

## CLAUSE NOTES

### **INTERSTATE TRANSFER (COMMUNITY BASED SENTENCES)** **BILL 2009**

**Clause 1:                   Short Title**

**Clause 2:                   Commencement**

The Act will commence on proclamation (to enable administrative processes to be developed for the scheme – the Corrective Services Ministerial Council has already developed working guidelines).

**Clause 3:                   Interpretation**

**Clause 4:                   Application**

Describes the sentences that will be transferable under the legislation.

The legislation will only apply to sentences imposed in relation to adults. This is because many jurisdictions, including Tasmania, have separate legislative, administrative and judicial regimes for adults and juveniles. The legislation will not apply to certain types of sentences or orders that may be served in the community and that could be considered to be alternatives to imprisonment. These are:

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

**Clause 5: Register**

Provides that the Administrator of the Magistrates Court (acting as Registrar for the purpose of this Bill) will keep a register of local sentences transferred interstate and interstate sentences transferred here.

**Clause 6: Transfer Criteria**

Requires the Minister to consider certain criteria when deciding to send or receive an offender. The criteria to be considered are:

- Whether a sentence that corresponds to the sentence could be made in the State (including this State) or Territory to which it is proposed to transfer the sentence; and
- The welfare of the offender to whom the sentence applies; and
- The administration of justice in this State, another State or Territory; and
- The protection of the community in this State, another State or Territory; and
- Whether the offender to whom the sentence applies can comply with the sentence in the State (including this State) or Territory in which it is proposed to register the sentence; and
- Whether the sentence can be safely, efficiently and effectively administered; and
- Any other matters prescribed by regulation.

Subsection (2) empowers the Minister to have regard to any reports from parole, prison or correctional services authorities.

Subsection (3) provides that the Minister may send reports from parole, prison or correctional services authorities to a corresponding authority to assist them in forming an opinion or exercising a discretion under a corresponding law.

**Clause: 7 Offender may apply for transfer**

Provides that an offender may apply to the Minister in writing for the transfer of a local sentence to an interstate jurisdiction. The Minister may agree, or refuse to agree, to such a request.

Subsection (4) requires the Minister to advise the offender that by transferring to another jurisdiction, they will be subject to the laws of the other jurisdiction, which may impact upon the administration or execution of their sentence. This will help to ensure that the offender is aware of the potential for any adverse consequences of transfer.

**Clause 8: Minister may request transfer**

If the Minister is satisfied under clause 7 that the sentence should be transferred, and is satisfied that there are no appeals pending in relation to the sentence to be transferred, the Minister will ask the corresponding authority to register the sentence. The request may be accompanied by any information or documents to support the application that the Minister sees fit.

**Clause 9: Provision of additional information**

Once a request has been made under Clause 8, the Minister is able to provide the corresponding authority with any other information about the sentence or the offender that is requested by the corresponding authority. This means that if further information is required after the application has been made, the further information can be provided.

**Clause 10: Conditional acceptance by corresponding authority**

If the corresponding authority agrees to the registration of a sentence subject to preconditions being met by the offender, the Minister, in consultation with the offender and taking into consideration the welfare of the offender, must decide whether those preconditions are acceptable. If the preconditions are not acceptable, the Minister must notify the offender and the corresponding authority, providing the corresponding authority with reasons for disagreeing.

**Clause 11: Withdrawal of request to transfer**

At any time prior to interstate registration, the offender may notify the Minister that he or she no longer consents to the transfer. The Minister will forward this advice to the corresponding authority. It would be administratively impractical to allow consents to the transfer to be withdrawn after registration of the transfer as re-transfer of the order would have to occur.

**Clause 12: Effect of interstate registration**

The clause outlines the effect of registration of a local community based sentence under a corresponding law, with reference to the administration of the sentence and how a breach of the sentence should be dealt with. The effects are:

- That once registered the sentence is in force in the interstate jurisdiction;
- The once registered interstate the sentence ceases to be in force in the local jurisdiction;
- The offender may be dealt with in the receiving jurisdiction for a breach of the sentence, whether the breach happened before or after registration. If a breach action is in progress in the local jurisdiction at the time a request for transfer is made, it is unlikely that the authorities would agree to a transfer until proceedings were resolved. This is because the corresponding authority cannot be sure of the nature of the sentence that it would be agreeing to formally supervise and administer. However, the case may arise in which a breach that occurred prior to registration is not discovered until after registration. In this case, the receiving authority would consider the matter of the breach of the registered sentence as appropriate.
- If the local sentence is a sentence that was originally transferred to Tasmania from a corresponding authority, it will be removed from the part of the Register that records such sentences. This provision is in place as it is foreseeable that offenders may move between a variety of jurisdictions

over the time that their community based sentence is in operation. Unless the sentence was originally imposed in Tasmania, or the offender currently resides in Tasmania, there is no value in keeping the offender on our register.

Subsection 2: Registration does not affect the offender's right to seek an appeal or review of the conviction or finding of guilt or the imposition of a sentence in the original jurisdiction. As a matter of practicality, any appeal or review of a conviction or sentence must be dealt with in the original jurisdiction. If an appeal or review is successful and results in an amendment of the sentence, the amended sentence has effect in the interstate jurisdiction as though it had been imposed on appeal or review in the interstate jurisdiction. It would be contrary to natural justice to prevent an offender from seeking an appeal or review of their conviction or sentence by virtue of registration to a jurisdiction other than the original jurisdiction.

Subsection (3) means that this clause does not prevent the re-registration of a sentence previously registered and then de-registered as a sentence of the local jurisdiction under this legislation.

#### **Clause 13: Record of transfer to be made in Register**

Once the Minister is informed that a community based sentence that was in force in Tasmania is registered under a corresponding law, the Minister will direct the Registrar to note the transfer on the Register.

The Registrar will enter such details on the Register as the Registrar thinks fit. The Registrar already holds a register of sentences imposed by Tasmanian Courts. This clause will allow transferred sentences to be treated similarly to local orders rather than introducing a new administrative regime to deal with them.

The Registrar must endorse on the memorandum of sentence a signed statement that the sentence is, on the date of the endorsement, registered under a corresponding law.

The Registrar is to cause to be served on the offender notice in writing of the making of the record of sentence.

#### **Clause 14: Requests from Interstate for registration of sentence in Tasmania**

Provides that a corresponding authority may request that the Minister register a community based sentence that was imposed and is registered in the interstate jurisdiction.

A request for registration must include the offender's name, date of birth, last known address, a certified copy of the community based sentence and any

amendments made to it, and a certified copy of the judgment or order to which the sentence relates.

Empowers the Minister to request from the corresponding authority any further information in relation to the offender or the sentence to which the request relates.

**Clause 15: Minister may agree to register interstate sentence**

The Minister, having regard to the transfer criteria in clause 6, and any other matter, can either agree or refuse to agree to register the sentence. The Minister must not agree to register the sentence unless satisfied that the offender consents.

Any sentence to be registered in Tasmania will be subject to the mandatory precondition that the offender reports to a specified person in Tasmania at an agreed time. This means that the sentence will not be formally registered here until these preconditions are met. When an offender wishes to move here the situation could arise where the offender is registered in Tasmania, but not actually residing here yet because they have not finalised matters such as travel and accommodation. If the orders were being registered at an early point it could mean that they would be unable to comply with the obligations of their sentence immediately, leading to an inadvertent breach. By requiring the offender to present in this State before the registration is finalised, this situation is avoided.

If the Minister agrees to registration, notice of the mandatory precondition is to be served on the offender and the corresponding authority.

If the Minister refuses registration, the Minister must notify the offender and corresponding authority of the refusal and the reasons for refusal.

The Minister is also able to apply preconditions to individual offenders (individual preconditions). Imposing preconditions provides a means for the Minister to confirm the offender's ability and willingness to comply with the sentence in the local jurisdiction, before formal registration and transfer occurs. This may be considered necessary where the Minister is in any doubt concerning the offender's willingness to comply with directions. The Minister may, before the sentence is registered, amend or revoke any individual preconditions.

If the Minister decides to impose individual preconditions or amend individual preconditions already imposed, the Minister must notify the offender and the corresponding authority in writing.

**Clause 16: offender may withdraw request for registration**

An interstate offender may, by notice in writing to the Minister, withdraw his or her consent to the registration of the sentence at any time prior to the sentence

being registered. The Minister must, as soon as practicable, notify the relevant corresponding authority of the withdrawal of consent.

The notice is provided to the receiving Minister as it is this jurisdiction that will already have actions in place that need to be ceased.

### **Clause 17: Registration of Sentence**

Once the Minister is satisfied that any mandatory and individual preconditions imposed have been met by the offender, and that the offender consents to the registration, the Minister will direct the Registrar to enter the sentence on the Register.

Subsection 3 requires the Registrar to categorise sentences being registered as either a community service order within the meaning of the Sentencing Act 1997, a probation order within the meaning of the Sentencing Act 1997, or a sentence that falls into one of the categories prescribed by regulations made under paragraph (c) of the definition of “community based sentence” in section 3.

This will make it clear what type of sentencing order Tasmania deems a transferred sentence to be. It is necessary to know this so that if there is some form of breach or other action that needs to be taken in relation to the sentence, it is clear which legislation or sections of legislation will apply. This will affect how the sentence can be dealt with in this State.

The remainder of the section deals with the administrative function of the Registrar in registering the sentence, and provides that the Registrar must advise the corresponding authority and the offender that the sentence has been registered.

### **Clause 18: Effect of registration of interstate sentence**

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

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

an offence against the laws of the local jurisdiction, and not an offence against the laws of the original jurisdiction;

- However, in this case the penalty for the offence is taken to be a penalty imposed under the law of the originating jurisdiction, and not under the law of the local jurisdiction. Therefore, a court in the local jurisdiction will treat the breach as a breach of a local sentence, but will look to the penalty that could have been imposed in the original jurisdiction for the relevant offence to determine an appropriate breach penalty. Treating breaches in this way avoids the need for offence or penalty matching between jurisdictions, which would be administratively inefficient and ineffective to establish and maintain. If the matter comes again before the local court for a breach or any other matter, both the sentence and the penalty will be viewed as imposed under the law of the receiving jurisdiction;
- That any part of the sentence served in the interstate jurisdiction before registration is taken to be served in this jurisdiction;
- That the offender may be dealt with in this jurisdiction for a breach of the sentence, whether the breach happened before or after registration. If a breach action is in progress in the interstate jurisdiction at the time a request for transfer is made, it is unlikely that the Minister would accept the transfer. This is because the Minister cannot be sure of the nature of the sentence that it would be agreeing to formally supervise and administer. However, the case may arise in which a breach that occurred prior to registration is not discovered until after registration. If this situation occurs, the local jurisdiction would consider the matter of breach of the registered sentence as appropriate.
- Whichever type of sentence the Registrar registers the sentence as under clause 17(3) is the type of sentence that the sentence will be treated for all purposes;
- The law of this State applies to the sentence and any breach of the sentence.

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

#### **Clause 19: Amendment of registration in other State or Territory**

Clause 19 states that in the case of the Minister becoming aware of inaccurate information regarding a sentence of the local jurisdiction registered in another jurisdiction under corresponding law, the Minister must inform the corresponding

authority of how the information held in the interstate register needs to be changed to become accurate. The register may have become inaccurate because the offender may have fulfilled additional components of the sentence registered in interstate jurisdiction between the request for transfer and registration of the transfer, or because the offender has been successful in seeking a review or appeal of their sentence.

#### **Clause 20: Amendment of registration and records**

Empowers the Registrar to amend inaccurate information contained in the register in relation to local sentences registered interstate and interstate sentences registered locally.

The Minister, after receiving a request from the interstate authority to amend the details of the registration, will direct the Registrar to make such amendments.

The Registrar is required to notify the offender and the interstate authority of any amendment so made and the details of the amendment.

#### **Clause 21: Dispute about accuracy of information**

Clause 21 states the action that must be taken by the Minister and interstate authority if there is a dispute over the accuracy of the information held about a sentence of the local jurisdiction that has been registered in the register of the interstate jurisdiction.

The offender may make a claim in writing to the interstate authority, stating how the information held in a register concerning the offender and/or sentence is inaccurate. The offender will communicate initially with the interstate authority as the interstate authority represents the jurisdiction administering and supervising the sentence.

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

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

#### **Clause 22: Application to Court for alteration of local sentence**

The reciprocal legislation that is being put in place across Australia will provide only for the transfer of sentences that are sufficiently "like" that they can be effectively administered in another jurisdiction.



It may be the case that an offender subject to a local sentence may wish to move to a jurisdiction that does not have a sentencing option available that is sufficiently “like” to allow the offender to transfer.

Clause 22 provides that any local offender in this situation may apply to the court that made, or is to be taken to have made, the community based sentence order to have the order reviewed. The application will be dealt with as though it is an application under sections 35 or 41 of the Sentencing Act 1997, and be deemed to have been made under these sections.

For any application made to the Supreme Court, a copy of the application and notice of hearing is to be served on the Director of Public Prosecutions and the Director of Community Corrections at least seven days before the hearing.

For any application made to the Court of Petty Sessions, a copy of the application and notice of hearing is to be served on the Commissioner of Police and the Director of Community Corrections at least seven days before the hearing.

This is because these parties may be interested in making submissions at the hearing.

At the hearing of an application for variation of a local sentence, the court may either alter sentence or cancel the sentence and deal with the offender as if the court had just found the offender guilty. The court may refuse to vary or cancel the sentence. These are the option already available to the Courts under those sections.

The Court is unable to vary the sentence or deal with the offender in a manner other than that which will enable the sentence to be registered under a corresponding law. This makes it clear that the court cannot take the opportunity to increase the severity of the sentence.

### **Clause 23: Delegation**

Recognises that it may be practical for the Minister's functions to be delegated.

### **Clause 24: Evidence**

Clause 24 establishes that an instrument in writing that purports to be a copy of a statement endorsed on a memorandum of sentence on a specified date and signed by the Registrar is prima facie evidence that the sentence was registered under this Act on that date.

A copy of an interstate sentence certified as a true copy by the registrar may be received into evidence in court. This copy of sentence is prima facie evidence of the matters stated in the sentence.

**Clause 25: Regulations**

Provides that the Governor may make any regulations necessary for this legislation. The regulations may relate to any matter under the legislation.

**Clause 26: Administration of Act**

Provides that, until an order under the Administrative Arrangements Act 1990 is made to the contrary, the administration of the Act is assigned to the Minister for Correctional Services. The Department responsible to that Minister in relation to the administration of this Act is the Department of Justice.