

EXPLANATORY STATEMENT

Select Legislative Instrument No. , 2016

Issued by the authority of the Minister for Justice

Crimes Act 1914

Crimes Amendment (Prescribed Schemes and Orders) Regulation 2016

A federal offender is a person convicted of an offence against a law of the Commonwealth. Under the *Judiciary Act 1903* (Cth), State and Territory courts exercise jurisdiction in relation to persons charged with offences against the Commonwealth. Part IB (sections 16 to 22A) of the Crimes Act provides for the sentencing, imprisonment and release of federal offenders. In particular, Part IB sets out sentencing options for federal offenders, including custodial sentences, conditional release and suspended sentences.

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

The *Crimes Amendment (Prescribed Schemes and Orders) Regulation 2016* (the Regulation) does not make any substantive amendments to Commonwealth law or policy. The purpose of the Regulation is to update the existing list of prescribed State and Territory pre-release permit schemes and alternative sentencing options in the *Crimes Regulations 1990* (Cth) (the Crimes Regulations) in order to ensure that these options may be available to be applied to federal offenders in appropriate circumstances.

Prescribed State and Territory pre-release permit schemes

Prescribed pre-release schemes generally provide for eligible, low-risk offenders to be conditionally released from prison for a specified period before their head sentence expires. These schemes assist offenders' rehabilitation and reintegration into the community and assist the States and Territories to allocate their correctional resources appropriately. Pre-release permit schemes are administered by the relevant State or Territory under their legislation. Subsection 19AZD(3) of the Crimes Act provides that State and Territory laws providing for a State or Territory offender to be released from prison under a pre-release permit scheme may be applied to a federal offender, if such a scheme is prescribed in the Crimes Regulations.

The list of prescribed State and Territory pre-release permit schemes is set out in regulation 5 of the Crimes Regulations. The Regulation amends regulation 5 to remove references to pre-release schemes which have been repealed in Queensland and Western Australia, and adds the Northern Territory administrative home detention scheme which was introduced through amendments to the *Sentencing Act* (NT) in 2014.

Prescribed State and Territory alternative sentencing orders

In accordance with section 17A of the Crimes Act, a court may not imprison a person for a federal offence unless, having considered all other available sentences, the court is satisfied that no other sentence is appropriate in all the circumstances of the case. Section 20AB of the Crimes Act provides a mechanism for courts, when sentencing federal offenders in their jurisdiction, to access a number of sentencing alternatives that are available under the relevant state or territory law in their jurisdiction. Some of these options are identified in subsection 20AB(1AA) of the Crimes Act and further sentencing options may be prescribed for the purposes of this subsection in the Crimes Regulations.

The list of prescribed State and Territory alternative sentencing orders is set out in regulation 6 of the Crimes Regulations.

The Regulation amends regulation 6 of the Crimes Regulations to provide South Australian sentencing courts with the discretion to make home detention orders as an alternative to imprisonment for federal offenders who are prosecuted and convicted in that jurisdiction, in the same way that the courts are able to do so for persons who commit offences against South Australian law. This sentencing option was introduced through amendments to the *Criminal Law (Sentencing) Act 1988 (SA)* which commenced on 1 September 2016.

Consultation

The Commonwealth Director of Public Prosecutions (CDPP) was closely consulted on the Regulation and supports the changes.

Notes on clauses

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Crimes Amendment (Prescribed Schemes and Orders) Regulation 2016*.

Section 2 – Commencement

This section provides that the Regulation commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the *Crimes Amendment (Prescribed Schemes and Orders) Regulation 2016* is made under the *Crimes Act 1914*.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 - Amendments

Item 1 - regulation 5 (heading)

This item repeals the existing heading at regulation 5 in the Crimes Regulations and replaces it with ‘Prescribed State and Territory pre-release permit schemes’ to recognise that the amended subregulation 5(1) includes a Northern Territory scheme and not just State schemes.

Item 2 - subregulation 5(1)

This item replaces the table at subregulation 5(1) of the Crimes Regulations with an up to date table of the pre-release schemes prescribed for the purposes of subsection 19AZD(3) of the Crimes Act. The purpose of this item is to give effect to legislative changes in Queensland and Western Australia which abolished home detention and work release orders, and also add administrative home detention orders which were introduced by the Northern Territory in 2014.

Item 3 - subregulation 5(4)

This item is a consequential amendment necessary to reflect the repeal of the abolished Western Australian home detention pre-release permit scheme set out at item 2 above. This item removes a condition of participation for federal offenders in that abolished Western Australian home detention order prescribed pre-release scheme.

Item 4 - regulation 6 (after table item 6)

Section 20AB of the Crimes Act enables courts, when sentencing federal offenders in their jurisdiction, to access a number of sentencing options that are available under the relevant state or territory law in their jurisdiction, if such options are identified in the Crimes Act or are prescribed. This item amends the existing table of prescribed sentencing orders at regulation 6 of the Crimes Regulations to include home detention orders in South Australia. This ensures that South Australian courts may consider this alternative to imprisonment when sentencing federal offenders convicted after the commencement of the Regulation.

Item 5 - regulation 6 (table items 8 and 9)

This item repeals Australian Capital Territory (ACT) sentencing options from the table at regulation 6 which no longer exist under ACT legislation, namely home detention orders and periodic detention orders.

Item 6 - regulation 6 (note)

This item is a consequential amendment necessary to reflect the repeal of the outdated ACT sentencing options. The item removes the note that existed below the table of prescribed sentencing orders at regulation 6. The note stated that although some of the laws mentioned in the table had been repealed, the prescribed orders continued to have some effect under transitional provisions in the relevant jurisdictions. The note is not required because, as a

result of the amendments, the table no longer refers to any repealed orders. Furthermore, any offenders who were serving such an order have since completed their order.

The Regulation is a legislative instrument for the purposes of the *Legislation Act 2003* (Cth).

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

Authority: Section 91 of the *Crimes Act 1914*

Statement of Compatibility with Human Rights

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

Overview

A federal offender is a person convicted of an offence against a law of the Commonwealth. 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 1914* (Cth) (the Crimes Act) provides for the sentencing of federal offenders, including custodial sentences, conditional release and suspended sentences. The Crimes Act also provides a mechanism for:

- the States and Territories to release federal offenders to home detention or other reintegration programs under prescribed pre-release permit schemes, and
- the courts, when sentencing federal offenders in their jurisdiction, to access a range of sentencing options available under the relevant State or Territory law in their jurisdiction, where the options are identified in the Crimes Act or prescribed by regulation.

The purpose of the *Crimes Amendment (Prescribed Schemes and Orders) Regulation 2016* (the Regulation) is to update the pre-release permit schemes and alternative sentencing options prescribed in the *Crimes Regulations 1990* (Cth) (the Crimes Regulations) in accordance with the Crimes Act so that they may be available to be applied to federal offenders.

Prescribed State and Territory pre-release permit schemes

Subsection 19AZD(3) of the Crimes Act provides that State and Territory laws providing for a State or Territory offender to be released from prison under a pre-release permit scheme may be applied to a federal offender serving a sentence in that jurisdiction, if such a scheme is prescribed for the purposes of this subsection in the Crimes Regulations. Pre-release permit schemes are administered by the relevant State or Territory. The schemes generally provide for eligible low-risk offenders to be conditionally released from prison for a limited period before their head sentence expires, in order to assist offenders' rehabilitation and reintegration into the community. These schemes also assist the States and Territories to allocate their corrections resources appropriately.

Prescribed State and Territory alternative sentencing orders

In accordance with section 17A of the Crimes Act, a court may not imprison a person for a federal offence unless, having considered all other available sentences, the court is satisfied that no other sentence is appropriate in all the circumstances of the case. Section 20AB of the Crimes Act provides a mechanism for courts, when sentencing federal offenders in their jurisdiction, to access a number of sentencing options that are available under the relevant State or Territory law in their jurisdiction. Some of these options are identified in subsection 20AB(1AA) of the Crimes Act and further sentencing options may be prescribed for the purposes of this subsection in the Crimes Regulations.

Human rights implications

The amendments in the Regulation to remove the Queensland and Western Australian work release and home detention permits from the list of prescribed schemes in the Crimes Regulations are entirely procedural in nature. These permit schemes have been repealed from the relevant Queensland and Western Australian legislation respectively and are no longer used in relation to any offenders in those jurisdictions. Therefore removing the reference to the schemes in the Regulation does not engage any human rights.

Similarly, the amendments in the Regulation to remove the Australian Capital Territory (ACT) home detention and periodic detention orders from the list of prescribed sentencing orders in the Crimes Regulations are entirely procedural in nature. These two orders have been repealed from the relevant ACT legislation and are no longer used in relation to any offenders in the ACT. Therefore removing the reference to them in the Regulation does not engage any human rights.

However, the amendments in the Regulation to add administrative home detention as a prescribed pre-release scheme in the Northern Territory and home detention orders as a prescribed alternative sentencing option in South Australia, may be considered to engage human rights, namely the right to:

- freedom of movement
- liberty
- work, and
- privacy and a family life.

Right to liberty and freedom of movement

A person's rights to liberty and freedom of movement (Articles 9 and 12 of the International Covenant on Civil and Political Rights (ICCPR)) could be considered to be affected if he or she is convicted of a federal offence and is either:

- imprisoned in the Northern Territory and later released up to twelve months prior to the expiry of their head sentence on administrative home detention as provided for by the amendments to regulation 5, or
- sentenced by a South Australian sentencing court to a home detention order, as enabled by the amendments to regulation 6.

The right to liberty requires that persons not be subject to arrest and detention except as provided for by law, and provided that the law itself and the manner of its execution are not arbitrary. However, the right to freedom of movement may be restricted to protect public order, provided the restriction is necessary and proportionate and the least intrusive method of achieving the desired outcome.

These amendments do not enable federal offenders to be subject to arbitrary arrest or detention. This is because these amendments do not affect:

- the existing laws that provide procedural safeguards for criminal prosecution in Australia
- the right for federal offenders to appeal their conviction and/or sentence, or
- the right to seek other remedies such as the writ of habeas corpus.

Federal offenders who are sentenced to imprisonment or a home detention order have been convicted of a criminal offence by a State or Territory court. The subsequent restriction on a federal offender's freedom of movement is provided for by law and is a consequence of a criminal conviction and sentence. The restriction on their freedom of movement protects public order, by ensuring that persons convicted of criminal offences are punished for their offences and the community is also protected from such offenders. Home detention is demonstrably a necessary and proportionate response to specified criminal offences, and is less intrusive than alternatives such as imprisonment.

Right to work

The right to work (Articles 6, 7 and 8 of the International Covenant on Economic, Social and Cultural Rights) includes the right of everyone to have the opportunity to gain his or her living by work that is freely chosen or accepted. The right to work may be limited, provided such limitations are:

- compatible with the nature of the rights
- are solely for the purpose of promoting the general welfare in a democratic society
- are proportional
- are of limited duration, and
- are subject to review.

These rights may be unavoidably affected during the time that a person is under sentence following their conviction of a criminal offence and as a direct consequence of the public interest in ensuring that the person is adequately punished for an offence. For example, any restrictions on the right to freely choose work may be limited due to the person's conviction and sentence, including under any court ordered conditions or requirements under relevant legislation. However, release from prison to home detention up to twelve months before the expiry of a convicted offender's sentence, or, a court order for a convicted offender to complete their sentence on home detention are not necessarily incompatible with being engaged in work. This is because it is a common purpose of home detention pre-release schemes and orders to assist the federal offender's rehabilitation and reintegration back into the community by allowing the offenders to attend rehabilitation and training programs in the community under supervision.

Right to privacy and to a family life

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence, and prohibits unlawful attacks on a person's reputation.

The right to respect for the family covers freedom from interference with the family by the removal of children, separation of family members under migration laws, consent to marriage and arbitrary or unlawful interference with the family (Articles 17 and 23 of the ICCPR).

The right to privacy and to a family life is unavoidably affected as a result of a person being convicted of a criminal offence and sentenced to imprisonment. Federal offenders who are sentenced to imprisonment and later released to administrative home detention, or, who are sentenced to a home detention order, have been convicted of a criminal offence by a State or Territory court. This does not involve unlawful or arbitrary interferences with the person's privacy, family, home or correspondence. The existing laws in Australia that regulate access to personal information (for example, the *Privacy Act 1988* and the *Freedom of Information Act 1982*) are not affected by these amendments.

Indeed, the amendments provide corrections authorities and the courts with less intrusive options than imprisonment for the punishment of convicted offenders which promotes the offenders' rights to privacy and to a family life. This is because home detention enables offenders to serve their punishment in the privacy of an approved place of residence, usually with the care of family members, subject to some proportionate limitations such as requirements to report to community corrections officers, undertake training and submit to drug testing.

Further, this scenario does not raise any issues relating to the removal of children, separation of family members under migration laws, consent to marriage, or unlawful or arbitrary interferences with the person's family. Any restriction on family life is lawful and not arbitrary. It is noted that the Crimes Act requires the sentencing court to consider the probable effect that any sentence or order under consideration would have on any of the person's family or dependants. In any case, complying with a home detention permit or order does not, of itself, affect a person's family life. Persons completing home detention permits or who are sentenced to home detention orders reside in the community, in most cases in their usual place of residence.

Conclusion

The measures in the Regulation are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate.