



**LEGISLATIVE ASSEMBLY**  
FOR THE AUSTRALIAN CAPITAL TERRITORY

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STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY  
Mr Peter Cain MLA (Chair), Dr Marisa Paterson (Deputy Chair),  
Mr Andrew Braddock MLA

## Submission Cover Sheet

Inquiry into Corrections and Sentencing Legislation  
Amendment Bills 2022

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Standing Committee on Justice and Community Safety  
Office of the Legislative Assembly  
Via [LACommitteeJCS@parliament.act.gov.au](mailto:LACommitteeJCS@parliament.act.gov.au)

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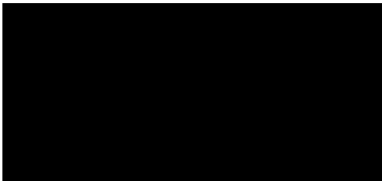
Dear Committee Secretary,

**Submission to the Inquiry into the Corrections and Sentencing Legislation Amendment Bill 2022**

Thank you for the opportunity to make a submission in relation to the Standing Committee's Inquiry into the Corrections and Sentencing Legislation Amendment Bill 2022 (the 'Inquiry'). This submission is made specifically in relation to the proposed amendment to section 102 of the *Crimes (Sentence Administration) Act 2005*.

I request that this submission be published in full.

Yours sincerely



Heidi Yates  
Victims of Crime Commissioner

## **About the ACT Human Rights Commission**

1. The ACT Human Rights Commission is an independent agency established by the *Human Rights Commission Act 2005* (HRC Act). Its main object is to promote the human rights and welfare of people in the ACT. The HRC Act became effective on 1 November 2006 and the Commission commenced operation on that date. Since 1 April 2016, a restructured Commission has included:
  - i. the President and Human Rights Commissioner;
  - ii. the Discrimination, Health Services, Disability and Community Services (DHSDCS) Commissioner;
  - iii. the Public Advocate and Children and Young People Commissioner (PACYPC); and
  - iv. the Victims of Crime Commissioner (VOCC).

## **About Victim Support ACT**

2. The Victims of Crime Commissioner (VOCC) is an independent statutory advocate and the head of Victim Support ACT (VSACT). VSACT is situated within the ACT Human Rights Commission. The VOCC's functions are set out in the *Victims of Crime Act 1994*, the *Victims of Crime (Financial Assistance) Act 2016* and the *Victims of Crime Regulation 2000*.
3. The function of the VOCC is to advocate for the rights and interests of victims of crimes committed in the ACT. Particularly relevant to the subject of this Inquiry, the VOCC's responsibilities include:
  - i. advocating for the interests of victims;
  - ii. monitoring and promoting compliance with victims rights;
  - iii. consulting on and promoting reforms to meet the interests of victims; and
  - iv. delivering frontline support services to victims via the Victim Services Scheme (VSS) and the Financial Assistance Scheme (FAS), which operate under the umbrella of 'Victim Support ACT'.
4. This Inquiry directly relates to the core functions of the VOCC in consulting on and promoting reforms to meet the rights and interests of victim-survivors, including supporting the development of reforms that increase victim and community safety in the supervision of community-based sentences.

## Preliminary Remarks

### Amendment to s 102 of the *Crimes (Sentence Administration) Act*

5. Of significance to the interests of victims of crime, the Corrections and Sentencing Legislation Amendment Bill 2022 ('the Bill') seeks to amend s 102 of the *Crimes (Sentence Administration) Act 2005* ('the CSA Act') to introduce a framework to empower a corrections officer to exercise discretion to not report a reportable breach of a good behaviour order ('GBO') to the sentencing court.
6. This Bill seeks to adopt elements of a COVID-19 measure that was introduced at s 102A of the CSA Act, which originally sought to provide corrections officers with greater flexibility to deal with breaches of a good behaviour order during the declared COVID-19 emergency. Section 102A displaced the operation of current s 102, which otherwise required corrections officers to report their reasonable belief to the sentencing court for every instance of alleged non-compliance with a GBO. The current s 102 does not give a corrections officer discretion to choose *not* to report an alleged breach of a GBO.

### Core safeguards included in proposed s 102

7. The VOCC supports the amendment to s 102 of the CSA Act, based on the following factors.
  - i. **Presumption of reporting alleged GBO breaches supports the principle of victim and community safety:** Proposed s 102 introduces a presumption that corrections officers must report an offender's breach of a GBO obligation to the sentencing court unless certain conditions have been met.<sup>1</sup> This reflects the legislature's intent that community sentences are monitored and taken seriously, with a presumption that reportable breaches *are* reported to the sentencing court.
  - ii. **The discretionary power does not apply to any conduct that could be the subject of a criminal offence:** The proposed amendment is clear that a reportable breach which *could* constitute an offence does not enliven the use of discretion, so the alleged breach must be reported.<sup>2</sup> This again reflects the legislature's intention that community sentences are taken seriously, and that the sentencing court has a clear interest in reviewing a reportable breach where that breach may constitute offending behaviour.
  - iii. **Discretionary powers will be regulated by a discretionary framework, which supports transparency and accountability:** The exercise of a discretion under proposed s 102 will be regulated by a discretionary framework that must be notified under the CSA Act.<sup>3</sup> The VOCC considers that this approach supports transparency and accountability in the exercise of corrections officers' discretionary powers. Such transparency and accountability is critically important to ensure that decisions made in relation to community-based sentences have oversight. This framework will also support justice

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<sup>1</sup> Corrections and Sentencing Legislation Amendment Bill 2022 (ACT) s 102(2). See also Explanatory Statement, Corrections and Sentencing Legislation Amendment Bill 2022 (ACT) 27.

<sup>2</sup> Corrections and Sentencing Legislation Amendment Bill 2022 (ACT) s 102(3).

<sup>3</sup> *Ibid*, s 102(5).

agencies to work alongside ACT Corrective Services in ensuring discretion is used in appropriate circumstances.

- iv. **The discretionary power will only be able to be used where there is a discretionary framework notified under the CSA Act:** The discretion will only be permitted to be used on commencement of the discretionary framework which will regulate the use of the discretionary power.<sup>4</sup> This aspect of the amendment ensures that the discretion does not operate without a transparent framework.
- v. **The discretionary framework must comply with certain legislative requirements to be valid, which creates a clearer structure for use of discretion:** The Bill requires the discretionary framework to include certain factors for it to comply with proposed s 102, including the circumstances in which a corrections officer *must* report a reportable breach to the sentencing court, notwithstanding the existence of the discretion.<sup>5</sup> This requirement acknowledges there are some circumstances – to be extrapolated in the discretionary framework – where it would not be appropriate for the discretionary power to be used.
- vi. **The use of discretion will be subject to record keeping requirements and reviewable by the Court where applicable:** The Bill requires that a corrections officer record any warnings in relation to a reportable breach in writing, including the grounds for believing there has been a breach.<sup>6</sup> Importantly, where a reportable breach is reported to the sentencing court, a summary of any reportable breaches previously unreported must be provided to the sentencing court. The VOCC considers this a further important safeguard, as it will ensure the Court has access to a full history of the offender’s compliance with the relevant GBO. Equally, the sentencing court will have visibility of a corrections officer’s use of discretion, which may act as an additional layer of transparency and accountability.

## **The human rights considerations for victims of crime under proposed s 102**

8. The criminal justice system could not operate without the evidence of victims. However, victims are not a party in criminal matters and are not entitled to legal representation. Many victims express the view that their rights and interests are not appropriately considered and upheld by the criminal justice system, including in post-sentence decision-making.
9. In this context, the legal regime of monitoring and enforcing sentence outcomes often has a considerable impact on victim and community safety. Sentence administration that does not have adequate regard to victim and community safety can elevate risk of further harm and contribute to a lack of faith in the justice system. For this reason, it is critically important that sentence administration not only supports the rights of offenders and encourages their rehabilitation, but balances these matters against the central considerations of victim and community safety. A sentencing regime that fails to account for the safety of victims and the community is not a system that supports rehabilitative outcomes for offenders.

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<sup>4</sup> Explanatory Statement, Corrections and Sentencing Legislation Amendment Bill 2022 (ACT) 5.

<sup>5</sup> Corrections and Sentencing Legislation Amendment Bill 2022 (ACT) s 102(6)(c).

<sup>6</sup> Ibid, s 102(4)(a)-(b).

## A victim's human right to security of person

10. The ACT *Human Rights Act 2004* ('HR Act') seeks to promote and implement the fundamental rights and freedoms of people living in the ACT. The VOCC understands that few rights are absolute and that reasonable limits may be placed on most human rights as a means of balancing competing interests and/or rights.<sup>7</sup> In the context of sentence administration, the VOCC considers that a victim's right to security of person needs to be carefully considered to ensure that unreasonable limits are not placed upon this right, especially where significant safety concerns are present.
11. Importantly, the HR Act permits the consideration of international law, including judgements of foreign and international courts and tribunals and other materials, in the interpretation of rights contained in the HR Act.<sup>8</sup> Part of international law jurisprudence comprises general comments by treaty bodies, which seek to provide guidance relating to the interpretation of human rights treaty provisions. Such guidance on rights-based interpretation can have import on the Territory's obligations under the HR Act.
12. The HR Act enshrines the human right to liberty and security of person,<sup>9</sup> which is sourced from article 9 of the International Covenant on Civil and Political Rights. Importantly, the Human Rights Committee issued General Comment No. 35 in 2014, providing guidance in the interpretation of the right to security of person. The Human Rights Committee states that the right to security of person is geared to protecting 'individuals against intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained'.<sup>10</sup>
13. The right to security of person therefore imposes obligations on the State and its officials to, inter alia:
  - i. generally protect individuals from foreseeable threats to life or bodily integrity proceeding from any governmental or private actors, and
  - ii. take measures to prevent future injury, such as through the enforcement of criminal laws, in response to past injury, including the obligation to respond appropriately to patterns of violence against categories of victims. Such categories are expansively noted and include domestic and family violence and violence against women.<sup>11</sup>

## Human rights application to proposed s 102

14. The Bill's Explanatory Statement expressly acknowledges that the use of discretion under the proposed s 102 is 'intended to be exercised in a manner that is safe for the community and victims of crime, having regard to a victim's human right to security of person'.<sup>12</sup> The proposed discretionary framework must have regard to this human rights consideration, alongside other

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<sup>7</sup> *Human Rights Act 2004* (ACT) s 28.

<sup>8</sup> *Ibid*, s 30.

<sup>9</sup> *Ibid*, s 18.

<sup>10</sup> HRC, General comment No. 35, 1 [3].

<sup>11</sup> HRC, General comment No. 35, 2 [9].

<sup>12</sup> Explanatory Statement, Corrections and Sentencing Legislation Amendment Bill 2022 (ACT) 5.

relevant rights (e.g., equality and non-discrimination), and provide structure around how discretion may be applied.<sup>13</sup>

15. The VOCC considers that any discretionary framework notified under proposed s 102 must have regard to risk of bodily or mental injury to victims of crime, as well as having regard to the obligation upon officials to respond to patterns of violence, especially against certain categories of vulnerable victims. It is important to contemplate these human rights considerations as obligations that likely arise for officials – i.e., corrections officers – who seek to exercise a discretion under proposed s 102, in accordance with their obligation to give proper consideration of relevant human rights when making a decision.<sup>14</sup>
16. The VOCC considers that these human rights obligations must be considered in terms of how the discretionary framework assesses the types of reportable breaches, and the context in which they occur. For instance, the VOCC considers that a breach of a GBO may elevate risk of harm to victims of crime, especially – but not exclusively – in matters characterised by domestic and family violence. The ACT’s Domestic and Family Violence Risk Assessment and Management Framework recognises the evidence base which indicates that breaches of legal orders are a ‘serious indicator of increased risk of future violence’, as breaches of orders tend to be underpinned by a disregard for the law and authority.<sup>15</sup>
17. Indeed, the VOCC’s office has observed patterns of “low-level” non-compliance with community-based orders, including GBOs and Intensive Corrections Orders, escalating into further violence perpetrated by a sentenced offender. In this context, the experience of the VOCC’s office has highlighted that non-compliance with orders may comprise a continued form of abuse, where a perpetrator demonstrates to a victim that they are able to breach orders or other legal obligations with little to no repercussion. The VOCC is of the view that such patterns of violence, and the accompanying obligations upon officials to appropriately respond to such patterns, is a human rights obligation inherent to the exercise of power under proposed s 102.
18. To this end, the VOCC suggests the Committee consider what recommendations may be made through this Inquiry to support the ACT Government in legislating a discretionary framework that will be, in theory and practice, exercised consistent with a victim’s human right to security of person. Within this context, the VOCC recommends the ACT Government undertake to provide training to corrections officers to support their functions under the proposed amendment to s 102. The provision of targeted, evidence-based training is one mechanism through which corrections officers can be supported to uphold their obligations under the HR Act.

## Concerns

### Risk of “low-level” GBO non-compliance falling outside of proposed s 102

19. While we acknowledge the positive objectives of the proposed amendment, we remain alive to the fact that the proposed discretionary framework imposes additional obligations upon

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<sup>13</sup> Explanatory Statement, Corrections and Sentencing Legislation Amendment Bill 2022 (ACT) 5.

<sup>14</sup> *Human Rights Act 2004*, s 40B(1)(b).

<sup>15</sup> ACT Domestic and Family Violence Risk Assessment and Management Framework, Community Services Directorate (July 2022), 36.

corrections officers in how alleged breaches of GBOs are managed. These obligations will require corrections officers to:

- i. understand and consistently apply a new discretionary framework notified at law, and
- ii. record decisions in writing to report or warn an offender, including the grounds for their belief in a reportable breach and the actions taken.

20. We consider that a properly administered and effective discretionary framework is underpinned by adequate resourcing and training to ensure that the person exercising a discretionary power:

- i. understands their legal obligations,
- ii. possesses the required knowledge to make a decision in accordance with their obligations, and
- iii. is supported with adequate resources to have the capacity to fulfil their obligations in exercising a discretionary power.

21. In the absence of training and resourcing, there is a risk that some instances of possible non-compliance with a GBO obligation may be regarded as not being “serious” enough to constitute a reportable breach, thereby circumventing the proposed s 102 framework. In effect, this is inherently a discretion that sits behind the threshold question as to what may constitute a breach of an offender’s obligations under a GBO.

22. The VOCC recommends the Committee consider the need for the ACT Government to review resourcing implications for the proposed s 102 reform, and undertake to provide training to corrections officers to support their functions under the proposed amendment to s 102.

### Reducing pressure on the courts

23. We note that a stated objective of the Bill in the Explanatory Statement is to ‘reduce pressure on the courts, which would ordinarily hear every instance of breach’.<sup>16</sup> While we appreciate the importance of ensuring that court resources are used efficiently in sentence administration, we note it may be inappropriate to predicate the basis of this reform on efficient sentence administration.

24. The VOCC considers that the proposed s 102 amendment primarily seeks to support a corrections officer in dealing flexibly with reportable breaches of a GBO to promote the rehabilitation of offenders, and that this is caveated by the significant requirement that discretion is not to be used in otherwise inappropriate contexts – such as where it would undermine the role of the sentencing court, limit the opportunity of the offender to be held accountable for reportable breaches, or be unsafe to the victim or community.

25. The VOCC recommends that the Committee consider whether it is appropriate for the Explanatory Statement to reference the reduction of pressure on the courts as a key objective of the Bill, given the other paramount objectives of proposed s 102.

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<sup>16</sup> Explanatory Statement, Corrections and Sentencing Legislation Amendment Bill 2022 (ACT) 5.