

[Act 1996 No 19]



New South Wales

Periodic Detention of Prisoners Amendment Bill 1995

Explanatory note.

This explanatory note relates to this Bill as introduced into Parliament.*

Overview of Bill

The object of this Bill is to amend the *Periodic Detention of Prisoners Act 1981* so as:

- (a) to require a court making a periodic detention order to order the person the subject of the order to submit immediately to the taking of particulars (including photographs and fingerprints) sufficient to identify the person, and
- (b) to increase from 2 to 6 weeks the maximum period by which a term of sentence may be extended to penalise a periodic detainee for a failure to report, and
- (c) to provide for the postponement of the commencement of a cumulative sentence of periodic detention if the sentence on which it is cumulative is extended under the Act, and

* Amended in committee—see table at end of volume.

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- (d) to enable the Commissioner of Corrective Services (or the Commissioner's delegate) to direct a periodic detainee to take leave of absence when necessary for the personal safety of the detainee or other detainees, and
- (e) to enable an order directing a periodic detainee to perform work at a place outside a prison to cover more than one detention period and to omit the requirement that such an order specify the place of work and hours of work, and
- (f) to remove certain anomalies concerning the calculation, and commencement, of unexpired portions of periodic detention sentences on cancellation of periodic detention orders, and
- (g) to clarify rights of appeal in respect of cancellation of periodic detention orders by Local Courts and the District Court, and
- (h) to make it clear that a court that cancels a periodic detention order in respect of a sentence may also cancel any other orders under the Act requiring other sentences to be served concurrently or cumulatively with the sentence, and
- (i) to provide that, on cancellation of a periodic detention order and imposition of a minimum and additional term for the unexpired portion of the sentence to which it relates, any cumulative sentence of periodic detention commences at the expiration of the minimum term, and
- (j) to provide that a court may refuse to cancel a periodic detention order for failure of a person to report, on the ground that leave of absence or an exemption ought to have been granted, only if the person actually applied for grant of the leave of absence or exemption concerned, and
- (k) to enable a court, on application by the Commissioner, to make such orders as it considers appropriate on cancellation of a periodic detention order, and
- (l) to provide that a periodic detention order is not invalidated merely because it specifies an incorrect date for commencement of the sentence of imprisonment the subject of the order and to enable the order to be corrected to take into account any detention period served by the periodic detainee in compliance with the order, and
- (m) to specify that a periodic detainee is to report for the detainee's first detention period at 8.30 am (or such other time as may be prescribed by the regulations) on the day following the date specified in the order of the court imposing the sentence to be served by way of periodic detention as the date on which the sentence commences, and

- (n) to clarify the disciplinary powers that may be exercised in respect of unruly periodic detainees, and
- (o) to provide that service by post to a periodic detainee's last known address or by facsimile to a number nominated by the detainee is sufficient service for the purposes of section 25 of the Act, and
- (p) to make provision with respect to periodic detainees who report late for detention periods, and
- (q) to enable regulations to be made requiring periodic detainees seeking, or directed to take, leave of absence for health reasons to undergo certain medical examinations, and
- (r) to confirm the existing power to make regulations relating to testing for, and evidence of, consumption of alcohol and drugs by periodic detainees by including provisions that parallel regulation making powers for this purpose in the *Prisons Act 1952*, and
- (s) to enact consequential savings and transitional provisions and to enable regulations of a savings and transitional nature to be made.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides that the proposed Act will commence on a day or days to be appointed by proclamation.

Clause 3 is a formal provision that gives effect to the Schedule of amendments to the *Periodic Detention of Prisoners Act 1981* (referred to as the "Principal Act") described in paragraphs (a)–(s) of the overview of this Bill.

Schedule 1 Amendments

Identification of periodic detainee (Schedule 1 [1])

Under section 353A of the *Crimes Act 1900*, a court may order a person convicted of certain prescribed offences to present himself or herself at a police station for the taking of particulars (including photographs and fingerprints) necessary for identification of the person if the court is satisfied the order would assist in resolving doubt about the defendant's identity. The proposed amendment requires a court making a periodic detention order to

make a similar order in respect of a person convicted of an offence who is to serve a sentence by way of periodic detention. Such an order will require the person to submit to the taking of such particulars at the court so as to ensure that the person who presents for periodic detention is the person in respect of whom the order was made.

Correction of orders (Schedule 1 [2])

Section 8 of the Principal Act provides that a sentence of imprisonment to be served by way of periodic detention is to commence on the date specified in the order of the court imposing the sentence. The proposed amendment will ensure that an order containing an error in relation to that date is not invalidated and will enable the order to be corrected to take into account any detention period served by the periodic detainee in compliance with the erroneous order.

Date and time of first reporting for periodic detention (Schedule 1 [3] and [4])

A detention period normally commences at 7.00 pm on the same day of the week as the date specified in the order of the court imposing the sentence as the date on which the sentence commences. The proposed amendments provide for the first detention period to be served under an order to commence at 8.30 am (or at such other time as may be prescribed by the regulations in respect of a particular prison) on the day following the date specified in the order for commencement of the sentence and to end at 4.30 pm the following day. This will ensure that a periodic detainee has an appropriate induction session and health assessment.

Work orders (Schedule 1 [5]–[7])

Under section 10 of the Principal Act, the Commissioner may make an order directing a periodic detainee to perform work in a prison or at a place outside a prison specified in the order during any detention period. The proposed amendment omits the requirement to specify the hours of work and place of work and will enable one order to be made covering a number of detention periods and work sites. This will avoid the unnecessary multiplicity of orders to cover detainees who work at a series of places.

Directed leave of absence (Schedule 1 [8]-[11] and [15])

Under section 20 of the Principal Act, the Commissioner may grant leave of absence for various reasons at the request of a periodic detainee. Proposed section 20A (Schedule 1 [10]) will enable the Commissioner (or the Commissioner's delegate) to direct a periodic detainee to take leave of absence for one or more detention periods in the interest of the personal safety or well being of the periodic detainee or other detainees. Schedule 1 [8], [9], [11] and [15] contains consequential amendments.

Reporting late (Schedule 1 [11], [14] and [15])

Proposed section 21AA (Schedule 1 [14]) provides for a periodic detainee who, without reasonable excuse, reports late for a detention period to be treated as having failed to report for the detention period. It also enables the Commissioner to grant leave of absence for the whole or part of a detention period if a periodic detainee who reports late has a reasonable excuse for doing so. The Commissioner will be able to order a periodic detainee who reports late for part of a period to make up the time concerned by reporting earlier or staying later at another detention period. Consequential amendments are made by Schedule 1 [11] and [15].

Penalty for failure to report (Schedule 1 [12])

At present, a periodic detainee who fails to report for one or more detention periods may be penalised by an extension of his or her term of sentence by up to 2 weeks. The proposed amendment increases the maximum period by which a term of sentence may be so extended to 6 weeks.

Commencement of cumulative sentences (Schedule 1 [13] and [19])

The proposed amendment to section 21 (Schedule 1 [13]) will ensure that the commencement date of a cumulative sentence is extended appropriately when the sentence on which it is to be served cumulatively is extended under that section.

Currently, when a periodic detention order is cancelled and a minimum and additional term is imposed, the periodic detainee is imprisoned full-time for the minimum term. Proposed section 27 (1) (d) (Schedule I [19]) will ensure that if a cumulative sentence of periodic detention has been imposed there will be no gap between the expiration of the minimum term and the commencement of the cumulative period of periodic detention.

Refusal to cancel an order (Schedule 1 [16])

At present, a court may refuse to cancel a periodic detention order in respect of a person who has failed to report for 3 or more detention periods if it is satisfied that the person ought to have been granted leave of absence or an exemption with respect to one or more of the periods. The proposed amendment will provide that the court may do so only if the person has actually applied for the grant of leave or exemption concerned.

Admissibility of evidentiary certificate in proceedings for cancellation of orders (Schedule 1 [17])

Under section 25 of the Principal Act, an order for periodic detention may be cancelled by a court in certain circumstances. At present, a certificate signed by the Commissioner of Corrective Services certifying as to certain matters is admissible as evidence if the court is satisfied that reasonable efforts have been made to serve a copy of the certificate on the periodic detainee concerned. The proposed amendment will require the court to instead simply be satisfied that the copy has been delivered personally to the detainee or sent by post to the last known address of the detainee or by facsimile to a number nominated by the detainee.

Cancellation of orders concerning sentences to be served cumulatively (Schedule 1 [18])

Under section 5B of the Principal Act, an order for periodic detention may require that a sentence be served by way of periodic detention cumulatively on another or other sentences required by the same or a different order to be served by way of periodic detention. Proposed section 25A will ensure that if an order to serve a sentence required to be served cumulatively with another or other sentences by way of periodic detention is cancelled, orders imposing the other sentences may also be cancelled.

Anomalies concerning calculation, and commencement, of unexpired portions of sentences served on cancellation of periodic detention orders (Schedule 1 [19], [20], [22], [25] and [31])

On cancellation of an order for periodic detention under section 24 or 25 of the Principal Act, the unexpired portion of the sentence of imprisonment to which the order applied is deemed to be a separate term of imprisonment. Section 27 (1) (c) specifies the time when that term is to commence.

Proposed section 27 (1) (c) (iii) (Schedule 1 [19]) ensures that when an order is cancelled, and the detainee is not before a court or in prison and before apprehension is convicted of another offence, the unexpired portion will be served concurrently with the sentence for the separate offence under section 444 (2) of the *Crimes Act 1900*. Consequential amendments are made by Schedule 1 [19] and [20].

When an order for periodic detention is cancelled under section 24 or 25 of the Principal Act, the periodic detainee concerned is required (subject to any parole order) to serve the unexpired portion of the sentence to which the order applies in full-time imprisonment. Section 27 deems the unexpired portion to be a separate term of imprisonment imposed at the time of cancellation. Section 29 provides the method of calculating the unexpired portion. When read with section 21 (as amended by the *Periodic Detention of Prisoners (Amendment) Act 1992*) section 29 may be interpreted so that calculation of the unexpired portion results in the term of full-time imprisonment being substantially in excess of the term originally imposed and ordered to be served by way of periodic detention. To ensure this does not occur, proposed amendments repeal section 29 (Schedule 1 [25]) and provide for a new method of calculation of the unexpired portion of such a sentence (Schedule 1 [22]). Under the new method, the unexpired portion is calculated in whole weeks by taking the original sentence in weeks, adding penalty periods and deducting periods served or taken to be served. A savings provision is included to validate calculations of unexpired portions of sentences under orders for periodic detention cancelled since 22 March 1993 (the commencement of the *Periodic Detention of Prisoners (Amendment) Act 1992*) (Schedule 1 [31]).

Orders on cancellation of periodic detention orders (Schedule 1 [21])

At present, a court that cancels a periodic detention order may make certain directions as to the minimum and additional term of the sentence to which the order related or make a parole order in respect of the person concerned. The proposed amendment will enable the court to make such other orders (for example community service orders) as it considers appropriate in the circumstances.

Appeals against cancellation of order for periodic detention (Schedule 1 [23])

On cancellation of a periodic detention order the unexpired portion of the sentence of imprisonment to which the order applied is deemed to be a separate term of imprisonment imposed at the time of cancellation (section 27 (1) (c)). However, it has been suggested that in cancelling an

order a magistrate is not “adjudging” a person “to be imprisoned or otherwise punished” for the purposes of section 122 (1) of the *Justices Act 1902* and that the cancellation is consequently not appealable to the District Court. Proposed section 278 (a) removes any doubt as to whether the cancellation of an order of periodic detention by a Local Court is appealable to the District Court.

Proposed section 27A (b) and (c) makes it clear that cancellation of an order for periodic detention by the District Court under section 24 is (subject to section 5 of the *Criminal Appeal Act 1912*) appealable to the Court of Criminal Appeal and that cancellation by the District Court under section 25 is not appealable.

Transfer of unruly periodic detainees (Schedule 1 [24])

Under section 18 of the Principal Act, an unruly periodic detainee may be transferred from one prison to another prison for the unexpired portion of a detention period. The proposed amendment to section 28 makes it clear that detainees who are transferred under section 18 can be dealt with under the *Prisons Act 1952* in respect of any disciplinary offences committed while in the prison to which the detainees are transferred.

Medical examination before grant of leave of absence for health reasons (Schedule 1 [26] and [29])

Under section 20 of the Principal Act, the Commissioner of Corrective Services may grant leave of absence to a periodic detainee for one or more detention periods for health reasons. The proposed amendments to section 34 will enable regulations to be made to require a periodic detainee requesting leave of absence (or directed to take leave of absence under proposed section 20A (Schedule 1 [10])) to undergo a medical examination outside a detention period at the expense of the Department of Corrective Services.

Alcohol and drug testing (Schedule 1 [27] and [28])

Proposed section 34 (1) (n) and (o) (Schedule 1 [27]) confirms the existing power to make regulations relating to testing for, and evidence of, consumption of alcohol and drugs under section 34 of the Principal Act by conferring express power to make such regulations. The proposed regulation-making powers are based on section 50 (1) (j1) and (j2) of the *Prisons Act 1952*. Schedule 1 [27] contains a consequential amendment and Schedule 1 [31] confirms the effect of the existing regulations (clause 17).

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Savings and transitional regulation-making powers (Schedule 1 [30])

The proposed amendment extends the power to make regulations of a savings and transitional nature to amendments made by the proposed Act.

Savings and transitional provisions (Schedule 1 [31])

Proposed Part 4 of Schedule 2 contains savings and transitional provisions that are consequent on the enactment of the proposed Act.