

Legislative Council—No 81

As received from the House of Assembly and read a first time, 26 February 2019

South Australia

**Sentencing (Suspended and Community Based
Custodial Sentences) Amendment Bill 2019**

A BILL FOR

An Act to amend the *Sentencing Act 2017* and to make related amendments to the
Correctional Services Act 1982.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

- 5 This Act may be cited as the *Sentencing (Suspended and Community Based Custodial Sentences) Amendment Act 2019*.

2—Commencement

This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Sentencing Act 2017*

5 4—Repeal of Part 2 Division 2 Subdivision 3

Part 2 Division 2 Subdivision 3—delete Subdivision 3

5—Amendment of section 52—Interpretation and application

Section 52(1), definition of *terrorist act*—delete "the *Terrorism (Commonwealth Powers) Act 2002*" and substitute:

10 Part 5.3 of the *Criminal Code* of the Commonwealth

6—Amendment of section 70—Home detention not available for certain offences

Section 70(2), definition of *terrorist act*—delete "the *Terrorism (Commonwealth Powers) Act 2002*" and substitute:

15 Part 5.3 of the *Criminal Code* of the Commonwealth

7—Amendment of section 71—Home detention orders

- (1) Section 71(2)(b)(ii)—delete "the court is satisfied that special reasons exist for the making of a home detention order; or" and substitute:

20 (A) the offence is a prescribed serious sexual offence that occurred in prescribed circumstances; or

(B) if subparagraph (A) does not apply, the court is satisfied that special reasons exist for the making of a home detention order; or

- (2) Section 71(2)(b)(iv)—delete "or home detention" and substitute:

25 , home detention or an intensive correction order

- (3) Section 71(2)(d)—delete "concurrently with a" and substitute:

cumulatively on another term of imprisonment (other than a term of imprisonment to be served subject to a home detention order), or concurrently with another

- 30 (4) Section 71(4)—delete subsection (4) and substitute:

(4) The following provisions apply for the purposes of subsection (2)(b)(ii)(B):

35 (a) the court cannot be satisfied that special reasons exist for the purposes of subsection (2)(b)(ii)(B) unless the court is satisfied that—

(i) the defendant's advanced age or permanent infirmity means that the defendant no longer presents an appreciable risk to the safety of the community (whether as individuals or in general); and

(ii) the interest of the community as a whole would be better served by the defendant serving the sentence on home detention rather than in custody;

(b) the court must not have regard to any other matter in determining whether it is satisfied that special reasons exist for the purposes of subsection (2)(b)(ii)(B).

(5) Section 71(5)—after the definition of *designated offence* insert:

foster parent, of a child, includes—

(a) an approved carer of the child; and

(b) a person in whose care the child is placed under section 77 of the *Children and Young People (Safety) Act 2017*;

(6) Section 71(5)—after the definition of *prescribed designated offence* insert:

prescribed serious sexual offence means—

(a) any of the following offences under the *Criminal Law Consolidation Act 1935* where the maximum penalty prescribed for the offence is, or includes, imprisonment for at least 5 years:

(i) an offence under section 49 (unlawful sexual intercourse);

(ii) an offence under section 56 (indecent assault);

(iii) an offence under section 58 (gross indecency);

(iv) an offence under section 63 (production or dissemination of child exploitation material);

(v) an offence under section 63B (procuring child to commit an indecent act etc); or

(b) an offence against a corresponding previous enactment substantially similar to an offence referred to in paragraph (a); or

(c) an attempt to commit or an assault with intent to commit any of the offences referred to in either of the preceding paragraphs;

(7) Section 71—after subsection (5) insert:

(6) For the purposes of this section, an offence occurred in *prescribed circumstances* if—

(a) either—

(i) the defendant was, at the time of the offence, 18 years of age and the victim was not less than 15 years of age; or

- (ii) the defendant was, at the time of the offence, 19 years of age and the victim was not less than 16 years of age; and
- (b) the defendant was not, at the time of the offence, a person in a position of authority in relation to the victim.
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- (7) For the purposes of subsection (6), a person is in *a position of authority* in relation to a victim (the *child*) if—
- (a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; or
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- (b) the person is a parent, step-parent, guardian or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian or foster parent of the child; or
- (c) the person provides religious, sporting, musical or other instruction to the child; or
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- (d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; or
- (e) the person is a health professional or social worker providing professional services to the child; or
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- (f) the person is responsible for the care of the child and the child has a cognitive impairment; or
- (g) the person is employed or providing services in a correctional institution (within the meaning of the *Correctional Services Act 1982*) or a training centre (within the meaning of the *Young Offenders Act 1993*), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or
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- (h) the person is employed or providing services in a licensed children's residential facility (within the meaning of the *Children and Young People (Safety) Act 2017*), or a residential care facility or other facility established under section 36 of the *Family and Community Services Act 1972*, or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or
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- (i) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).
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- (8) A description of an offence appearing in brackets in this section is for convenience of reference only.

8—Amendment of section 73—Orders that court may make on breach of condition of home detention order etc

(1) Section 73(4)—delete "under subsection (1)" and substitute:

in the circumstances referred to in subsection (1)(b)

(2) Section 73(4)(b)—delete paragraph (b)

(3) Section 73—after subsection (4) insert:

(4a) If a court revokes a home detention order for breach of a condition of the order and orders that the balance of the sentence be served in custody—

(a) the balance of the sentence is the balance remaining as at the day on which the breach was committed, but the court may reduce the sentence after taking into account both of the following:

(i) any period spent by the person on home detention after the day on which the breach was committed pending determination of the proceedings for the breach;

(ii) any period spent by the person in custody pending determination of the proceedings for the breach of condition; and

(b) the court may direct that the sentence be cumulative on any other sentence, or sentences, of imprisonment then being served, or to be served, by the person.

(4b) In relation to the breach of a condition of a home detention order, a reference in subsection (4a) to the day on which the breach was committed will, in the case of proceedings relating to more than 1 breach, be taken to be a reference to the day on which the first breach was committed.

9—Amendment of section 80—Intensive correction not available for certain offences

(1) Section 80(1)—after paragraph (a) insert:

(ab) are not exercisable in relation to an offence involving a terrorist act;
or

(2) Section 80(2)—after the definition of *Act* insert:

terrorist act has the same meaning as Part 5.3 of the *Criminal Code* of the Commonwealth.

10—Amendment of section 81—Intensive correction orders

(1) Section 81(3)(a)—delete "concurrently with a" and substitute:

cumulatively on another term of imprisonment (other than a term of imprisonment to be served subject to an intensive correction order), or concurrently with another

(2) Section 81(3)—after paragraph (a) insert:

(ab) an intensive correction order must not be made if the defendant is being sentenced—

- (i) as an adult to a period of imprisonment with a non-parole period of 2 years or more for a prescribed designated offence; or
- (ii) as an adult for a serious sexual offence unless the court is satisfied that special reasons exist for the making of an intensive correction order; or
- (iii) as an adult for a serious and organised crime offence or specified offence against police; or
- (iv) as an adult for a designated offence and, during the 5 year period immediately preceding the date on which the relevant offence was committed, a court has sentenced the defendant to imprisonment (other than where the sentence is suspended), home detention or an intensive correction order for a designated offence;

(3) Section 81—after subsection (4) insert:

(5) In this section—

designated offence means any of the following offences under the *Criminal Law Consolidation Act 1935*:

- (a) an offence under section 12 (conspiring or soliciting to commit murder);
- (b) an offence under section 12A (causing death by an intentional act of violence);
- (c) an offence under section 13 (manslaughter);
- (d) an offence under section 13A (criminal liability in relation to suicide);
- (e) an offence under section 19 (unlawful threats);
- (f) an offence under section 19AA (unlawful stalking);
- (g) an offence under section 19AC (dangerous driving to escape police pursuit);
- (h) an offence under section 19A (causing death or harm by use of vehicle or vessel);
- (i) an offence under section 23 (causing serious harm);
- (j) an offence under section 24 (causing harm);
- (k) an offence under section 29A (shooting at police officers);
- (l) an offence under section 39 (kidnapping);
- (m) an offence under section 137 (robbery);

- (n) an offence under section 170 (serious criminal trespass—places of residence);
- (o) an offence under section 270B (assaults with intent) if the offence against the person to which that section applies is a relevant offence referred to in a preceding paragraph;

prescribed designated offence means either of the following offences under the *Criminal Law Consolidation Act 1935*:

- (a) an offence under section 13 (manslaughter);
- (b) an offence under section 23 (causing serious harm);

serious and organised crime offence means—

- (a) any of the following offences under the *Criminal Law Consolidation Act 1935*:

- (i) an offence under section 83E (participation in criminal organisation);

- (ii) an aggravated offence under—

- (A) section 172 (blackmail); or

- (B) section 251 (abuse of public office),

- where the aggravating circumstances of the offence are the circumstances referred to in section 5AA(1)(ga)(i) or (ii) of that Act;

- (iii) an offence under section 244 (offences relating to witnesses);

- (iv) an offence under section 245 (offences relating to jurors);

- (v) an attempt to commit any of the offences referred to in any of the preceding subparagraphs; or

- (b) any of the following offences under the *Controlled Substances Act 1984*:

- (i) an offence under section 32(1) (trafficking (large commercial quantity controlled drug));

- (ii) an aggravated offence under section 32(2) (trafficking (commercial quantity controlled drug));

- (iii) an aggravated offence under section 32(2a) (trafficking (controlled drug in prescribed area));

- (iv) an aggravated offence under section 32(3) (trafficking (controlled drug));

- (v) an offence under section 33(1) (manufacturing controlled drug for sale (large commercial quantity));

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- (vi) an aggravated offence under section 33(2) (manufacturing controlled drug for sale (commercial quantity));
- (vii) an aggravated offence under section 33(3) (manufacturing controlled drug for sale);
- (viii) an aggravated offence under section 33A(1) (sale/manufacture etc controlled precursor (large commercial quantity));
- 10 (ix) an aggravated offence under section 33A(2) (sale/manufacture etc controlled precursor (commercial quantity));
- (x) an aggravated offence under section 33A(3) (sale/manufacture etc controlled precursor);
- 15 (xi) an aggravated offence under section 33A(4) (manufacture etc controlled precursor);
- (xii) an aggravated offence under section 33A(5) (manufacture etc controlled precursor);
- (xiii) an offence under section 33F (sale, supply or administration of controlled drug to child);
- 20 (xiv) an offence under section 33G (sale, supply or administration of controlled drug in school zone);
- (xv) an offence under section 33H (procuring child to commit offence (relating to controlled drug, precursor or plant));
- 25 (xvi) an attempt to commit any of the offences referred to in any of the preceding subparagraphs;

serious sexual offence means—

- 30 (a) any of the following offences under the *Criminal Law Consolidation Act 1935* where the maximum penalty prescribed for the offence is, or includes, imprisonment for at least 5 years:
- (i) an offence under section 48 (rape);
- (ii) an offence under section 48A (compelled sexual manipulation);
- 35 (iii) an offence under section 49 (unlawful sexual intercourse);
- (iv) an offence under section 50 (persistent sexual abuse of a child);
- (v) an offence under section 51 (sexual exploitation of person with a cognitive impairment);
- 40 (vi) an offence under section 56 (indecent assault);
- (vii) an offence under section 58 (gross indecency);

- (viii) an offence under section 59 (abduction);
 - (ix) an offence under section 60 (procuring sexual intercourse);
 - (x) an offence under section 63 (production or dissemination of child exploitation material);
 - (xi) an offence under section 63B (procuring child to commit an indecent act etc);
 - (xii) an offence under section 66 (sexual servitude and related offences);
 - (xiii) an offence under section 67 (deceptive recruiting for commercial sexual services);
 - (xiv) an offence under section 68 (use of children in commercial sexual services);
 - (xv) an offence under section 72 (incest);
 - (xvi) an offence against a corresponding previous enactment substantially similar to an offence referred to in any of the preceding subparagraphs;
 - (xvii) an attempt to commit or an assault with intent to commit any of the offences referred to in any of the preceding subparagraphs;
- (b) an offence against the law of another State or a Territory corresponding to an offence referred to in paragraph (a);

specified offence against police means—

- (a) an aggravated offence under—
 - (i) section 23(1) of the *Criminal Law Consolidation Act 1935* (intentionally causing serious harm); or
 - (ii) section 23(3) of the *Criminal Law Consolidation Act 1935* (recklessly causing serious harm),where the aggravating circumstances of the offence are the circumstances referred to in section 5AA(1)(c) of that Act and the victim is a police officer; or
- (b) an offence of attempted murder or attempted manslaughter under the *Criminal Law Consolidation Act 1935* where the victim is a police officer and the offender committed the offence—
 - (i) knowing the victim to be acting in the course of the victim's official duty; or
 - (ii) in retribution for something the offender knows or believes to have been done by the victim in the course of the victim's official duty.

- (6) A description of an offence appearing in brackets in this section is for convenience of reference only.

11—Amendment of section 82—Conditions of intensive correction order

(1) Section 82(1)—after paragraph (g) insert:

- (ga) a condition requiring the person to undertake an intervention program as directed by the community corrections officer to whom the person is assigned;

(2) Section 82(2)(d)—delete paragraph (d)

12—Amendment of section 83—Orders that court may make on breach of condition of intensive correction order etc

(1) Section 83(3)—delete subsection (3) and substitute:

(3) If a court revokes an intensive correction order for a breach of a condition of the order and orders that the balance of the sentence be served in custody under subsection (1)—

(a) the balance of the sentence is the balance remaining as at the day on which the breach was committed, but the court may reduce the sentence after taking into account both of the following:

(i) any period spent by the person subject to the intensive correction order after the day on which the breach was committed pending determination of the proceedings for the breach;

(ii) any period spent by the person in custody pending determination of the proceedings for the breach of condition; and

(b) the court may direct that the sentence be cumulative on any other sentence, or sentences, of imprisonment then being served, or to be served, by the person.

(3a) A reference in subsection (3) to the day on which the breach (of a condition) was committed will, in the case of proceedings relating to more than 1 breach, be taken to be a reference to the day on which the first breach was committed.

(2) Section 83(4)(a)—delete paragraph (a) and substitute:

(a) attendance at remunerated employment at such times and places as are approved from time to time by the community corrections officer to whom the person is assigned;

(3) Section 83(4)(b)—delete "necessary" and substitute:

urgent

(4) Section 83(4)—after paragraph (b) insert:

(ba) attendance at—

(i) a place for the purpose of undergoing assessment or treatment (or both) relating to the defendant's mental or physical condition; or

- (ii) an intervention program; or
- (iii) any other course of education, training or instruction, or other activity,

as approved or directed by the community corrections officer to whom the person is assigned;

13—Amendment of section 95—Interpretation and application of Part

(1) Section 95(2)(b)—after subparagraph (i) insert:

- (ia) an offence involving a terrorist act; or

(2) Section 95(3)—after the definition of *Act* insert:

terrorist act has the same meaning as in Part 5.3 of the *Criminal Code* of the Commonwealth.

(3) Section 95—after subsection (3) insert:

- (4) For the purposes of this Part, a reference to an *offence of murder* includes—

- (a) an offence of conspiracy to murder; and
- (b) an offence of aiding, abetting, counselling or procuring the commission of murder.

14—Amendment of section 96—Suspension of imprisonment on defendant entering into bond

(1) Section 96(3)—after paragraph (b) insert:

- (ba) as an adult for a serious sexual offence; or

(2) Section 96(7)—delete subsection (7)

(3) Section 96(9), definition of *designated offence*, (i)—delete paragraph (i)

(4) Section 96(9)—after the definition of *designated offence* insert:

foster parent, of a child, includes—

- (a) an approved carer of the child; and
- (b) a person in whose care the child is placed under section 77 of the *Children and Young People (Safety) Act 2017*;

(5) Section 96(9)—after the definition of *serious and organised crime offence* insert:

serious sexual offence means—

- (a) —
 - (i) any of the following offences under the *Criminal Law Consolidation Act 1935* where the maximum penalty prescribed for the offence is, or includes, imprisonment for at least 5 years:
 - (A) an offence under section 48 (rape);
 - (B) an offence under section 48A (compelled sexual manipulation);

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- (C) an offence under section 50 (persistent sexual abuse of a child);
- (D) an offence under section 51 (sexual exploitation of person with a cognitive impairment);
- (E) an offence under section 59 (abduction);
- (F) an offence under section 60 (procuring sexual intercourse);
- (G) an offence under section 66 (sexual servitude and related offences);
- 10 (H) an offence under section 67 (deceptive recruiting for commercial sexual services);
- (I) an offence under section 68 (use of children in commercial sexual services);
- (J) an offence under section 72 (incest);
- 15 (K) an offence against a corresponding previous enactment substantially similar to an offence referred to in any of the preceding subparagraphs;
- (L) an attempt to commit or an assault with intent to commit any of the offences referred to in any of the preceding subparagraphs; or
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- (ii) any of the following offences under the *Criminal Law Consolidation Act 1935* where the maximum penalty prescribed for the offence is, or includes, imprisonment for at least 5 years:
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- (A) an offence under section 49 (unlawful sexual intercourse), other than an offence that occurred in prescribed circumstances;
- (B) an offence under section 56 (indecent assault), other than an offence that occurred in prescribed circumstances;
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- (C) an offence under section 58 (gross indecency), other than an offence that occurred in prescribed circumstances;
- (D) an offence under section 63 (production or dissemination of child exploitation material), other than an offence that occurred in prescribed circumstances;
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- (E) an offence under section 63B (procuring child to commit an indecent act etc), other than an offence that occurred in prescribed circumstances;
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(iii) an offence against a corresponding previous enactment substantially similar to an offence referred to in either of the preceding subparagraphs;

(iv) an attempt to commit or an assault with intent to commit any of the offences referred to in any of the preceding subparagraphs;

(b) an offence against the law of another State or a Territory corresponding to an offence referred to in paragraph (a);

(6) Section 96—after subsection (9) insert:

(10) For the purposes of this section, an offence occurred in *prescribed circumstances* if—

(a) either—

(i) the defendant was, at the time of the offence, 18 years of age and the victim was not less than 15 years of age; or

(ii) the defendant was, at the time of the offence, 19 years of age and the victim was not less than 16 years of age; and

(b) the defendant was not, at the time of the offence, a person in a position of authority in relation to the victim.

(11) For the purposes of subsection (10), a person is in *a position of authority* in relation to a victim (the *child*) if—

(a) the person is a teacher and the child is a pupil of the teacher or of a school at which the teacher works; or

(b) the person is a parent, step-parent, guardian or foster parent of the child or the de facto partner or domestic partner of a parent, step-parent, guardian or foster parent of the child; or

(c) the person provides religious, sporting, musical or other instruction to the child; or

(d) the person is a religious official or spiritual leader (however described and including lay members and whether paid or unpaid) in a religious or spiritual group attended by the child; or

(e) the person is a health professional or social worker providing professional services to the child; or

(f) the person is responsible for the care of the child and the child has a cognitive impairment; or

(g) the person is employed or providing services in a correctional institution (within the meaning of the *Correctional Services Act 1982*) or a training centre (within the meaning of the *Young Offenders Act 1993*), or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or

(h) the person is employed or providing services in a licensed children's residential facility (within the meaning of the *Children and Young People (Safety) Act 2017*), or a residential care facility or other facility established under section 36 of the *Family and Community Services Act 1972*, or is a person engaged in the administration of those Acts, acting in the course of the person's duties in relation to the child; or

(i) the person is an employer of the child or other person who has the authority to determine significant aspects of the child's terms and conditions of employment or to terminate the child's employment (whether the child is being paid in respect of that employment or is working in a voluntary capacity).

(12) A description of an offence appearing in brackets in this section is for convenience of reference only.

15—Amendment of section 106—Provisions relating to supervision in the community

Section 106(2)(b)—delete "except in the case of a bond with a home detention condition,"

16—Repeal of section 109

Section 109—delete the section

17—Amendment of section 114—Orders that court may make on breach of bond

Section 114(5)(d)—delete paragraph (d)

Schedule 1—Related amendments and transitional provisions

Part 1—Related amendments to *Correctional Services Act 1982*

1—Amendment of section 37A—Release on home detention

(1) Section 37A(3)(a)(i)—delete subparagraph (i) and substitute:

(i) attendance at remunerated employment at such times and places as are approved from time to time by the authorised officer to whom the prisoner is assigned;

(2) Section 37A(3)(a)—after subparagraph (ii) insert:

(iia) attendance at—

(A) a place for the purpose of undergoing assessment or treatment (or both) relating to the person's mental or physical condition; or

(B) an intervention program (within the meaning of the *Sentencing Act 2017*); or

- (C) any other course of education, training or instruction, or other activity,

as approved or directed by the authorised officer to whom the person is assigned; or

5 **2—Amendment of section 75—Automatic cancellation of parole on imprisonment for offence committed while on parole**

- (1) Section 75(1)(a)—delete "the sentence is not suspended; or" and substitute:

—

- (i) the sentence is not suspended; or
- (ii) the court does not order that the person serve the sentence subject to a home detention order or an intensive correction order under the *Sentencing Act 2017*; or

- (2) Section 75—after subsection (3) insert:

- (4) If a person is sentenced to imprisonment for an offence committed while on parole and—
 - (a) the court orders—
 - (i) that the sentence be suspended; or
 - (ii) that the person serve the sentence subject to a home detention order or an intensive correction order under the *Sentencing Act 2017*; and
 - (b) the person is, at the time of the order, still on parole, the parole is, by virtue of this subsection, cancelled.

Part 2—Transitional provisions

3—Transitional provisions

- (1) An amendment effected by a provision of this Act applies to the sentencing of a defendant after the commencement of the provision, regardless of whether the offence for which the defendant is being sentenced was committed before or after that commencement.
- (2) An amendment effected by a provision of this Act relating to proceedings for a breach of a condition of a home detention order or intensive correction order applies to such proceedings—
 - (a) commenced but not determined before the commencement of the provision; or
 - (b) commenced after the commencement of the provision,regardless of whether the breach to which the proceedings relate was committed before or after that commencement.