EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 21

Issued by the authority of the Minister for Home Affairs

Crimes Amendment Regulation 2012 (No. 2)

Section 91 of the *Crimes Act 1914* (the Crimes Act) provides that the Governor-General may make regulations, not inconsistent with the Crimes Act, prescribing all matters required or permitted by the Crimes Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Crimes Act.

Subsection 19AZD(3) of the Crimes Act provides a mechanism for federal prisoners to access pre-release schemes that are available in the States and Territories and are prescribed for the purposes of this subsection in regulation 5 of the *Crimes Regulations 1990* (the Principal Regulations).

Section 20AB of the Crimes Act provides a mechanism for courts, when sentencing federal offenders, to access a number of sentencing options that are available in the States and Territories. Some of these options are specifically identified in subsection 20AB(1) of the Crimes Act and further sentencing options are prescribed for the purposes of this subsection in regulation 6 of the Principal Regulations.

The purpose of this Regulation is to correct and simplify existing regulations 5 and 6 of the Principal Regulations, and then amend regulations 5 and 6 to refer to revised sentencing legislation in Victoria. This ensures that federal offenders are eligible to access a range of pre-release and sentencing options, in accordance with recently amended sentencing legislation in Victoria.

The amendments remove reference to home detention orders as a pre-release option in Victoria in regulation 5 of the Principal Regulations, and also remove reference to home detention orders as a sentencing option in Victoria in regulation 6 of the Principal Regulations. Home detention, both as a pre-release option for sentenced prisoners and as an initial sentencing option for courts, no longer exists in Victoria – see the *Sentencing Legislation Amendment (Abolition of Home Detention) Act 2011* (Vic) (the Sentencing Legislation Amendment (Abolition of Home Detention) Act).

The amendments also remove references to intensive corrections orders and community-based orders as sentencing options in Victoria in regulation 6 of the Prescribed Regulations, and replace them with a reference to community correction orders as a prescribed sentencing option in Victoria in regulation 6 of the Principal Regulations. Intensive corrections orders and community-based orders no longer exist as sentencing options in Victoria, and have been replaced by community correction orders – see the *Sentencing Amendment (Community Correction Reform) Act 2011* (Vic) (the Sentencing Amendment (Community Correction Reform) Act).

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Crimes Amendment Regulation 2012 (No. 2)

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

Federal offenders are prosecuted and sentenced in State and Territory courts and, if sentenced to imprisonment, are imprisoned in State and Territory prisons. The Crimes Act provides a mechanism for courts to consider sentencing alternatives that are available in the relevant State or Territory, and are either set out in the Act or prescribed in the Principal Regulations, when sentencing federal offenders. The Crimes Act also provides a mechanism for federal prisoners to access pre-release schemes that are available in the relevant State and Territory, and prescribed in the Principal Regulations.

Regulation 5 of the Principal Regulations prescribes pre-release schemes that are available to federal offenders in the States and Territories and regulation 6 of the Principal Regulations prescribes sentencing options that are available to federal offenders in the States and Territories.

This Regulation amends regulations 5 and 6 of the Principal Regulations to correct and simplify these provisions and amend them to reflect changes to pre-release schemes and sentencing options available in Victoria as a result of amendments made to sentencing legislation in Victoria.

The amendments remove references to home detention orders as a pre-release scheme and as a sentencing option for federal offenders in Victoria. This is because home detention orders have been abolished in Victoria under amendments to Victorian sentencing legislation and are therefore no longer an available option. The amendments also replace references to intensive corrections orders and community-based orders as sentencing options for federal offenders in Victoria with references to community correction orders as a sentencing option for federal offenders in Victoria. This is because intensive corrections orders and community-based orders have been replaced in Victoria by community correction orders under amendments to Victorian sentencing legislation.

The legislative instrument does not make any substantive amendments to Commonwealth law or policy. It reflects amendments to Victorian sentencing legislation that affect federal offenders and ensures that federal offenders are still eligible to access a range of pre-release and sentencing options in accordance with Victorian sentencing legislation.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.

[The Hon Jason Clare MP, Minister for Home Affairs]

Other Issues

The Commonwealth Director of Public Prosecution and the Victorian Department of Justice have been consulted on the proposed amendments.

The Regulation is not likely to impact on business or restrict competition.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on the day after it is registered on the Federal Register of Legislative Instruments.

Details of the Regulation are set out in the Attachment.

ATTACHMENT

Details of the *Crimes Amendment Regulation 2012 (No. 2)*

Subsection 19AZD(3) of the Crimes Act provides a mechanism for federal prisoners to access pre-release schemes that are available in the States and Territories and are prescribed for the purposes of this subsection in regulation 5 of the Principal Regulations.

Section 20AB of the Crimes Act provides a mechanism for courts to consider sentencing options that are available in the States and Territories when sentencing federal offenders. Some sentencing options are prescribed for the purposes of this section in regulation 6 of the Principal Regulations.

Victoria has introduced amendments to its relevant sentencing regime. It is necessary to amend regulation 5 and regulation 6 of the Principal Regulations to reflect current pre-release and sentencing options in this jurisdiction and ensure that federal offenders can access the pre-release schemes and sentencing options now available in Victoria.

Section 1 – Name of regulation

This section provides that the title of the regulation is the *Crimes Amendment Regulation 2012 (No. 2).*

Section 2 – Commencement

This section provides that the regulation will commence on the day after the regulation is registered.

Section 3 – Amendment of *Crimes Regulations 1990*

This section provides that the Principal Regulations are amended as set out in Schedule 1.

Schedule 1 – Amendment

Item [1] – Substitute regulations 5 and 6

Regulation 5

Existing regulation 5 of the Principal Regulations prescribes a range of State and Territory pre-release permit schemes as prescribed schemes for the purposes of the enabling provision – that is, subsection 19AZD(3) of the Crimes Act.

The heading of existing regulation 5 does not accurately reflect the enabling provision. Also, regulation 5 does not conform to the standard citation drafting style and order of States and Territories.

New regulation 5 of the Principal Regulations will:

(a) Replace the heading to regulation 5 so that it refers to prescribed State pre-release permit schemes, rather than State laws prescribed for the purposes of subsection 19AZD(3) of the Act. This heading better reflects the enabling provision in subsection 19AZD(3).
(b) Replace paragraphs 5(1)(a) to (e) with a table containing items 1 to 5 under subregulation 5(1). This table reflects current drafting styles.

In accordance with the changes in drafting style explained above, existing paragraph 5(1)(b) will be replaced by item 5 in the table in new subregulation 5(1). In addition, the amendment will replace the existing reference to Division VIA of Part IV of the *Correctional Services Act, 1982* of South Australia in paragraph 5(1)(b) with a reference to Division 6A of Part 4 of the *Correctional Services Act 1982* of South Australia in item 5 in the table in new subregulation 5(1). This ensures the reference to the South Australian legislation in the table in new subregulation 5(1) is the correct citation.

Existing paragraph 5(1)(d) of the Principal Regulations refers to the *Sentence Administration Act 1995* of Western Australia (Sentence Administration Act). The existing note under paragraph 5(1)(d) explains that, although the Sentence Administration Act has been repealed, transitional provisions in relation to prescribed pre-release schemes under the repealed legislation may still have some effect.

The amendment removes the note under existing paragraph 5(1)(d) of the Principal Regulations and places a new note under the table in subregulation 5(1). The new note explains that transitional provisions in relation to prescribed schemes under repealed legislation may still have some effect. That is, the note is of general effect, rather than limited to the particular prescribed scheme set out in relation to the Western Australian legislation in existing paragraph 5(1)(d).

Existing paragraph 5(1)(c) of the Principal Regulations refers to pre-release permits granted under section 19 of the *Penalties and Sentences Act 1985* of Victoria (Penalties and Sentences Act). Existing paragraph 5(1)(ca) refers to pre-release permits granted under Division 6 of Part 8 of the *Corrections Act 1986* of Victoria (Corrections Act), or Division 5 of Part 8 of the *Corrections Regulations 1988* of Victoria (Corrections Regulations), with respect to a sentence of imprisonment imposed before the commencement of subsection 5(1) of the *Corrections (Remissions) Act 1991* of Victoria (Corrections (Remissions) Act). However, the Victorian Department of Justice has confirmed that there are no persons any longer subject to these provisions.

New regulation 5 of the Principal Regulations removes the references to pre-release permits granted under section 19 of the Penalties and Sentences Act and pre-release permits granted under Division 6 of Part 8 of the Corrections Act, or Division 5 of Part 8 of the Corrections Regulations, with respect to a sentence of imprisonment imposed before the commencement of subsection 5(1) of the Corrections (Remissions) Act.

Existing paragraph 5(1)(cb) of the Principal Regulations prescribes a home detention order made under Division 4 of Part 8 of the Corrections Act as a pre-release permit scheme for the purposes of subsection 19AZD(3) of the Crimes Act.

The Sentencing Legislation Amendment (Abolition of Home Detention) Act abolished home detention orders, both as an initial sentencing option for persons convicted by a court and as a pre-release scheme for prisoners. The Act commenced on 16 January 2012.

The amendment omits the reference in regulation 5 of the Principal Regulations to home detention orders in Victoria as a pre-release permit scheme prescribed for the purposes of subsection 19AZD(3) of the Crimes Act. This ensures that the reference to a pre-release scheme that is no longer available in Victoria is removed from the Principal Regulations and ensures that only current Victorian pre-release schemes are prescribed in the Principal Regulations.

In addition, existing subregulation 5(2A) and subregulation 5(3) will be renumbered so that they become subregulation 5(3) and subregulation 5(4) respectively. Existing subregulation 5(3), which will be renumbered as subregulation 5(4), currently refers to a permit scheme prescribed under subparagraph 5(1)(d)(ii). As a consequence of the new table in subregulation 5(1) replacing existing paragraphs 5(1)(a) to (e), the reference in renumbered subregulation 5(4) will be replaced with a reference to item 3 of the table in subregulation 5(1).

Regulation 6

Existing regulation 6 of the Principal Regulations prescribes a range of State and Territory sentencing alternatives as prescribed orders for the purposes of the enabling provision - that is, section 20AB of the Crimes Act.

The heading of existing regulation 6 does not accurately reflect the enabling provision and the regulation does not conform to the standard citation drafting style and order of States and Territories.

New regulation 6 of the Principal Regulations will:

(a) Replace the heading to regulation 6 so that it refers to prescribed State and Territory orders, rather than State laws prescribed for the purposes of section 20AB of the Act. This heading better reflects the enabling provision in section 20AB.

(b) Replace paragraphs 6(a) to (h) with a table containing items 1 to 10. This table reflects current drafting styles.

In addition, existing paragraph 6(b) of the Principal Regulations prescribes a community-based order made under Division 3 of Part 3 of the *Sentencing Act 1991* (Vic) (Sentencing Act) as a sentencing option for the purposes of section 20AB of the Crimes Act. Existing paragraph 6(c) of the Principal Regulations prescribes an intensive correction order made under section 19(1) of the Sentencing Act as a sentencing option for the purposes of section 20AB of the Crimes Act.

However, the Sentencing Amendment (Community Correction Reform) Act abolished community-based orders and intensive corrections orders in Victoria, and replaced them with community correction orders. The relevant provisions of this Act commenced on 16 January 2012.

The amendments remove the references to Victorian community-based orders and intensive correction orders in regulation 6 of the Principal Regulations as a sentencing option for the purposes of section 20AB of the Crimes Act.

New item 3 in the table in regulation 6 of the Principal Regulations prescribe a community correction order made under Part 3A of the Sentencing Act as a sentencing option for the purposes of section 20AB of the Crimes Act. This will allow courts to sentence federal offenders prosecuted in Victoria to community correction orders.

These amendments remove the references to sentencing options that are no longer available in Victoria from the Principal Regulations and ensure that only current Victorian sentencing legislation is prescribed in the Principal Regulations.

Further, existing paragraph 6(ca) of the Principal Regulations prescribes a home detention order made under section 26M of the Sentencing Act as a sentencing option for the purposes of section 20AB of the Crimes Act.

However, the Sentencing Legislation Amendment (Abolition of Home Detention) Act abolished home detention orders, both as an initial sentencing option for persons convicted by a court and as a pre-release scheme for prisoners. The Act commenced on 16 January 2012.

The proposed amendment omits the reference in regulation 6 of the Principal Regulations to home detention orders in Victoria as a sentencing option for the purposes of section 20AB of the Crimes Act. This will ensure that the reference to a sentencing option that is no longer available in Victoria is removed from the Principal Regulations and ensure that only current Victorian sentencing legislation is prescribed in the Principal Regulations.