

# **YOUNG OFFENDERS AMENDMENT BILL 2023**

## **EXPLANATORY MEMORANDUM**

The *Young Offenders Amendment Bill 2023* (the Bill) provides for an Act to amend the *Young Offenders Act 1994* (WA) (YOA) to reform the process of transferring detainees from a detention centre to a prison.

Section 178 of the YOA enables offenders serving a sentence of detention or sentence of imprisonment, including those who have reached 18 years of age, to be transferred from a detention centre to a prison to serve the unserved portion of the sentence. The transfer requires the Children's Court, constituted so as to consist of or include a judge, to make a direction that the offender be transferred to a prison. This involves the chief executive officer (CEO) of the Department of Justice making an application to the Children's Court for the transfer. The existing provisions also permit appeal of the Court's decision to be filed by the CEO or the offender.

Similarly, under section 21 of the YOA a young person held in detention on remand or on committal for trial who reaches the age of 18 years can only be transferred to prison if a direction is made by the court on application by the CEO.

The reform introduced by the Bill aims to expedite the transfer of 18 year old offenders from a detention centre to a prison, while also making it clear that adults are not to be held in custody on remand, committal or under sentence in a detention centre. Separation of adults from younger offenders is consistent with international best practice of not housing adults and juveniles in the same facility.

The Bill will repeal the statutory requirement to obtain approval from the court for the transfer of 18 year old detainees from a detention centre to a prison and instead make their transfer mandatory unless the CEO directs that the transfer is not to occur.

A collateral amendment is introduced to authorise the CEO to provide personal information of an offender or detainee obtained by a detention centre under the YOA to a prison following the transfer of the offender or detainee from the detention centre to the prison. Other amendments are introduced to align relevant provisions of the YOA with the reform.

### **Clause 1      Short title**

The Act will be called the *Young Offenders Amendment Act 2023*.

### **Clause 2      Commencement**

Clause 2 provides for commencement of the Act.

Sections 1 and 2 of the Act come into operation on the day of Royal Assent, and the rest of the Act on the day after.

### **Clause 3      Act amended**

The Act amends the *Young Offenders Act 1994*.

#### **Clause 4      Section 15A amended**

Clause 4 amends section 15A to insert new subsection (7A) to authorise the CEO to provide certain prison staff with information of a young offender or detainee when the young offender or detainee is transferred from a detention centre to a prison. The intent is to facilitate disclosure of information to assist the prison with management of the young offender or detainee.

#### **Clause 5      Section 19 amended**

Clause 5 amends section 19 to clarify that the police can only place a young person in a detention centre if the young person is under 18 years old.

The heading is changed to read: Detention of young persons apprehended by police. This is to accurately describe the subject matter.

#### **Clause 6      Section 21 amended**

Clause 6 amends section 21 to introduce mandatory transfer to young persons remanded in custody whilst awaiting trial.

- Subsection 21 (1) is deleted and replaced with a new subsection (1) to:
  - (a) clarify that a young person under 18 years may be detained while on remand or while on committal for trial to a detention centre; and
  - (b) expressly exclude a young person who has reached 18 years of age from being remanded or held on committal for trial in a detention centre unless the young person is already held in the detention centre pursuant to a CEO's direction issued under proposed section 21A (1) or section 178B (1).
- Subsection 21 (2) is amended to remove the requirement for the CEO to apply to the court to transfer a young person who has reached 18 years of age from a detention centre to a prison and insert a requirement that the CEO must transfer the young person to a prison unless a direction under proposed section 21A (1) or 178B (1) in respect of the young person is force.
- New subsection 21 (3) is inserted to require the CEO to transfer the young person to a prison within 30 days after (a) the day on which the young person reaches 18 years of age, or (b) the day on which a direction made under section 21A (3) or 178B (3) to not to transfer the young person is revoked.
- New subsection 21 (4) is inserted to provide that a failure to comply with subsection (3) does not invalidate the transfer.
- New subsection 21 (5) to provide that the young person who is transferred to a prison is taken to be an adult prisoner on remand.

## **Clause 7      New section 21A introduced**

Clause 7 inserts a new section 21A which gives the CEO a discretion to direct that a transfer under section 21(2) (as amended) not apply, as follows:

- (1) The CEO may, in writing, direct that mandatory transfer does not apply to a particular young person.
- (2) In giving the direction, the CEO: (a) must have regard to the interests of the young person and the interests of other persons detained in the detention centre; and (b) may have regard to any other matter the CEO considers appropriate.
- (3) The CEO may, in writing, revoke the direction.
- (4) The exercise of the CEO's functions within this section is not conditional on the rules of natural justice.
- (5) The CEO's decision is not subject to review or appeal.
- (6) Judicial review is not excluded in cases of jurisdictional error.

## **Clause 8      Section 118 amended**

Section 118 provides for sentencing of offenders where the offences are punishable by imprisonment and specifies the options available to the court when it decides to impose a custodial sentence.

Clause 8 amends section 118 to:

- update reference to section 178 (4)(a) in subsection (4) with section 178(4) due to proposed amendments to section 178 which results in section 178(4)(a) being re-numbered as section 178(4).
- change the heading to read "Sentencing for offences punishable by imprisonment" to accommodate a drafting preference.

## **Clause 9      Section 118A amended**

Section 118A stipulates where an offender is to serve a sentence of imprisonment.

Clause 9 amends section 118A to make drafting improvements and consequential changes.

- Section 118A (1) is re-drafted via subclauses 6 (1) and (2) to read:
  - (1) Subsection (1A) applies if –
    - (a) as a result of a sentence imposed by a court a young person is to be imprisoned; and
    - (b) the young person is under 18 years old at the time when under that sentence the young person is to be imprisoned.

(1A) The young person must serve the sentence in a detention centre and not in a prison unless –

- (a) a direction is made in respect of the young person under section 118 (4) or 178 (3); or
- (b) the young person is transferred under section 178 A (2).

- Section 118A (2) is re-drafted via subclauses 9 (3) and (4) to read:

(2) Subsection (2A) applies if –

- (a) as a result of a sentence imposed by a court a young person is to be imprisoned; and
- (b) the young person has reached the age of 18 years at the time when under that sentence the young person is to be imprisoned.

(2A) The young person must serve the sentence in a prison.

The re-drafting in both cases is designed to improve the text of the provisions without altering its effect or substance, along with consequential reference to proposed section 178A (2). The re-drafting also uses gender-neutral language to replace “he or she”.

- Section 118A (3) is amended via subclause 9 (5) to –
  - (a) update reference to subsection (1) with subsection (1A), and
  - (b) replace “offender” with “young person” to correct an inconsistency in terminology.

#### **Clause 10     Section 142B amended**

Clause 10 makes a drafting change in section 142B (2) by replacing “CEO” with “chief executive officer”.

#### **Clause 11     Section 178 amended**

As it stands, section 178 operates to permit the transfer, with the approval of the Children’s Court, offenders aged 16 years or above serving a sentence of detention or sentence of imprisonment from a detention centre to a prison to serve the unserved portion of the sentence.

The primary purpose of clause 11 is to repeal the requirement for the CEO to make an application to the Children’s Court to allow for the transfer of offenders who have reached 18 years of age. Instead, transfer of those offenders who reach the age of 18 years will occur via proposed section 178A inserted by clause 12 below. To achieve this purpose, the following amendments are made to section 178:

- insert new subsection (1A) to specify that section 178 applies to an offender who has reached 16 years but is under 18 years. This retains the application of existing section 178 as it applies to offenders who are 16 or 17 years old.
- consequentially replace reference to “an offender” in subsection (1) with “the offender”.

- delete subsection (2) which is made redundant by the new subsection (1A).
- remove from subsection (4) the Court's jurisdiction to transfer offenders who have reached 18 years of age while retaining the Court's existing jurisdiction to transfer offenders under 18 years old.

The heading is changed to read: Transfer of offender who is 16 or 17 years old from detention centre to prison.

In addition, minor drafting changes are made by subclauses 11 (4) and (6).

## **Clause 12     New sections 178A and 178B introduced**

Clause 12 inserts 2 new provisions to facilitate the transfer of offenders who reach the age of 18 years.

- New section 178A provides:
  - (1) The section applies to offenders who have reached 18 years of age.
  - (2) The CEO must transfer the offender to a prison to serve the unserved portion of the sentence unless the CEO has issued a direction under section 178B (1) to the offender.
  - (3) The transfer must be made within 30 days after (a) the day the offender reaches the age of 18 years or (b) the day on which the CEO revokes a direction made under section 178B (3).
  - (4) A failure to transfer within the 30 days does not invalidate the transfer.
  - (5) While serving a sentence of detention in a prison due to the transfer, the *Prisons Act 1981* applies to the offender, and Part 7 Division 8 and Part 8 of the *Young Offenders Act 1994* continue to apply to the sentence of detention. (Part 7 Division 8 relates to service of the sentence, and Part 8 relates to the offender's eligibility and release to supervised release order).
- New section 178B gives the CEO a discretion to direct that a transfer under section 178A not apply in relation to a particular offender. It provides:
  - (1) The CEO may, in writing, direct that mandatory transfer does not apply to a particular offender.
  - (2) In giving the direction, the CEO: (a) must have regard to the interests of the young person and the interests of other persons detained in the detention centre; and (b) may have regard to any other matter the CEO considers appropriate.
  - (3) The CEO may, in writing, revoke the direction.

- (4) The exercise of the CEO's functions within this section is not conditional on the rules of natural justice.
- (5) The CEO's decision is not subject to review or appeal.
- (6) Judicial review is not excluded in cases of jurisdictional error.

#### **Clause 13      Part 11 Division 3 heading replaced**

The heading of Part 11 Division 3 reads: Transitional provisions.

The transitional provisions refer to sections 231 – 235, which were enacted by the YOA (as passed).

Clause 13 inserts a new sub-heading to Division 3, namely "Subdivision 1 – General" to accommodate sections 231- 235.

#### **Clause 14      Part 11 Division 3 Subdivision 2 inserted**

Clause 14 inserts a new sub-heading to Division 3, namely "Subdivision 2 – Transitional provisions for *Young Offenders Amendment Act 2023*".

Subdivision 2 contains new transitional provisions as outlined below. The intent is to give immediate effect to the proposed mandatory transfer provisions on commencement day as defined by section 235A.

#### **Section 235A**

Define *commencement day* to mean the day on which the *Young Offenders Amendment Act 2023* comes into operation.

#### **Section 235B**

In respect of young persons who are remanded in a detention centre or have been committed for trial and have reached 18 years of age before commencement day, section 21 (as amended) applies on commencement day.

#### **Section 235C**

In respect of offenders who are in a detention centre serving a sentence of detention or sentence of imprisonment and have reached 18 years of age before commencement day, new section 178A applies on commencement day.

#### **Section 235D**

This section deals with applications made by the CEO prior to commencement day under section 21 (2) or under section 178 where the offender has reached 18 years of age.

If the application is yet to be determined on commencement day, it is taken to be withdrawn. This means that the proposed provisions will apply with immediate effect.