

2002

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

COMMUNITY BASED SENTENCES (TRANSFER) BILL 2002

EXPLANATORY MEMORANDUM

Circulated by the authority
Ted Quinlan MLA

Outline

The Community Based Sentences (Transfer) Bill 2002 introduces new legislation that establishes a scheme for the formal transfer and enforcement of community based sentences between Australian jurisdictions. The ACT has drafted the Bill as model legislation for implementation in all Australian jurisdictions, following a short trial between itself and NSW. The trial will commence following implementation of the model legislation in NSW.

Under the scheme, offenders with community based sentences, that is, non-custodial sentences, in the ACT will be able to transfer the supervision and administration of the sentence to a new jurisdiction on a voluntary basis, provided the requirements of the legislation are satisfied. The offender will then be managed in the new jurisdiction as if a court of the new jurisdiction had imposed the sentence, except for purposes of appeal or review, which remains the responsibility of the originating jurisdiction.

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

- community service orders;
- home detention orders;
- periodic detention orders; and
- recognizances.

Parole orders, fines or reparation orders and bail orders are excluded from the scope of the legislation.

The Bill provides for the appointment of a designated authority for the local jurisdiction, who will process requests for transfer into and out of the local jurisdiction. Details of the transferred orders will be recorded and maintained on a register. The local authority will make 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 will apply when deciding whether to accept a request for transfer are as follows:

- the offender has consented to the order and has not withdrawn that consent;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 will be able to refuse a request for transfer if the criteria are not met, or otherwise at the local authority's discretion. This will be particularly relevant in the case that the local authority becomes aware of concerns expressed by an individual for his or her 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 will be supervised and administered by the local authority as though the sentence had been made in the local jurisdiction. This includes for purposes of administering breach of the sentence. Therefore, if the offender does not comply with the conditions of their order, they will be re-sentenced by a court of the local jurisdiction according to the laws of the local jurisdiction. The court 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.

If however the offender seeks an appeal or amendment of the conviction or the sentence relating to the conviction, the appeal will be 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 will be administered and supervised in the jurisdiction supervising and administering the transferred sentence as though the appeal or amendment had been made by a court of the local jurisdiction.

CLAUSE NOTES

Part 1 - Preliminary

Clauses 1 and 2 – Name of Act and Commencement

These are machinery provisions that specify the name of the legislation and provide for its commencement. The name of the legislation is inclusive of community based sentences as described in the legislation and practice of all Australian States and Territories.

Clause 3 – Purpose of the Act

Outlines the purpose of the legislation, which is to provide for the formal transfer and enforcement of community based sentences between jurisdictions.

Clause 4 – Application of Act

Describes the sentences that will be transferable under the legislation.

The legislation will only apply to sentences imposed in relation to adults. This is because many jurisdictions including the ACT have separate legislative, administrative and judicial regimes for adults and juveniles, and providing for a single piece of legislation to cover both distinct regimes would be administratively inefficient.

The legislation will *not* apply to certain types of sentence that may be served in the community and that could be considered to be alternatives to imprisonment. These are:

- parole orders. The formal transfer of parole orders between jurisdictions is currently provided for under the ACT *Parole Orders (Transfer) Act 1983* and corresponding interstate legislation;
- sentences or components of sentences that impose a fine or other financial penalty. Inclusion of sentences or components of sentences of this kind is likely to render enforcement mechanisms overly complex and could result in loss of revenue to the original jurisdiction. The exclusion of these types of sentences will not prevent the transfer of the remaining components of the sentence, provided all other requirements of the legislation are satisfied. In this case, the fine or other financial penalty will remain payable to the original jurisdiction; and
- sentences or components of sentences that impose the making of reparation. The obligation to make the reparation will be to an individual (for instance a victim or crime) or other entity, such that the obligation cannot be fulfilled if the offender transfers that component of the order to another jurisdiction. The exclusion of sentences that impose the making of reparation or a fine or other financial penalty will not prevent the transfer of the remaining components of the sentence, provided all other requirements of the legislation are satisfied. In this case, the offender will be required to make the reparation before the transfer of the remainder of the sentence will be considered.

Clause 5 – Dictionary

The dictionary at the end of the Act is part of the Act.

Clause 6 – Notes

Notes in the Act are explanatory and not part of the Act.

Part 2 – Key Concepts for the Act

Clause 7 – What is a *community based sentence*

Specifies the sentences that the ACT will allow to be transferred to and from the ACT. Community based sentences are those sentences that are served within the community, are imposed an alternative to imprisonment and that can be supervised and administered in the local jurisdiction.

The orders that are specified as community based sentences for purposes of transfer from and to the ACT are:

- community service orders. Community service orders require the offender to perform unpaid work and to report to a corrections officer, are served within the community and are imposed by a court as an alternative to imprisonment;
- home detention orders. Home detention orders involve the offender living within the community and being subject to monitoring while complying with the particular conditions of the order, and are imposed by a court as an alternative to imprisonment. Some Australian jurisdictions also offer home detention orders as remand or parole options, that is, not as alternatives to imprisonment but as supervision options pre-sentence and following a period of imprisonment. If those jurisdictions legislate for the inclusion of such types of home detention orders under their corresponding legislation, the matter of determining whether offenders with varying types of community based orders may transfer to the ACT will be a matter for the local registrar;
- recognisances. Recognisances are orders for conditional release imposed as alternatives to imprisonment that require the offender to be of good behaviour and abide by the conditions of the sentence, with or without supervision on probation, whilst in the community;
- periodic detention orders. Periodic detention orders require the offender to live within the community and abide by certain conditions for the time that they are not actively fulfilling the requirements of their order;
- sentences declared under the regulations to be a community based sentence. This provision allows for the future inclusion of relevant sentences as community based sentences as and when they become available.

Clause 8 and 9 – Jurisdictions and Participating Jurisdictions and Local and Interstate Sentences

These are definitional clauses to assist with interpretation of the legislation.

Clause 10 – What is a *corresponding law*

Establishes the connection between this legislation and the legislation of other jurisdictions, to form a transfer scheme applicable between all jurisdictions that enact legislation based on this model Bill.

A law will be corresponding between jurisdictions if it is stated to be corresponding in the regulations to the Act, or if the laws substantially correspond. A law will substantially correspond if it corresponds in nature – determined on the basis of the mode of enforcement, requirements and conditions – regardless of whether it prima facie corresponds.

Clause 11 – Local Authority and Interstate Authorities

Provides for local and interstate authorities that will administer this legislation. The local authority will be the designated authority for the ACT appointed under Clause 12. Each other participating jurisdiction will have a designated authority as the authority for that jurisdiction.

Having one authority for each jurisdiction will ensure that there is a single communication point in each jurisdiction, establishing clear communication procedures and practices.

Part 3 – Administration

Clause 12 – Appointment of Local Authority

Establishes that the local authority will be a public servant appointed by the chief executive.

Clause 13 – Delegation by Local Authority

Recognises that it may be practical for the local authority's functions to be delegated to another public servant.

Clause 14 – Local Register

Establishes the way in which transferred orders will be recorded. Sentences transferred to the ACT will be recorded in a local register.

This clause also provides power for the local authority to correct any error that appears on the local register. For example, correction may be necessary as a result of a successful appeal or amendment to the sentence in the original jurisdiction.

Part 4 – Registration of Interstate Sentences in this Jurisdiction

Clause 15 – Request for Transfer of Interstate Sentence

Establishes the administrative process of registration. Requests for registration should be sent between authorities in the local and interstate jurisdiction. The local authority may only register a request for transfer that comes from the relevant interstate authority. This process will ensure that communication regarding offenders is clear and effective.

Clause 16 – Form of Request for Registration

Prescribes the form in which the interstate jurisdiction must present a request for registration of a community based sentence in the local jurisdiction if it is to be considered by the local authority. The required form is in writing, and inclusive of the

offender's name, date of birth, last known address and any other relevant personal details.

The request must also contain:

- a copy of the interstate sentence certified by the interstate authority;
- a copy of the offender's informed consent for the registration of the sentence in the local jurisdiction;
- a copy of the relevant pre-sentence report about the offender if held by the interstate authority;
- a copy of any relevant psychological or other assessment of the offender that may be held by the interstate authority;
- details of the offender's criminal history and the offender's history of compliance with sentences for which the offender is under a current obligation;
- a statement by the interstate authority confirming the part of the community based sentence that has been fulfilled prior to the request being made;
- a statement by the interstate authority that the offender has been told, in language that the offender is likely to understand, the implications of transferring the sentence. The statement must confirm that the offender has been informed that they will be required to abide by the laws of the new jurisdiction, including with regards to any penalties and other consequences that may arise on re-sentencing for breach of the transferred sentence;
- any other document that the local authority either requires or requests under Clause 17. This might include documentation detailing concerns expressed by victims of the offender's crimes regarding their safety, the details of protection or domestic violence orders imposed against the offender, or any other documentation that would assist the local authority to decide whether it can accept the request for transfer.

Clause 17 – Request for Additional Information

Empowers the local jurisdiction to request additional information that may be held by the interstate jurisdiction concerning the offender or the sentence.

Clause 18 – Withdrawal of the offender's consent

An offender may withdraw their consent to the transfer at any time before the registration of the order by communicating their lack of consent in writing to the local authority, following verbal communication with the authority or assistance from the offender's corrections officer in the local jurisdiction if necessary. Upon receiving written notice from the offender, the local authority will inform the interstate authority of the offender's withdrawal of consent, whereupon the interstate authority will resume formal supervisory responsibility for the offender. It is appropriate that the offender communicate initially with the local authority, because the local authority will have commenced arrangements for impending supervision of the offender following the initial request for transfer. It would be administratively impractical to allow consent to the transfer to be withdrawn after registration of the transfer.

Clause 19 – Registration Criteria

Requires the local authority to apply registration criteria when determining whether to accept the transfer of a community based sentence. The criteria to be applied are that:

- the offender has consented to the transfer and has not withdrawn that consent. This will be evidenced by the statement by the interstate authority indicating the offender's informed consent to the transfer required under Clause 17;
- there is a corresponding community based sentence in the local jurisdiction;
- the offender can comply with the sentence in the local jurisdiction. The local authority may need to consider issues such as whether programs available will be sufficient and appropriate, and whether the person will have adequate support. The local authority may also relate to availability of accommodation and/or community service work placements within the local jurisdiction at the time of request for transfer; and that
- the sentence can be safely, efficiently and effectively administered in the local jurisdiction. Factors relevant to this consideration might include:
 - the amount of the sentence that is yet to be completed. If there is a short period of supervision remaining, it may be administratively inefficient to provide for the transfer; and
 - the effect of the transfer of the sentence upon individuals other than the offender, for example it may be considered unsafe to allow an offender to relocate to an area in which a victim of their crimes reside.

The registration criteria must be satisfied before the local authority will accept a request for transfer. However, the local authority may act with discretion and decline to register the sentence even if all registration criteria are met.

Clause 20 – Decision on Request

Clause 20 specifies the decision that the local authority may make upon receiving a request for transfer. The local authority may decide to:

- register the sentence;
- require the offender to meet certain preconditions before registering the sentence; or
- decline to register the sentence. If the local authority decides not to register the sentence, the local authority must write to the offender and the interstate authority and advise them of this decision. There is no need for the local authority to give reasons for its decision.

Sentences may be transferred between jurisdictions whether or not the jurisdiction making the request is the jurisdiction in which the sentence originated, and whether or not the sentence has previously been registered in the local jurisdiction. This is to accommodate offenders who may move between jurisdictions more than once, and allows offenders to return to jurisdictions.

The local authority may make their decision on the basis of the information and documentation sent and otherwise available to them without regard to the offender.

Clause 21 Preconditions for Registration

Clarifies the process if the local authority imposes preconditions to registration under Clause 20. Imposing preconditions provides a means for the local authority to confirm the offender's ability and willingness to comply with the sentence in the local jurisdiction, before formal registration and transfer occurs. This may be considered necessary where the offender's exact residence is unconfirmed at the time of the request, or where the authority is in doubt concerning the offender's willingness to comply with directions. In the ACT, preconditions that the local authority may impose are:

- that the offender satisfy the local authority that the offender is living in this jurisdiction; and/or
- reporting to a corrections officer in the local jurisdiction in accordance with directions issued by the corrections officer.

If the local authority decides to impose preconditions or amend preconditions already imposed, the local authority must write to the offender and the interstate authority advising of the preconditions.

Clause 22 – How Interstate Sentence Registered

Establishes the action that may be taken dependent on the decision reached by the authority under Clause 20.

The local authority must register the sentence by entering the details required in the regulations in the local register.

Clause 23 – Notice of Registration

Establishes that if the local authority decides to register the sentence, the local authority must write to the offender and the interstate authority advising of the registration, and stating the date upon which the sentence was registered.

Clause 24 – Effect of Registration Generally

Outlines the effect of registration of a community based sentence in the local jurisdiction, with reference to the administration of the sentence and how a breach of the sentence should be dealt with. The effects are:

- that the sentence is in force in the local jurisdiction and ceases to be in force in the interstate or any other jurisdiction;
- that the sentence is taken to have been validly imposed by a relevant court of the local jurisdiction. The sentence is thereby treated in the same way as any other sentence imposed by a court of the local jurisdiction;
- that the sentence continues to apply to the offender on its terms despite anything to the contrary in the local jurisdiction. This is to ensure that the sentencing intentions of the court of the interstate jurisdiction are fulfilled, and that the offender cannot seek to avoid the obligations under the sentence by transferring to a new jurisdiction under this legislation;
- that in the case that the sentencing jurisdiction is different from the local jurisdiction, the offence for which the sentence was imposed is taken to be an offence against the laws of the local jurisdiction, and not an offence against the law of the original jurisdiction. However, in this case the penalty for the offence

is taken to be a penalty imposed under the law of the originating jurisdiction, and not under the law of the local jurisdiction. Therefore, a court in the local jurisdiction will treat the breach as a breach of a sentence imposed in the local jurisdiction, but will look to the penalty that can be imposed in the original jurisdiction for the relevant offence to determine an appropriate breach penalty. Treating breaches in this way avoids the need for offence or penalty matching between jurisdictions, which would be administratively inefficient and ineffective to establish and maintain. If the matter again comes before the local court for breach or any other matter, both the sentence and the penalty will be viewed as imposed under the law of the local jurisdiction;

- that any part of the sentence served in the interstate jurisdiction before registration is taken to be served in this jurisdiction; and
- that the offender may be dealt with in this jurisdiction for a breach of the sentence, whether the breach happened before, or after, the registration. If breach action is in progress in the interstate jurisdiction at the time a request for transfer is made, it is unlikely that the local authority would accept the request. This is because the local authority cannot be sure of the nature of the sentence that it would be agreeing to formally supervise and administer. However, the case may arise in which a breach that occurred prior to registration is not discovered until after registration. If this situation occurs, the local jurisdiction would consider the matter of breach of the registered sentence as appropriate.

Registration does not affect an offender's right to seek an appeal or review of the conviction or finding of guilt or the imposition of a sentence in the original jurisdiction. As a matter of practicality, any appeal or review of a conviction or sentence must be dealt with in the original jurisdiction rather than the local jurisdiction. If the appeal or review is successful and results in amendment of the sentence, the amended sentence has effect in the local jurisdiction as though it had been imposed on appeal or review in the local jurisdiction. It would be contrary to natural justice to prevent an offender from seeking an appeal or review of their conviction or sentence by virtue of registration to a jurisdiction other than the original jurisdiction.

Part 5 – Registration of Local Sentences in Interstate Jurisdictions

Part 5 establishes the role and duty of the local authority under the legislation that correspond to the matters stated in Part 4 of this legislation.

Clause 25 – Request for Transfer of Local Sentences

Clause 25 establishes that the local authority may request the interstate authority to register a community based sentence in the interstate jurisdiction.

Clause 26 – Response to Request for Additional Information

Clause 26 establishes that the local authority may send the interstate authority information about a sentence or an offender that is requested by the interstate authority under corresponding interstate legislation.

Clause 27 – Effect of Interstate Registration

Clause 27 states that registration of a sentence from the local jurisdiction in the interstate jurisdiction has a number of effects, namely:

- that the sentence ceases to be a community based sentence in force in the local jurisdiction and becomes a community based sentence in force in the interstate jurisdiction;
- that the offender may be dealt with in the interstate jurisdiction for breaches of the sentence, whether these occurred before or after the registration; and
- that the sentence ceases to be registered on the local register.

If the local jurisdiction was also the original jurisdiction, this clause does not limit the offender's right to seek an appeal or review of the sentence or the conviction or finding of guilt upon which the sentence were based.

This clause does not prevent the re-registration of a sentence previously registered as a sentence of the local jurisdiction under this legislation.

Part 6 – Miscellaneous

Clause 28 – Inaccurate Information about Local Sentence Registered Interstate

Clause 28 states that in the case of the local authority becoming aware of inaccurate information regarding a sentence of the local jurisdiction registered in another jurisdiction under corresponding legislation, the local authority must inform the interstate authority of how the information held in the interstate register needs to be changed to be accurate. The register may have become inaccurate because the offender may have fulfilled additional components of the sentence registered in the interstate jurisdiction between the request for transfer and registration of the transfer, or because the offender has been successful in seeking a review or appeal of their sentence.

Clause 29 – Dispute about Accuracy of Information in Interstate Register

Clause 29 states the action that must be taken by the local and interstate authority if there is a dispute over the accuracy of the information held about a sentence of the local jurisdiction that has been registered in the register of the interstate jurisdiction.

The offender may make a claim in writing to the interstate authority, stating how the information held in a register concerning the offender and/or the sentence is inaccurate. The offender will communicate initially with the interstate authority as the interstate authority represents the jurisdiction administering and supervising the sentence. The interstate authority may send the local authority a copy of the claim, and a copy of the interstate register listing the information that pertains to the claimed inaccuracy.

If the interstate authority sends the local authority the specified information, the local authority must check whether the offender's claims and the information sent are accurate. The local authority must then advise the interstate authority either that the information held on the interstate register is accurate, or the way in which the interstate authority must alter the interstate register for it to become accurate.

Claimed inaccuracies may relate to incorrectly entered sentence details, address details, or any information that is contained on the register held by the interstate jurisdiction.

Clause 30 – Evidence of Registration and Registered Particulars

Clause 30 establishes that a certificate signed by the local or interstate authority stating a matter in or that can be ascertained from the local or interstate register is evidence of the particular matter, including if it refers to a date or period of time. The certificate will be evidence of the registration and other details that appear on the register (the registered particulars) whenever required in a court.

The regulations to this legislation may prescribe any other documents that a court must also admit into evidence.

Clause 31 – Regulation-making power

Clause 31 establishes that the chief executive may make regulations necessary for this legislation. The regulations may relate to any matter under the legislation.

Dictionary

The dictionary, provided for in Clause 5, provides definitions of words and expressions used in the legislation that are not otherwise defined in the *Legislation Act 2001*. Definitions provided for in the Dictionary should be referred to whenever words or expressions appear throughout the legislation.