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

CORRECTIONS AND SENTENCING LEGISLATION AMENDMENT BILL 2022

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
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CORRECTIONS AND SENTENCING LEGISLATION AMENDMENT BILL 2022

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CORRECTIONS AND SENTENCING LEGISLATION AMENDMENT BILL 2022

The Corrections and Sentencing Legislation Amendment Bill (the Bill) is a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004* (HR Act).

OVERVIEW OF THE BILL

The policy objective of this Bill is to address identified opportunities for improving the administration of corrective services and community-based sentences.

The Bill is an omnibus bill which amends a range of legislation in the Minister for Corrections' portfolio.

The Bill contains the following proposed amendments to:

- a) the *Crimes (Sentence Administration) Act 2005* (CSA Act) to:
 - i. require the Sentence Administration Board (rather than corrections officers on behalf of the director-general) to issue notices of inquiry relating to breaches of intensive correction order obligations;
 - ii. adopt elements of a COVID-19 measure (section 102A) to provide community corrections officers with greater flexibility to deal with breaches of a good behaviour order.
- b) the CSA Act and *Crimes (Sentence Administration) Regulation 2006* (CSA Regulation) to:
 - iii. support a national system of interstate transfers for community-based sentences and associated community-based orders;
- c) the *Corrections Management Act 2007* (CM Act) to:
 - iv. allow searches by certain scanning devices of non-detainees (staff, contractors and visitors) by a corrections officer of any sex;
 - v. clearly authorise routine scanning and ordinary searches of non-detainees (staff, contractors and visitors) to an ACT correctional centre, as a condition of entry;
 - vi. confirm existing practice regarding detainees induction into correctional centres, including search requirements on admission for the purposes of section 67 subject to a statutory review of this amendment after 2 years, to allow for a reassessment of the availability and suitability of alternative approaches that would be less restrictive;

- vii. make it an offence for a person to send a prohibited item to a correctional centre including via a remotely piloted aircraft; and
- viii. clarify that the director-general can declare the entirety of an ACT correctional centre to be smoke free.

CONSULTATION ON THE PROPOSED APPROACH

The Justice and Community Safety (JACS) Directorate and ACT Corrective Services (ACTCS) have worked closely to develop the proposed reforms. ACTCS will be most affected by the amendments and has been extensively consulted.

The amendments have been subject to extensive consultation with independent statutory office holders and key justice stakeholders. The amendments were circulated to the following stakeholders:

- Aboriginal and Torres Strait Islander Elected Body;
- Aboriginal Legal Service;
- ACT Bar Association;
- ACT Courts and Tribunal;
- ACT Director of Public Prosecutions;
- ACT Human Rights Commission;
- ACT Inspector of Correctional Services;
- ACT Law Society;
- ACT Ombudsman;
- ACT Policing;
- Canberra Health Services (including Justice Health Services);
- Community Services Directorate;
- Community and Public Sector Union
- Coordinator-General, Family Safety;
- Human Rights and Social Policy Team (JACS);
- Inspector-General

- Legal Aid ACT;
- Prisoner Aid ACT;
- Sentence Administration Board;
- Victims of Crime Commissioner; and
- Winnunga Nimmityjah Aboriginal Health and Community Services.

SUMMARY OF AMENDMENTS

Crimes (Sentence Administration) Act 2005 (CSA Act); Crimes (Sentence Administration) Regulation 2006 (CSA Regulation)

Streamline processes to minimise delays to Intensive Correction Order breach inquiries and outcomes

In its current form, section 63 of the CSA Act requires the Director-General of the Justice and Community Safety Directorate (JACS) to provide an offender and the Director of Public Prosecutions (DPP) with a notice of inquiry when the Sentence Administration Board (SAB) decides to conduct an inquiry into an alleged breach of a condition of an intensive corrective order (ICO).

The Bill will authorise the SAB to give written notice of inquiries into the breach of an offender's ICO obligations to align it with notice processes for other types of notices issued by the SAB and foster administrative efficiency. The SAB already manages ICO and parole orders and has responsibility for writing and disseminating the notices of hearings in relation to parole management. The SAB also currently undertakes other tasks related to the ICO inquiry including scheduling dates, agendas, and preparing paperwork for the members of the board.

Adopt elements of a COVID-19 measure (section 102A) to provide community corrections officers with greater flexibility to deal with breaches of a good behaviour order.

Section 102 of the CSA Act requires corrections officers to report their reasonable belief to the sentencing court for each instance of alleged non-compliance with any good behaviour order (GBO) obligations. The provision does not confer any discretion on a corrections officer to respond to a breach, however minor, in any way, other than referral to the sentencing court.

Section 102A of the CSA Act is a COVID-19 measure that displaces section 102 during a COVID-19 emergency. Section 102A of the CSA Act provides corrections officers with discretion to determine the response to a breach of a GBO obligation.

The Bill amends section 102 of the CSA Act to incorporate some elements of the COVID-19 measure to provide community corrections officers (CCOs) with greater flexibility to deal with certain breaches of GBO obligations. Section 102 of the CSA Act applies if a CCO believes on reasonable grounds that an offender has breached any of their GBO obligations (a **reportable breach**).

The Bill ensures that CCOs must report a reportable breach to the sentencing court, unless certain conditions have been met which would enliven the discretion, to be established by notifiable instrument (discretion framework).

The Bill seeks to reduce pressure on the courts, which would ordinarily hear every instance of breach, and equip CCOs with discretion to promote the rehabilitation of offenders by allowing officers to choose not to report a reportable breach to a sentencing court.

A CCO's discretion is intended to be exercised in a manner that is safe for the community and victims of crime, having regard to a victim's human right to security of person (HR Act, section 18). The discretion framework will provide an appropriate administrative oversight mechanism so that there is consistent and transparent supervision and enforcement of GBOs. The proposed framework for exercising the discretion will have regard to a victim's human right to security of person and provide structure around when and how a CCO may apply discretion and the factors for consideration, for example, the type of information that can be shared with the offender, the nature and type of offences committed by the offender, the type of breach that may be subject to discretion, the offender's history of compliance with their GBO obligations as well as whether the offender has a reasonable excuse for their non-compliance.

As the discretion framework is in the process of finalisation, the amendment will be subject to delayed commencement to a date fixed by the Minister by written notice to align with the notification of the discretion framework. The effect of this delayed commencement is that section 102 of the CSA will commence not later than the first day after 12 months from the Bill's commencement or earlier by written notice.

CCOs will only be permitted to use the discretionary power on commencement of the discretion framework. The Bill provides that the non-reporting actions can only be taken by CCOs when they are acting in accordance with the discretion framework. ACTCS also commits to not using the discretionary power without the discretion framework in place even if the framework is not finalised after 12 months after the Bill's commencement.

Support a national system of interstate community-based sentence transfers

Section 5 of the CSA Regulation currently lists NSW as the only participating jurisdiction under section 265 of the CSA Act. The Bill declares the Northern Territory, Queensland, South Australia, Tasmania, Victoria and Western Australia as participating jurisdictions.

The Bill will support a national system of interstate transfers for community-based sentences and associated community-based orders. It will enable community-based sentences to be transferred and registered between ACT and other jurisdictions such that the sentence becomes enforceable in the receiving jurisdiction as if it had been imposed in that jurisdiction. It promotes freedom of movement by allowing people to serve their sentence interstate for reasons such as proximity to family and community, employment opportunities, or escaping domestic violence. The scheme also allows a person to serve their offence in a jurisdiction they normally reside in should they commit an offence interstate.

To address concerns about the amendment's implications for victim survivors of domestic and family violence and how their safety can be accommodated, ACTCS

are working on an assessment process that will provide a formalised framework for corrections officers to determine whether a person will be suitable to be transferred to the ACT. The Bill introduces a new head of power to enable ACTCS to notify this assessment process under Chapter 12 of the CSA Act. This assessment process will be based on the existing eligibility criteria outlined in the National Operating Procedures for the Interstate Transfer Scheme and will be finalised in consultation with relevant stakeholders.

Corrections Management Act 2007 (CM Act)

Allow searches by certain scanning devices of non-detainees by a corrections officer of any sex

Section 112 of the CM Act currently provides that a corrections officer can only conduct a scanning search, ordinary search or a frisk search under section 111 if the person being searched is of the same sex as the corrections officer or if that is not the case, if another person (who is not a detainee) of the same sex as the person searched is present. The searching requirements under section 111 apply to a detainee, another corrections officer or anyone else working at or visiting a correctional centre.

The Bill allows a corrections officer of any sex to conduct searches that are confined to the use of scanning devices such as a “roto-turn” (metal detector gate) device, handheld metal detecting wand and property x-ray machine. These searches do not allow any physical touching of the person.

The Bill promotes operational flexibility and overcomes the need for corrections officers of both sexes to be present at the Alexander Maconochie Centre’s (AMC) entrance.

Clearly authorise routine scanning and ordinary searches of non-detainees before entry at an ACT Correctional Centre

Section 111 currently provides that “the director-general may, at any time, direct a corrections officer to conduct a scanning search, frisk search or ordinary search of a detainee, another corrections officer or anyone else working at or visiting a correctional centre if the director-general believes, on reasonable grounds, that is prudent to conduct the search to protect (a) the safety of anyone at the correctional centre; or (b) security or good order at a correctional centre”.

The Bill will remove the requirement for a view to be formed in relation to each individual about the prudence of searching that individual. A search of a non-detainee before entry to a correctional centre would always be prudent to protect the safety of anyone at a correctional centre, or the security and good order at a correctional centre. This is because any person entering the centre could bring in items that represent safety or security risks, and this risk can only be addressed by conducting a search.

The Bill will reduce the opportunity for people to bring harmful contraband into a correctional centre while ensuring that the form of search performed (scanning and/or ordinary searches) on non-detainees is the least intrusive type of search that is reasonable and necessary in the circumstances.

Confirm existing practice regarding of search processes during admission to an ACT Correction centre.

Section 67 of the CMA requires that, for each detainee admitted to a correctional facility, the director-general conduct an initial assessment as soon as practicable in order to 'identify any immediate physical or mental health, or safety or security, risks and needs'. Section 67 also provides that the director-general must ensure that any ongoing risks and needs are addressed in the detainee's case management plan.

Section 70(1) of the CMA provides that the director-general may direct the detainee to submit to a strip search for the initial assessment under 67. By virtue of section 70(2) the entirety of Part 9.4 (searches) of the CMA also applies to section 70. Part 9.4 includes section 108 which requires officers to consider that the search is the least intrusive kinds of search that is conducted in the least intrusive way. Part 9.4 also includes sections 113A, 113B and 113C.

Sections 113A, 113B and 113C were introduced into the Act after section 70 and, whilst focused on searches for contraband in the possession of detainees already in custody, also have implications for section 70 that were not originally envisaged. These sections provide that a strip search may only be conducted if there are reasonable grounds that the detainee has a seizeable item concealed (section 113B on suspicion) or that it is prudent to search the detainee for a seizeable item that may be concealed on the detainee (section 113C where prudent).

The requirement for the admission strip search to be either on the basis of suspicion or prudence introduces an ambiguity for correctional officers with respect to an admission strip search. Requiring correctional officers to form a particular state of mind for each detainee during the admissions process carries a risk that the officer may not subjectively have the reasonable belief or suspicion required by sections 113B and 113C.

When a detainee enters the custody of ACT Corrective Services, they have not been under the control or immediate supervision of a correctional officer. It is the very circumstance of a detainee's admission, that is the detainee has been outside of the control of a correction officer, which will generally make strip search proportionate and appropriate in the circumstances.

As there is a heightened risk of detainees carrying dangerous contraband on admission, it is necessary that a form of search be conducted on admission that captures the widest range of concealed items to ensure the safety and security of the detainee, staff and other detainees and to achieve the purpose of section 67 including to identify a detainee's immediate physical and mental health risks and needs. Requiring corrections officers to conduct an individualised risk assessment as contemplated by section 113B and 113C, on each detainee, creates uncertainty.

The Bill prescribes that sections 113A, 113B and 113C will no longer apply to a strip search on admission, avoiding any need for a risk assessment to be conducted for each detainee.

The proposed amendment will not displace the processes and safeguards outlined in the CMA. Section 70 will continue to confer a statutory discretion on corrections officers to strip search a detainee as part of an initial assessment on admission. It will not authorise a routine or blanket approach.

In exercising the discretion under section 70, correctional officers will need properly to consider relevant human rights, in accordance with the director-general's public authority duties under s 40B(2) of the *Human Rights Act 2004* (HR Act). Further, Part 9.4 of the CM Act and importantly section 108, will apply to the strip search on admission.

ACTCS intends to guide corrections officers' use of their limited discretion in policies and procedures in relation to whether to conduct a strip search on admission. This will be in accordance with section 108 of the CM Act and acknowledges that there may be particular instances that warrant consideration of whether a strip search on first admission of a detainee may unreasonably limit their rights under the HR Act.

The Bill also incorporates a statutory requirement for a review of the amended strip search provision after 2 years following its commencement, with a report due to be tabled in the Legislative Assembly 6 months after the review commences. This statutory review requirement will ensure that an assessment is made after 2 years on whether strip searches of a person on admission continues to be the least intrusive kind of search that is reasonable and necessary in the circumstances and conducted in the least intrusive way, to meet the objectives of a section 67 initial assessment.

The review mechanism built into legislation will require the director-general to reassess the availability and suitability of alternative approaches for searches on admission that would be less restrictive and act as a safeguard to ensure that strip searching on admission is not permanently authorised in circumstances where less restrictive methods become available.

The amendment provides flexibility and does not preclude other forms of less intrusive search, or a combination of searches, from being used to search on admission should the director-general determine that an equally effective and less restrictive approach is available to meet the objectives of section 67 of the CM Act. In those instances, it may be appropriate to cease using strip searching on admission before the statutory review commences or legislative assembly report is tabled.

The amendment does not pre-empt the potential outcome of the statutory review, but it is noted that the review may find that strip searching on admission continues to be the least intrusive kind of search that is reasonable and necessary in the circumstances and recommend that another statutory review be conducted in future.

The terms of reference and methodology of the statutory review will be determined in consultation with the Minister for Corrections later, closer to the time the review is due to commence.

Clarify that the director-general can make a declaration that allows a prohibition on smoking to apply to the entirety of an ACT Correctional Centre

Section 86 of the CM Act currently allows the director-general to declare part of a correctional centre an area in which smoking is prohibited. The Bill would allow the director-general to declare all of a correctional centre smoke free. This change will allow a correctional centre to become smoke free.

Smoke free correctional centres allow both staff and detainees to not be impacted by second hand smoke. Every Australian jurisdiction, other than the ACT and Western Australia have prohibited smoking in correctional centres.

Make it an offence to take or send a prohibited item to a correctional centre

It is currently an offence under section 145 of the CM Act to (a) take a prohibited thing into a correctional centre; (b) give a prohibited thing to a detainee; and (c) remove a prohibited thing from a correctional centre. The CM Act provides that for the purposes of section 145, 'give' includes 'send'. Send is not defined but is only otherwise used in the CM Act in relation to mail in section 48.

The Bill proposes to amend the CM Act to make it an offence to 'send' a prohibited thing into a correctional centre (rather than 'take') and a new definition of 'send'. The amendment addresses concerns originally raised by the Shadow Minister for Corrections in the Corrections Management Amendment Bill 2021.

The proposed new definition of 'send' will cover the widest possible range of delivery mechanisms and clarify that sending a prohibited thing by drone or remotely piloted aircraft (RPA) is an offence. This will make it clear that an item does not need to be personally taken or sent into a correctional centre or personally given or sent to a detainee for an offence to be committed under the section.

The use of RPAs is largely regulated by Commonwealth Aviation Safety Authority (CASA) and the amendment does not seek to affect Commonwealth information privacy laws surrounding the use of RPAs.

CONSISTENCY WITH HUMAN RIGHTS

Rights Promoted

The criminal justice system integrates the principles of restoration and rehabilitation of individuals at the sentencing process. It does so by allowing judicial officers to determine appropriate penalties including non-custodial penalties such as community-based sentences in the form of a GBO. Incarceration nevertheless remains an integral part of the criminal justice system in upholding the rule of law, by ensuring that alleged offenders are brought to justice and by providing a sanction for serious wrongdoing. Notwithstanding this, the ACT Government is committed to ensuring that the human rights of people detained in a correctional centre are upheld. It is enshrined in ACT legislation that public authorities including ACTCS must act in a way that is compatible with human rights in delivering correctional services (section 40B of the HR Act).

The Bill seeks to improve the administration of corrective services and community-based sentences. The amendments incorporated in this Bill reflects the ACT Government's commitment to continuous improvement, noting the diverse challenges and priorities of correctional services, and to striking the right balance between supporting the rehabilitation of offenders and ensuring victims safety in the ACT.

Broadly, the Bill engages and supports the following HR Act rights:

- Section 9 - Right to life

- Section 13 - Right to freedom of movement
- Section 18 - Right to liberty and security of the person

The right to life (section 9 of the HR Act) includes a positive obligation on government to take reasonable actions to safeguard life and protect individuals to address. This right is promoted by the amendments relating to scanning searches performed on non-detainees, strip searches for a detainee's initial admission to a correctional centre, making the AMC smoke-free and the new offence to send prohibited items to a correctional centre. These amendments respond to increased operational demands of the ACTCS, increased knowledge of the ill effects of smoking and second-hand smoking and advancement in the capabilities of RPAs, and have been introduced to uphold the paramount wellbeing and safety of everyone present at the correctional centre including the detainees. The amendments seek to reduce the risk of contraband/dangerous items being introduced into a correctional centre which will reduce the risk to harm or the loss of life that may be caused by an infliction of self-harm or harm to others. Smoking is known to be a major cause of cardiovascular disease, including heart disease and stroke. The amendments also seek to safeguard life and protect individuals by minimising a smoker and passive smoker's exposure to cigarette smoke at the correctional centre.

The right to freedom of movement (section 13 of the HR Act) provides individuals with the right to move freely within the ACT and to enter and leave it, and the freedom to choose his or her residence in the ACT. This right is promoted by the amendments to support a national system of interstate community-based sentence transfers and enabling community corrections officers greater flexibility to deal with breaches of GBOs. People will be allowed to serve their sentence interstate for reasons such as proximity to family and community, employment opportunities, or escaping domestic violence. People who commit an offence interstate may also serve their offence in a jurisdiction they normally reside in. Additionally, the Bill will clarify that some minor infractions against a good behaviour order will not result in a court appearance and potential sanctions. Under circumstances to be clearly defined via notifiable instrument, the Bill increases the autonomy of individuals to choose where they complete their community-based sentence and enables people subject to GBOs more flexibility and opportunity to move freely within the ACT.

The right to security of person (section 18 of the HR Act) protects individuals against intentional infliction of bodily or mental injury, regardless of whether a person is detained. It imposes a positive obligation on government to take appropriate measures to protect individuals from foreseeable threats to bodily or mental integrity from public authorities or private individuals. This right is promoted by amendments concerning the searching of detainees and non-detainees at a correctional centre and the new offence to send prohibited items to a correctional centre. These amendments recognise that the introduction and circulation of contraband such as

drugs or weapons can produce a range of potential physical and mental harms. The right is also promoted by the amendment making the AMC smoke-free. The amendments will safeguard the health of individuals by minimising the exposure to cigarette smoke at the correctional centre for both smokers and non-smokers.

The right to liberty (section 18 of the HR Act) prohibits the arbitrary and unlawful deprivation of liberty. This right also behoves government to not arbitrarily arrest or detain individuals. Arrest or detention may be ‘arbitrary’ if it is unreasonable, unjust, inappropriate or disproportionate in all the circumstances of the case or not in accordance with due process.¹ This right is promoted by the amendment providing greater flexibility to community corrections officers to not have to automatically report all breaches, no matter how minor, which reduces the prospect of an individual being detained for a minor infraction. Such minor infractions – for example, being late to an appointment because of public transport delays – could have a disproportionate impact and cause the arbitrary detention of someone who otherwise adheres to their GBO conditions.

Rights Limited

The Bill also engages and potentially limits the following rights:

- Section 12 - the right to privacy and reputation
- Section 18 - the right to liberty and security of person
- Section 19 - the right to human treatment in detention when deprived of liberty
- Section 21 – the rights to a fair trial and hearing

The preamble to the HR Act notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HR Act contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

Detailed human rights discussion

Crimes (Sentence Administration) Act 2005 – providing greater flexibility for community corrections officers to deal with breaches of a good behaviour order

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The Bill introduces an amendment to provide CCOs with greater flexibility to deal with certain breaches of GBO obligations while ensuring they must adhere to a

¹ [Hugo van Alphen v. The Netherlands, Communication No. 305/1988](#), U.N. Doc. CCPR/C/39/D/305/1988 (1990) [5.8].

structured framework, to be established via notifiable instrument, for exercising their discretion (discretion framework).

This amendment engages and limits the right to a fair trial and hearing (section 21 of the HR Act). Section 21 of the HR Act 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 amendment may limit the right to a fair trial and hearing for victims of crime by conferring a CCO discretion in prescribed circumstances to not refer an offender's GBO breach to the sentencing court. The CCO's decision replaces the process of adjudication by an impartial sentencing court of breaches of an offender's GBO obligations.

The amendment engages and may also limit the right to security of person for victims of crime (section 18 of the HR Act). Section 18 of the HR Act is sourced from article 9 of the International Covenant on Civil and Political Rights (ICCPR), and the Human Rights Committee states in their general comment that the security of person noted in article 9 includes 'freedom of injury to the body and the mind, or bodily and mental integrity'.² This right to security persists whether the victim is detained or non-detained.

The amendment engages the right to security of person and may limit a victim's right to security of person in acknowledgement that breaches of GBOs, however minor they may appear, may constitute a pattern of violence and result in an escalation of harm to victims of crime.

2. Legitimate purpose (s 28 (2) (b))

The amendment is consistent with the CSA Act's principles in section 7(1) for treating sentenced offenders and is aimed at the promotion of the offender's rehabilitation and reintegration into society.

The discretionary framework to be notified under the provision will be guided by the competing human rights engaged by this amendment including with regards to a victim of crimes' human right to security of person. The amendment ensures that the offender can be rehabilitated and reintegrated in society to complete their GBO obligations without causing further harm to the community at large including victim-survivors. The Bill achieves this by prescribing that non-reporting actions may only be taken in relation to breaches that are not confirmed by CCOs to be offences (that is, breaches that could not be the subject of criminal charge), and subject to the discretion framework.

² HRC, General comment No. 35, 1 [3].

In allowing CCOs greater flexibility to ascertain whether a GBO breach needs to be brought before a sentencing court, this amendment seeks to uphold principles of 'restorative practice' for offenders within the criminal justice system and to foster their rehabilitation. In practice, requiring a CCO to report every instance of alleged non-compliance with GBO obligations can be resource-intensive for a CCO and for the court. This is particularly so for relatively minor conduct – for example, late arrival to an appointment because of public transport delays. The amendment provides a transparent and structured approach to allow CCOs to utilise a measure of discretion which seeks to take into account the context of the behaviour, weighed against the desired rehabilitation outcomes.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between the limitation on human rights and the aim of ensuring the offender's rehabilitation and reintegration into society while addressing community concerns about public safety.

Successful interventions provided through the implementation of community-based sentences are an effective means of assisting an offender's rehabilitation.

4. Proportionality (s 28 (2) (e))

The restriction on rights is proportionate to the aim of promoting the offender's rehabilitation and reintegration into society. The measure will also promote the management of sentences in a transparent framework that is protective of the needs of victims of crime.

Offenders subject to a GBO will still be required to adhere to their GBO obligations including their core conditions, as listed in section 86 of the CSA Act. A CCO's discretion to not report a breach to the sentencing court will be an exception, not the rule. The amendment will make it clear that CCOs must report a GBO breach obligation to the sentencing court, unless certain conditions have been met which would enliven discretion. The amendment ensures that CCOs may only take non-reporting actions in relation to individuals who commit reportable breaches subject to clearly defined circumstances, to be outlined in the discretion framework.

The Bill promotes transparency and accountability in the community sentencing framework and ensures there are adequate safeguards regarding the exercise of a CCO's discretion. This includes requiring a CCO to: record all reportable breaches regardless of whether the breach is reported to the sentencing court; provide a warning to the offender about the breach including grounds for believing there has been a breach; and that all prior non-reported breaches (and information relevant to why the non-reporting action was taken) are to be referred where a breach is reported to the sentencing court.

Corrections Management Act 2007 – allowing certain scanning searches of non-detainees by a corrections officer of any sex; and clearly authorising routine scanning and ordinary searches of staff, contractors and visitors to an ACT correctional centre

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The Bill introduces amendments to searches that apply to non-detainees (staff, contractor or visitor) to:

- clearly authorise routine scanning and ordinary searches of non-detainees before entry to an ACT correctional centre; and
- allow a corrections officer of any sex to perform searches by certain scanning devices on non-detainees.

A non-detainee includes a corrections officer and a visitor, which is newly defined in the Bill. A visitor includes a person working at the correctional centre other than a corrections officer and a person who intends to enter the correctional centre as a visitor.

These amendments may engage and limit the right to privacy and reputation (Section 12 of the HR Act). Section 12 of the HR Act provides that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. The right to privacy extends to protection against arbitrary and unlawful interference with a person's physical and bodily integrity.

The amendments limit the right to privacy by regulating the types of searches that must be performed on everyone who is not ordinarily detained at the correctional centre who wish to enter the correctional centre. Further, it also expands the categories of corrections officers who can perform a scanning search on these individuals. The searches captured by the amendments include physical searches of a person as well as searches of a person's belongings.

2. Legitimate purpose (s 28 (2) (b))

A routine scanning or ordinary search of a non-detainee before entry to a correctional centre is necessary to protect the safety of anyone at a correctional centre, or the security and good order at a correctional centre. This is because any person entering the centre could bring in items that represent safety or security risks, and this risk can only be addressed by conducting a scanning search and/or ordinary search.

A scanning search involves the search of a person by electronic or other means that does not require the person to remove the person's clothing or to be touched by someone else. An ordinary search instead involves the removal of the person's overcoat, coat or jacket and any gloves, shoes or hat, and an examination of those items by a corrections officer. If a person has other items in their possession that

cannot be detected through a scanning search, conducting an ordinary search on entry will uphold the safety and security of the correctional centre by ensuring that any prohibited items including inherently dangerous items such as drugs or weapons can be detected.

The amendment to allow a corrections officer of any sex to scan a non-detainee and their possessions promotes the safety and smooth operation of a correctional centre. The amendment recognises that subjecting non-detainees to prescribed forms of scanning devices does not involve the physical touching of a person and is not an intrusive search while enhancing operational efficiency by removing the requirement of corrections officers of both sexes to be present at the correctional centre's entrance. Presently there are rostering challenges in ensuring corrections officers of both sexes are available and when that is not possible, the consequences can be discriminatory and unfair on detainees who may be prevented from seeing a female visitor, for instance, simply because there is no female corrections officer rostered.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between the limitation on the right to privacy and the objective of promoting the safety of anyone at a correctional centre and the security and good order at a correctional centre. The amendments to search powers of non-detainees are an effective means of ensuring that contraband can be identified and prevented from being taken into the correctional centre, reducing any risks of harmful and potentially deadly outcomes.

4. Proportionality (s 28 (2) (e))

The restrictions on the rights of the persons being searched are proportionate measures to reduce the introduction and circulation of contraband, including inherently dangerous items such as drugs or weapons, and ensure safety of everyone detained, visiting or working in a correctional centre.

The amendments are the least restrictive search available to detect and prevent the introduction of contraband, including inherently dangerous items such as drugs or weapons. The amendments fall under Part 9.4 of the CM Act and are made in accordance with the safeguards in section 108 of the CM Act which provides that a search under this part must be the least intrusive kind of search that is reasonable and necessary in the circumstances, and must be conducted in a way that is reasonable and necessary in the circumstances.

The point of entry to a correctional centre will always present opportunities for contraband to be brought in. Clearly authorising routine scanning and ordinary searches of non-detainees before entry to a correctional centre will reduce the risk of contraband being brought into a correctional centre.

The amendment in relation to the sex of the corrections officer is also limited to searches relating to an x-ray of articles of a non-detainee's possession and involving non-detainees passing through a metal-detecting device or being searched by a hand-held metal detecting device. The amendment does not seek to change the requirement of a corrections officer to perform other types of searches on non-detainees including those requiring physical contact with a person's body.

Corrections Management Act 2007 – confirm existing practice that corrections officers are authorised to conduct a strip search of detainees on their admission to an ACT correctional centre

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

The Bill permits the director-general to authorise the strip search of detainees upon admission without the need to conduct an individual risk assessment (pursuant to sections 113B and 113C) for the purpose of assessing the detainee's immediate physical or mental health, or safety or security, and risks and needs.

This amendment limits the right to privacy and reputation (Section 12 of the HR Act) and engages the right to humane treatment in detention when deprived of liberty (Section 19 of the HR Act).

Section 12 of the HR Act protects individuals from unlawful or arbitrary interference with privacy, and extends to protection against interference with a person's physical and bodily integrity. The amendment limits this right because strip searching compels an individual to reveal their body to corrections officers and constitutes an interference with privacy with regards to bodily autonomy.

Section 19 of the HR Act protects the right to humane treatment when deprived of liberty by ensuring that detainees are held in conditions befitting their inherent dignity as human beings despite the fact they may have been accused or convicted of serious offences. The amendment engages this right because strip searching is an invasive form of search.

2. Legitimate purpose (s 28 (2) (b))

The amendment is directed at the legitimate aim of ensuring safety and security of detainees and others within a correctional facility. A strip search is conducted for the purpose of undertaking an initial assessment upon admission to a correctional centre under section 67 of the CM Act which seeks to identify and address a detainee's immediate physical or mental health, or safety or security, risks and needs and ensure appropriate ongoing management of these risks and needs.

It is necessary that searches conducted during a detainee's initial admission to a correctional centre can identify the widest range of concealed items. By ensuring that a thorough search and risk assessment can be conducted upon a detainee's admission, the amendment will reduce the opportunities for dangerous contraband

such as drugs and weapons to enter a correctional centre and enable prison authorities to gain a better understanding of detainees' health in order to reduce risks of self-harm and harm to others.

The Bill prescribes that sections 113A, 113B and 113C will no longer apply and would remove the requirement for a full risk assessment to be conducted for each detainee.

The proposed amendment will not displace the processes and safeguards outlined in the CMA. Section 70 will continue to confer a statutory discretion on corrections officers to strip search a detainee as part of an initial assessment on admission, and will not authorise a routine or blanket approach.

The removal of ambiguity in relation to the subjective elements in sections 113B and 113C will discourage detainees (who might otherwise be assessed as lower risk of smuggling contraband) from being pressured by other detainees to bring contraband into a correctional centre.

Suicide is a common cause of death in Australian prisons, representing about a quarter of all prison deaths.³ Prisons have a rate of suicide typically three to five times that of the general community.⁴ The risk of suicide is generally highest early on in an offender's sentence, with 26% of such suicides in South Australia found to occur in the first week of custody and 39% in the first month.⁵

Correctional centres are inherently a place of negative stressors, including prison culture, shame at being a labelled offender, loss of contact with family members, and feelings of oppression and powerlessness.⁶ Self-harming behaviour is a common response to these stressors.⁷ Detainees' self-harm also causes negative tributary problems for staff,⁸ and the prevention of detainee's self-harm also promotes staff's health and wellbeing.

Additionally, contraband poses a substantial threat to the safety of correctional staff,⁹ especially weapons. Further, detainees can utilise mobile phones to direct criminal actions outside correctional centres, thus compromising public safety and potentially

³ Matthew Willis, Ashleigh Baker, Tracy Cussen and Eileen Patterson. (2016). *Self-inflicted deaths in Australian prisons. Trends & issues in crime and criminal justice no. 513*. Canberra: Australian Institute of Criminology. <https://www.aic.gov.au/publications/tandi/tandi513>

⁴ Ibid.

⁵ Ibid.

⁶ Steven Doty, Hayden P. Smith, Jeffrey Rojek (2012). Self-Injurious Behaviors in Corrections: Informal Social Control and Institutional Responses in a State Prison System. *Victims and Offenders* 7, 30–52. DOI: 10.1080/15564886.2011.629774

⁷ Ibid.

⁸ Hayden Smith. (2014). Self-Injurious Behavior in Prison: A Case Study. *International Journal of Offender Therapy and Comparative Criminology* 60(2), 1-16. DOI: 10.1177/0306624X14552063

⁹ Bryce Peterson, Megan Kizzort, KiDeuk Kim & Rochisha Shukla. (2021). Prison Contraband: Prevalence, Impacts, and Interdiction Strategies. *Corrections*, 1-18. DOI: 10.1080/23774657.2021.1906356

lives.¹⁰ Actions to reduce the flow of contraband in a correctional centre thus promotes and safeguards the rights to life enjoyed by many within and in some instances, outside the centre.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

There is a rational connection between the limitations on the rights of detainees and the objective of ensuring safety within a correctional centre. Searches upon admission are necessary to reduce contraband such as weapons or drugs, which represent a risk to detainees and others.

Suicide prevention is a collective responsibility within correctional centres, and the work of corrections officers to conduct strip searches to reduce contraband which can be utilised for suicide forms one important safeguard to protect detainees. The same applies for self-harming behaviour in a corrections centre which, as described above, is typically higher inside correctional centres than in the general community.

Detainees in Australia – including within the ACT – typically have considerable histories of self-harming and suicidal behaviour. In the AMC, the self-reported prevalence of suicide attempts and suicide ideation are nearly 10 times higher than within the general Australian population.¹¹ A correctional centre is a unique setting, with unique challenges. In relation to self-harm management, correctional settings mean that typical clinical approaches to preventing such injuries (such as encouraging tension-releasing activities like working in one's garden) are unlikely to be realistic.¹²

Additionally, contraband drugs can be used to continue, exacerbate or develop substance use problems.¹³ Working to manage drug dependency and prevent harms such as overdose is an important facet of ensuring prisoners are treated humanely in a correctional centre. Furthermore, drugs in a correctional centre may create unregulated economies;¹⁴ when detainees enter into debts with other detainees, they may be at risk of physical assault.

A thorough search such as a strip search can also detect undisclosed physical injuries upon admission which may require urgent treatment.

4. Proportionality (s 28 (2) (e))

¹⁰ Ibid.

¹¹ Amanda Butler, Jesse T. Young, Stuart A. Kinner and Rohan Borschmann. (2018). Self-harm and suicidal behaviour among incarcerated adults in the Australian Capital Territory. *Health and Justice* 6(13). DOI: 10.1186/s40352-018-0071-8

¹² DeHart, D. D., Smith, H. P., & Kaminski, R. H. (2009). Institutional response to self-injury among inmates. *Journal of Correctional Health Care* 15(2), 129-141. DOI: 10.1177/1078345809331444

¹³ Bryce Peterson, Megan Kizzort, KiDeuk Kim & Rochisha Shukla. (2021). Prison Contraband: Prevalence, Impacts, and Interdiction Strategies. *Corrections*, 1-18. DOI:

10.1080/23774657.2021.1906356

¹⁴ Ibid.

The restrictions on detainees' rights are proportionate to the importance of the broader safety and security of a correctional centre.

The amendment will limit the assumptions that can be made about any individual or group with respect to whether they are more or less likely to have contraband or physical and mental health requirements than any other individual or group.

The admission process is conducted in accordance with the CM Act and the *Corrections Management (Strip Search) Operating Procedure 2022 (NI2022-57)*, which contain a range of safeguards to maintain the searched individual's dignity and to eliminate the potential for arbitrary or unlawful interference with human rights.

For example, section 108 of the CM Act provides that the person conducting a strip search on admission (amongst other types of searches under Part 9.4) must ensure, as far as practicable, that the search is the least intrusive kind of search that is reasonable and necessary in the circumstances, and that the search is conducted in the least intrusive way.

Other legislative safeguards include sections 114 and 115 of the CM Act which provide that a strip search must be conducted in a private area or an area that provides reasonable privacy for the detainee being searched, and the search must not involve:

- a. the removal from the detainee of more clothes than is necessary and reasonable to conduct the search; or
- b. the removal from the detainee of more clothes at any time than is necessary and reasonable to conduct the search; or
- c. without limiting paragraph (b), both the upper and lower parts of the person's body being uncovered at the same time.

Furthermore, in accordance with section 40B of the HR Act, as a public authority, the director-general and the ACTCS are required to act in a way that is compatible with human rights and to consider relevant human rights in making decisions in relation to making any decisions.

As outlined in the operating procedure, the corrections officers must not touch any part of the detainee unless in exceptional circumstances: where the detainee requires reasonable adjustments, the detainee explicitly consents to the assistance, and the officer is comfortable and able to provide the assistance. The procedure specifically notes that officers must not request that a detainee 'squat and cough' during a strip search and upper and lower parts of a detainee's body must not be uncovered at the same time during a search (except in exceptional circumstances). Two officers of the same gender as the detainee being searched must conduct the strip search.

The Bill prescribes that sections 113A, 113B and 113C will not apply to a strip search on admission for the purposes of a section 67 assessment, thereby removing any requirement for a full risk assessment to be conducted for each detainee.

The proposed amendment will not displace the processes and safeguards outlined in the CMA. Section 70 will continue to confer a statutory discretion on correctional officers to strip search a detainee as part of an initial assessment on admission, and will not authorise a routine or blanket approach.

The amendment also incorporates a statutory requirement for a review of the new strip search provision after 2 years following its commencement, with a report due to be tabled in the Legislative Assembly 6 months after the review commences. This will allow the director-general or their delegate to reassess the availability and suitability of alternative less restrictive searches including body scanners and whether they can meet the objectives of a section 67 initial assessment.

If in future other effective search mechanisms become available, such as the body scanners with appropriate capabilities available at the time and place of the relevant admission point, the statutory review provision will also act as a safeguard to ensure that strip searching on admission is not permanently authorised in circumstances where less restrictive methods had become available. This is an important safeguard to ensure that detainees human rights to privacy and humane treatment are not unreasonably limited by being subjected to a strip search where a less restrictive form of search is available that would achieve the safety objective.

Corrections Management Act 2007 – clarifying the Director-General's ability to declare the whole of a correctional centre an area which smoking is prohibited

1. Nature of the right and the limitation (s 28 (2) (a) and (c))

This amendment would allow the director-general to make a declaration that would prohibit smoking in a correctional centre, meaning that detainees and staff would not be able to smoke anywhere within the correctional facility. The use of the power under this amendment may engage and potentially limit the right to humane treatment in detention (s 19) and the right to equality and non-discrimination (s 8), and the right to privacy and home (s 12).

Right to humane treatment in detention: Smoking is a complex behaviour that can be difficult to stop. Nicotine is the main addictive substance in tobacco. Most of the harmful health effects of smoking are caused by tar and chemicals in tobacco smoke, and not by nicotine.

There are several nicotine withdrawal symptoms associated with smoking cessation including depressed mood, difficulty sleeping, anxiety, irritability, frustration, anger and restlessness. Without appropriate treatment for withdrawals, the prohibition could cause significant distress for detainees and would potentially limit the right not to be subject to inhumane treatment.

However, as noted below, safeguards will be put in place before a declaration is made under this section to ensure that potential harms associated with smoking withdrawal are properly mitigated and that detainees who are smokers are treated humanely, with access to appropriate therapeutic treatment.

Right to equality and non discrimination and right to privacy and home: these rights are potentially impacted as a prohibition on smoking at a correctional centre would place a restriction on what a detainee can do in a space that is their home, and this restriction is not one which the general community is subject to. While these rights may be limited, these limitations are reasonable as discussed below.

2. Legitimate purpose (s 28 (2) (b))

The primary purpose of this amendment is to authorise action to better protect the lives and health of staff and detainees, by allowing the director general to declare that smoking is prohibited entirely at correctional centre, rather than part of a correctional centre as is currently the case.

Use of the power provided by the amendment would positively engage the right to Life (s 9 of General Comment No. 36 [25]) as providing a smoke free working and living environment reduces employees' and detainees' exposure to second hand smoke and the associated serious health impacts.

The protection of staff and detainee life and health is an important and legitimate objective sought to be achieved by this amendment.

3. Rational connection between the limitation and the purpose (s 28 (2) (d))

The ability to declare all of a correctional centre to be smoke free allows staff and detainees to work and live in a smoke free environment. Declaring all of an ACT correctional centre to be smoke free would have significant health benefits for detainees and staff by avoiding the serious harms of tobacco smoking and passive smoke exposure.

Smoking is prohibited in correctional centres in all jurisdictions other than the ACT and Western Australia and this approach has had benefits for staff and detainees.

4. Proportionality (s 28 (2) (e))

While a number of rights are engaged and potentially limited by the amendment, any limitation on rights is the least restrictive means to achieve the aim of safeguarding the lives and health of detainees and staff by allowing employees and detainees to work and live in a smoke free environment.

Prior to the use of this power the director-general will need to be reasonably satisfied that there are appropriate therapeutic supports for smoking cessation available to detainees before making a declaration under this section.

Corrections and Sentencing Legislation Amendment Bill 2022

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Corrections and Sentencing Legislation Amendment Bill 2022**. In my opinion, having regard to the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

Corrections and Sentencing Legislation Amendment Bill 2022

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 will be the *Corrections and Sentencing Legislation Amendment Act 2022*.

Clause 2 — Commencement

This clause provides that the Act (other than section 18 and Part 4) will commence on the day after its notification day.

Section 18 and Part 4 will commence on a day fixed by the Minister by written notice. If these sections have not commenced within 12 months beginning on the Act's notification day, they automatically commence on the first day after that period.

Clause 3 — Legislation Amended

This clause lists the legislation amended by this Bill. This Bill will amend the *Corrections Management Act 2007*, *Crimes (Sentence Administration) Act 2005*, and the *Crime (Sentence Administration) Regulation 2006*.

Part 2 – Corrections Management Act 2007

Clause 4 — Section 70

This clause substitutes section 70 and clarifies the existing authorisation that the director-general may authorise strip searching on admission to be conducted on a detainee to achieve the objective of undertaking an assessment under section 67.

Section 70 (4) provides that Part 9.4 and Part 9.5 of the *Corrections Management Act 2007* other than section 113A, section 113B and section 113C apply. Excluding sections 113A, 113B and 113C allows a strip search to be conducted without an individualised risk assessment for each detainee.

The amendment will still allow corrections officers (as delegates of the director-general) a discretion not to strip search on first admission. There may be a small number of individual circumstances, where a strip search for the purposes of section 67 is not warranted. Corrections officers will exercise this discretion in line with their obligations under section 40B of the *Human Rights Act 2004* and consistent with relevant ACTCS policies and procedures.

The express intention in section 70 (2) to apply part 9.4 of the *Corrections Management Act 2007* expands the application of section 108 beyond a search

under part 9.4. Implied in section 70 (2) is a requirement that necessary adaptations are read into the provisions in parts 9.4 and 9.5 to allow them to be effective in relation to strip searches on admission. This has the effect of also clarifying that sections 109, 125 and 126 of the CM Act apply to strip searches conducted on admission.

Clause 5 – Nonsmoking areas, Section 86 (1)

This clause substitutes section 86 (1) to provide that the director-general of a correctional centre may declare the whole or part of the correctional centre as an area in which smoking is prohibited. Before making a declaration that the whole of a correctional centre is smoke free the director-general must be reasonably satisfied that appropriate therapeutic supports are available to detainees at the correctional centre to help them stop smoking. This amendment will allow the director-general to declare the whole of a correctional centre an area which smoking is prohibited.

Clause 6 – Section 111 heading

This clause substitutes the heading at section 111 with ‘Scanning, frisk and ordinary searches—direction to search detainee’.

Clause 7 – Section 111 (1)

This clause omits the phrase of ‘another corrections officer or anyone else working at or visiting a correctional centre’ in section 111 (1). This amendment confines the director-general’s authorisation under section 111 (1) to a direction to a corrections officer to conduct a scanning search, frisk search or ordinary search on detainees only.

Clause 8 – Section 111 (1), examples

This clause substitutes the examples provided in section 111 (1) to reflect that the updated section 111 (1) only applies to searches by corrections officer on detainees. This amendment removes the examples pertaining to searching a corrections officer or a person engaged to provide an educational program at a correctional centre. The updated examples reflect existing examples pertaining to searching detainees verbatim.

Clause 9 – Section 112

This clause substitutes the heading at section 112 with ‘Scanning, frisk and ordinary searches—requirements for search of detainee’. This clause also inserts new sections 112A, 112B, 112C and 112D.

Section 112 reflects existing requirements surrounding a corrections officers’ sex when performing a scanning, frisk or ordinary search of a detainee.

New section 112A relates to scanning and ordinary searches of non-detainees. It removes the requirement for a view to be formed in relation to each individual about the prudence of performing a scanning and/or ordinary search of another corrections officer or a visitor on entry or admission to a correctional centre. However, it provides that at any other time (other than on entry or admission to a correctional centre), the director-general is still required to form a belief based on reasonable grounds that it is prudent to do so to protect the safety of anyone or for the security and good order, at a correctional centre.

New section 112B provides that specific scanning and ordinary searches may be performed on non-detainees by a corrections officer of any sex. These may only involve an x-ray of the articles in the individual's possession and an individual passing through a metal-detecting device or a hand-held metal detecting device being passed over the individual. The amendment also provides safeguards in relation to ensuring a corrections officer or visitor must not be searched without consent, that they may withdraw consent at any time and they may choose to leave their possessions in a secure place provided at the entrance to a correctional centre.

New sections 112C and 112D relate to frisk searches of non-detainees. This section does not change any existing requirements in relation to frisk searches on a corrections officer or visitor authorised under sections 111 and 112.

Clause 10 – Strip searches—when may be conducted, Section 113A (1), new note 2

This clause inserts a new note into section 113A (1) to clarify that this section does not apply to a strip search undertaken pursuant to section 70.

Clauses 4 – Taking prohibited things etc into correctional centre, Section 145 (1) (a) and (b)

This clause substitutes two offences to ensure that taking a prohibited thing into a correctional centre or giving a prohibited thing to a detainee will remain an offence while also prescribing that sending a prohibited thing into a correction centre or sending a prohibited thing to a detainee will constitute an offence. This amendment will cover the widest possible range of delivery mechanisms including via RPAs.

Clause 12 – New section 145 (1A)

This clause inserts subsection 1A to clarify that a person may commit an offence under section 145 by sending a prohibited item without personal carriage of the item into a correctional centre or personally giving the item to a detainee.

The clause provides examples of what sending a prohibited item may encompass and this includes instances where a prohibited thing is being dropped into a correctional centre by a drone or RPA or being thrown into a correctional centre.

Clause 13 – Section 145 (3), definition of give

This clause omits the definition ‘give includes send’ in section 145 (3). This is a consequential amendment to clauses 11 and 12 of the Bill.

Clause 14 – New section 230

The clause inserts new section 230 which provides that the administering Minister of the CM Act must review the operation of section 70 as amended by the *Corrections and Sentencing Legislation Amendment Act 2022* as soon as practicable at the end of 2 years after its commencement. New section 230 also provides that the Minister must present a report of the review to the ACT Legislative Assembly within 6 months after the day the review commences.

The statutory review provision expires 3 years after the day it commences and is not ongoing.

Clause 15 – Dictionary, definition of visitor

This clause substitutes the definition of a visitor in the Dictionary to specify that a visitor includes a person who is not a corrections officer but who works at a correctional centre and a person who intends to enter the correctional centre as a visitor.

The clause provides examples of persons working at correctional centre who are deemed to be visitors such as a tradesperson, counsellor, psychologist or volunteer. The amendment covers individuals who may be at the parking lot of a correctional centre and have not yet entered but are intending to enter, the correctional centre as a visitor.

Part 3 – Crimes (Sentence Administration) Act 2005

Clause 16 – Notice of inquiry—breach of intensive correction order obligations, Section 63 (1)

This clause omits ‘director-general’ and substitutes ‘board’ so that the Sentence Administration Board is responsible for providing written notice of an inquiry into an alleged breach of an offender’s intensive correction order obligations. Written notice must still be provided to the offender and the director of public prosecutions.

Clause 17 – Section 63 (4)

This clause omits the requirement for the director-general to tell the Sentence Administration Board about the offender being given written notice of a breach of intensive correction order obligations. This requirement is now superfluous and is a consequential amendment to clause 15 of the Bill.

Clause 5 – Section 102

This clause substitutes the absolute requirement for a corrections officer to report a reportable breach based on their belief on reasonable grounds of an offender's breach of their good behaviour obligations to a sentencing court. The clause provides that corrections officers may under certain circumstances exercise a level of discretion by warning the offender about the reportable breach, rather than reporting the breach to the court.

The amendment introduces a presumption that corrections officers must report the offender's breach of their good behaviour order obligations to the sentencing court, unless certain conditions have been met which would enliven the discretion, to be established by notifiable instrument (discretion framework).

In addition to the conditions, the amendment also clarifies that the discretion would not be enlivened if corrections officers can ascertain that the conduct of the breach could be the subject of criminal charge. In this scenario, a corrections officer would need to make a record of the reportable breach and report this breach to the sentencing court so the matter can be dealt with under Part 6.5 of the *Crimes (Sentence Administration) Act 2005*.

The amendment provides that corrections officers must take a written record of all reportable breaches regardless of whether discretion is exercised and that a report to the court or a warning to the offender must be recorded in writing along with information about the grounds for believing there has been a breach.

For a report to the court, the corrections officer must include a summary of any previous warnings given to the offender for reportable breaches including information explaining why the non-reporting action was taken.

A corrections officer may only issue a warning to an offender if they act in accordance with the prescribed guidelines issued by the director-general. The amendment provides that a director-general must make guidelines about when a corrections officer can warn an offender about a reportable breach, rather than report them.

The amendment provides that the discretion framework must set out matters to be considered, the procedures to be followed, and the circumstances in which a corrections officer is obligated to report a reportable breach to the sentencing court.

The amendment retains the meaning of an 'offender' in existing section 102.

Clause 19 – Corrections officer’s actions for breach of good behaviour obligations—COVID-19 emergency, Section 102A (7)

The clause omits ‘section 102 (4)’ and substitutes ‘section 102 (8)’ in relation to the reference to *offender* as a result of numbering changes to the substituted section 102. This is a consequential amendment to clause 17 in the Bill.

Clause 20 – Community-based sentence transfer—decision on request, New section 277 (2A) and (2B)

This clause inserts new subsection 2A and 2B to enable the local authority to make procedures by notifiable instrument to assist in determining whether offenders with interstate sentences can be registered in the ACT.

This amendment will enable ACT Corrective Services to develop an assessment process that will provide a formalised framework for corrections officers to determine whether an offender will be suitable to be transferred to the ACT.

Clause 6 – Young offenders—breach of good behaviour obligations, Section 320G (3), definition of young offender, note

This clause substitutes the note in section 320G (3) to update the reference to section 102, referring to section 102 (8) instead of section 102 (4). This is a consequential amendment to clause 17 of the Bill.

Part 4 – Crimes (Sentence Administration) Regulation 2006

Clause 7 – Community-based sentence transfer—participating jurisdictions—Act, s 265 (3)

This clause substitutes section 265 (3) and provides that each state including the Northern Territory is a participating jurisdiction for community-based sentence transfers. Currently, New South Wales is the only participating jurisdiction. This amendment will support a national system of interstate transfers for community-based sentences and their associated community-based orders.