clarifies that a re-sentenced offender retains any rights of appeal.

Clause 108 — Cancellation of good behaviour order made as non-conviction order

In *Properjohn v Gaughan* [1998] SCACT 26 No. SCA 100 of 1997, Justice Gallop discussed non-conviction orders in reference to the High Court's judgement in *Griffiths v The Queen* 137 CLR 293. Justice Gallop concluded that a non-conviction order is an alternative to conviction and punishment.

When made in conjunction with a non-conviction order, a good behaviour order cannot include a punishment, as discussed by Justice Gallop in *Properjohn.* However, the person found guilty can agree to abide by a good behaviour order and conditions

of the order — such as probation and rehabilitation, fulfilling a reparation order etc — knowing that a breach of the order may result in a sentence. (A reparation order is not a sentence in the context of a non-conviction order, as reparation involves returning property unlawfully taken or making up for a loss as a direct consequence of an offence.)

A non-conviction order is, therefore, not a sentence. However, if a person breaches any conditions set by the non-conviction order the Court is still empowered to bring the person before the Court and sentence the person for the offence in question.

If a person's good behaviour order was made as a non-conviction order, and the order is cancelled, clause 108 empowers the court to convict and sentence the offender for the original offence.

Clause 108(3) clarifies that the terms of the foreshadowed *Crimes (Sentencing) Act* would be enlivened and applied to determining the sentence.

Clause 109 — Cancellation of good behaviour order with suspended sentence order

A suspended sentence enables a court to sentence an offender to a term of imprisonment and then suspend the execution of that imprisonment on the basis that the offender complies with conditions set by the court. The tool for setting conditions under the Crimes (Sentencing) Bill 2005 is the good behaviour order. If the offender breaches the good behaviour order made in conjunction with a suspended sentence, clause 109 provides the court with the authority to execute the sentence or re-sentence the offender.

Clause 109(3) ensures that any surety made as part of the good behaviour order can be enforced if the court determines a breach has occurred.

Clause 109(4) clarifies that the terms of the foreshadowed *Crimes (Sentencing) Act* would be enlivened and applied to any re-sentencing.

Clause 109(5) clarifies that a re-sentenced offender retains any rights of appeal.

Clause 110 — Enforcing security under good behaviour order

If a surety was made as part of a good behaviour order which is cancelled as a consequence of breach of obligations, clause 110 stipulates that the cancelled order is akin to a final judgement in favour of the Territory.

Clause 110(3) clarifies that surety due to the Territory can be enforced under the circumstances listed.

Part 6.6 — Good behaviour orders — amendment and discharge

Clause 111 — Court's powers — amendment or discharge of good behaviour order

Part 6.6 contemplates alteration or discharge of good behaviour orders under circumstances other than a court's consideration and determination of an alleged breach of good behaviour obligations.

Clause 111 empowers the court to amend or discharge a good behaviour order. The court can initiate the amendment or discharge, or the offender, the chief executive or the Director of Public Prosecutions may apply to amend or discharge the order.

Clause 111(4) is a direction to clause 112 (below), which sets out the limitations in relation to amending orders.

Clause 112 — Limitations on amendment or discharge of good behaviour order

Clause 112 sets out the limitations upon amending good behaviour orders.

In (1) a court cannot increase the number of hours of community service work under a good behaviour order, nor can the court extend a good behaviour order beyond a term of three years.

In (2) a court cannot amend a core condition as listed in clause 84 of this Bill. Likewise, in (3) the Magistrates court cannot amend an order in a way that is inconsistent with a condition set by the Supreme Court.

Clause 112(4) is an exception to 112(3) where the Magistrates Court needs to engage an amendment of a good behaviour order to carry out its responsibilities in relation to a proceeding before it. For example, if a Magistrates Court is hearing a protection order application for a full order against an offender subject to a good behaviour order made by the Supreme Court, the Magistrates Court may alter the good behaviour order to give effect to the protection order.

Clause 112(5) ensures that the Magistrates Court may not discharge an order made or amended by the Supreme Court.

Clause 113 — Good behaviour orders — effect of amendment on sureties

If a good behaviour order is amended without any surety's agreement, the surety is not bound by the amended order.

However, if the surety doesn't agree with the amendment the court has the power to determine the extent the surety remains bound by the amended order.

Part 6.7 — Good behaviour — miscellaneous

Clause 114 — Good behaviour proceedings — rights of interested person

An 'interested person', as defined in clause 83 above, includes the offender, any sureties under the good behaviour order, the chief executive and the Director of Public

Prosecutions. These people have a right to appear before the court in proceedings to address breaches, discharge, and amendment of good behaviour orders.

These parties must also be given copies of any decision, order or direction by the court.

Clause 115 — Court power after end of good behaviour order

Clause 115 ensures that the court retains the power to address a matter that arose during the term of a good behaviour order, even though the order had finished when the court dealt with the matter.

Chapter 7 — Parole

The purpose of parole is to moderate a sentence of imprisonment to enable the offender to rehabilitate. In *R v Shrestha* (1991) 173 CLR 48, Justices Deane, Dawson and Toohey said:

> The basic theory of the parole system is that, notwithstanding that a sentence of imprisonment is the appropriate punishment for the particular offence in all the circumstances of a case, considerations of mitigation or rehabilitation may make it unnecessary, or even undesirable, that the whole of that sentence should actually be served in custody. [at 67]

To enable parole to occur, the sentencing Judge or Magistrate must determine what period of a sentence must be served by imprisonment, leaving the remaining period to be eligible for parole. For example, if a court imposed a four year sentence of imprisonment the Court could determine that the first three years are a nonparole period. After serving the first three years of the sentence the offender would be eligible for parole. The Crimes (Sentencing) Bill 2005 provides the sentencing court with the authority to set non-parole periods.

Chapter 7 provides the Sentence Administration Board with the authority to determine whether an offender who is eligible for parole should be conditionally released from prison.

Part 7.1 — Parole — general

Clause 116 — Definitions for part 7.1

An ‘additional condition’ is made as a consequences of the power to make conditions of parole under chapter 7 and amend conditions of parole under chapter 7.

‘Application’ applies to both forms of application for parole.

A ‘core condition’ is a condition provided by clause 136 of the Bill.

‘Ordinary parole application’ is an application that an offender may make when the term of their sentence approaches the end of the non-parole period. This is distinguished from a ‘special parole application’ which can occur at any time during a term of a sentence if an offender has special and exceptional grounds to apply for parole.

The ‘parole eligibility date’ is the first day after the non-parole period set by the sentencing court or if the offender is subject to more than one sentence, the day after the last non-parole period.

‘Parole obligations’ are set out in clause 135.

A ‘parole order’ can be made by the Sentence Administration Board after an inquiry on written evidence, or after an inquiry that includes a hearing.

‘Special parole application’ is discussed above.

A victim is a person who suffers harm because of the conduct of the offence committed by the offender.

Clause 117 — Meaning of *parole eligibility date*

The ‘parole eligibility date’ is the first day after the non-parole period set by the sentencing court or if the offender is subject to more than one sentence, the day after the last non-parole period.

Clause 117(2) clarifies that if the offender is also subject to a sentence that is ineligible for parole, eligibility for parole does not commence until the excluded sentence is complete.

Excluded sentences include a sentence of life imprisonment, a sentence for an offence committed in lawful custody, sentence of imprisonment served completely by way of periodic detention, a fully suspended sentence of imprisonment, and a sentence of imprisonment imposed in default of a fine.

Part 7.2 — Making of parole orders

Clause 118 — Application of part 7.2

Part 7.2 applies to offenders who are eligible for parole.

Clause 119 — Criteria for making parole orders

The provisions for the Sentence Administration Board’s inquiries are set out in chapter 8, below.

Clause 119(1) requires the board to contemplate the general considerations of appropriateness and the public interest when making a parole decision. This may require the board to weigh the interests of the public at large against the individual interests of the offender before them.

Clause 119(2) sets out specific considerations the board must address when making a parole decision.

Under (a) and (b) the board must consider the record of the sentencing court and the offender’s background and offending history.

Under (c) and (d) the board must consider any submission made by a victim and the likely effect release on parole will have on the victim and the victim's family. The board should be particularly attune to concerns expressed by victims and the need for protection from violence.

Under (e) and (f) the board must consider any reports it is required to consider by regulation and any report prepared for consideration of the board. Under chapter 8 the board would have the authority to request reports from the chief executive.

Under (g) and (h) the board must consider the offender's behaviour in prison and the offender's participation in any programs during imprisonment.

Under (i) and (j) the board should contemplate the risk that the offender poses of committing further offences and the offender's likelihood of abiding by conditions of parole.

Consistent with the purpose of parole, under (k) the board must consider if parole would help the offender to adjust to community life without re-offending.

Under (l) the board must consider any special circumstances in relation to the application. This is particularly important where an offender makes a special parole application (discussed at clause 120 below).

If the Executive makes regulations prescribing other criteria under (m), the board must consider the additional criteria.

Clause 119(3) clarifies that the board can consider any other matters it decides is relevant to the parole decision.

Clause 120 — Applications for parole

Clause 120(1) enables offenders to apply to the board within six months before the offender becomes eligible for parole.

Clause 120(2) allows for special parole applications. If an offender is not eligible for parole within six months, but will be eligible for parole at some stage during their sentence, and the offender believes exceptional circumstances may warrant their release, they may apply for parole.

Clause 120(3) requires offenders applying for special parole to include a written submission that explains what the exceptional circumstances are they may warrant release on parole.

Parole applications must be in writing and a form can be prepared by the government to facilitate applications.

Clause 120(5) allows further applications to be made even though a previous parole order was cancelled.

Clause 121 — Board may reject parole application without inquiry

To ensure that the board's time is not wasted and that a case for parole is clearly put to the board, clause 121 provides the board with the power to reject an application for parole.

Clause 121(1) allows the board to reject a special parole application if the application does not include a written submission explaining the exceptional circumstances that may justify release on parole.

Clause 121(2) stipulates that the board can reject an application if it is frivolous, vexatious or misconceived, or the board has already refused to make a parole order within 12 months before the latest application.

Clause 121(3) and (4) requires the board to notify the offender and the chief executive of a rejection and the reasons for the rejection.

Clause 121(5) clarifies that the board does not have to consider the criteria in clause 119 to make a decision to reject an application. Apart from the requirements of administrative law, only the criteria in this clause apply.

Clause 122 — Board to seek victim's views for parole inquiry

Clause 122 requires the board to make contact with the relevant victims who have registered their names on the victim's register. If the board is aware of other victims, these people may also be approached by the board, or an entity on behalf of the board.

It should be noted that clause 122 does not require the board to approach victims in person. A public servant or other person authorised to liaise with victims may approach victims on behalf of the board.

Clause 122(4) ensures that information from victims who are under 15 years old is obtained via parents or other people responsible for parenting. 122(5) provides a definition from the *Children and Young People Act 1999.*

Clause 123 — Notice to victims for parole inquiry

The board must invite each registered or known victim of the offender to make a submission to the board about the effect the offender's release may have upon the victim and their family, or to tell the board about any concerns regarding personal safety.

The board must inform the victim that their submission to the board will be taken into account when considering if parole should be granted and any conditions of parole.

In its contact with the victim, the board must provide any relevant information about the offender that may address some fundamental concerns the victim may have about the risk of violence or harassment in general.

Clause 123(2) gives victims at least seven days to make a submission about the effect of the offender being granted parole.

Clause 124 — Parole applications — inquiry without hearing

This clause must be considered in conjunction with the board's inquiry procedure set out in chapter 8.

The board may only proceed to an inquiry on parole on the basis of an application. There is no authority to consider release on parole without an application.

Unless a parole application is rejected, the board must conduct an inquiry to determine a parole application.

Clause 124(2) requires the board to seek a submission from the offender supporting their application for parole. The offender is given 14 days to provide a submission. If no submission is forthcoming, the board must proceed to an inquiry.

Clause 124(3) requires notification of the chief executive and the director of public prosecutions.

Clause 124(4) obliges the board to consider if the written evidence justifies release on parole, having considered the criteria in clause 119 (above). The written evidence would include, amongst other things, the sentencing record, any reports provided by the chief executive and any submissions provided by victims. Again, this must be read in conjunction with the inquiry procedure in chapter 8.

Clause 125 — Parole applications — decision after inquiry without hearing

Clause 125(1) and (2) provides the board with two options if it has conducted an inquiry into parole without a hearing. If the evidence warrants a parole order, the board may make an order. If the evidence does not justify a parole order the board must set a hearing time and issue notices for the hearing.

Clause 125(3) assists the board to set the date of parole in the order.

Clause 125(4) contemplates special parole applications. The board must be satisfied that the circumstances advocated exist and are indeed exceptional. If it is the case that exceptional circumstances apply, clause 125(4)(b) allows the board to set aside the criteria in clause 119(1) regarding the public interest and appropriateness.

Clause 126 — Parole applications — notice of hearing

Clause 126(1) and (2) requires the board to issue a notice of a hearing in writing to the parties that includes the board's decision not to order parole on the written evidence, the details of the hearing, an invitation to the offender to make a submission and participate in the hearing, and a warning of the consequences of the offender failing to participate in the hearing. The offender has seven days to respond to the board.

Clause 126(3)(a) enables the board to include other matters in the notice. The intent of this provision is to allow the board to focus upon the issues arising from the written evidence that need to be addressed.

Clause 126(3)(b) requires the board to include the documents the board would consider to make a parole decision. This clause is not an unfettered obligation to

provide all documents. Clause 191 authorises the board to decide not to release documents to an offender if to do so would create a risk of harm to anyone.

Clause 127 — Parole applications — failure of offender to participate in hearing

If an offender does not appear at a hearing, or the offender tells the board a submission for the hearing will be provided but fails to provide the submission, or both, then the board is obliged to refuse parole.

Clause 128 — Parole applications — decision after hearing

A hearing is part of an inquiry and would usually conclude the fact finding aspects of an inquiry. This clause should be read in conjunction with chapter 8 of the Bill, regarding inquiries.

Having conducted a hearing, and having already considered the written evidence discussed in clause 124 above, the board may decide to order parole or to refuse parole.

If a parole order is made clause 128(3) assists the board to set the date of parole in the order.

Clause 128(4) contemplates special parole applications. The board must be satisfied that the circumstances advocated exist and are indeed exceptional. If it is the case that exceptional circumstances apply, clause 128(4)(b) allows the board to set aside the criteria in clause 119(1) regarding the public interest and appropriateness.

Clause 128(5) obliges the board to make its decision to grant parole or refuse parole within 60 days of the first hearing of the application. This is not to be confused with when the board begins its inquiry into the application, which commences first.

If the board cannot reach a decision the offender is obliged to remain imprisoned.

Clause 129 — Parole orders may include conditions

Clause 129 is an explicit power for the board to impose any conditions the board considers appropriate. The board is obliged to consider any parole conditions recommended by the sentencing court when the sentence was imposed.

Clause 130 — When parole orders take effect

A parole order takes effect when the person is released from imprisonment under the order. If the person is not released the order does not take effect, despite any release date on the order.

Clause 131 — Explanation of parole order

The board must provide the offender with a written notice of the board's parole order.

The notice must explain the offender's obligations under parole and the consequences of breaching those obligations. The offender must be told the date of their release and when their parole order ends.

Clause 132 — Notice of decisions on parole applications

If the board has made a decision to grant parole or refuse parole the board must notify the offender, the chief executive, the Director of Public Prosecutions and the Chief Police Officer of its decision.

Relevant victims must also be notified of the decision. If the offender is granted parole, the board must tell the victims of the offender's release date and the offender's obligations under the parole order. The board can tell victims where the offender will be living while on parole.

Clause 132(5) ensures that information to victims who are under 15 years old is provided via parents or other people responsible for parenting. 132(6) provides a definition from the *Children and Young People Act 1999* and a definition of 'relevant victims'.

Part 7.3 — Release under parole order

Clause 133 — Application of part 7.3

Part 7.3 applies to offenders granted parole.

Clause 134 — Release authorised by parole order

Clause 134(1) provides for the release of an offender from imprisonment if parole has been granted.

If the offender is in custody as a consequence of another offence, the parole order is displaced by clause 134(2).

Clause 134(3) and (4) requires an offender granted parole to be released at any time on the release date.

Clause 134(5) enables prison authorities to release an offender granted parole earlier if the release date is not a day when releases are normally made.

Clause 135 — Parole obligations

Clause 135 sets out an offender's obligations while released on parole.

Clause 136 — Parole order — core conditions

Clause 136 sets out an offender's statutory conditions while released on parole. The offender must abide by the law, both inside and outside the Territory. Committing an offence punishable by imprisonment is a breach of parole conditions.

It is a condition that any charge against the offender must be reported to corrections officers.

The offender must report any changes to their home or work address, and corresponding phone numbers.

The offender must comply with any direction by corrections officer. It is implicit that the exercise of a corrections officer's powers must be lawful.

Any agreement the offender makes to voluntarily attend a proceeding of the Sentence Administration Board as a consequence of an alleged breach of parole is also itself a condition of parole.

Clause 136(1)(f) authorises the Executive to make regulations prescribing further conditions of parole.

Clause 136(2) provides a definition for contact details.

Clause 137 — Parole — chief executive directions

Clause 137 provides an explicit power for the chief executive to give directions to offenders subject to parole.

Clause 138 — Parole — effect of custody during order

Clause 138 clarifies that custody while an alleged breach of parole is being addressed should be counted towards the sentence of imprisonment associated with the parole.

Clause 138(3) stipulates that if an offender is taken into lawful custody after a parole order is cancelled, the custody should not be counted towards the sentence of imprisonment associated with the parole.

Likewise, if a person on parole is taken into lawful custody for a reason other than an alleged breach of parole, the time in custody is not counted towards the sentence of imprisonment associated with parole. Despite the fact that a parolee charged with further offences may be subject to a breach of parole, the government's intention is that custody, or remand, for further offences should not be counted towards the completion of the sentence of imprisonment associated with the parole.

Clause 139 — Parole — sentence not discharged unless parole completed

The ACT has held a policy of no 'clean street time' for parole. This Bill maintains that policy and clause 139 would give effect to no clean street time while on parole. In essence, if a parolee breaches parole the parolee must serve a period of imprisonment equivalent to the period from the day of release to the end of the sentence of imprisonment. This is the case whether the parolee breaches parole on the first day of parole, or the last day of parole.

Clause 139(2) clarifies that if the parole ends without cancellation only then is the remainder of the sentence of imprisonment discharged.

If parole is cancelled after the end of parole but the cancellation applies to a time during the parole order, the effect of cancellation still applies. In this circumstance the parolee would be obliged to serve the remainder of the sentence of imprisonment.

Example: Nathan is eligible for parole during the last six months of a sentence of imprisonment which finishes on 1 July 2005. Nathan is granted parole and released on 5 January 2005. On 29 May 2005 the Sentence Administration Board determines that Nathan has breached his parole order and cancels the order with effect from that day. Nathan is liable to serve the remainder of his sentence of imprisonment being

the equivalent to the period he would have served if not granted parole, namely 5 January 2005 to 1 July 2005.

Clause 140 — Parole — end of order

A parole order ends at the end of an offender's sentence or the day any cancellation of the order takes effect.

Part 7.4 — Supervising parole

Division 7.4.1 — Preliminary

Clause 141 — Application of part 7.4

Part 7.4 applies to parolees.

Division 7.4.2 — Breach of parole obligations

Clause 142 — Corrections officers to report breach of parole obligations

Clause 142 stipulates that corrections officers must report any breach of an offender's core conditions of parole to the Sentence Administration Board. Corrections officers are also empowered to report any other breach to the board.

Clause 143 — Arrest without warrant — breach of parole obligations

Clause 143 provides police with an explicit authority to arrest a parolee, without warrant, on reasonable grounds that the person has breached their parole obligations.

Following arrest, clause 143(3) requires the police officer to bring the person before the board or a magistrate if the board is not sitting. If the person is taken before a court the person may apply for bail under the *Bail Act 1992*.

Clause 144 — Arrest warrant — breach of parole obligations

Clause 144 authorises the issue of a warrant to arrest a person suspected of breaching their parole obligations, or it is suspected that the person will breach their obligations.

The warrant must contain the details in clause 144(2).

Following arrest, clause 144(3) requires the police officer to bring the person before the board or a magistrate if the board is not sitting. If the person is taken before a court the person may apply for bail under the *Bail Act 1992*.

Clause 145 — Board inquiry — breach of parole obligations

Clause 145 provides the Sentence Administration Board with a flexible power to determine if an offender has breached their parole obligations.

Clause 145(2) clarifies that the board can inquire into a breach before the parole begins or in conjunction with another inquiry under chapter 7.

By clause 145(3) the board can inquire on its own initiative or upon application by the chief executive. This enables the board to address any obvious breaches in the course of another inquiry.

Clause 145(4) is an imperative to ensure that allegations of breaches are addressed quickly if a person is arrested.

Clause 146 — Notice of inquiry — breach of parole obligations

Clause 146 obliges the Sentence Administration Board to issue a notice of a breach inquiry.

The notice must include the reasons for conducting the inquiry. Consistent with the new method of conducting inquiries, the notice must invite the offender accused of breaching their obligations to make a written submission to the board.

The offender, the chief executive and the Director of Public Prosecutions must be notified of the breach inquiry.

Chapter 8, below, provides for board proceedings and inquiries. This clause corresponds to the inquiry procedure set out in chapter 8.

Clause 147 — Board powers — breach of parole obligations

If the Sentence Administration Board has completed an inquiry into a breach and determined the breach occurred, clause 147 provides the board with a number of options to address the breach.

Clause 147(2) empowers the board to:

- take no action;
- warn the offender to comply;
- direct the chief executive to supervise the offender in a particular way;
- impose additional or amended conditions; or
- cancel the offenders parol order.

If the offender's parole is cancelled, the offender must be re-committed to prison for a period equivalent to the whole period the person was eligible for parole.

Clause 147(3) stipulates that any additional condition imposed by the board must be consistent with the core conditions at clause 134 (above).

Clause 147(4) ensures that the board's powers can be exercised in conjunction with any other power triggered as a consequence of another inquiry under chapter 7.

Clause 148 — Automatic cancellation of parole order for ACT offence

A parolee's parole is automatically cancelled if the parolee is convicted of an offence punishable by imprisonment.

Under these circumstances parole is automatically cancelled on the day of conviction.

Clause 149 — Cancellation of parole order on conviction outside ACT

Clause 149 authorises the board to cancel parole if the board establishes the fact that a parolee has been convicted of an offence outside the jurisdiction of the ACT and that offence would have punishable by imprisonment if committed in the ACT.

Clause 150 — Cancellation of parole order for offence by former parolee

Clause 150 stipulates that a parole order can still be cancelled automatically even though the order has finished. The order would be cancelled, and the effect of the cancellation would apply, if the parolee was convicted of an offence punishable by imprisonment. The offence in question would have to have been committed during the parole order for this clause to apply.

Under these circumstances parole is automatically cancelled on the day of conviction. As a consequence the offender must be re-committed to prison for a period equivalent to the whole period the person was eligible for parole.

Clause 151 — Exercise of board's functions after parole ended

Clause 151 authorises the board's powers to be exercised retrospectively in relation to the end date of a parole order.

Division 7.4.3 — Management of parole

Clause 152 — Board's inquiry — Management of parole

Clause 152 enables the board to review parole. The review can occur if there are any changes in circumstances that may affect the offender's parole that is not intentional conduct to breach parole.

Clause 152(3) enables the board to conduct a review before the parole begins and in conjunction with any other review.

Clause 152(4) lists who can initiate a review.

Clause 153 — Notice of inquiry — management of parole

Clause 153 obliges the Sentence Administration Board to issue a notice of a review of an offender's parole.

The notice must include the reasons for conducting the inquiry. Consistent with the new method of conducting inquiries, the notice must invite the offender to make a written submission to the board.

The offender, the chief executive and the Director of Public Prosecutions must be notified of the review.

Chapter 8, below, provides for board proceedings and inquiries. This clause corresponds to the inquiry procedure set out in chapter 8.

Clause 154 — Parole order — commencement deferred before parole release date

Clause 154 applies if the board has made a parole order and subsequently the board decided to review that order.

Clause 154 authorises the board to defer the parole order until the board has decided the review. While the order is suspended the offender must remain in full-time

detention and any time in custody is counted towards the completion of the sentence of imprisonment.

The offender, the chief executive and the Director of Public Prosecutions must be notified of the review.

Clause 155 — Board's powers — management of parole

Having reviewed an offender's parole, clause 155 empowers the board to take no action, change the way the offender is supervised, change the offenders obligations or cancel the parole order.

Any additional conditions must be consistent with the core conditions at clause 134 above.

Clause 155(3) examines the decisions the board can take in relation to cancellation. In (a) if the board agrees with the offender's case for cancelling parole, it may do so. In (b) the board may consider the that the person is no longer suitable for parole and decide to cancel the parole.

Clause 155(4) ensures that the board may exercise this power in conjunction with any other power as a consequence of another inquiry under the chapter.

Part 7.5 — Change or cancellation of parole

Clause 156 — Notice of board decisions about parole

If the board makes a decision about a breach of parole or a review of a parole order, clause 156 requires the board to give an offender, the chief executive and the Director of Public Prosecutions notice about its decision, the reasons for the decision and the date of effect of its decision

Clause 157 — When changes to parole obligations take effect

Clause 157 stipulates that a board decision to change an offender's obligations must be in a notice and state when it is to take effect. The date of effect is either the date of the notice or a later date set in the notice.

Clause 158 — When board cancellation of parole order takes effect

If the board has decided to cancel a parole order the board must give the offender a notice that tells the offender when the decision takes effect, and where and when the offender must report for imprisonment.

Clause 159 — Parole order — effect of cancellation

If an offender's parole is cancelled, clause 159 requires the offender to serve the remaining period of imprisonment the offender would have served if not for parole.

Clause 160 — Cancellation of parole — recommittal to full-time detention

If an offender's parole is cancelled, clause 160 requires the board or the court to place the offender in the custody of the chief executive to serve the remaining period of imprisonment.

Example: Nathan is eligible for parole during the last six months of a sentence of imprisonment which finishes on 1 July 2005. Nathan is granted parole and released on 5 January 2005. On 29 May 2005 the Sentence Administration Board determines that Nathan has breached his parole order and cancels the order with effect from that day. Nathan is liable to serve the remainder of his sentence of imprisonment being the equivalent to the period he would have served if not granted parole, namely 5 January 2005 to 1 July 2005.

Clause 160(3) enables the board to issue a warrant of re-committal, while (4) and (5) provides for the execution of the warrant.

Part 7.6 — Interstate transfer of parole orders

Part 7.6 re-makes the *Parole Orders (Transfer) Act 1983.* Given the part does not depart from existing law, the effect of the chapter will be described in outline rather than clause by clause.

The clauses provide for a scheme to transfer parole orders between corresponding jurisdictions. Respective Ministers may request transfers between jurisdictions.

The provisions allow for jurisdictions, including the ACT to declare corresponding law. Each corresponding Minister or authority is able to consider applications for transfer and either permit or reject the application.

Parole orders transferred to the ACT are registered in the ACT and are supervised as if the order was made under ACT law.

Chapter 8 — Sentence administration board

Part 8.1 — Establishment, functions and constitution

Clause 170 — Establishment of the board

This clause authorises and declares the establishment of the Sentence Administration Board.

Clause 171 — Functions of the board

The government has decided to articulate two clear areas of work for the board: its supervisory functions and its advisory functions. The supervisory functions are the board's responsibilities in relation to periodic detention, parole and release on licence. These functions are drafted in the provisions of this Bill.

The advisory functions allow the government to seek advice from the board on individual offenders, classes of offenders and the management of sentences imposed upon children and young people. This latter function enables the government to utilise the resource of the board to supervise sentences imposed upon young people.

Clause 171(c) enables other functions to be assigned to the board.

Clause 172 — Members of the board

Clause 172 clarifies that anyone appointed in accord with clause 173 forms the membership of the board.

Clause 173 — Appointment of board members

Clause 173 authorises and requires the Minister to appoint a chairperson, at least one and up to two deputy chairs, and up to eight members.

Clause 173(2) requires the Minister to appoint judicially qualified people to the positions of chairperson or deputy chairperson. 'Judicially qualified' is defined in 173(8) as being a judge, retired judge, magistrate, retired magistrate, or a person qualified to be appointed as a resident judge.

Clause 173(3) provides an interpretive aid to the classes of board members by distinguishing between 'judicial members' being the chairperson and deputy chairs and 'non-judicial members' being the other members.

Clauses 173(4) and (5) ensures that an ACT judge or magistrate nominated for appointment does not have to seek a separate permission to take up a position on the board from the Executive or the Attorney General.

Clause 173(6) and (7) clarifies that an appointment of a judge or magistrate does not affect the person's office or the exercise of their powers as a judge or magistrate.

Clause 174 — Conditions of appointment of board members

Clause 174 authorises the Minister to settle conditions of appointment between the nominated member and the Minister. This agreement is subject to the *Remuneration Tribunal Act 1995.*

Clause 175 — Term of appointment of board member

A board member may be appointed for up to three years. The instrument of appointment must state the class of membership the appointee holds.

Clause 176 — Disclosure of interests by board members

Clause 176 requires board members to disclose any material interest they have in a matter before the board. The disclosure must be recorded in the minutes. If a disclosure has been made by a member, the member must not be present at the deliberations of the issue or take part in the decision.

Clause 176(4) provides a set of inter-connected definitions that inform the definition of material interest. The term material interest must be read in conjunction with the other definitions.

Clause 177 — Ending board member appointments

Clause 177 provides the Minister with a power to end a board appointment if the member: misbehaves, becomes bankrupt or personally insolvent, is convicted of an offence within or without the ACT, or if the board member breaches their requirement to disclose interests.

Clause 177(2) requires the Minister to end a board appointment if the member: has a medical condition that substantially affects the member's capacity; is absent without leave for three consecutive meetings; being a judicial member is no longer judicially qualified.

Clause 178 — Protection from liability for board member and secretary

Clause 178 provides board members and the board's secretary with protection from civil liability. This provision will not provide protection for any intentional, purported exercise of power that is known to be unlawful and will likely cause harm to someone.

Clause 178(3) stipulates that any liability arising from a civil action for the exercise of the board's powers and the secretary's powers would lie with the ACT.

Part 8.2 — Divisions of the board

Clause 179 — Meaning of the board's supervisory functions

The board's supervisory functions are its responsibilities in relation to periodic detention, parole and release on licence.

Clause 180 — Exercise of the board's supervisory functions

Clause 180 requires a division of the board to exercise the board's supervisory functions rather than the whole board itself. When exercising a supervisory function a division of the board has all of the powers of the board.

Clause 181 — Constitution of the divisions of the board

Clause 181 requires the chairperson of the board to form divisions of the board to carry out the board's supervisory functions. The chairperson must ensure there are enough divisions to do the work of the board.

Clause 181(2) stipulates that a division cannot be comprised of more than one judicial member and two non-judicial members.

Clause 181(3) ensures that the chairperson can constitute divisions in flexible ways. If needs be, any division may exercise any supervisory function of the board. The chairperson has the flexibility to assign members to a particular case or a particular class of cases. Members can also sit on more than one division.

Part 8.3 — Proceedings of the board

Clause 182 — Time and place of board meetings

The board has the power to decide when and where it holds its meetings. The chairperson has the authority to call meetings at any time, but in doing so must give members reasonable notice of the meeting.

The board also has the power to adjourn proceedings. It should be noted that this is not an absolute power, as the board must make certain decisions within timeframes specified by this Bill. For example, the board has 60 days to make a parole decision after the first day of a hearing on a parole matter.

Clause 183 — Presiding member at board meetings

The chairperson or a deputy chair, both offices being filled by judicial members, may preside at board meetings.

Clause 184 — Quorum at board meetings

A quorum is one judicial member and two non-judicial members.

Clause 185 — Voting at board meetings

Each member has one vote on each decision made by a board meeting.

Each decision is decided by a simple majority of the votes. If the members are evenly split, the presiding member has the casting vote. For example, in a division of three members a vote of two to one would resolve the question. Conversely, if the board was meeting as a whole and had eight members in attendance, a vote of four against four would require the chairperson's casting vote to resolve the question. The chairperson's casting vote is in addition to the chairperson's ordinary, deliberative vote.

Clause 186 — Conduct at board meetings

The board may conduct its proceedings as it sees fit. However, the board must follow the procedure for inquiries set out in chapter 9.

Clause 186(3) and (4) authorises members to participate in board meetings by using audio communication. This enables divisions of the board, and the board as a whole, to do its work without having to be in each other's presence. This also enables the participation of a third member of a division by phone, if another member expected to participate cannot participate at short notice.

Clause 186(5) enables the board to make decisions out of session by arranging for members to agree, or disagree, with written motions circulated to members.

Clause 186(6) obliges the board to keep minutes.

Clause 187 — Authentication of board documents

Clause 187 provides for the authentication of board documents. A member present or secretary may authenticate a document.

Clause 188 — Evidentiary certificate about board documents

Clause 188 directs that any certificate provided by the board recording a board decision is admissible in legal proceedings as evidence of the matter.

Clause 189 — Proof of certain board-related matters not required

Clause 189 stipulates that in legal proceedings any issue raised about the validity of the board's constitution, decisions, recommendations, appointments, quorums etc the onus is upon the person raising the issue to provide evidence of any alleged invalidity.

Clause 190 — Board secretary

Clause 190 stipulates that the board's secretary is the public servant delegated, or assigned, by the chief executive to be the board's secretary.

Clause 191 — Confidentiality of board documents

Clause 191 provides the board with the authority not to release documents or parts of documents.

In clause 191(2) the board has an obligation not to give a victim's contact details to an offender.

In clause 191(3) the board has an obligation not to pass a document or part of a document to any person, if a judicial member believes there is a risk that it would affect the security or good order of a corrections centre, jeopardise an investigation, endanger the person in question or any other person, or otherwise not be in the public interest.

(It should be noted that this clause does not displace clause 135 of the Crimes (Sentencing) Bill 2005 which creates an explicit authority for the exchange of information between criminal justice agencies, including the Attorney General's department in its role of supervising criminal justice agencies. The authority in clause 135 of the Crimes (Sentencing) Bill 2005 is limited to the agencies' responsibilities in relation to an offence.)

Chapter 9 — Inquiries by sentence administration board

Chapter 9 modernises the decision making process to be used by the Sentence Administration Board. The government's intent is to ensure the board has a common method for all of the board's supervisory functions.

Chapter 9 clarifies the relationship between an inquiry and a hearing. In this case a hearing occurs in the context of an inquiry. Chapter 9 requires the board to gather documents, reports and any other written evidence together first. In most cases offenders will be required, or invited, to provide written submissions if the board initiates an inquiry. If the board cannot make a decision on the written material, it may proceed to a hearing.

The government's intent is to ensure hearings are focused and economical. Implementing a method of examining written material before considering a hearing, will provide the board with an opportunity to identify any issues that may need exploration by a hearing.

Part 9.1 — Inquiries — general

Clause 192 — Meaning of inquiry

Clause 192 ensures that the term inquiry is used in a generic manner in relation to any supervisory function of the board.

Clause 193 — Application of Criminal Code, chapter 7

Clause 193 stipulates that chapter 7 of the *Criminal Code 2002* applies to board inquiries, as these are legal proceedings.

Clause 194 — Board inquiries and hearings

Clause 194 sets out the general requirement for inquiries and the relationship between inquiries and hearings.

Clause 194(2) obliges the board to hold inquiries for its supervisory functions, while (3) provides the board with the discretion to hold inquiries for the board's other functions.

Clause 194(4) enables the board to hold hearings as part of an inquiry, but clarifies that the board is not obliged to hold a hearing for each inquiry.

Specific provisions in chapter 5 (periodic detention), chapter 7 (parole) and chapter 13 (release on licence) set out the necessary thresholds that need to be reached before initiating a hearing. For example, in relation to parole clause 124 provides the board with two options if it has conducted an inquiry into parole without a hearing. If the evidence warrants a parole order, the board may make an order. If the evidence does not justify a parole order the board must set a hearing time and issue notices for the hearing.

Clause 194(5) directs the board to complete inquiries without unnecessarily holding a hearing. If the board believes that a hearing is necessary to ensure that natural justice is satisfied, the board should conduct a hearing.

In effect the clause emphasises the element of natural justice that requires judicial or administrative entities acting judicially, to hear both sides of the case. An opportunity to make a written submission, or consider written submissions made, may be sufficient to consider the arguments and evidence for both sides of the case. If the written submissions are not sufficient, and the board holds the view that issues require further exploration or arguments need to be tested, then a hearing would be appropriate.

Clause 194(6) provides the Executive with authority to make regulations that stipulate when a hearing must, or must not, be held.

Clause 194(8) provides the board with the authority to exercise these powers in conjunction with other powers provided with its other supervisory functions.

Clause 194(9) directs the board to part 9.2 of the Bill dealing with hearings.

Clause 195 — Conduct of inquiry

Clause 195 specifies that the board is not bound by the rules of evidence. In this sense the board may behave in an inquisitorial way, but the board is still bound by natural justice.

Clause 195(2) requires the board to focus upon the substance of its task rather than the form, and to ensure that decisions are made in timely fashion.

Clause 195(3) stipulates the default position that board proceedings are not open to the public. The board may make a decision otherwise.

Clause 195(4) states that people not entitled to be at board meetings may only attend with the board's agreement.

Clause 195(5) clarifies that officers necessary to assist the board and the management of prisoners are authorised to be present during board meetings.

Clause 195(6) ensures that board decisions are upheld in substance rather than defeated in form.

Clause 196 — Submissions for inquiry

Clause 196 enables offenders who are the subject of an inquiry, to provide submissions to the board. It is envisaged that these submissions will mainly be in writing. However, some offenders will not be able to read or write. In these cases the offender may provide a recording to the board for their consideration in an inquiry. Obviously, if the board proceeds to a hearing, the offenders would have the opportunity to speak for their case.

This clause also enables the chief executive to provide submissions to the board about any inquiries held to carry out the board's supervisory functions.

Clause 197 — Board may require official reports

Clause 197 provides the board with a power to obtain reports about an offender from any of the entities listed. The Executive may prescribe other public servants in regulations who would be obliged to provide reports.

Clause 198 — Board may require information and documents

Clause 198 empowers the board to obtain copies of documents in the possession of people that are relevant to the board's inquiry. If the Minister certifies that producing the document for the board's deliberations may endanger someone or is against the public interest, the obligation is belayed.

Clause 199 — Expenses — production of documents etc

Clause 199 enables the board to determine and pay the expenses of witnesses before the board and others who provide documents. It is implicit that this does not apply to ACT Government departments and other agencies of the Executive.

This entitlement does not apply to offenders or any witness who are imprisoned or on remand.

Clause 200 — Possession of inquiry documents etc

Clause 200 authorises the board to hold documents as long as necessary to complete its inquiry.

Clause 201 — Record of inquiry

This clause requires the board to keep written records of inquiries.

Part 9.2 — Hearings for inquiry

Clause 202 — Application of part 9.2

Part 9.2 applies to inquiries in relation to the board's supervisory functions.

Clause 203 — Notice of hearing

Clause 203 requires the board to notify relevant parties of a hearing.

Clause 204 — Appearance by offender at board hearing

Clause 204 empowers the board to summons an offender to appear at a hearing to give evidence, or require the offender to provide a document or other information relevant to the inquiry.

Compliance with the direction to give a document occurs when the offender provides the document to the board in time.

Clause 204(3) enables an offender's appearance at a hearing to be secured by voluntary agreement.

Clause 205 — Arrest of offender for board hearing

Clause 205 empowers a judicial member of the board to issue a warrant for an offender's arrest if the offender fails to appear before the board.

Following arrest, the police may bring the person before the board or a magistrate if the board is not sitting. If the person is taken before a court the person may apply for bail under the *Bail Act 1992*.

Clause 206 — Appearance at board hearing by audiovisual or audio link

Currently, ACT offenders sentenced to imprisonment serve their sentences in NSW. This creates a logistical and financial challenge for the Territory and the board when the board requires the offender to appear at a hearing.

Clause 206 allows the use of audiovisual or audio links for an offender's participation in a hearing. In this way, there is no need to transport an offender from NSW as the offender's participation can be facilitated by an audiovisual link.

Clause 206(2) ensures that anyone who is entitled or directed to appear before the board, may do so and participate accordingly.

Clause 207 — Evidence at board hearings etc

Clause 207 obliges witnesses or offenders before the board to take an oath, answer relevant questions and produce relevant documents.

Clause 207(4) provides the judicial member at an inquiry with the authority to disallow questions put to witnesses or offenders.

Clause 208 — Offender's rights at board hearings

Clause 208 sets out an offender's rights during a hearing.

The offender has a right to be represented by a lawyer, or other advocate approved by the board.

The offender may make submissions to the board about the issues relevant to the board's hearing.

The offender may produce documents, produce exhibits and give evidence to the board.

The offender may also present other evidence to the board or address the board on relevant matters.

Clause 209 — Custody of offender during hearing adjournment

The board may remand a person in custody during adjournments of a hearing. However, this form of remand is strictly limited to no longer than two days at a time, and only twice during one hearing.

It is envisaged that any adjournment longer than the time contemplated by this clause should rely on other bodies of law to establish whether the person is in custody or not. For example, if the offender is a prisoner they should return to prison during the adjournment. If the offender was arrested, then the offender should be taken before a magistrate and the *Bail Act 1992* applied.

Clause 210 — Record of board hearings

Clause 210(1) obliges the board to keep an audio or audiovisual record of a hearing.

Clause 210(2) enables parties to a hearing, as listed in 210(3), to request a copy of the record, or a copy of a transcript. If a transcript isn't available, 210(2) enables the board secretary to authorise the party to purchase transcription services to transcribe the record or part of the record. It should be noted that at present the Territory cannot afford the cost of transcribing all hearings as a matter of course.

Clause 211 — Protection of witnesses

Clause 211 provides lawyers and witnesses with the same protections as if they were before the Supreme Court.

Chapter 10 — Victim and offender information

Clause 212 — Definitions for chapter 10

Clause 212 provides definitions for terms used in chapter 10.

Clause 213 — Meaning of victim

Clause 213 provides a definition for victim. A victim is a person who suffers harm because of the conduct of the offence committed by the offender. If the victim dies as a consequence of the offence, the people who are closest to the victim are also victims.

Clause 214 — Victims register

Throughout this Bill there are references to registered victims. In the main these references are about obtaining victims' views during relevant deliberations about an offender's release or informing registered victims about the release of offenders or other relevant matters.

Clause 214 obliges the chief executive responsible for administering the foreshadowed Act to establish a victims register.

If a victim, or an advocate on the victim's behalf, requests to be registered on the register, the chief executive must register that person.

Once registered the victim must be told about the role of the Sentence Administration Board, the rights the victim has to information about offenders and the rights the victim has to information about an offender's parole.

Clause 215 — Disclosures to registered victims about sentenced offenders

Clause 215 provides explicit authority for the chief executive to disclose information about sentenced offenders to victims of the offender in question. The chief executive must be satisfied that the disclosure is appropriate.

Examples of disclosures are provided to remove any doubt.

Clause 215(2) ensures that parents of victims who are under 15 years-old are privy to the information that can be disclosed.

Chapter 11 — Transfer of prisoners

Part 11.1 — Interstate transfer of prisoners

Part 11.1 remakes the existing *Prisoners (Interstate Transfer) Act 1993* as a part of this chapter. Given the provisions do not depart from existing law, the effect of the part will be described in outline rather than clause by clause.

Part 11.1 provides for the transfer of prisoners between the ACT and other Australian jurisdictions. The provisions correspond to the laws of other Australian jurisdictions to enable the transfer of prisoners.

Division 11.1.2 of the chapter enables a prisoner to request a transfer to, or from, the ACT in the interests of the prisoner's welfare. The chapter confers powers to issue an order for a transfer on the Minister responsible for the proposed Act.

Division 11.1.3 of the chapter provides for the transfer of prisoners to, or from, the ACT for the purpose of standing trial.

Division 11.1.4 of the chapter states that where an interstate prisoner is transferred to the ACT for a trial, and the period of sentence the offender becomes liable to serve in the ACT is shorter than the prisoner is to serve in the other jurisdiction, the Minister may return the prisoner to the other jurisdiction from where the prisoner was transferred.

Division 11.1.5 of the chapter provides for the effect of an interstate transfer on a prisoner's sentence.

Part 11.2 — International transfer of prisoners

Part 11.1 remakes the existing *Prisoners (International Transfer) Act 1999* as a part of this chapter. Given the provisions do not depart from existing law, the effect of the part will be described in outline rather than clause by clause.

Part 11.2 compliments the *International Transfer of Prisoners Act 1997* (Cth) which provides for a scheme of prisoner transfers between Australia and other countries.

The Commonwealth Act enables Australians imprisoned in foreign countries to be able to return to Australia to serve their sentences. It also enables foreigners imprisoned in Australia to return to their home countries to complete serving their sentences. The Commonwealth Act covers the transfer to Australia of prisoners convicted by tribunals dealing with war crimes in the former Yugoslavia or Rwanda.

Part 11.2 will enable the scheme to operate in the ACT. A person with community ties with the ACT, who is imprisoned in a foreign country, will be able to seek a transfer to the ACT. A foreigner undergoing a Territory sentence will be eligible to seek a transfer to their home country. In either case, the scheme requires the consent of the Territory's Minister before a transfer can occur.

Chapter 12 — Transfer of community-based sentences

Chapter 12 remakes the existing *Community Based Sentences (Transfer) Act 2002* as a chapter of this Bill. Given the chapter does not depart from existing law, the effect of the chapter will be described in outline rather than clause by clause.

The *Community Based Sentences (Transfer) Act 2002* and chapter 12 establishes a scheme for the formal transfer and enforcement of community based sentences between Australian jurisdictions. This chapter, akin to the original Act, is based upon model legislation for all Australian jurisdictions.

Under the scheme, offenders with community based sentences in the ACT are able to transfer the supervision and administration of the sentence to a new jurisdiction on a voluntary basis, provided the requirements of the chapter are satisfied. The offender is managed in the new jurisdiction as if a court of the new jurisdiction imposed the sentence. For the purposes of appeal or review the originating jurisdiction retains responsibility.

The sentences currently available in the ACT that may be transferred under the scheme are:

- periodic detention orders;
- good behaviour orders; and
- community service orders or (good behaviour orders with community service conditions).

Parole orders, fines or reparation orders and bail orders are not contemplated in chapter 12, akin to the *Community Based Sentences (Transfer) Act 2002* .

The chapter provides for the appointment of a designated authority for the local jurisdiction, who processes requests for transfer into and out of the local jurisdiction. Details of the transferred orders are recorded and maintained on a register. The local authority makes decisions on the basis of information sent by the interstate equivalent of the local authority (the interstate authority) regarding the offender and the sentence, provided specific criteria are satisfied.

The criteria that the local authority applies when deciding whether to accept a request for transfer are as follows:

- the offender consents to the order and has not withdrawn consent;
- there is a sentence in the local jurisdiction that substantially corresponds to the sentence imposed in the interstate jurisdiction;
- the offender can comply with the sentence in the local jurisdiction; and
- the sentence can be safely, efficiently and effectively administered in the local jurisdiction.

The local authority is able to refuse a request for transfer if the criteria are not met, or otherwise at the local authority's discretion. This is particularly relevant in cases where the local authority becomes aware of a person's concern for their safety, if the offender were to reside in the local jurisdiction.

The authority's discretion may also be exercised in the instance that the offender poses an unacceptable administrative burden to the local jurisdiction, because the offender has a history of not complying with directions issued by a supervising officer.

If the local authority decides to accept a request for transfer, the offender is supervised and administered by the local authority as though the sentence was made in the local jurisdiction. This includes administering breaches of the sentence. Therefore, if the offender does not comply with the conditions of their order, the local forum for determining a breach and consequences of a breach, will apply. The local forum may however refer to the penalty range and type that would have been applicable in the original jurisdiction, so as to ensure that the transfer does not serve to avoid the sentencing intentions of the original jurisdiction.

Conversely, if the offender seeks an appeal or amendment of the conviction or sentence, the appeal is made to the original jurisdiction and not to the jurisdiction supervising and administering the transferred sentence. In the case that the appeal or request for amendment is successful, the amended sentence is administered and supervised in the jurisdiction supervising and administering the transferred sentence as though the appeal or amendment was made by a court of the local jurisdiction.

Chapter 13 — Release on licence, remissions and pardons

Chapter 13 re-makes remedies available to Executive Government that have their origins in the royal prerogative of mercy. The prerogative, being an incident of the common law can be abrogated or conditioned by statutory law.

Chapter 13 provides for: a scheme of release on licence for prisoners sentenced to life imprisonment; a power for the Executive to remit partly or completely certain punishments; and a power for the Executive to grant a written pardon to a person found guilty of an offence.

Part 13.1 — Release on licence

Part 13.1 sets out the release on licence scheme. The scheme enables the Attorney General to seek a recommendation from the Sentence Administration Board about an offender's application for release on licence. The Sentence Administration Board must conduct an inquiry and seek the views of any victims.

Once it establishes its recommendation, the board must provide the recommendation to the Executive along with any recommended conditions. The Executive must consider the board's recommendations, but has the discretion to grant or refuse to grant a licence.

If an offender is granted a licence and they breach any condition of the licence, the board may cancel the licence and re-commit the offender to full-time detention.

Division 13.1.1 — Release on licence — general

This division stipulates that release on licence is only available to offenders serving a life sentence of imprisonment and the offender has served at least 10 years of the sentence. In the ACT a life sentence is imprisonment until natural death.

Division 13.1.2 — Grant of licence

This division enables the Attorney General to seek a recommendation from the Sentence Administration Board as to whether it would be appropriate to release a person serving a life sentence from being imprisoned. It should be noted that the scheme does not authorise a pardon, quashing or setting aside of a sentence of life imprisonment, it simply authorises the person's conditional release from imprisonment.

The board must conduct an inquiry if the Attorney seeks a recommendation. The board must notify the offender in question, seek a submission from the offender and provide any documents the board may use during deliberations to the offender.

Any documents are subject to clause 191 (above) where the board has an obligation not to pass a document or part of a document to any person, if a judicial member believes there is a risk that it would affect the security or good order of a corrections centre, jeopardise an investigation, endanger the person in question or any other person, or otherwise not be in the public interest.

The chief executive and the Director of Public Prosecutions must be notified of the inquiry and be provided with relevant documents.

The board must seek the views of relevant victims. Victims can make written submissions on the matter. As provided in chapter 8, if the board decided to hold a hearing the board may also ask a victim to be a witness in proceedings.

The board has an obligation to have regard to the public interest when deliberating on a recommendation. The board must also consider all of the matters set out in clause 292(2). The board has the discretion to consider any other matter it believes is relevant.

Once it has completed its inquiry, the board must provide its recommendation to the Executive. If the board recommends release on licence the board may also include any conditions on the licence of release. The board can make other recommendations, such as recommending a certain period of time pass before an application for release on licence is considered again.

The Executive must then consider the board's recommendation and anything else the Executive regards as relevant. The Executive has the discretion to grant, or refuse to grant, a licence and to impose any conditions upon the licence.

If the Executive grants a release on licence, the Executive must notify the offender, the Director of Public Prosecutions, the Chief Police Officer and the board of its decision. The Executive must also issue a licence to the offender.

If the offender is released on licence, the board must take reasonable steps to tell victims about the decision, the offender's release date and the obligations upon the offender.

The board must also explain to the offender the obligations imposed upon the offender to hold the licence and the consequences of breaching these obligations.

Division 13.1.3 — Operation of licence

If an offender is granted release on licence, the offender must be released from detention on the release date mentioned in the licence.

The offender is obliged to comply with the conditions of the licence and any provisions of the Bill that would apply to the offender. Once released from detention, the offender is still obliged to follow directions made by the chief executive.

As noted earlier, release on licence does not overturn or set aside a sentence of life imprisonment, it simply authorises the person's conditional release from detention. The legal status of the offender is that they are continuing to serve their life sentence albeit they are not in prison. In *Haley v Commissioner of Corrective Services* 1975 1 NSWLR 118, the court found that a sentence continues to run while released on licence, and the licence only commutes the incidents of the sentence (detention) but not the sentence itself.

Division 13.1.4 — Supervision of licensees

Police will have an explicit authority to arrest a licensee, without warrant or with a warrant, on grounds that the person has breached their licence.

Following arrest, police are required to bring the person before the board or a magistrate if the board is not sitting. If the person is taken before a court the person may apply for bail under the *Bail Act 1992.*

The board has the power to inquire into an existing release licence at any time. The board can conduct an inquiry to determine if the release is still appropriate or if the offender has allegedly breached their obligations.

If the board reviews a release licence, the board has the power to: do nothing; to give the chief executive a direction about supervising the offender; to change the offenders obligations; or cancel the licence.

If the offender is convicted of an offence in the ACT or any other Australian jurisdiction, the offenders licence is cancelled.

Any cancellation of a release licence requires the offender to be placed in custody and serve the remainder of their life imprisonment by way of full-time detention.

Part 13.2 — Remissions and pardons

Part 13.2 re-makes the existing provisions in the *Crimes Act 1900* that enable the Executive to grant a remission of a sentence of imprisonment, a fine or other penalty and a forfeiture of property.

Part 13.2 also re-makes the existing provision in the *Crimes Act 1900* that empowers the Executive to grant pardons. A pardon discharges a person from the consequences of a conviction or finding of guilt but does not quash the conviction or finding of guilt. The record of conviction or finding of guilt would remain.

Chapter 14 — Community service work — general

Clause 314 — Definitions for chapter 14

Clause 314 provides some definitions for use in the Act and chapter 14. By the definition in clause 314 and the meaning set out in clause 315, a regulation can be made to prescribe community service work.

An ‘offender’ in chapter 14 is a person who does community service work under a sentence. The term ‘person involved’ is used to encompass anyone, or any entity, that is a third party providing the opportunity for community service work.

Clause 315 — Meaning of community service work

By the definition in clause 314 and the meaning set out in clause 315, a regulation can be made to prescribe community service work.

Clause 316 — Protection from liability for person involved in community service work

Clause 316 provides third parties involved in community service with protection from civil liability for an offender’s actions during community service. Nor is a third party involved in community service liable to the offender in relation to the community service work.

Clause 316(3) stipulates that any liability arising from a civil action by an offender, or a person affected by the offender's actions during community service, lies with the ACT.

Clause 316(4) clarifies that if the work was not approved or the conduct of the third party was intended to injure, then the protection does not apply.

Clause 317 — Community service work not to displace employees

Clause 317 ensures that community service work is not abused as a means to substitute regular paid employment for free labour. The chief executive must not allow the progress of community service work if the chief executive believes the offender would be taking the place of a regular employee.

Clause 318 — No employment contract for community service work

In *Pullen v Prison Commissioners* [1957] 3 All ER 470, Lord Goddard, Chief Justice of the Queen's Bench Court of the United Kingdom, determined that a prison workshop was not a factory for the purposes of the *Factories Act 1937.* The *Factories Act 1937* was an antecedent to modern workers compensation legislation.

Lord Goddard, stated that the *Factories Act 1937* was designed to place obligations upon employers of labour in factories and other places of people working under contract and not to prisoners employed on labour as part of penal discipline.

The Chief Justice noted that the relationship was not an employment relationship. Prisoners were obliged to work as a consequence of their sentence. A prison was also not a workplace for people imprisoned there. The general line of this case was followed and applied to other forms of sentence in: *Hall v Whatmore* [1961] VR 225; *Morgan v Attorney-General* [1965] NZLR 134; *Zappia v Department of Correctional Services* (SA) (1993) WCATR 30; *Palmer v The Salvation Army*, NSW Compensation Court, No. 6224/95, (unreported) 22 February 1996; *Helmers v Dept of Corrective Services* (1997) 14 NSWCCR 256; and *Calin v Dept of Corrective Services* (1997) 14 NSWCCR 559.

Clause 318 explicitly stipulates that work under a sentence, including community service, is not a contract of employment or an employment relationship in any form.

Clause 319 — Community service work — occupational health and safety

Given that work under a sentence is not an employment relationship, the Government is aware that offenders engaged in community service work would not attract the protections of health and safety afforded to employees.

To ensure offenders engaged in community service work are able to work safely, the clause 319 requires the chief executive to make sure that a work place complies with the *Occupational Health and Safety Act 1989.*

Clause 319 does not directly apply the *Occupational Health and Safety Act 1989* to a community service workplace. However, clause 317(3) provides the Executive with a power to apply relevant parts of the *Occupational Health and Safety Act 1989* to community service.

Chapter 15 — Miscellaneous

Clause 320 — Chief executive directions

Clause 320 provides the chief executive with a general power to give directions to any person in the custody of the chief executive.

Clause 321 — Criminology or penology research

Clause 321 enables research entities to apply to the chief executive to conduct quantitative or qualitative research. The chief executive may apply conditions upon granting permission to the entity. It is an offence for the entity to breach any conditions.

Clause 322 — Determination of fees

Clause 322 enables the Minister to set any fees for the foreshadowed Act by a disallowable instrument.

Clause 323 — Approved forms

Clause 323 enables the Minister to make forms for the purposes of the foreshadowed Act.

Clause 324 — Regulation-making power

Clause 324 provides the Executive with a general power to make regulations. The power includes authority to prescribe penalties up to 30 penalty units.

Chapter 16 — Transitional

Chapter 16 provides for the transition between existing law and the foreshadowed Act. The chapter also sets out the rules for determining which law applies at any given time.

Part 16.1 — Preliminary

Clause 325 — Purpose of chapter 16

Clause 325 explains that the chapter's purpose is to provide how the foreshadowed Act would apply to any sentence or order that was made before the Act commenced.

Clause 325(2) clarifies that the foreshadowed Act would not affect judicial proceedings determining an offence.

Clause 326 — Application of Act to offenders and other people in custody

Clause 326 establishes that the foreshadowed Act would apply to all sentences and remand in existence at the time the Act commences, irrespective of when the sentence or remand was determined.

Clause 327 — Definitions for chapter 16

Clause 327 sets out definitions specifically for chapter 16.

Part 16.2 — Transitional — detention

Part 16.2 provides the transitional arrangements for dispositions involving detention. The Bill contemplates inter-relationship with the foreshadowed *Corrections Management Act.*

For full-time detainees, being both remandees and sentenced offenders, any disposition imposing imprisonment or remand before the commencement of the Act, is subject to the Act.

To facilitate the phasing out of home detention, clause 331 provides that any existing home detention orders before the commencement of the Act remain in force after commencement. The clause stipulates that the relevant provisions existing before the new Act commences remain in force after the new Act commences. Any offenders on these orders after commencement will be regarded as full-time detainees for the purpose of parole. Clause 331 lists the relevant provisions covering home detention in a definition.

Existing home detention orders will be regarded as a community-based sentence.

Offenders under periodic detention orders before the Act commences are subject to the Act after commencement. Clause 333(2) provides a means of translating existing orders for periodic detention to the new method used under the new Act. Any proceedings to supervise periodic detention that started before the Act continue under the old law after the new Act commences.

Following commencement, conditional release under the *Periodic Detention Act 1995* will be regarded as the same as a conditional release of convicted offenders order under the *Crimes Act 1900.* As a result the provisions in clause 336, part 16.3 below will apply.

Part 16.3 — Transitional — non-detention

Part 16.3 provides for other dispositions that don't involve detention.

Existing orders of conditional release without conviction made under section 402 of the *Crimes Act 1900* will be regarded as non-conviction orders under this Bill, when the Bill commences as an Act. Any conditions made under the order still apply and the statutory conditions under the new Act will also apply. Any proceedings to supervise these orders that started before the Act continue under the old law after the new Act commences.

Existing orders of conditional release with conviction made under section 403(1)(a) of the *Crimes Act 1900* will be regarded as good behaviour orders under this Bill, when the Bill commences as an Act. Any conditions made under the order still apply and the statutory conditions under the new Act will also apply. Any proceedings to supervise these orders that started before the Act continue under the old law after the new Act commences.

Existing conditional release with conviction orders made in conjunction with a suspended sentence under section 403(1)(b) of the *Crimes Act 1900* will be regarded

as suspended sentence orders combined with good behaviour orders under this Bill, when the Bill commences as an Act. Any conditions made under the orders still apply and the statutory conditions under the new Act will also apply. Any proceedings to supervise these orders that started before the Act continue under the old law after the new Act commences.

Community service orders made under the *Crimes Act 1900* will be regarded as good behaviour orders under this Bill with a community service condition when the Bill commences as an Act. Any conditions made under the order still apply and the statutory conditions under the new Act will also apply. Any proceedings to supervise these orders that started before the Act continue under the old law after the new Act commences.

Part 16.4 — Transitional — unfinished requests for transfer of prisoners and sentences

Part 16.4 ensures any transfer requests for interstate prisoner transfers or transfer of community-based sentences that started before the commencement of the Act can be finished under the terms of the new Act.

Part 16.5 — Transitional — parole orders

Part 16.5 applies to parole.

Parole orders in place before the new Act commences are taken to be parole orders under chapter 7 of the new Act after commencement. While the existing conditions will continue to apply, the new statutory conditions will not apply.

Any parole proceedings started before the new Act commences will continue using existing law. However, if proceedings are continued on or after commencement day the new, statutory, core conditions will apply along with existing conditions.

Any proceedings for an interstate transfer of parole orders started before the commencement of the Act can be completed under the provisions of the new Act.

Part 16.6 — Transitional — general

Any sentence administration proceedings started before the new Act commences may apply the law existing before commencement.

Sentence administration proceedings started on or after the new Act commences must apply the new Act.

The Executive may make regulations to address any transitional issues not contemplated by the Bill. The regulations may modify the transitional provisions of the commenced Act.

The transitional provisions include a sunset clause that expires the chapter after five years.

Dictionary

The Bill includes a dictionary which draws upon the dictionary of the *Legislation Act 2001* and provides definitions for this Bill.