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

**CRIMES (RESTORATIVE JUSTICE) AMENDMENT BILL 2018**

**EXPLANATORY STATEMENT**

**Presented by  
Shane Rattenbury MLA  
Minister for Justice, Consumer Affairs and Road Safety**

## **CRIMES (RESTORATIVE JUSTICE) AMENDMENT BILL 2018**

This explanatory statement relates to the Crimes (Restorative Justice) Amendment Bill 2018 (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 intended to be, a comprehensive description of the Bill. What is written about a provision is not taken to be an authoritative guide to the meaning of a provision, this being a task for the Courts.

### **Overview**

#### **Purpose of the Bill**

The Bill will amend the *Crimes (Restorative Justice) Act 2004* (the Act) to improve access to restorative justice in the Territory. A summary of the amendments is outlined below.

#### **Summary of amendments to the *Crimes (Restorative Justice) Act 2004***

- The Bill amends the Act by reducing the assessments a referring entity will be required to undertake prior to making a referral to restorative justice. This will reduce an administrative burden for referring entities, as they will no longer be required to assess an offender or victim's capacity to participate in restorative justice prior to making a referral. Assessments of capacity to agree to participate in a restorative justice process are comprehensively undertaken by the Director-General of Restorative Justice (the Director-General) through their delegate in the Restorative Justice Unit (RJU) of the Justice and Community Safety Directorate (JACSD).
- The Act requires a referring entity to seek the agreement of an offender to a referral and provide the offender with an explanation of restorative justice prior to a referral being made. These requirements have restricted the ability of victims of crime to initiate referrals, as victim-management agencies do not have the ability to liaise directly with offenders. The Bill introduces a framework which will support post-sentence referring entities to make referrals to restorative justice on behalf of a victim of crime without the offender's involvement at the point of referral.
- Sections 22 and 27 of the Act provide for referrals to restorative justice by the Magistrates Court and Supreme Court. The Bill makes minor amendments to these sections to ensure that up-to date language is reflected in the Act and the procedural requirements of court referrals made prior to a plea are clarified. These amendments will reduce an administrative burden on the referring court by transferring their duty to provide a court referral order to the offender and victims of an offence, to the Director-General of Restorative Justice.

- The Act requires conference participants to give written consent to a conference being called and to sign any restorative justice agreement in writing. In the case of participants with physical disabilities or limitations, this requirement has the unintended consequence of limiting their ability to fully engage in a restorative justice process. This Bill will correct that situation.
- Eligibility criteria require a referring entity to be satisfied that an offender has accepted responsibility for an offence prior to the offence being referred to restorative justice. This Bill introduces a changed threshold for the taking of responsibility by young offenders charged with less serious offences. It will allow these offenders to be referred to restorative justice when they do not deny responsibility for the commission of the offence.
- The Bill amends the requirements that the Director-General of Restorative Justice must comply with when reporting to the court after a pre-plea referral is made. These amendments prioritise the safety and privacy of all participants.

The amendments introduced by the Bill will commence on 1 October 2018.

### **Human rights implications**

The Bill supports several rights under the *Human Rights Act 2004*.

#### **Right to equality before the law**

Section 8 of the *Human Rights Act 2004* provides that ‘everyone has the right to equal and effective protection against discrimination on any ground’. This Bill supports this right by introducing amendments which will allow a convenor to use flexible means to obtain consent for a restorative justice process, and allowing a required participant to indicate their consent to the terms of a restorative justice agreement through means other than by writing.

By clarifying that consent for a restorative justice process or for the terms of a restorative justice agreement may be given orally or otherwise, if a written record of the consent being given is made by a person who was with the person who gave consent when it was given, the Bill reduces barriers for people with disabilities engaging in a restorative justice process.

Clause 18 of the Bill also engages with the right to equality before the law as it may be read as engaging and limiting the right to equal protection of the law without distinction or discrimination of any kind under section 8(3) of the *Human Rights Act 2004*. In considering the principle of equality, of which equal protection from discrimination is a subset, the High Court of Australia has recognised that “discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different”.<sup>1</sup> As the expanded definition of ‘personal characteristics’ would specifically allow the Director-General to consider whether a prospective participant is capable of agreeing to participate in restorative justice, it

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<sup>1</sup> *Waters v Public Transport Corporation of Victoria* (1991) 173 CLR 349, McHugh J at 402.

may appear that such an assessment could form an indirect barrier to persons with disability (including conditions affecting decision-making capacity) being found suitable to access restorative justice.

The *Crimes (Restorative Justice) Act 2004* presently contemplates consideration of whether a person is capable of agreeing to participate in restorative justice by a referring entity before it makes a referral. Such assessments are generally based on what information is available to the referring entity and may not always fully reflect the victim, parent or offender's capability to agree to participate. Where a referring entity is uncertain whether a person is able to agree to participate in restorative justice, a risk is they may favour not referring the person – creating a greater barrier to participation.

In assessing suitability, the Director-General is under obligations to consider and act consistently with relevant rights under section 40B of the *Human Rights Act 2004* and to comply with the *Discrimination Act 1991*. Coupled with these legislative obligations, allowing the Director-General to consider a prospective participant's ability to agree to restorative justice as a part of a suitability assessment process supports the right to equal and effective protection from discrimination. Assessments of capability to agree to participate (including decision making capacity) by the Director-General will be conducted by delegated and trained assessors who understand the mechanics and subtleties of restorative conferencing. Such assessors are best positioned to determine whether an inability to understand the processes and potential outcomes of restorative justice, or a need for supported engagement, may disproportionately disadvantage a participant who has indicated they wish to access restorative justice.

Amendments to section 29 of the Act will allow the Director-General to explore which reasonable adjustments could be made to assist persons with a disability to fully participate in a restorative justice process. Unlike referring entities, the Director-General also has the ability to obtain information from the referring entity relevant to the administration of restorative justice, to ensure full consideration can be made of whether it is reasonable for a person with limited capability to agree to participate in restorative justice.

In this manner, the expanded definition of personal characteristics will allow the Director-General to consider whether people with limited capability to agree to participate in restorative justice may be able to access restorative justice, subject to reasonable adjustments or further safeguards. It therefore supports the right to equal and effective protection from discrimination by providing an additional safeguard to ensure people who might agree to restorative justice despite not being able to understand its purpose or likely outcomes are protected. This approach similarly supports the right to fair trial, by allowing assessors to confirm participants appreciate the potential outcomes of restorative justice in the context of their ongoing criminal proceedings.

#### Right to protection of the family and children

Increased access to restorative justice, resulting from referrals made for young offenders under the *doesn't deny responsibility* threshold, positively engages with the

right to protection of the family and children outlined in section 11 of the *Human Rights Act 2004*. Section 11 identifies that ‘the family is the natural and basic group unit of society and is entitled to be protected by society’ and that ‘every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind’.

Restorative justice ‘provides offenders with an opportunity to re-engage with the community through a redemptive action with the victim, public administration and people closely associated with the victim and the offender’.<sup>2</sup> Where the offender is a child or young person, engagement in restorative justice provides an opportunity for them to develop empathy and consequential thinking skills in a safe and supportive environment. Restorative justice is a process which can be tailored to meet and engage with the needs of participants while taking into account their personal characteristics such as their age and respective maturity levels.<sup>3</sup>

Restorative justice processes may be tailored to include a young person’s community of care (i.e. parents, caregivers, support workers and/or family members). Opportunities for supported participation protects the needs of the child, while enhancing their ability to engage in a restorative justice process. Where family members are included in a process as a part of the child’s community of care, this action may positively impact the development of family relationships that contribute to the child or young person’s rehabilitation and engagement in family life.

Increasing access to restorative justice will support children and young people who are victims of crime to be afforded the opportunity to engage in a criminal justice process which considers their needs and personal characteristics in a safe and supported way. The ability to include a victim of crime’s support network within a restorative justice process supports young people and their families to collectively manage the impacts associated with experiencing harm following crime. Including communities of care within a restorative justice process supports and enhances the ability of restorative justice to assist in protecting and strengthening the family, the natural and basic group unit of society.

### Right to privacy and reputation

The Bill engages with the right to privacy and reputation under section 12(a) of the *Human Rights Act 2004*. Section 12(a) provides that ‘everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily’.

The Bill protects the right to privacy of all parties to a restorative justice process through amendments to the reporting requirements under section 28 of the Act. Section 28 reports relate to referrals made by the court prior to the entry of a plea by an offender.

Removing the requirement to report to the court on whether restorative justice is suitable for individual offenders and victims protects the privacy of all participants in

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<sup>2</sup> *R v Forrest* [2016] ACTSC 321.

<sup>3</sup> *R v Wyatt* [2017] ACTSC 87.

a restorative justice process. It also reduces the risk that the assessment of individual suitability may give rise to assumptions about the willingness of victims or offenders to participate, and potential associated risks to safety or implications for the sentencing process.

Consequential amendments to section 28(5) of the Act also support the right to privacy. These amendments reduce the risk that, where a matter has been referred to restorative justice with multiple victims, personal information relating to specific victims of crime would be disclosed to other victims who were not directly involved in their restorative justice process. This amendment recognises the sensitivity of the contents of restorative justice agreements and protects participants from unreasonable disclosure of their personal information.

The *Human Rights Act 2004* protects individuals from arbitrary interferences with their privacy. In *Toonen v Australia*, the United Nations Human Rights Committee held that ‘the term arbitrary was meant to cover interferences which, under Australian law, would be covered by the concept of unreasonableness’.<sup>4</sup> The Bill introduces a framework which will allow referrals to restorative justice to be made without informing or seeking the offender’s agreement. This resolves a key concern that victim-management agencies, such as the Victims of Crime Commissioner, are unable to initiate referrals to restorative justice because they do not have reasonable or practicable ways to work with offenders. Creating a climate which enhances the ability of victims of crime to explore their needs through restorative justice will require the Director-General of Restorative Justice to be able to access documentation about the offender without their knowledge or consent to the relevant disclosures.

Section 63 of the Restorative Justice Act authorises the Director-General to ask a referring entity for information about a victim, the parent of a victim, an offender, or any other person if it is reasonably necessary for the administration of the Act. Referring entities are required to do everything reasonable to comply with such requests. This provision is consistent with the Territory Privacy Principles outlined in Schedule 1 of the *Information Privacy Act 2014*. Information required for the purpose of administration of the Act relates to the Director-General’s ability to facilitate a restorative justice conference in a carefully managed and safe environment. Accordingly, documentation which may be sought by the Director-General may include, and is not limited to, contact details of required participants, statements of facts, risk assessment reports and criminal histories. All requests for disclosure of information about a participant in a restorative justice process, made under section 63, are considered reasonable as they are authorised by current law and are necessary for the administration of the restorative justice scheme.

### Rights of children in a criminal process

Section 20 of the *Human Rights Act 2004* provides that accused or convicted children must be treated in a way that is appropriate for a person of the child’s age who has or has not been convicted of an offence. By increasing access to restorative justice for young offenders, where they do not deny responsibility for the commission of the offence, the Bill supports the rights of children in criminal proceedings. As

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<sup>4</sup> UN Doc CCPR/C/50/D/488/1992.

discussed above, the restorative justice scheme allows for tailored, age appropriate engagement with all participants and recognises the need for there to be additional safeguards (such as the inclusion of a community of care in a restorative justice process) to address specific vulnerabilities that are inherent to children and young people.

Offenders who do not deny responsibility for the commission of an offence may be referred to restorative justice at all stages of the criminal justice system. This allows for referrals for young people to be made as diversions from the criminal justice system, prior to sentencing or during the term of a sentence-related order. When engaging with accused or convicted children, the restorative justice scheme is tailored to address their personal characteristics and circumstances, including their age. As Refshauge J considered in *Forrest* (2016) and *Forrest (No 2)* (2017), engagement in restorative justice may result in rehabilitative outcomes for offenders as offenders have the opportunity to re-engage with the community through redemptive actions with the victim of crime.<sup>5</sup> Increased referrals to restorative justice, therefore, provide an opportunity for accused or convicted children to engage in a criminal justice process which takes their age into account while promoting their rehabilitation.

By introducing a framework that facilitates referrals to restorative justice without prior notification of an offender at new section 28A, this Bill increases the possibilities of an offence committed by a child or young person being referred to the restorative justice scheme by means of a victim initiated referral. Any victim initiated referral, which is made possible by the Bill, in which an offence was committed by a child or young person would engage the convicted child or young person in an age-appropriate and rehabilitative manner.

### Right to a fair trial

Section 21(1) of the *Human Rights Act 2004* provides that ‘everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing’. The Bill engages this right by removing a requirement for referring entities to perform an assessment of a required participant’s capacity to agree to participate in restorative justice, which changes the rights and obligations of offenders and victims of crime currently recognised by law.

The amendment supports this right by providing that assessments of all required participants’ capabilities to agree to participate in restorative justice are conducted by an independent assessor with expertise in restorative justice practices and the ability to work with both offenders and victims. As these assessments are comprehensively conducted by the Director-General of Restorative Justice, through delegated RJU staff, this amendment allows for the implementation of a consistent approach to assessments that can be conducted in a highly-personalised manner within a non-adversarial environment. Requiring assessors to be trained practitioners in restorative justice means that a participant’s capability to agree to participate in

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<sup>5</sup> *R v Forrest* (2016) ACTSC 321; *R v Forrest (No 2)* (2017) ACTSC 87

restorative justice will be assessed in line with the goals and purposes of the restorative justice scheme.

This amendment will not impact on an offender's ability to enter a plea of not guilty. New section 20 of the Act provides that an offender can be referred to restorative justice (either by accepting responsibility for an offence or not denying responsibility for the commission of the offence) and enter a plea of not guilty in a court proceeding. As a matter of procedure, reports to referring entities following an assessment of suitability will only address the overall suitability of the matter for restorative justice and will not provide comment on the assessment of individual participants.

### Rights in criminal proceedings

Section 22(3) of the *Human Rights Act 2004* provides that 'a child who is charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation. The discussions above regarding the *doesn't deny responsibility* eligibility threshold introduced by this Bill identifies the Bill's support for the rights of children in criminal proceedings. While the ACT's restorative justice scheme is focussed on meeting the needs of victims of crime, as outlined in section 6 of the Act, offenders – including young offenders – may benefit from participation in the scheme.<sup>6</sup>

Where a referral is made under this threshold, a young person will need to accept responsibility for the offence for the purpose of participating in restorative justice as a part of the suitability assessment process conducted by the RJU. Criteria for determining suitability are outlined in Part 7 of the Act. The changed threshold for referral, introduced by this Bill, recognises that young people may benefit from being given the opportunity to process an offence and take responsibility for their actions in a non-adversarial setting while supported by their broader community of care.

### Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

Owing to historic low levels of trust between Aboriginal and Torres Strait Islander communities and the police, there is potential for Aboriginal and Torres Strait Islander offenders to present as not accepting responsibility for the commission for an offence at the point of apprehension by law enforcement. By introducing the *doesn't deny responsibility* threshold for referral of certain offences, the Bill supports the cultural rights of Aboriginal and Torres Strait Islander people by allowing for increased access to a criminal justice program that recognises and prioritises the engagement of participants with their cultural rights. Referrals made as a diversion from the court process have the potential to reduce the high levels of incarceration of Aboriginal and Torres Strait Islander people.

JACS, where possible, employs Aboriginal and Torres Strait Islander convenors and guidance partners to support Aboriginal and Torres Strait Islander people to participate in a criminal justice process that is culturally sensitive and cognisant of

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<sup>6</sup> *R v Forrest (No 2)* (2017) ACTSC 83; *R v Wyatt* (2017) ACT 87



their rights. Aboriginal and Torres Strait Islander-led conferencing processes are built upon extensive cultural knowledge and cultural competence, and are an opportunity for members of Aboriginal and Torres Strait Islanders to develop trust in the criminal justice system.

Providing additional opportunities for access to restorative justice, as a culturally cognisant service, for Aboriginal and Torres Strait Islander young people, in particular, aligns with section 27 of the *Human Rights Act 2004* which provides that ‘anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language’. Utilised at the diversionary stage, this threshold recognises the negative impact of imprisonment for Aboriginal people and that Aboriginal and Torres Strait Islander young people require ‘tremendous care and attention, much thought and much consideration, as ‘seldom is anything solved by putting [them] in prison’.<sup>7</sup>

### **Regulatory impact analysis**

This Bill will not impose an appreciable cost on the community.

### **Climate Change Impacts**

This Bill has no identified climate change impacts.

### **Gender Impacts**

Domestic violence, family violence and sexual violence have significant impacts on the ACT community. While these offences are underreported, statistics identify significant ongoing impacts of this type of offending on women. While men and women tend to experience violence in different contexts, women are most likely to have lived experience of intimate partner violence. From the age of 15, approximately one in four women experiences at least one incident of violence by an intimate partner.<sup>8</sup> Violence against women is a widespread problem in Australia.<sup>9</sup>

By introducing a framework which will facilitate referrals being made to restorative justice without prior notification of an offender, this Bill will have a positive impact on women as they will be able to safely explore whether their needs may be met by restorative justice with a reduced risk of experiencing coercion from an offender. This Bill provides women with additional agency and choice, as victims of crime navigating the criminal justice system.

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<sup>7</sup> *R v Tjami* (2007) 77SASR 514, CCA; *Jabaltjari v Hammersley* (1977) 15 ALR 94.

<sup>8</sup> 2016 Personal Safety Survey (Australian Bureau of Statistics, 2017)

<sup>9</sup> ANROWS, “Violence against Women: Accurate use of key statistics”, (2018: ANROWS, Sydney).

## CLAUSE NOTES

### Clause 1      Name of Act

This clause provides that the name of the Act is the *Crimes (Restorative Justice) Amendment Act 2018*.

### Clause 2      Commencement

This clause provides that the Act will commence on 1 October 2018.

### Clause 3      Legislation amended

This clause identifies that the legislation amended by the Bill is the *Crimes (Restorative Justice) Act 2004*.

### Clause 4      Eligible victims

#### Section 17(1)(c) and (2)(c), except note

Section 17 of the Act sets out the criteria for a victim of an offence to be eligible for restorative justice in relation to the offence, and for an immediate family member to be eligible for restorative justice for the offence, where the victim is younger than ten years old.

A referral of an offence for restorative justice can only be made, under section 24 of the Act, where there is an eligible victim or parent in relation to the offence and an eligible offender.

This clause omits the requirement that an eligible victim, or immediate family member (for victims younger than 10 years old), be capable of agreement to take part in restorative justice.

This will remove the requirement for referring entities to undertake an assessment of a victim's capability to agree to participate in restorative justice, prior to making a referral.

Instead, consideration of the victim's capacity to participate in restorative justice will be part of the assessment of the victim's suitability for participation in restorative justice conducted by restorative justice convenors, as delegates of the Director-General.

This amendment will relieve referring entities of the requirement to make an assessment as to the capacity of victims to participate in restorative justice when they will often not have information available to support them to make that assessment. It will avoid duplication of the assessment of a victim's suitability to participate in restorative justice at two stages of the process and will support consistent and informed assessments being made about victim suitability and capacity to participate in restorative justice.

## **Clause 5     Eligible parents**

### **Section 18(1)(c)**

Section 18 of the Act provides that a parent of a victim of crime who is a child (that is, under 18 years of age) at the time of the offence, is eligible for restorative justice in relation to the offence if the child is incapable of adequately understanding or responding to the experience of the offence, or has died.

There is a requirement that the parent be capable of agreeing to take part in restorative justice which necessitates the referring entity undertaking an assessment of the parent's capability to agree to participate in restorative justice, prior to making a referral.

This clause omits the requirement that an eligible parent be capable of agreement to take part in restorative justice.

This will remove the requirement for referring entities to undertake an assessment of a parent's capability to agree to participate in restorative justice, prior to making a referral. Referring entities will often not have information available to support them to make that assessment.

Instead, consideration of the parent's capacity to participate in restorative justice will be part of the assessment of the parent's suitability for participation in restorative justice conducted by restorative justice convenors, as delegates of the Director-General.

This amendment avoids duplication of the assessment of a parent's suitability to participate in restorative justice at two stages of the process and will support consistent and informed assessments being made about parent suitability and capacity to participate in restorative justice.

For the purpose of the Act, a parent of a child is defined as a person with parental responsibility for the child within the meaning of the *Children and Young People Act 2008*, division 1.3.2. Parental responsibility, for a child or young person, means all the duties, powers, responsibilities and authority parents have by law in relation to their children, including daily care responsibility for the child or young person and long term care responsibility for the child or young person. Sections 19 and 20 of the *Children and Young People Act 2008* provide guidance as to the responsibilities and decision-making powers held by individuals with daily and long term care responsibilities, constituting parental responsibility, for children and young people.

## **Clause 6     Eligible offenders**

### **Section 19(1)(b)**

Section 19 of the Act sets out the requirements for an offender to be eligible for restorative justice. The offender must:

- (a) accept responsibility for the commission of the offence
- (b) be at least 10 years old when the offence was committed
- (c) be capable of agreeing to take part in restorative justice
- (d) agree to take part in restorative justice.

This clause amends section 19 to introduce a different eligibility threshold relating to the taking of responsibility by young offenders who have committed or are alleged to have committed a less serious offence. Definitions of young offender and less serious offence are provided in section 12 of the Act.

Allowing referrals where young people do not deny responsibility for the commission of an offence recognises that acceptance of responsibility is a subjective test and that young people, particularly marginalised young people, may not present as accepting responsibility at the point of apprehension by police.

The amendment made by this clause will reduce barriers for referrals to restorative justice, particularly for marginalised young people. All young people referred under the *doesn't deny responsibility* eligibility threshold will be required to be assessed by experienced restorative justice convenors to determine whether restorative justice is suitable for the offender in accordance with the criteria in Part 7 of the Act. This will include consideration of the extent of the offender's contrition or remorse for the offence and their personal motivation for taking part in restorative justice.

Clause 6 also amends section 19, consistent with the amendments made to sections 17 and 18 by clauses 4 and 5, to remove the requirement for referring entities to undertake an assessment of an offender's capability to agree to participate in restorative justice, prior to making a referral.

Instead, consideration of the offender's capacity to participate in restorative justice will be part of the assessment of their suitability for participation in restorative justice conducted by restorative justice convenors, as delegates of the Director-General.

This amendment will relieve referring entities of the requirement to make an assessment as to the capacity of offenders to participate in restorative justice when they may not have information available to support them to make that assessment. It will avoid duplication of the assessment of an offender's suitability to participate in restorative justice at two stages of the process and will support consistent and informed assessments being made about offender suitability and capacity to participate in restorative justice.

## **Clause 7     Section 20**

Section 20 of the Act provides that if an offender accepts responsibility for the commission of an offence to take part in restorative justice that does not prevent the offender from pleading not guilty to the offence. Section 20 also provides that there is no requirement for a court to reduce the severity of a sentence for an offender who has accepted responsibility for an offence to take part in restorative justice.

Clause 7 substitutes a new section 20, consequential on the amendment, made to section 19, by clause 6. The effect of the new substituted section 20 is not substantively different to the provision it replaces – its operation is changed to reflect that an offender may accept responsibility for the commission of an offence or a young offender, in relation to a less serious offence, may not deny responsibility for the offence, to take part in restorative justice.

The notes for section 20 have been updated to reflect the amendment made to section 19 and a consequential amendment to the *Crimes (Sentencing) Act 2005* made by Schedule 1.

## **Clause 8 Referring entities**

### **Table 22, item 3, column3**

Clause 8 amends Table 22 in section 22 of the Act, which sets out referring entities for the Act and the stages of the criminal justice process at which referring entities can refer an offence for restorative justice. In relation to referrals from the courts, clause 8 replaces the term 'case management hearing' with the term 'pre-hearing mention' to reflect current terminology.

## **Clause 9 Referral power**

### **Section 24(3)(b)**

This clause amends section 24 which sets out the conditions for referral of an offence by a referring entity. It is consequential on the amendment made by clause 13 to the heading of section 27 of the Act.

## **Clause 10 New section 24(4)**

This clause inserts new section 24(4) consequential on the introduction of new division 6.4 by the Bill. New division 6.4 is intended to support victim initiated referrals to be made without prior notification of an offender in certain circumstances.

New section 24(4) displaces the section 24 requirements for referral where a referral is made in accordance with new section 28A in division 6.4.

## **Clause 11 Explanation of restorative justice**

### **Section 25 (e)**

Clause 11 amends section 25 which requires that before an offence is referred for restorative justice, the referring entity must take reasonable steps to explain certain matters about restorative justice to the offender.

The amendment substitutes a new section 25(e) relating to the information to be provided where an offender has not entered a plea for an offence and is consequential on the amendment to section 19 made by clause 6.

## **Clause 12    Section 25(f)(i)**

This clause substitutes a new section 25(f)(i) relating to where a sentence-related order has not been made, if the offender is found guilty, what consideration the court can have of the offender having accepted responsibility for an offence to take part in restorative justice or whether the offender has participated in restorative justice.

The amendment is consequential on the amendment to section 19 made by clause 6.

## **Clause 13    Section 27 heading**

This clause replaces the heading for section 27 of the Act to make clearer that it applies to referrals to restorative justice made by a court prior to the entry of a plea.

## **Clause 14    Section 27 (3)**

Section 27 of the Act sets out requirements for restorative justice referrals by the court, including the making of a court referral order.

This clause amends the notification provisions relating to court referral orders by transferring the duty to provide a copy of a court referral order to an offender and each person who could be an eligible victim or eligible parent in relation to the offence, from the court to the Director-General of Restorative Justice. This reduces the administrative burden placed on the court when making referrals to restorative justice and recognises that convenors, as delegates of the Director-General of Restorative Justice, are generally better placed to provide information to victims of crime.

## **Clause 15    Court referral orders – reports                     Section 28(3)**

Section 28 of the Act requires that where a court makes a court referral order for section 27, the Director-General must give the court a report about the outcome of restorative justice for the offence referred under the court referral order.

Clause 15 substitutes a new section 28(3) to modify the requirements for the content of the report. In particular, the insertion of new section 28(3) removes a requirement for the Director-General to report on the individual suitability of a required participant for restorative justice and replaces this obligation with a requirement for the Director-General to inform the court of the matter's suitability as a whole.

This amendment is intended to reduce risks for victims and offenders arising from any inferences which may be drawn, about the willingness of the victim or offender to participate in restorative justice, from an assessment of the suitability of restorative justice for the individual.

## **Clause 16 Section 28(5)**

Section 28(4) of the Act provides that if a restorative justice agreement was reached at a restorative justice conference the report provided to the court under section 28 must include a copy of the agreement. Section 28(5) requires the Director-General to provide a copy of the report to various parties including each person whom the court is aware is a victim or a parent of a child victim of the offence.

Clause 16 substitutes a new section 28(5) which limits the people to whom a copy of the report must be provided so as to exclude victims or parents of victims who were not participants in the conference to which the report relates.

This change to section 28(5) is to protect the privacy of victims of crime in offences where multiple victims have been referred for the same offence, by providing that only parties who participated in a conferencing process may have access to the personal conferencing outcomes associated with the offence.

This amendment respects the prerogative of victims of crime who decline to participate in a restorative justice process by recognising that their involvement in a process will cease at a time of their choosing rather than at the conclusion of a routine administrative process.

## **Clause 17 New division 6.4**

Clause 17 inserts new division 6.4, consisting of new section 28A, which will allow for specified referring entities to make referrals to restorative justice without notifying an offender that the referral has been made.

New section 28A provides that a post-sentence referring entity may refer an offence for restorative justice where:

- (a) the entity is satisfied there is an eligible victim or eligible parent in relation to the offence
- (b) the offender was at least 10 years old when the offence was committed
- (c) the offender is in the post-sentence stage (that is, has already been sentenced and is serving the sentence) in relation to the offence
- (d) the entity is satisfied that, having regard to the objectives of the Act, it is not appropriate, or is not reasonably practicable in the circumstances, to notify the offender that the offence is being considered for restorative justice.

Post-referral entities are the Director-General for Children and Young People (responsible for youth justice including management of young offenders), the Director-General for Corrections (responsible for management of sentenced offenders), the Sentence Administration Board and the Victims of Crime Commissioner.

New section 28A is included in the Act to support victim initiated referrals. In particular, it will increase the scope for the Victims of Crime Commissioner, as a victims-management agency, to make referrals to restorative justice on behalf of victims of crime, in a way which supports victim safety. The provision has been developed to enable victim-initiated referrals to be made in circumstances where

victim safety or other considerations require assessment prior to advising the offender of the referral.

The operation of section 28A is limited to referrals of offences where the offender has already been sentenced.

## **Clause 18    Section 29**

Section 29 of the Act sets out the meaning of ***personal characteristics*** in relation to a victim, parent of a victim or offender. This definition is relevant for sections 34 to 36 of the Act which require the Director-General, in assessing whether restorative justice is suitable for victims, parents of victims and offenders, to consider their personal characteristics

Clause 18 amends this definition consequential on the amendments made by clauses 4 to 6, removing the requirement for a referring entity to be satisfied as to the capacity of victims, parents of victims or offenders to participate in restorative justice.

The substituted section 29 extends the definition of personal characteristics to include characteristics going to the capability of the victim, parent or offender to agree to take part in restorative justice. This amendment supports the other amendments made by the Bill to ensure that the assessment of the suitability of restorative justice for victims, parents and offenders will take place as a part of the suitability assessment processes set out in Part 7 of the Act.

## **Clause 19    Finding of eligibility by referring entity** **Section 31(1)**

Section 31 is a provision that allows the Director-General to rely on a statement from a referring entity as to the eligibility status of a victim, parent of a victim or offender.

Clause 19 amends this provision to reflect the introduction of referrals not requiring offender notification under new section 28A.

## **Clause 20    Section 31 (1), new note**

Clause 20 inserts a new note for section 31(1) recognising that, where referrals are made under section 28A, the referring entity is not required to be satisfied the offender is an eligible offender. This is because it will not be possible for offenders to meet the definition of eligible offender under section 19 of the Act because the referring entity will not have sought their agreement to participate in restorative justice, or provided them with an explanation of restorative justice under section 25. This note has been included to assist the reader to understand the procedural differences between referrals made to restorative justice under section 28A and section 24.



## **Clause 21    Suitability - decision**

### **New section 32(4)**

In order for a restorative justice conference to occur, section 32(3) of the Act requires written consent to be obtained from required participants (eligible victims, eligible parents and offenders). Clause 21 inserts a new section 32(4) in the Act to provide a definition for “written consent” to include oral consent or other consent where a written record is made of the oral or other consent being given. This is to provide flexibility in circumstances where a required participant is unable to provide or indicate their consent in a written form. Where these circumstances apply, a convenor will be taken to have obtained written consent for a restorative justice conference to be called where consent has been given orally or otherwise, and a written record of that consent being given is made by a person who was with the person giving the consent when it was given. This clause reduces barriers to engaging in restorative justice for people with disability.

## **Clauses 22 and 23 Explanation of restorative justice – before consent**

### **Sections 32A (e) and (f)(i)**

Section 32A requires that before obtaining consent for a restorative justice process, an explanation of restorative justice must be provided to each eligible victim and parent, and the offender, in language that the parties can readily understand. As a part of this explanation, convenors must provide information as to the right of the offender to plead not guilty and how the court may consider the offender’s engagement in restorative justice if there is a finding of guilt. Clauses 22 and 23 make consequential amendments to sections 32A(e) and 32A(f)(i) to reflect the amendment to section 19 made by clause 6.

## **Clauses 24 and 25                      Explanation for participants**

### **Sections 45 (e) and (f)(i)**

Before a restorative justice conference begins, section 45 of the Act requires that convenors must take reasonable steps to provide each participant in a restorative justice conference with an explanation of restorative justice.

As a part of this explanation, convenors must provide information as to the right of the offender to plead not guilty and how the court may consider the offender’s engagement in restorative justice if there is a finding of guilt. Clauses 24 and 25 make consequential amendments to sections 45(e) and 45(f)(i) to reflect the amendment to section 19 made by clause 6.

## **Clause 26    Form of agreement**

### **New section 52(3)**

Section 52 of the Act requires that a restorative justice agreement must be in writing and signed by each of the required participants.

This clause inserts new section 52(3) which provides that where a required participant is not able to sign a restorative justice agreement but has given oral or other consent to the terms of the agreement, the Director-General must ensure that a written record of the consent is made by a person who was with the person giving the consent, when it was given and this must be kept with the restorative justice agreement. This amendment reduces barriers for engaging in restorative justice for people with a disability.

## **Clauses 27 and 28 Explanation of effect of agreement**

### **Sections 53 (d) and (e)(i)**

Before a restorative justice agreement is signed section 53 of the Act requires that the convenor must ensure that reasonable steps have been taken to provide an explanation of the effect of the agreement to each required participant in a conference. This explanation must cover the nature, purpose and effect of the agreement, identify that no-one is under an obligation to sign an agreement and advise that the participant may seek legal advice before signing the agreement. As a part of this explanation, convenors must provide information as to the right of the offender to plead not guilty and how the court may consider the offender's engagement in restorative justice if there is a finding of guilt.

Clauses 27 and 28 make consequential amendments to sections 53(d) and 53(e)(i) to reflect the amendment to section 19 made by clause 6.

## **Clause 29 Secrecy**

### **Section 64(1), definition of *protected information*, paragraph (b)**

Section 64 of the Act makes it an offence, in certain circumstances, for protected information provided in the course of participation in restorative justice to be recorded or disclosed by officers involved in the restorative justice process.

Protected information is defined in section 64 to exclude information in a restorative justice agreement and information disclosing who attended a restorative justice conference.

Consistent with the existing exclusions from the definition of protected information, clause 29 amends the definition of protected information to not include a written record of consent made under new section 52(3).

## **Clause 30 Dictionary, definition of *personal characteristics***

This clause updates the definition of *personal characteristics* in the Dictionary for the Act by reference to the definition in section 29.

## **Schedule 1 Crimes (Sentencing) Act 2005**

### **1.1 Crimes (Sentencing) Act 2005 section 33(1)(y)**

Schedule 1 makes an amendment to section 33 of the *Crimes (Sentencing) Act 2005* consequential on the amendment made by clause 6, which allows for young

offenders to be referred to restorative justice where they do not deny responsibility for the commission of the offence.

Section 33 of the Crimes (Sentencing) Act provides that in sentencing an offender the court must consider whichever of a number matters set out in section 33 are relevant and known to the court. One of the matters listed in section 33, at section 33(1)(y), is the fact of an offender accepting responsibility for an offence in order to take part in restorative justice.

This amendment substitutes a new section 33(1)(y) to reflect the amendment made to section 19 so that it now provides for an offender to accept responsibility for the purpose of taking part in restorative justice or, for a young offender for a less serious offence to not deny responsibility for the commission of an offence to take part in restorative justice.