2014

LEGISLATIVE ASSEMBLY FOR THE

AUSTRALIAN CAPITAL TERRITORY

CORRECTIONS AND SENTENCING LEGISLATION AMENDMENT BILL 2014

EXPLANATORY STATEMENT

Presented by
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Corrections and Sentencing Legislation Amendment Bill 2014

Introduction

This explanatory statement relates to the Corrections and Sentencing Legislation Amendment Bill 2014 (the Bill) as presented to the Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not to be taken as authoritative to the meaning of a provision, this being a task for the courts.

Outline

Purpose of the Bill

The Bill makes a number of changes to corrections and sentencing law and for related purposes. The Bill will provide clarity and confer necessary powers, all of which will result in a fairer and more transparent criminal justice system.

In summary, the Bill will do the following.

- Require people who are serving a sentence of imprisonment and parolees to obtain approval from the Director-General before applying to change their name. These amendments in part give effect to the 2011 Standing Council on Law and Justice resolution on best practice approach to name changes. This will provide for greater identity security. An appeal mechanism is also available for offenders whose application for approval to apply for a change of name is refused by the Director-General.
- Give a court power to order a person in charge of a correctional facility to bring a detainee before the court for a civil proceeding. This amendment will authorise the Director-General for the *Corrections Management Act 2007* to bring the person before the court. This amendment does not create a new basis on which to compel a detainee's attendance at court for a civil matter.
- Provide that for any period when an offender is detained under the *Mental Health (Treatment and Care) Act 1994*, the offender is deemed to satisfy a relevant

obligation. This amendment seeks to remedy an anomaly identified in the inter-operation of the *Crimes (Sentence Administration) Act 2005* and the Mental Health (Treatment and Care) Act. This amendment will deem those detained in a mental health facility or community care facility under a mental health order to have performed their corrections obligations.

- Clarify that a person is not excluded from being appointed a member of the Sentence Administration Board merely because they are 70 years old or older. This amendment will remove doubt about who is a judicially qualified person for the purposes of appointment as a judicial member of the SAB.

Human Rights Considerations

The Bill engages a number of the rights in the *Human Rights Act 2004*.

The Bill engages, and places limitations on, the following rights:

- the right to privacy and reputation (section 12 of the Human Rights Act); and
- the right to freedom of expression (section 16 of the Human Rights Act).

A detailed discussion of human rights engagement in relation to particular amendments is in the detail section of this explanatory statement.

Climate Change Impact Assessment

There are no climate change impacts flowing from the amendments in this Bill.

Consultation

This Bill contains amendments of a technical nature. The Office of Regulatory Services, ACT Corrective Services, the SAB, the Director of Public Prosecutions, the ACT Human Rights Commission and the Solicitor-General were consulted in the drafting of the amendments.

Corrections and Sentencing Legislation Amendment Bill 2014

Detail

Part 1 – Preliminary

Clause 1 — Name of Act

This is a technical clause that names the short title of the Act. The name of the Act would be the Corrections and Sentencing Legislation Amendment Act 2014 (the Bill).

Clause 2— Commencement

This clause commences the Act on the day after it is notified on the ACT Legislation Register.

Clause 3— Legislation amended

This clause identifies the legislation amended by the Act.

Part 2 - Births, Deaths and Marriages Registration Act 1997

Clause 4 – New division 3.1 heading

This clause inserts a new division 3.1 heading into the *Births, Deaths and Marriages Registration Act 1997*. The purpose of this division is to support the integrity of identities in the ACT and provide a scheme that allows restricted people to apply for approval to make a change of name application.

Clause 5 – New division 3.2

This clause inserts a new division 3.2 into the Births, Deaths and Marriages Registration Act.

New section 22A - Definitions – div 3.2

This new section provides definitions for new division 3.2.

A ***restricted person*** is a person who is serving a sentence of imprisonment (by full-time detention or periodic detention or release on licence) or is subject to a parole order or corresponding parole law.

The ***relevant Director-General*** means (for a person serving a sentence of imprisonment) the Director-General of the administrative unit responsible for the *Corrections Management Act* 2007 or (for a person the subject of a parole order or corresponding parole law) the Director-General of the administrative unit responsible for the Crimes (Sentence Administration) Act.

A ***change of name application*** means an application under the Births, Deaths and Marriages Registration Act or a law of another jurisdiction corresponding to the Births, Deaths and Marriages Registration Act, for registration of a change of the restricted person's name.

New section 22B – Application for approval for restricted person to make change of name application

This new section provides that a restricted person may apply to the relevant Director-General for approval to make a change of name application.

New section 22C – Decision on s22B application

This new section provides that the relevant Director-General must approve or refuse the application within 30 days after receiving it. The Director-General must not approve an application in certain specified circumstances. These are discussed below under the human rights discussion.

New section 22D – Notice of decision

This new section provides that the relevant Director-General must give written notice of the decision to approve or refuse the application to the applicant and the Registrar-General.

New section 22E – Offences – restriction on change of name application by restricted person etc

This new section makes it an offence for a restricted person to apply to change their name (in the ACT or another Australian jurisdiction with corresponding change of name laws) before first obtaining the approval of the relevant Director-General. The maximum penalty for the offence is 5 penalty units.

New section 22F – Registrar-General must not register change of name without relevant Director-General's approval

This new section provides that the Registrar-General must not register a change of name by a restricted person if they know that a change of name application is made by or on behalf of the restricted person and they haven't received notice of approval from the relevant Director-General.

New section 22G – Registrar-General may correct register

This new section provides that the Registrar-General may correct the register if the name of a restricted person was changed because of an application made by or on behalf of a restricted person without the Director-General's approval.

New section 22H – Information-sharing

This new section provides that the relevant Director-General must notify the Registrar-General of a restricted person's details, including their name, date of birth and address.

The new section also provides that the registrar-general must notify the relevant Director-General where a change of name application is made by or on behalf of a restricted person and the Registrar-General hasn't received notice of approval from the relevant Director-General.

Both the relevant Director-General and Registrar-General may give each other information necessary for the exercise of their functions under the division.

New section 22 I– Protection of security sensitive information

This new section provides that where the relevant Director-General refuses to approve a change of name application on the basis of security sensitive information they do not need to give reasons for the decision to the extent that it would disclose that information.

The definition of security sensitive information provided by this clause is designed to: ensure the safety and security of people; allow law enforcement to carry out criminal investigations; and support the supervision of a restricted person.

New section 22J – ACAT review – security sensitive information

This new section provides where the relevant Director-General refuses to approve a change of name application on the basis of security sensitive information and the applicant seeks a review of that decision the relevant Director-General must apply to the ACT Civil and Administrative Tribunal (the ACAT) for a decision about whether the information is security sensitive information.

If the ACAT decides the information is security sensitive information they must ensure the information is not disclosed and receive evidence and submissions in private in the absence of the public, the applicant for review, the applicant's representative and any other interested party.

The clause provides that the security sensitive information provisions also apply to an appeal to or review by a court.

Clause 6 – Section 54

This clause provides that a decision maker means the Registrar-General or a relevant Director-General. The clause provides that where a decision maker makes a reviewable decision they must give notice to the applicant and any other person whose interests are affected by the decision.

Clause 7 – Reviewable decisions, Schedule 1, new items 3A and 3B

This new section provides that a decision of the relevant Director-General to refuse approval to make a change of name application in relation to a restricted person may be reviewed by the ACAT. The clause also provides that a decision by the Registrar-General to refuse to register a change of name in relation to a restricted person may be reviewed by the ACAT.

Clause 8 – Dictionary, new definitions

This new section amends the dictionary to provide new definitions that are consistent with the provisions in new division 3.2 of the Births, Deaths and Marriages Registration Act.

Human rights discussion

The scheme created by these amendments may limit the right to freedom of expression of restricted people (at section 16 of the Human Rights Act) as they must obtain approval before applying to change their name.

The right to freedom of expression provides that: (1) everyone has the right to hold opinions without interference; and (2) everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her. Such a right may include the freedom to change one's name.

The limitation is proportionate and justified for the following reasons.

The purpose of the limitation is important. The purpose of the amendment is to improve the ability of law enforcement to prevent convicted offenders from changing their name for the purpose of evading parole supervision, obtaining new passports, facilitating the commission of offences or avoiding detection.

The limitation is restricted to people who are convicted and sentenced to imprisonment or have been sentenced to imprisonment and are released on parole or on licence. The measures exclude people who are convicted and given a less serious sentence such as a non-conviction order, good behaviour order or financial penalty.

The limitation does not necessarily prevent restricted people from changing their name. The amendment will require that they seek approval for such a change. The grounds on which the Director-General decides whether to allow the restricted person to apply to change their name are outlined in the amendment and are as follows. The change of name must be necessary or reasonable and must not be reasonably likely:

- to be a threat to prison security;
- to jeopardise a person's health or safety;
- to be used to further an unlawful activity or purpose;
- to be used to evade or hinder the supervision of the restricted person; or
- to be regarded as offensive by a victim of crime or an appreciable sector of the community.

A further safeguard is that the restricted person can appeal to the ACT Civil and Administrative Tribunal where the Director-General refuses an application for approval to apply for a change of name or where the Registrar-General refuses to register a change of name.

The scheme created by the amendments may also limit the right to privacy and reputation (at section 12 of the Human Rights Act). The section provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. This right may be limited as the Director-General must be made aware of the restricted person's intention to change their name before they can apply to do so. Additionally, the Registrar-General and Director-General may share information about the applicant necessary for the exercise of their functions under new division 3.2.

This limitation is justified and proportionate. The purpose of the amendment is to improve the ability of law enforcement to prevent a convicted offender from changing their name for the purpose of evading parole supervision, obtaining new passports, facilitating the commission of offences or avoiding detection.

There are two safeguards to ensure the privacy of a restricted person is only limited to the least degree necessary. These are outlined below.

Firstly, new section 22H provides that information may only be shared between the Registrar-General and the Director-General as necessary for the exercise of their functions under new division 3.2.

Secondly, Government agencies must comply with the Information Privacy Principles (IPPs). The IPPs, located at section 14 of the Privacy Act 1988 (Cth), set the standards for handling personal information. In particular, agencies supporting the functions of the Registrar-General and the Director-General are bound by IPP 10.1. IPP 10.1 includes the requirement that an agency must not use personal information for any purpose other than the purpose for which it obtained the information, unless the use is required or authorised by law or is reasonably necessary to enforce the criminal law or a law imposing a pecuniary penalty.

Government agencies providing information to other Government agencies are bound by IPP 11.1. IPP 11.1 requires a record-keeper, who has possession or control of a record containing personal information, not to disclose the information to another agency unless the

disclosure is required or authorised by law or is reasonably necessary for the enforcement of the criminal law or a law imposing a pecuniary penalty.

New sections 22I and 22J of the Births Deaths and Marriages Registration Act do not engage and limit any rights under the Human Rights Act (for example, the right to a fair trial – which only applies to criminal proceedings). However, it is appropriate to discuss here the fact that procedural fairness requires a person to know the case against them. These new sections will affect an applicant's access to procedural fairness as security sensitive information, which may form the basis for the relevant Director-General's refusal to allow them to change their name, may not be disclosed to them.

The new sections are justified, however, as they are necessary to ensure the safety of others and to allow law enforcement to carry out criminal investigations effectively. The decision of the Director-General that the information is security sensitive is reviewable by the ACAT and the Supreme Court, to ensure that such information will be withheld from the applicant and others only where necessary.

Part 3 – Corrections Management Act 2007

Clause 9 – New section 217A

This clause will give a court (including the ACT Civil and Administrative Tribunal) power to order the Director-General in charge of a correctional facility to bring a detainee before the court for a civil proceeding. The purpose of this amendment is to ensure that where appropriate a detainee is present at civil proceedings, for example, where the detainee is an applicant, where a domestic violence protection order or forensic procedure order is sought against the detainee or where the detainee is a witness who is the subject of a subpoena.

This amendment does not compel the detainee to attend a civil proceeding. It only gives a court power to order the Director-General to bring the detainee before the court where the detainee consents.

A court may order that the detainee be brought before the court in person or by audiovisual or audio link.

This clause does not limit any rights under the Human Rights Act.

Part 4 – Crimes (Sentence Administration) Act 2005

Clause 10 – Periodic detention – offender in custody for other reasons, Section 57A (1)

This clause provides that for any period when an offender is detained under the Mental Health (Treatment and Care) Act, the offender is deemed to carry out their obligation to perform periodic detention. The amendment applies to this sentence obligation as it requires attendance or reporting under the Crimes (Sentence Administration) Act and results in an automatic breach if reporting does not occur.

The intention is that this provision will only apply where the offender is detained under the Mental Health (Treatment and Care) Act and therefore prevented from leaving a specific place such as a health or care facility.

The clause will ensure that an offender is not at risk of being found in breach or unnecessarily brought before a court or the SAB, where the offender has failed to perform periodic detention only because they were detained under the Mental Health (Treatment and Care) Act.

This clause does not limit any rights under the Human Rights Act.

Clause 11 – Community service work – failure to report etc, Section 92 (1)

This amendment is consequential on the amendment at clause 12 which inserts new section 92(3) and (4).

Clause 12 – New section 92 (3) and (4)

This clause provides that for any period when an offender is detained under the Mental Health (Treatment and Care) Act, the offender is deemed to perform their obligation to report to do community service work. The amendment applies to this sentence obligation as it requires attendance or reporting under the Crimes (Sentence Administration) Act and results in an automatic breach if reporting does not occur.

The intention is that this provision will only apply where the offender is detained under the Mental Health (Treatment and Care) Act and therefore prevented from leaving a specific place such as a health or care facility.

The clause will ensure that an offender is not at risk of being found in breach or unnecessarily brought before a court, where the offender has failed to report to do community service work only because they were detained under the Mental Health (Treatment and Care) Act.

This clause does not limit any rights under the Human Rights Act.

Clause 13 – Definitions – pt 7.6, Section 162, definition of *parole order*

This is a technical amendment to ensure that the Crimes (Sentence Administration) Act refers consistently to a 'corresponding parole law' rather than a 'corresponding parole order'.

Clause 14 – Appointment of board members, Section 174 (8)

This clause clarifies that a person is not excluded from being appointed a member of the SAB merely because they are aged 70 years old or older.

The clause omits the current wording of section 174(8) of the Crimes (Sentence Administration) Act and provides that the only limitation on whether a person can be appointed as a member of the SAB is that the person must have been a legal practitioner for not less than 5 years. This is the only requirement under the current section 174(8) but the amendment will make this fact clearer.

This clause does not limit any rights under the Human Rights Act.

Clause 15 – Dictionary, note 2

This clause makes an amendment consequential to the amendment at clause 14 to ensure that the definition of 'legal practitioner' can be readily found in the legislation.