



New South Wales

Crimes (Administration of Sentences) Amendment Act 2004 No 47

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New South Wales

Crimes (Administration of Sentences) Amendment Act 2004 No 47

Act No 47, 2004

An Act to amend the *Crimes (Administration of Sentences) Act 1999* with respect to mobile phone offences, inquiries and hearings for correctional centre offences, drug testing of inmates and other miscellaneous matters; and for other purposes. [Assented to 6 July 2004]

The Legislature of New South Wales enacts:**1 Name of Act**

This Act is the *Crimes (Administration of Sentences) Amendment Act 2004*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by this section.
- (2) The amendments made by Schedule 2 commence on the commencement of Schedule 1 [14] to the *Crimes (Administration of Sentences) Further Amendment Act 2002*.
- (3) The amendments made by Schedule 3.2 commence on the date of assent.

3 Amendment of Crimes (Administration of Sentences) Act 1999 No 93

The *Crimes (Administration of Sentences) Act 1999* is amended as set out in Schedules 1 and 2.

4 Amendment of other Acts and instrument

The Acts and instrument specified in Schedule 3 are amended as set out in that Schedule.

Schedule 1 Amendment of Crimes (Administration of Sentences) Act 1999

(Section 3)

[1] Section 3 Interpretation

Insert in alphabetical order in section 3 (1):

mobile phone includes any device that may be used, in whole or in part, for the purpose of sending or receiving voice or other data over a mobile telephone network, whether or not it may be used for any other purpose.

non-invasive sample means any of the following samples of human biological material:

- (a) a sample of breath, taken by breath test, breath analysis or otherwise,
- (b) a sample of urine,
- (c) a sample of faeces,
- (d) a sample of saliva taken by buccal swab,
- (e) a sample of nail,
- (f) a sample of hair other than pubic hair,
- (g) a sample of sweat taken by swab or washing from any external part of the body other than:
 - (i) the genital or anal area or the buttocks, or
 - (ii) the breasts of a female or a transgender person who identifies as a female.

[2] Section 51 Definitions

Omit the definitions of *major offence* and *minor offence*.

[3] Section 53 Penalties governor may impose

Omit “minor offence” from section 53 (1), (2) and (3) wherever occurring.

Insert instead “correctional centre offence”.

[4] Section 53 (1) (b)

Omit “28”. Insert instead “56”.

[5] Section 53 (1) (c)

Omit “3”. Insert instead “7”.

[6] Section 54 Reference of offences to Visiting Magistrate

Omit section 54 (1). Insert instead:

- (1) The governor may refer a correctional centre offence with which an inmate is charged to a Visiting Magistrate for hearing and determination if the governor considers that, because of the serious nature of the offence, it should be referred to a Visiting Magistrate.

[7] Section 55 Hearing of charges by Visiting Magistrate

Omit section 55 (5). Insert instead:

- (5) Any hearing in the proceedings is to be held:
 - (a) in the correctional centre at which the inmate is in custody, or
 - (b) if the Visiting Magistrate is satisfied that it is in the interests of the administration of justice for it to be held elsewhere—at any other place appointed by the Visiting Magistrate (an *appointed place*).
- (5A) If a Visiting Magistrate appoints an appointed place for the holding of any hearing in the proceedings, the Visiting Magistrate may do any of the following:
 - (a) direct that the inmate must appear before the Visiting Magistrate by way of audio visual link from the correctional centre at which the inmate is in custody,
 - (b) direct that any other inmate who gives evidence or makes a submission in the hearing is to do so by way of audio visual link from the correctional centre at which that inmate is in custody,
 - (c) direct that any person other than an inmate who gives evidence or makes a submission is to do so by way of audio visual link from any place within New South Wales nominated by the Visiting Magistrate.
- (5B) The Visiting Magistrate must not make a direction referred to in subsection (5A) if:
 - (a) the necessary audio visual facilities are unavailable or cannot reasonably be made available, or

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- (b) the Visiting Magistrate is satisfied that the direction would be unfair to a party to the proceedings.
- (5C) Facilities are to be made available for private communication between an inmate appearing by way of audio visual link under this section and the inmate's representative in the proceedings if the inmate's representative attends the hearing at the appointed place.
- (5D) Any place at which a person appears, gives evidence or makes a submission by way of audio visual link under this section is taken to be part of the appointed place.
- (5E) Subsection (5D) has effect, for example, for the purposes of the laws relating to evidence, procedure, contempt of court or perjury.
- (5F) Subsection (5D) also has the effect that any offence committed at the place at which a person appears, gives evidence or makes a submission under this section by way of audio visual link is to be taken to have been committed at the appointed place.
- (5G) Sections 5D, 20A, 20B and 20D–20F of the *Evidence (Audio and Audio Visual Links) Act 1998* apply, with such modifications as the Visiting Magistrate may direct, to proceedings in which a person appears, gives evidence or makes a submission by way of audio visual link under this section as they apply to the appearance, giving evidence or making of a submission by way of audio visual link in a proceeding before a NSW court under that Act.
- (5H) Nothing in this section prevents a direction under section 5BB (1) of the *Evidence (Audio and Audio Visual Links) Act 1998* being made in the proceedings.

[8] Section 56 Penalties Visiting Magistrate may impose

Omit “conducting an inquiry” from section 56 (1).

Insert instead “hearing the charge”.

[9] Section 56 (1)–(3)

Omit “the offence” wherever occurring.

Insert instead “the correctional centre offence”.

[10] Section 56 (1) (b)

Omit “56”. Insert instead “90”.

[11] Section 56 (1) (e)

Omit “28 days”. Insert instead “6 months”.

[12] Section 56 (1) (f)

Insert after section 56 (1) (e):

- (f) imposition of a sentence of imprisonment for a period not exceeding 6 months.

[13] Section 56 (4)

Insert after section 56 (3):

- (4) To avoid doubt, a Visiting Magistrate making an order referred to in subsection (1) (f) is a person exercising criminal jurisdiction for the purposes of the definition of *court* in section 3 (1) of the *Crimes (Sentencing Procedure) Act 1999*.

[14] Section 56A

Insert after section 56:

56A Penalty for possession of a mobile phone

- (1) The governor or Visiting Magistrate dealing with a charge relating to a correctional centre offence arising out of the possession of a mobile phone or any part of it, a mobile phone SIM card or any part of it, or a mobile phone charger or any part of it may order that an inmate be deprived, for up to 6 months, of such withdrawable privileges as the governor or Visiting Magistrate may determine if satisfied beyond reasonable doubt that the inmate is guilty of the offence.
- (2) To avoid doubt, if a penalty is imposed under this section in respect of a correctional centre offence, a governor or Visiting Magistrate must not also impose a penalty referred to in section 53 or 56, as the case may be, in respect of the same correctional centre offence.

[15] Section 57 Drug tests for inmates

Omit section 57 (1) (a). Insert instead:

- (a) the result of a test showing the presence of a drug in a non-invasive sample taken from or provided by an inmate, or

[16] Section 57 (1) (b)

Omit “provide a sample of his or her urine”.

Insert instead “provide, or enable to be taken, from the inmate a non-invasive sample”.

[17] Section 59 Compensation for property damage

Omit “\$100” from section 59 (2). Insert instead “\$500”.

[18] Section 62 Appeals against decisions of Visiting Magistrates

Insert “or (f)” after “section 56 (1) (e)” in clause 62 (1).

[19] Section 79 Regulations

Omit “an inmate’s breath, urine or faeces” from section 79 (v).

Insert instead “a non-invasive sample provided by, or taken from, an inmate”.

[20] Section 79 (w)

Omit the paragraph.

[21] Section 101 Regulations

Omit “an offender’s breath, urine or faeces” from section 101 (f).

Insert instead “a non-invasive sample provided by, or taken from, an offender”.

[22] Section 117 Regulations

Omit “an offender’s breath, urine or faeces” from section 117 (e).

Insert instead “a non-invasive sample provided by, or taken from, an offender”.

[23] Section 163 Revocation of periodic detention order

Omit section 163 (2) and (2A). Insert instead:

- (2) The Parole Board must revoke an offender's periodic detention order on the application of the Commissioner if the Parole Board is satisfied that:
 - (a) the offender:
 - (i) has failed to report for 3 or more detention periods, whether during the same sentence of imprisonment or during different sentences of imprisonment being served consecutively (or partly consecutively) and whether any of the failures to report occurred before or after a reinstatement of the offender's periodic detention order under section 164A or 168A, and
 - (ii) has not had a periodic detention order reinstated previously under section 164A or 168A following revocation for failure to report for 3 or more detention periods, whether under this subsection or any other law, or
 - (b) the offender:
 - (i) has failed to report for at least 1 detention period, and
 - (ii) has had a periodic detention order reinstated previously under section 164A or section 168A following revocation for failure to report for 3 or more detention periods, whether under this subsection or any other law,

and the Parole Board is satisfied that the failures to report occurred otherwise than on leave of absence and are not the subject of an exemption under section 90.

- (2A) An application under subsection (2) must be made:
 - (a) if the Commissioner is satisfied that:
 - (i) an offender has failed to report for 3 or more consecutive detention periods, and
 - (ii) the offender has failed to apply for, or been refused, leave of absence with respect to each of the detention periods referred to in subparagraph (i), and

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- (iii) the offender's periodic detention order has not previously been reinstated under section 164A or 168A following revocation for failure to report for 3 or more detention periods, whether under subsection (2) or any other law, or
 - (b) if the Commissioner is satisfied that:
 - (i) an offender has failed to report for at least 1 detention period, and
 - (ii) the offender has failed to apply for, or been refused, leave of absence with respect to the detention period referred to in subparagraph (i), and
 - (iii) the offender's periodic detention order has previously been reinstated under section 164A or 168A following revocation for failure to report for 3 or more detention periods, whether under subsection (2) or any other law.

[24] Section 249 Definitions

Insert at the end of the section:

- (2) For the removal of doubt, *person in custody* in subsection (1) includes a person in lawful custody:
 - (a) refused bail by an authorised officer as referred to in section 20 of the *Bail Act 1978*, or
 - (b) granted bail by an authorised officer but not released as referred to in section 20 of the *Bail Act 1978*, or
 - (c) arrested under section 50 (1) (a) of the *Bail Act 1978*, or
 - (d) apprehended under a warrant referred to in section 50 (1) (b) (i) of the *Bail Act 1978*.

[25] Section 250 Transport and detention of persons in custody

Insert “, court” after “correctional centre” in section 250 (2) (a).

[26] Section 255 Effect of extension of sentence

Insert “, or partly consecutively,” after “consecutively” in section 255 (2).

[27] Section 255 (2) (a)

Insert “or before” after “at”.

[28] Section 255 (2) (b)

Omit “at the expiry of the earlier sentence”.

Insert instead “at or before the expiry of the earlier sentence (but after the end of any non-parole period)”.

[29] Schedule 2 Serious Offenders Review Council

Omit clause 3 (1). Insert instead:

- (1) The Commissioner may establish a list of officers of the Department eligible to be nominated as the deputy of an official member (*eligible officers*).
- (1A) An official member may from time to time nominate an eligible officer to be the deputy of the official member.
- (1B) The nomination of a deputy of an official member under this clause may be revoked at any time by the Commissioner or the official member that nominated the deputy.
- (1C) The nomination of a deputy under this clause may be for a specified period or an indefinite period and, in respect of the period the nomination is in force, has effect according to its terms.
- (1D) The nomination of a deputy of an official member under this clause is revoked on revocation of the appointment of the official member under clause 7.

[30] Schedule 5 Savings, transitional and other provisions

Insert at the end of clause 1 (1):

Crimes (Administration of Sentences) Amendment Act 2004

[31] Schedule 5

Insert at the end of the Schedule with appropriate Part and clause numbers:

**Part Provisions consequent on enactment of
Crimes (Administration of Sentences)
Amendment Act 2004**

Definition

In this Part, the *2004 amending Act* means the *Crimes (Administration of Sentences) Amendment Act 2004*.

Removal of distinction between major offence and minor offence

Sections 51, 53 and 54, as in force before their amendment by the 2004 amending Act, continue to apply to any correctional centre offence committed before the commencement of those amendments, and such offences are to be dealt with in accordance with those sections as if they had not been so amended.

Hearing of charges by Visiting Magistrate

Section 55, as in force before its amendment by the 2004 amending Act, continues to apply to any proceedings on a charge referred to a Visiting Magistrate that had been referred but not concluded before the commencement of that amendment, and such proceedings are to be determined in accordance with that section as if it had not been so amended.

Compensation for property damage

Section 59, as in force before its amendment by the 2004 amending Act, continues to apply to a correctional centre offence committed before the commencement of that amendment, and such an offence is to be dealt with in accordance with that section as if it had not been so amended.

Revocation of periodic detention orders

Section 163 (2) and (2A), as substituted by the 2004 amending Act, apply to a failure to report for a detention period that occurred before the commencement of the relevant

provision (being one of a series of detention periods occurring during consecutive, or partly consecutive, sentences of imprisonment) only if it is one of a series of failures to report of which the most recent occurred after the relevant commencement.

Extension of sentences

- (1) Section 255, as in force before its amendment by the 2004 amending Act, continues to apply to a sentence whose term or non-parole period was extended under this Act before the commencement of that amendment.
- (2) Any such sentence and the date of commencement of any other sentence that is to be served consecutively with the extended sentence are to operate in accordance with section 255 as if it had not been so amended.

Exempt documents within the meaning of Freedom of Information Act 1989

A document that contains matter relating to functions in relation to which the office of Inspector-General of Corrective Services was, by virtue of section 9 of the *Freedom of Information Act 1989*, exempt from the operation of that Act immediately before 1 October 2003 is taken to be, and to always have been, an exempt document within the meaning of the *Freedom of Information Act 1989*.

Schedule 2 Further amendments to Crimes (Administration of Sentences) Act 1999

(Section 3)

[1] Section 236F Testing of staff for alcohol and prohibited drugs

Omit “to provide a sample of the staff member’s urine or hair” from section 236F (1) (b).

Insert instead “to provide, or enable to be taken, a non-invasive sample from the staff member”.

[2] Section 236F (3) (b)

Omit “to provide a sample of the member of staff’s urine or hair”.

Insert instead “to provide, or enable to be taken, a non-invasive sample from the staff member”.

[3] Section 236G Testing where member of correctional staff attends hospital

Omit “provide a sample of the member of staff’s blood, urine or hair” from section 236G (1).

Insert instead “provide, or enable to be taken, a sample of blood or a non-invasive sample from the staff member”.

[4] Section 236G (4)

Omit “taking of a sample of blood, urine or hair”.

Insert instead “taking, or provision, of a sample of blood or a non-invasive sample”.

[5] Section 236H Protection from liability

Omit “taking a sample of blood, urine or hair” from section 236H (1).

Insert instead “taking, or being provided with, a sample of blood or a non-invasive sample”.

[6] Section 236H (1) (a) and (b)

Omit “take the sample of blood, urine or hair” wherever occurring.

Insert instead “take, or be provided with, the sample of blood or the non-invasive sample”.

[7] Section 236I Regulations

Omit “samples of urine, hair or blood” from section 236I (c).

Insert instead “samples of blood or non-invasive samples”.

[8] Section 236I (e)

Omit “a sample of the staff member’s urine or hair”.

Insert instead “a non-invasive sample from the staff member”.

[9] Section 236I (h)

Omit “samples of urine, hair or blood”.

Insert instead “samples of blood or non-invasive samples”.

Schedule 3 Amendment of other Acts and instrument (Section 4)

3.1 Crimes (Administration of Sentences) Regulation 2001

[1] Clause 113B

Insert after clause 113A:

113B Inmate possession of a mobile phone

An inmate must not have in his or her possession a mobile phone or any part of it, a mobile phone SIM card or any part of it, or a mobile phone charger or any part of it.

[2] Clause 116 Definition of “correctional centre offence”

Omit “Part 1 or 2 of” from clause 116 (c).

[3] Clause 117 Definition of “major offence”

Omit the clause.

[4] Clause 118 Attempts

Omit “and (if appropriate) a major offence”.

[5] Schedule 2

Omit the Schedule. Insert instead:

Schedule 2 Correctional centre offences

(Clause 116)

Provision	Subject
Clause 5	Supply false or misleading particulars
Clause 8	Fail to surrender property on reception
Clause 38	Fail to clean yards
Clause 39	Fail to comply with correctional centre routine
Clause 40	Enter other cells

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Schedule 3 Amendment of other Acts and instrument

Provision	Subject
Clause 41	Fail to attend musters
Clause 42	Operate bell, hooter, siren or whistle
Clause 43	Avoid correctional centre routine
Clause 44	Unlawfully deliver or receive article to or from inmate
Clause 45	Possess or create prohibited goods
Clause 46	Resist or impede search
Clause 47	Fail to keep property in a tidy and orderly manner
Clause 52	Unlawfully purchase food
Clause 52	Possess unauthorised food
Clause 52	Unlawfully trade in food
Clause 56	Fail to maintain personal cleanliness
Clause 57	Wear improper clothing
Clause 58	Fail to keep clean cells and issued articles
Clause 58	Damage, destroy or deface cell
Clause 58	Fail to look after clothing, bedding and other issued articles
Clause 59	Unlawfully possess condom or dental dam
Clause 59	Unlawfully use condom or dental dam
Clause 59	Unlawfully dispose of condom or dental dam
Clause 61	Misbehave while attending services and programs
Clause 68	Desecrate or abuse religious items

Provision	Subject
Clause 97	Convey or deliver to, or receive from, visitors unauthorised articles
Clause 107	Send or receive unauthorised letters or parcels
Clause 108	Send prohibited letters, parcels or articles
Clause 112	Unlawfully use telephone or facsimile
Clause 113A	Possess camera or video or audio recording equipment
Clause 113B	Possess mobile phone, mobile phone SIM card or mobile phone charger
Clause 120	Disobey direction
Clause 124	Contravene condition of local or interstate leave permit
Clause 125	Conceal for purpose of escape
Clause 126	Conceal article for use in escape or other offence
Clause 126A	Possess offensive weapon or instrument
Clause 127	Intimidation
Clause 128	Indecency
Clause 129	Participate, or inciting other inmates to participate, in riot
Clause 130	Assaults
Clause 130	Fight or engage in other physical combat
Clause 130	Throw article
Clause 131	Steal
Clause 131	Damage or destroy property
Clause 131	Tamper with food or drink

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Schedule 3 Amendment of other Acts and instrument

Provision	Subject
Clause 132	Hinder or obstruct dog
Clause 133	Cause harm to animal, bird or reptile
Clause 134	Interfere with correctional centre property
Clause 135	Tattoo
Clause 136	Gamble
Clause 137	Possess or consume alcohol
Clause 137	Prepare or manufacture alcohol
Clause 138	Possess drug
Clause 139	Administer drug
Clause 140	Possess drug implement
Clause 141	Self-intoxication
Clause 142	Fail prescribed urine test
Clause 143	Smoke in non-smoking area
Clause 143	Alter, damage or remove non-smoking sign or smoking sign
Clause 144	Bribery
Clause 145	Obstruct correctional officer
Clause 146	Refuse breath testing
Clause 148	Refuse or fail to supply urine sample
Clause 149	Refuse or fail to supply urine sample
Clause 160	Make mischievous complaint
Clause 172	Give false or misleading information

[6] Dictionary

Omit the definitions of *major offence* and *minor offence*.

3.2 Criminal Appeal Act 1912 No 16

[1] Section 25A Certain time to count as part of appellant's sentence

Insert after section 25A (5):

- (6) In this section, *appeal* includes an application for special leave to appeal.

[2] Section 28A

Insert after section 28:

28A Operation of sections 18 and 25A

- (1) This section applies if, under section 18 or 25A, any period does not count as part of any term of imprisonment under an appellant's sentence.
- (2) The court may make any order that it thinks fit to give effect to section 18 or 25A (including an order specifying the date of the commencement or re-commencement of the sentence).
- (3) If the court does not make such an order, the sentence commences or re-commences on the appropriate date required for the operation of section 18 or 25A.
- (4) This section extends to apply in respect of the following appeals:
 - (a) an appeal made, but not determined, before the commencement of this section,
 - (b) an appeal in respect of which notice of intention to appeal or to apply for leave to appeal or application for leave (or for special leave) to appeal was made before the commencement of this section.

3.3 Freedom of Information Act 1989 No 5

Schedule 2 Exempt bodies and offices

Omit the matter relating to the office of Inspector-General of Corrective Services.

3.4 Summary Offences Act 1988 No 25

Section 27DA

Insert after section 27D:

27DA Inmate possession of a mobile phone

- (1) An inmate must not, without reasonable excuse (proof of which lies on the inmate), have in his or her possession in a place of detention a mobile phone or any part of it, a mobile phone SIM card or any part of it, or a mobile phone charger or any part of it.

Maximum penalty: imprisonment for 2 years or 50 penalty units, or both.

- (2) In this section, *mobile phone* includes any device that may be used, in whole or in part, for the purpose of sending or receiving voice or other data over a mobile telephone network, whether or not it may be used for any other purpose.

[Second reading speech made in—

Legislative Assembly on 4 June 2004

Legislative Council on 24 June 2004]

BY AUTHORITY