PENALTIES AND SENTENCES LEGISLATION AMENDMENT BILL 1993

EXPLANATORY NOTES

The objective of this Bill is to enhance clarity and understanding by the courts, registrars and Corrective Services Commission of the administrative arrangements resulting from the *Penalties and Sentences Act 1992*, whilst at the same time, providing as far as is practicable a common enforcement procedure for all court jurisdictions dealing with fine defaulters.

Since the provisions of the *Penalties and Sentences Act* came into effect on 27 November 1992, a number of technical, administrative and interpretative difficulties have been identified which require clarification. These amendments are designed to enhance clarity and understanding of the relevant provisions.

The sentencing provisions applicable to the Supreme and District Courts were, until the passage of the *Penalties and Sentences Act 1992* contained in the *Criminal Code.* In contradistinction, the provisions relating to the imposition of sentences and their administration in the Magistrates Court was governed by the provisions of the *Justices Act 1886.* The Magistrates Court system empowered magistrates, at the time of imposing a sentence, to nominate a default period of imprisonment if the fine was not paid in the time allowed. In contrast, the District and Supreme Courts system required that the offender be returned to the sentencing court before being dealt with for failing to pay the fine within the allowed time. Whilst retaining the existing Supreme and District Courts system as an option in those courts, the amendments provide the power to all sentencing courts to nominate a default period of imprisonment against the offender at the time of imposing the fine.

In Magistrates Courts at present, a clerk of the court rather than a judicial officer can accept and determine an application from an offender to convert a fine into a fine option order after the time to pay the fine has elapsed. The

amendments align the powers of the proper officers of the Supreme and District Courts with those of the Magistrates Court so that all will have the power to grant fine option orders to offenders fined in that jurisdiction after the time to pay the fine has elapsed.

PART I—PRELIMINARY

Clause 1 Short title of the Act.

PART 2—AMENDMENT OF PENALTIES AND SENTENCES ACT 1992

Clause 2 states that the *Penalties and Sentences Act 1992* is amended as set out in this Act.

Clause 3 sets out the enforcement procedure to be followed by the court in the event of a convicted offender who has entered into a recognisance failing to obey the condition of the recognisance.

Clause 4 relates to permitting a court to extend the time within which an offender may make restitution. It omits the existing section 38 and replaces it with a new section which enables a proper officer of the court as well as the court that made the original order, or a court of like jurisdiction , to extend the time within which the restitution is to be paid and also allows them to vary that extended time.

The amendment also clarifies that the application for an extension of time must be in writing.

The amendment which recognises a long standing practice in the Magistrates Court will obviate the need to reconvene a court to extend time.

Clause 5 relates to applications to the proper officer of the court for a fine option order after the time allowed for the payment of the fine has expired. It omits the existing section 56 which relates only to an order by a Magistrates Court and replaces it with a new section which extends the procedure to all courts, so that the proper officer of any court that imposes the fine may determine such applications.

For administrative reasons, the amendment also extends the time after which a warrant of commitment may issue against an offender after an application for a fine option order has been posted to the offender from 10 business days to 15 business days and for clarity provides that the time runs as from the date the application for a fine option order is posted to the offender rather than from the date the offender receives the application.

Clause 6 inserts a new section 58 and corrects a potential injustice that might result from the provisions of section 61(2) of the Act which imposes a bar on the offender making more than one application for a fine option order. The clause permits an offender who has previously been refused a fine option order on financial grounds to reapply for a fine option order and have the application reconsidered if the offender's financial position has become worse since the refusal.

Clause 7 omits the existing section 68 and replaces it with a new section which clarifies and details the process involved by which an offender to whom a fine option order has been granted may apply for an extension beyond 1 year or the other time allowed in which to perform the relevant community service.

Clause 8 omits the existing section 83 and replaces it with a new section which expresses more clearly the need for a court that is not the court that imposed the fine option order to notify the court that did impose the fine option order of any action taken by way of resentencing the offender in the event of the fine option order being revoked.

Clause 9 omits the existing section 151 and replaces it with a new section which clarifies the fact that the section relates only to the fact that imprisonment, wholly or partially suspended, is not to be taken to be a sentence of imprisonment for the purposes of remission of sentence, except where imprisonment is ordered to be served by the offender as a consequence of the

offender committing an offence during the operational period of the suspended sentence. This amendment is necessary to enable the Corrective Services Commission to ascertain clearly as to what portions of a suspended sentence are subject to remission, if any.

Clause 10 inserts a new section 151A which makes it clear that an offender whose sentence of imprisonment is suspended is only eligible for release to a re-integration program in relation to imprisonment ordered as a consequence of committing an offence during the operational period of the suspended sentence.

Clause 11 inserts a new section 158A to make it clear that the term of imprisonment ceases to run after an offender has been sentenced but has been granted bail pending an appeal.

Clause 12 inserts a new section 180A so as to clarify that where a provision of an Act provides a maximum penalty of a fine or imprisonment, the offender may be sentenced to either a fine or imprisonment up to the maximum for each or to both a fine up to the maximum amount stated plus imprisonment up to the maximum period stated. This section, together with the amendment to the definition of the word "penalty" in section 4 replacing the word "means" with the word "includes" is designed to make it clear tha the definition of "penalty" includes both a fine and imprisonment and accords with the definition in the *Acts Interpretation Act 1954.*

Clause 13 inserts two new sections, the first being section 182A. It gives all courts the power to impose default orders of imprisonment at the time of sentence which are to apply in the event that the offender fails to pay the penalty within the time allowed. In the event that the offender does not pay the penalty as ordered, s. 182B outlines the procedure for the issue of a warrant for the arrest and imprisonment of the offender. The section ensures that a warrant of imprisonment must not be issued unless the proper officer of the court has first made the offender aware of the right to apply for a fine option order.

Clause 14 inserts two new sections. Section 185A makes it clear that the proper officer of the court must issue a warrant of commitment for the imprisonment of the offender as soon as practicable after the default has occurred which justifies the issue of the warrant. However, section 185B provides that if the proper officer considers it just to do so, he or she may

postpone the issue of a warrant. The section reiterates the existing requirements of s. 166A of the *Justices Act* whereby an application for the postponement of the issue of a warrant must be in writing and must be made by a party to the proceedings in which the warrant is to issue.

PART 3—MINOR AND CONSEQUENTIAL AMENDMENTS OF OTHER ACTS

Clause 15 provides that each Act mentioned in Schedule 2 is amended as set out in that Schedule.

SCHEDULE 1

MINOR AND CONSEQUENTIAL AMENDMENTS OF PENALTIES AND SENTENCES ACT 1992

Clause 1 (As for explanation to Clause 12 of Part 2).

Clause 2 for the purposes of clarity, adopts the existing definition of the term "period of imprisonment" previously only contained in s. 157 (see explanation to clause 84), and introduces it as a new definition to apply wherever it is used in the Act.

Clause 3 clarifies the meaning of the term "penalty unit" by adding subclause (4) to section 5 so as to clarify that, unless the contrary intention appears, a reference to a penalty of a specified number of penalty units is a reference to a fine of that number of penalty units.

Clause 4 replaces the word "discharge" or its grammatical equivalent with the word "terminate" or it its grammatical equivalent. The word change has been made at the request of Corrective Services Commission staff due to confusion in administration between the use of the word "discharge" and the use of the word "revoke". The change obviates the apparent confusion surrounding the ending of community based orders.

Clause 5 (as for explanation to Clause 4).

Clause 6 (as for explanation to Clause 4).

Clause 7 (as for explanation to Clause 4).

Clause 8 (as for explanation to Clause 4).

Clause 9 (as for explanation to Clause 4).

Clause 10 amends section 52 of the Act and redefines the word "fine" to include both court fees and the notification costs imposed by the SETONS Court. The term "court fees" is more easily capable of precise understanding than is the more general term "court costs" which is also understood to include barristers and solicitors charges. The SETONS system does not have "court costs" as such costs recoverable under SETONS are styled "notification costs" which need to be recognised in this definition if the offender is to be able to convert these "notification costs" to a fine option order.

Clause 11 adds subclause (4) to section 53 so as to permit a court to adjourn the application for a fine option order to enable the court to obtain further information relevant to the offender's application. The existing section does not appear to permit the court to adjourn. Section 58(2) of the existing Act does however permit the clerk of the court to adjourn such applications.

In addition and by way of clarification a new subclause (5) requires that a court that refuses an application must note on the court records as to whether the refusal was made on the grounds of the offender's ability to pay the fine or on the grounds that the offender is not a suitable person for a fine option order. This clarification is necessary to establish the offender's eligibility to reapply for a fine option order under section 58A(1)(b).

Clause 12 replaces the existing subsection (2) of section 55 which relates to applications to the court for fine option orders, within the time allowed for the

payment of the fine. The new clause makes it clear that, an offender who is not before the court when the fine is imposed, and who has been given a notice informing him or her of the right to apply for a fine option order, may apply for such an order at any time before the end of the time fixed in the original order for the payment of the fine.

Clause 13 omits the existing section 57 as this section is now obsolete due to the amended section 56 which incorporates the same procedures in all jurisdictions for applications for fine option orders after the end of the time allowed for the payment of the fine.

Clause 14 omits the term "clerk" and replaces it with the term "proper officer". The term "clerk" relates specifically to Magistrates Courts whereas the definition of "proper officer" in section 4 of the existing Act covers all courts and is the correct terminology in view of the fact that the amendment of section 56 extends to the proper officer in all courts the power to determine an application for a fine option order by an offender after the end of the time allowed for the payment of a fine.

Clause 15 (as for explanation to Clause 14).

Clause 16 (as for explanation to Clause 14).

Clause 17 inserts a new subsection (3) to section 58 which clarifies the fact that an offender may only make one application to a proper officer for a fine option order after the end of the time allowed for the payment of the fine unless the offender's financial position has become worse since the refusal.

Clause 18 renumbers s. 58 as s. 57 so as to complete the gap in renumbering caused by the omission of s. 57 by Clause 12.

Clause 19 (as for explanation to Clause 14).

Clause 20 inserts a new subsection (2) to section 59 so as to clarify the fact that the requirement that a court to which an application for a fine option order is made need not give written notice of the time and place for the hearing if the offender making the application is personally before the court and the application is to be dealt with immediately.

Clause 21 (as for explanation to Clause 14).

Clause 22 (as for explanation to Clause 14).

Clause 23 renumbers the subsections of s. 59 as a result of a new subsection (2) being added by Clause 20.

Clause 24 (as for explanation to Clause 14).

Clause 25 adds the requirement to section 60(2)(b)(i) that a court that refuses an application must give notice to the applicant as to whether the refusal was

added to make the scheme for dealing with refusal of applications for fine option orders consistent with the provisions of sections 53(5) as explained in Clause 11.

Clause 26 (As for explanation to Clause 14).

Clause 27 inserts a new subsection (4) to section 60 requiring that when an application for a fine option order is refused the court records must be noted as to whether the refusal was made on the grounds of the applicant's ability to pay the fine or on the grounds of the applicants's unsuitability for a fine option order. This requirement is added for consistency with other sections of the Act and for the reasons explained in Clause 11.

Clause 28 (As for explanation to Clause 14).

Clause 29 (As for explanation to Clause 14).

Clause 30 (As for explanation to Clause 14).

Clause 31 omits the reference to section 57 which is no longer relevant. (See explanation to Clause 13).

Clause 32 (As for explanation to Clause 14).

Clause 33 (As for explanation to Clause 14).

Clauses 34-35 amend section 66 which relates to the requirement of a fine option order and clarifies the existing administrative arrangements whereby an offender who has been granted a fine option order must, in addition to performing the order, in a satisfactory way, within one year from the making of the order, or such time as the court directs, also perform the community service at the times directed by the authorised Commission officer. This amendment is necessary to make it clear to offenders to whom a fine option order has been granted that they must perform community service at such times as are directed by the authorised Commission officer.

To avoid uncertainly, these amendments also make it clear that a direction by an authorised Commission officer applies to all fine option orders made by the same court on the same day with respect to the offender.

Clause 36 (As for explanation to Clause 14).

Clause 37 amends s. 74(4)(a) so as to include the provisions of s. 66(2) as explained in Clauses 34-35.

Clause 38 omits the existing subsection (7) to section 74 and replaces it with a new subsection which requires the court to which a notice of failure to comply with a fine option order has been given, to give a copy of the notice to the court that originally returned the offender. The new subsection also requires that the court that deals with the failure to comply must notify the court that originally

The reason for the amendment is to ensure that the court that made the original order and keeps the relevant records is kept aware of any such proceeding so as to ensure that a fine option order is not revoked where the penalty has in fact been paid.

Clause 39 omits the existing subsection (2) to section 78 and replaces it with a section which clarifies that, for the administrative purposes, (explained in Clause 38) the need for a court that revokes a fine option order that was made by another court, to give notice of the revocation to the court that made the original order and further provides that it is the responsibility the court that revokes the fine option order is to issue a warrant for the arrest of the offender.

Clause 40 inserts the words "to it" to overcome a doubt that has been expressed as to whom the application under section 81 should be made.

Clause 41 inserts the words "the court" into s. 81(3). This is to ensure that a copy of the notice referred to in the subsection is given to the court as well as to the other parties named.

Clause 42 (As for explanation to Clause 41).

Clause 43 inserts two new subsections (5), (6) and (7) to section 81 to maintain consistency throughout the Act to ensure that, with respect to an application for revocation, the Commission and the offender must be notified as to when the application is to be heard but with the proviso that the application may be heard in the absence of the offender if the court is satisfied that the offender is unable to be present.

Clause 44 omits the existing subsections (1) and (2) of section 85 relating to appeals against a decision refusing a fine option order and replaces it by words making it clear that, consequent upon the amendments to the Act extending to the proper officer in all courts, the power to determine an application for a fine option order after the end of the time allowed for the payment of a fine, the section now relates to decisions by the proper officer in all courts.

In addition the time within which the appeal must be instituted has been increased to 25 business days after the notice of refusal is posted to the offender. This is to enable the SETONS court to determine the date for the automatic issue of a warrant of commitment as it is impossible to know when the offender receives a notice of refusal. In order to ensure that no offender is prejudiced by delays in the post, an additional 5 working days have been allowed.

Clause 45 clarifies that with respect to a notice of appeal, it is the responsibility of the proper officer of the court to give notice to the relevant parties.

Clause 46 omits the words "Magistrates Court" in section 86(2) and

to grant fine option orders after the time allowed for the payment of the fine has expired and to encompass appeals to be made to the court, the proper officer of which has refused an application for a fine option order.

Clause 47 (As for explanation to Clause 46).

Clause 48 (As for explanation to Clause 46).

Clause 49 amends the section to which s. 86(4) refers to accord with the numbering of section 57 referred to in Clause 18.

Clause 50 enlarges the ambit of section 87(1) so as to empower all courts to make rules for the hearing of appeals relating to fine option orders.

Clause 51 - 52 (As for explanation to Clauses 46-48).

Clauses 53 - 56 (As for explanation to Clause 4).

Clause 57 inserts a new subsection (5) clarifying the intention of the Act that a sentence of imprisonment imposed in conjunction with a probation order under this section must not be suspended under Part 8 of the Act.

Clause 58 - 60 (As for explanation to Clause 4)

Clause 61 inserts a provision in section 101 of the existing Act providing that a court may make a community service order for the offender if the court is satisfied that the offender is a suitable person to perform community service. This amendment cures an unintentional omission in the existing Act and complies with the essence of the former section 217(1)(b)(ii)(A) of the former *Corrective Services Act.*

Clauses 62 - 63 omits subsection (d) of section 103(1) and subsection (2) of section 103 and replaces them with new subsections setting out more clearly the conditions under which an offender who has been ordered to perform community service must perform that order. The conditions are the same as those for a fine option order as explained in Clauses 34 - 35.

Clauses 64 - 66 (As for explanation to Clause 4).

Clause 67 clarifies the fact that under the existing section 112, the court may make an intensive correction order in respect of an offender who has been sentenced to one years imprisonment or less.

Clause 68 omits subsection (f) of section 114(1) and replaces it by a new subsection which clarifies the arrangements whereby an offender, who is subject to an intensive correction order must, if directed, reside at a community residential facility for periods of not longer than 7 days at a time. The amendment makes it clear that an offender who is subject to an intensive correction order need only reside at a community residential facility if directed by an authorised Commission officer.

Clause 72 inserts the word "the court" in subsection (3) of section 122 so as to ensure that notice of application for amendment or revocation is also given to the court.

Clause 73 (As for explanation to Clause 72).

Clause 74 inserts a new subsection (5) to section 122 similar to that inserted by Clause 37 into section 81 so as to ensure that, if any application is made for revocation of a community based order to a court that is not the court that made the original order, the notice of the application must be given to that court. This is to ensure that a community based order is not revoked where the restitution or compensation order has in fact been paid.

Clause 75 inserts words in section 128(1) of the existing Act to enable the practice formerly authorised by section 206(1) and 268(6) of the *Corrective Services Act* to continue, whereby senior Commission officers examine the facts of the alleged contravention before authorising other staff to initiate action, but rarely swear complaints personally.

Clause 76 (As for explanation to Clause 75).

Clause 77 omits from section 144(1) relating to orders of suspended imprisonment the term "less than 5 years" and replaces it with the term " 5 years or less". This amendment is necessary in order to enable an offender who is sentenced to imprisonment for exactly 5 years or less to be granted a suspended sentence.

Clause 78 omits existing subsection (5) of section 144 and replaces it with two new subsections (5) and (6) which, for the purposes of clarification and consistency with the new subsection (1) of section 144 makes it clear that the operational period of the suspended sentence commences on the day the order is made and must not be for a period of more than 5 years.

Clause 79 omits existing subsection (1) of section 147 and replaces it with a new subsection which removes the unnecessary distinction between the types of suspended imprisonment and gives the court that reviews any breach of any type of suspended imprisonment, the same options in dealing with such breach.

Clause 80 makes an amendment to the reference numbers in section 147(2) to comply with the amendment to section 147(1) made by Clause 79.

Clause 81 makes a consequential amendment to the reference to section 147 resulting from the amendment to section 147.

Clause 82 makes a consequential amendment to the sections referred to in section 154 resulting from the inclusion of a new section 158A.

Clause 83 by way of clarification amends section 156(1) by introducing the term "period of imprisonment" (as newly defined) and thereby makes it clear

imprisonment starting at the end of the unbroken duration of imprisonment that an offender is to serve for two or more terms of imprisonment.

Clause 84 removes the definition of "period of imprisonment" in section 157(1) as the definition is now contained in section 4 of the Act.

Clause 85 amends section 157(3)(a) which deals with eligibility for parole, so as not to limit the provisions of that section only to offenders for whom a recommendation for a non-parole period has been made under section 157(2).

Clause 86 clarifies the fact that a recommendation in relation to a non parole period made under section 157(3)(b)(ii) must not be longer than the term of imprisonment imposed for that offence.

Clause 87 inserts subsection (1)(a)(ii) to section 158 so as to make it clear that the section which enables a court to order that the term of imprisonment is to have effect on and from the day the offender was sentenced, applies only to an offender who has been in custody in relation to proceedings for the offence and for no other reason. This amendment is necessary to ensure that a prisoner remanded in custody is not disadvantaged if he or she serves another sentence of imprisonment e.g. default imprisonment during the remand period.

Clause 88 ensures that the date upon which the term of imprisonment is to have effect is clear by inserting an additional subsection (2) to section 158 setting out the requirements that the sentencing court when ordering that the term of imprisonment is to have effect on and from the day the offender was sentenced, must calculate and declare to the Commission the details upon which the calculation has been made.

Clauses 89 - 90 omit subsection (3)(a) of section 161 which relates to a declaration by the court that the time the offender has been held in presentence custody be imprisonment already served under the sentence and replace the subsection with three new subsections (a), (b) and (c) which require the court to calculate and declare the time calculated to be imprisonment already served under the sentence. This amendment is necessary as some courts are stating merely that the time held in presentence custody is to be taken as imprisonment served but no specific period is being specified.

Clauses 91 - 93 amends existing section 182 so that it applies only to indictable offences. In this way it reflects the amendments to the Act which provide the Supreme and District Courts with two methods of enforcement of penalties with respect to offenders dealt with on indictment who fail to pay the penalty. The Supreme and District Courts may either impose a default penalty at the time of sentence under the provisions of new section 182A or may have the offender who is convicted of an indictable offence brought back before the court to be dealt with under the provisions of section 182.

failure to pay the penalty imposed, is given the opportunity to apply verbally for a fine option order in relation to the penalty.

Clause 95 amends subsection (a) of section 183 so as to provide for the imprisonment of an offender who does not pay the penalty imposed and who has not been granted a fine option order even though the court that made the original order does not make an order for default in the event of the penalty not being paid.

Clause 96 clarifies that the intention of section 185(2)(b) is to ensure that imprisonment served for non-payment of a penalty must be served cumulatively with any term of imprisonment the offender is serving or has been sentenced to serve unless a court otherwise orders.

Clause 97 amends section 185(3) so as to clarify the fact that even though a conviction was not recorded when the offender was ordered to pay a penalty, and in spite of the provisions of section 152 which provides that a court may only make an order of imprisonment if it records a conviction, an offender who does not pay the penalty that was ordered and who has not been granted a fine option order may be imprisoned for a term calculated under the provisions of this section.

Clause 98 amends section 189(1)(b)(i) so as to remove the uncertainty caused by the word "charged" in the existing section so as to enable the court to take into account outstanding offences that it is alleged the offender has committed, but for which the offender has not been convicted. This will enable the court to take into account contravention of multiple community based orders when dealing with an offender brought before the court for a specific contravention under the provisions of section 130.

Clause 99 - 102 add a new subsection to the general transitional provisions of s. 204 so as to preserve the status quo in respect of offenders convicted between the commencement of the *Penalties and Sentences Act 1992* and the commencement of the *Penalties and Sentences Legislation Amendment Act 1993*. In respect of offenders convicted after the commencement of the latter Act, they will be dealt with as if the amendments made by this amendment Act were contained in the *Penalties and Sentences Act 1992*.

Clause 103 inserts a new subsection (7) to section 204 which has the effect of including the provisions of Regulation 17 of the *Penalties and Sentences Act Regulations* in the Act itself. The new subsection deals with a transitional matter and permits an offender, who has failed to comply with a requirement of an order which has not been amended that was made prior to the commencement of the original Act, to be dealt with under this Act as if the sentence had been imposed after the commencement of this section.

SCHEDULE 2

MINOR AND CONSEQUENTIAL AMENDMENTS OF OTHER ACTS

CORRECTIVE SERVICES ACT 1988

Clause 1 corrects a reference to section 685A of the *Criminal Code* which is now included in the *Penalties and Sentences Act 1992*.

Clause 2 amends section 187(2) of the *Corrective Services Act 1988* to provide that the parole order relating to an offender who has been released to parole is not automatically cancelled if he or she is subsequently sentenced to either an intensive correction order or a wholly suspended term of imprisonment.

JUSTICES ACT 1886

Clauses 1 - 3 effect the necessary consequential amendments to sections 98F(2), 98J(2) and 98K of the *Justices Act 1886* so as to allow the SETONS court to enforce penalties under the provisions of the *Penalties and Sentences Act 1992.*

The amendments to section 98F(2) and 98J(2) deem an order of the SETONS court to be a recorded conviction only for the purposes of section 152 of the *Penalties and Sentences Act* so as to enable a default period of imprisonment to be imposed in the event of the penalty not being paid and the offender not being granted a fine option order.

The amendments to section 98K of the *Justices Act 1886* enable fine option orders to be granted with respect to enforcement orders or warrants issued by the SETONS court as if they were a fine imposed by a Magistrates Court.