

EXPLANATORY STATEMENT

Issued by the Minister for Home Affairs

Criminal Code Act 1995

Criminal Code Regulations 2019

The *Criminal Code Act 1995* (the Code) codifies the general principles of criminal responsibility under laws of the Commonwealth, and contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created. Section 5 of the Code provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

As the Minister administering the *Australian Federal Police Act 1979* (the AFP Minister), the Minister for Home Affairs is the rule-maker for regulations made for the purposes of the provisions listed in subsection 5(2) of the Code. For regulations made for the purposes of other provisions, the rule-maker is the Attorney-General who is the Minister responsible for administering the Code under the Administrative Arrangements Order. Both the Minister for Home Affairs and the Attorney-General have approved the text of the *Criminal Code Regulations 2019* (the Regulations).

The *Criminal Code Regulations 2002* (the 2002 Regulations) are due to sunset on 1 October 2019. The Regulations remake the 2002 Regulations in their entirety, with some amendments to ensure that the Regulations remain up-to-date and fit for purpose.

Part 2 of the Regulations provides for arrangements relating to the orders available to support the security of the Commonwealth. Part 3 of the Regulations address matters relating to dangers to the community, including listing serious drugs and precursors, the regulation of the importation of psychoactive substances, and the regulation of cross-border firearms trafficking. Part 4 of the Regulations provide for dangerous or harmful substances and things that must not be carried by post. Part 5 of the Regulations set out application, saving and transitional provisions relating to the Regulations. The matters prescribed in these parts are consistent with the matters dealt with in the 2002 Regulations, with minor amendments.

The Regulations prescribe a number of substances and plants. Section 301.7 of the Code requires that before a regulation is made listing a substance or plant as a serious drug for the purposes of the serious drug offences in Part 9.1, the AFP Minister must be satisfied that the substance or plant is likely to be taken without appropriate medical supervision, and that one or more of the following conditions is met:

- (i) taking the substance or plant would create a risk of death or serious harm
- (ii) taking the substance or plant would have a physical or mental effect substantially similar to that caused by taking a serious drug that is already listed
- (iii) the substance or plant has the capacity to cause physiological dependence
- (iv) possession or conduct in relation to the substance or plant is proscribed under a law of a State, a Territory or a foreign country that has purposes similar to those of Part 9.1 of the Code, or
- (v) the substance or plant poses a substantial risk to the health or safety of the public.

Section 301.8 of the Code also requires that, before a regulation is made listing a substance as a controlled precursor or a border controlled precursor, the AFP Minister must be satisfied that there is a risk that the substance will be used to unlawfully manufacture a controlled drug (other than a determined controlled drug).

As AFP Minister, the Minister for Home Affairs is satisfied that the above criteria have been met in relation to the relevant substances that are listed by the Regulations.

The Code specifies no other conditions that need to be satisfied before the power to make regulations may be exercised.

In addition to the remaking of the matters prescribed in the 2002 Regulations, the Regulations include amendments to prescribe relevant officers from the Attorney-General's Department (AGD) responsible for the administration of federal parole, who may share information to facilitate the administration or execution of the continuing detention order regime in Division 105A of the Code.

The amendments were informed by consultation with the High Risk Terrorist Offenders Implementation Working Group, which supported the changes. Agencies represented include:

- AGD
- Australian Federal Police
- Australian Security Intelligence Organisation (ASIO)
- State and Territory corrections agencies
- State and Territory police
- State and Territory justice departments, and
- State and Territory first ministers' departments.

Details of the Regulations are set out in Attachment A.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at Attachment B.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulations. No Regulation Impact Statement is required. The OBPR consultation reference is 24588.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations were also informed by consultation with the Australian Border Force, Australian Federal Police, Australian Criminal Intelligence Commission, ASIO, Department of Health, and Department of Communications and the Arts.

The Regulations commence on the day after the Regulations are registered on the Federal Register of Legislation.

Authority: Section 5 of the *Criminal Code Act 1995*

Details of the *Criminal Code Regulations 2019***Part 1 – Preliminary****Section 1 – Name**

This section provides that the title of this instrument is the *Criminal Code Regulations 2019* (the Regulations).

Section 2 – Commencement

This section provides that the whole of the instrument is to commence the day after the Regulations are registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Regulations are made under the *Criminal Code Act 1995* (the Code).

Section 4 – Definitions

This section provides a non-exhaustive list of terms, defined in the Code, and used for the purposes of the Regulations. The purpose of this provision is to facilitate understanding of the terms used throughout the Regulations.

The section also prescribes definitions for the following terms in the Regulations.

Authorised person

The term ‘authorised person’ is defined as meaning the person to whom the Health Secretary has delegated his or her authority to consider and issue licences and permits to import drugs under section 5 of the *Customs (Prohibited Imports) Regulations 1956* (Prohibited Imports Regulations). It relies on the existing delegation made under the Prohibited Imports Regulations and does not require the Health Secretary to issue a new delegation for these provisions. This term is used in relation to the people who can receive written notices from importers about the importation of psychoactive substances.

Chief executive officer

The term ‘chief executive officer’ of a legal aid commission of a State or Territory has a different meaning for each jurisdiction in accordance with the relevant structure and legislation in the particular State or Territory.

Code

The term ‘Code’ is defined as meaning the *Criminal Code Act 1995*.

Health Secretary

The term ‘Health Secretary’ is defined as meaning the Secretary of the Department administering the *Therapeutic Goods Act 1989*. This is consistent with a similar definition in section 5 of the Prohibited Imports Regulations. This term is used in relation to persons who can receive written notices from importers about the importation of psychoactive substances and the person who can determine the minimum requirements for such a notice.

Legal aid commission

The term ‘legal aid commission’ is defined as meaning an authority established by or under a law of a State or Territory for the purpose of providing legal assistance. This term is used for the purposes of Division 1 of Part 2 of the Regulations.

Young person

The term ‘young person’ is defined as meaning a person who is at least 14 but under 18 years old. This term is used for the purposes of Division 1 of Part 2 of the Regulations.

Other defined terms

This section defines a number of other terms, including ‘AFP member’, ‘control order’, and ‘issuing court’, and ‘lawyer’, to have the same meaning as in Part 5.3 of the Code.

Part 2 – The security of the Commonwealth

Division 1 – Control orders

Section 5 – Legal representation for young people

This section states that Division 1 of Part 2 of the Regulations provides for a lawyer to be appointed by the Court to act for a young person in relation to certain control order proceedings as set out in subsection 104.28(6) of the Code. As outlined above, section 4 of the Regulations defines a ‘young person’ as a person who is at least 14 but under 18 years old.

Section 6 – Court may request legal aid commission to arrange representation

This section authorises an issuing court to request a legal aid commission to arrange the legal representation of the young person (the relevant legal aid commission). As outlined above, section 4 of the Regulations provides that ‘legal aid commission’ means an authority established by or under a law of a State or Territory for the purpose of providing legal assistance.

This section ensures that any young person the subject of control order proceedings, other than *ex parte* proceedings for an interim control order or where the young person refused a

lawyer previously appointed, who does not already have legal representation has a reasonable opportunity to access a lawyer for the purposes of these proceedings. In so doing, this section provides an avenue for an issuing court to meet its obligations under subsection 104.28(4) of the Code.

Section 7 – AFP to inform relevant persons of request and contact details

This section imposes certain obligations on the Australian Federal Police (AFP) in relation to informing relevant persons of an issuing court's request for a legal aid commission to arrange legal representation of a young person the subject of control order proceedings, as well as relevant contact details for the legal aid commission and young person.

Subsection 7(1) of the Regulations provides that the section only applies where the issuing court requests that a legal aid commission arrange legal representation of a young person for certain proceedings in relation to a control order.

Subsections 7(2), 7(3) and 7(5) of the Regulations ensure that, to the extent possible, the relevant legal aid commission, the young person, and the young person's parent or guardian are made aware of the issuing court's request for legal representation to be provided to the young person. This process is intended to ensure, so far as is reasonably practicable, that contact is made by one or both parties to discuss the particulars of the legal representation, thereby facilitating the young person's access to that representation.

Informing the legal aid commission

Subsection 7(2) of the Regulations imposes certain obligations on the AFP with respect to the relevant legal aid commission. Paragraph 7(2)(a) requires either a member of the AFP or a legal representative of the AFP to inform the chief executive officer of the relevant legal aid commission in writing of the issuing court's request. In addition, paragraph 7(2)(b) requires either an AFP member or a legal representative of the AFP to provide the legal aid commission with the following information that the AFP member or a legal representative of the AFP has:

- the young person's name
- the young person's residential address
- the young person's contact details, including a telephone number and an email address
- the young person's date of birth
- the name, residential address and contact details of at least one parent or guardian of the young person, and
- if the young person requires assistance with communication—information about the assistance required.

The note in subsection 7(2) provides that, for the purposes of subparagraph 7(2)(b)(vi), a young person may need assistance with communication because, for example, the person is deaf or hearing impaired, is unable to read, has a mental impairment, or requires an interpreter.

Paragraph 7(2)(b) only requires the AFP member or legal representative to provide the information to the extent that that member or legal representative already holds or has access to that information. It does not impose an obligation on the AFP member or legal

representative to obtain and furnish the legal aid commission with information not already held by the AFP.

As the AFP is an enforcement body and the disclosure of the young person's contact details to the relevant legal aid commission is a disclosure of personal information reasonably necessary for an enforcement related activity (in this case, the conduct of control order proceedings), the AFP member or legal representative is required to make a written note of the disclosure, in accordance with Australian Privacy Principle 6.5.

Informing the young person

Subsection 7(3) of the Regulations imposes certain obligations on the AFP with respect to the young person.

Paragraph 7(3)(a) requires either a member of the AFP or a legal representative of the AFP to inform the young person of the request made by the issuing court. Paragraph 7(3)(b) requires either a member of the AFP or a legal representative of the AFP to give the young person sufficient information about the relevant legal aid commission to enable the young person to contact and, if necessary, attend the relevant legal aid commission, including the following information that the AFP member or legal representative has:

- the name of the legal aid commission
- the legal aid commission's business address (not being a post box)
- the legal aid commission's contact details, including a telephone number and an email address, and
- any other information about the legal aid commission provided by the issuing court.

The overall effect of paragraph 7(3)(b) is that, provided the AFP member or legal representative gives the young person sufficient information to contact and attend the relevant legal aid commission, consistent with paragraph 7(2)(b), there is no obligation on the AFP member to obtain relevant information in addition to what the AFP member or legal representative already holds. Neither paragraph 7(3)(a) nor 7(3)(b) requires the AFP member or legal representative to provide the information in writing. However, the AFP member or legal representative would make a written record of the conversation and the information provided.

Paragraph 7(3)(c) imposes an obligation on the AFP member or legal representative, consistent with that in paragraph 104.12(1)(c) of the Code, to ensure the young person understands the information provided to him or her under paragraphs (a) and (b), taking into account the person's age, language skills, mental capacity and any other relevant factor.

Subsection 7(4) of the Regulations provides that subsection 7(3) does not apply if the actions of the young person make it impracticable for the AFP member or legal representative to comply with that subsection.

Informing a parent or guardian of the young person

Subsection 7(5) of the Regulations imposes certain obligations on the AFP with respect to informing a parent or guardian of the young person.

Subsection 7(5) requires a member of the AFP or a legal representative of the AFP to take reasonable steps to inform at least one parent or guardian of the young person of the issuing court's request, and give the parent or guardian the relevant legal aid commission's contact details.

This subsection ensures that at least one parent or guardian of a young person subject to a control order is made aware that the issuing court has requested a legal aid commission to provide a lawyer for the young person. This process is intended to ensure, so far as is reasonably practicable, that contact is made by one or both parties to discuss the particulars of the legal representation, thereby facilitating the young person's access to that representation. The term 'reasonable' has its ordinary meaning and is determined at the time of informing or attempting to inform.

Timing

Subsection 7(6) of the Regulations imposes a timeframe in which a member of the AFP or a legal representative is required to comply with the requirements to inform the relevant legal aid commission, the young person and a parent or guardian of the young person that is imposed by subsections 7(2), (3) and (5).

In particular, this subsection requires the AFP member or legal representative, as the case may be, to provide the information and comply with any other requirements in those subsections as soon as practicable after the issuing court decides to make the request and at least 48 hours before the next day when the court will conduct proceedings relating to the control order. This is intended to ensure the legal aid commission, the young person and the parent or guardian have sufficient time to make the necessary preparations for the next court date.

Division 2 – Preventative detention orders

Section 8 – Corresponding State preventative detention laws

This section provides for the laws of a State or Territory, or the particular provisions of these laws, that are declared, for the purposes of the definition of 'corresponding State preventative detention law' in subsection 100.1(1) of the Code, to correspond to Division 105 of the Code (which deals with preventative detention orders). This section prescribes the following declared laws, or particular provisions of laws, as in force from time to time, which correspond with the provisions at Division 105 of the Code.

- Part 2A of the *Terrorism (Police Powers) Act 2002* (NSW)
- Part 2A of the *Terrorism (Community Protection) Act 2003* (Vic.)
- the *Terrorism (Preventative Detention) Act 2005* (Qld)
- the *Terrorism (Preventative Detention) Act 2006* (WA)
- the *Terrorism (Preventative Detention) Act 2005* (SA)
- the *Terrorism (Preventative Detention) Act 2005* (Tas.)
- Part 2 of the *Terrorism (Extraordinary Temporary Powers) Act 2006* (ACT), and
- Part 2B of the *Terrorism (Emergency Powers) Act* (NT).

These laws correspond to Division 105 of the Code on the basis that they represent similar preventative detention order schemes that operate in states and territories. The Code contains provisions (such as subsections 105.6(4)–(6)) that clarify the interaction between

Commonwealth preventative detention orders under Division 105 of the Code and corresponding State preventative detention laws. The listing of state and territory preventative detention laws in this section sets out the relevant state or territory laws, or particular provisions of laws, under which an individual may be detained for the purpose of a preventative detention order.

Division 3 – Continuing detention orders

Section 9 – Terrorist offender unable to engage legal representative in continuing detention order proceedings – matters court may take into account in determining whether circumstances beyond offender’s control

This section provides a Supreme Court of a State or Territory with guidance as to what matters it may consider when deciding if circumstances are beyond an offender’s control for the purposes of paragraph 105A.15A(3)(a) of the Code. It is ultimately up to the Court as to what matters it considers, and what weight it gives to each matter.

Paragraph 9(a) provides that the Court may take into account the offender’s financial circumstances. The offender’s financial circumstances are highly relevant in determining whether that offender is able to afford the costs of legal representation.

Paragraph 9(b) provides that the Court may take into account whether the offender has engaged in unreasonable conduct during the proceeding which has resulted in the offender being unable to afford any or all of the costs and expenses of legal representation. This matter may be relevant where, for example, a person is no longer able to afford legal representation as a result of unreasonably delaying the proceedings and knowingly incurring high legal costs.

Paragraph 9(c) provides that the Court may consider whether the offender has made efforts to obtain legal aid or legal assistance, and the outcomes of those efforts. Where the offender believes that he or she cannot afford the costs of legal representation for a continuing detention order proceeding, the offender should make efforts to apply for legal aid or legal assistance. The outcomes of those efforts may also be relevant to the Court’s decision. For example, the offender may not be granted access to legal aid if they can afford legal representation using funds available to them.

Paragraph 9(d) provides that the Court may also consider any other matter it considers relevant. The inclusion of this paragraph clarifies that matters in section 9 are not exhaustive, and do not prevent the Court from considering additional matters that it considers relevant.

It is anticipated that, as a civil proceeding, existing State and Territory Supreme Court processes will be applied and relied on to assess these costs.

Section 10 – Sharing information – prescribed persons

This section prescribes a list of persons for the purposes of subsections 105A.19(1) and (3) of the Code. Subsections 105A.19(1) and (3) of the Code provide that the Minister for Home Affairs, as the Minister administering the *Australian Federal Police Act 1979*, may request information from, and disclose information to, persons prescribed by the regulations to facilitate the execution of Division 105A.

Division 105A of the Code contains the Commonwealth's post-sentence preventative detention scheme for high risk terrorist offenders, and allows the Minister for Home Affairs to apply to the Supreme Court of a State or Territory for the continuing detention of a convicted terrorist offender who poses an unacceptable risk of committing a serious terrorist offence if released into the community at the conclusion of their custodial sentence.

Section 10 prescribes a list of persons who:

- the Minister for Home Affairs may request information from, being information that the Minister for Home Affairs reasonably believes to be relevant to the administration or execution of Division 105A of the Code, and
- the Minister for Home Affairs may disclose information to, if:
 - the information was acquired by the Minister for Home Affairs, a legal representative of the Minister for Home Affairs, the Secretary of the Department, or an Australian Public Service (APS) employee in the Department, and
 - the Minister for Home Affairs reasonably believes that the disclosure is necessary to enable the person to exercise the person's powers, or to perform the person's functions or duties.

Persons that are prescribed under section 10 for the purposes of facilitating the execution of Division 105A include:

- certain members of police
- persons employed by a State or Territory, or an authority thereof, whose duties relate to corrective services, justice or parole
- persons providing services for or on behalf of a State or Territory, or an authority thereof, in relation to corrective services, justice or parole
- the Director of Public Prosecutions and the staff of their Office, and State and Territory equivalents
- the Director-General, a Deputy Director-General, and employees or affiliates of the Australian Security Intelligence Organisation
- an APS employee of a Department administered by the Minister administering the *Migration Act 1958* or *Australian Citizenship Act 2007*, and
- authorised officers within the meaning of Division 9A of Part IB of the *Crimes Act 1914* (Crimes Act) or persons who are performing functions under that Division under a delegation from such an authorised officer.

Section 10 of the Regulations has been amended to include relevant officers from the Attorney-General's Department (AGD) to the list of prescribed persons. These AGD officers are authorised officers within the meaning of Division 9A of Part IB of the Crimes Act, or persons who are performing functions under that Division under a delegation from such an authorised officer, to share information relevant to federal offenders. Prior to the passage of the *Home Affairs and Integrity Agencies Legislation Amendment Act 2018*, the Attorney-General exercised the Minister's powers under Division 105A and, as such, there was no requirement to include relevant officers from AGD in the list of prescribed persons.

This section is designed to ensure all relevant agencies are able to share information on federal parole where it relates to high risk terrorist offenders eligible for a continuing detention order. This information supports recommendations to the Minister for Home Affairs on whether to apply for a continuing detention order under Division 105A of the Code.

Information held by police, public prosecution authorities, corrective services, intelligence agencies, and immigration authorities is crucial to facilitating the effective execution and administration of Division 105A.

Part 3 – Dangers to the community

Division 2 – Serious drugs and precursors

Section 11 – Controlled drugs

This section refers to the list of controlled drugs inserted in clause 1 of Schedule 1 to the Regulations. Section 11 also identifies the threshold quantities that apply to controlled drugs and the location of these on the list at Schedule 1.

Paragraph 11(a) of the Regulations provides that the substances listed in the table in clause 1 of Schedule 1 are controlled drugs for the purposes of the serious drug offences in Part 9.1 of the Code. The definition of ‘controlled drug’ can be found at section 301.1 of the Code. A controlled drug includes substances listed indefinitely in the Regulations as a controlled drug, analogues of a listed controlled drug, or substances listed temporarily by emergency determination as a controlled drug. Offences relating to controlled drugs can be found at Divisions 302, 305, 308 and 309 of the Code.

Paragraph 11(b) of the Regulations provides that the commercial quantity of the controlled drug is the quantity listed in clause 1 of Schedule 1. Section 301.10 of the Code contains the definition of ‘commercial quantity’ which includes quantities listed as such in the Regulations.

Paragraph 11(c) of the Regulations provides that the marketable quantity (if any) of the controlled drug is the quantity listed in clause 1 of Schedule 1. Section 301.11 of the Code contains the definition of ‘marketable quantity’ which includes quantities listed as such in the Regulations.

Paragraph 11(d) of the Regulations indicates that the trafficable quantity of the controlled drug is the quantity listed in clause 1 of Schedule 1. Section 301.12 of the Code contains the definition of ‘trafficable quantity’ which includes quantities listed as such in the Regulations.

Section 301.7 of the Code contains criteria of which the Minister must be satisfied before a controlled drug may be listed indefinitely. These criteria are largely based on the detrimental effect the drug has on the individual and the risk to the community. The Minister is satisfied that these criteria have been met in relation to the substances being listed, on the basis of advice from operational agencies. In relation to paragraph 301.7(b) of the Code, the Minister is satisfied that the criterion at paragraph (b)(iv) has been met in relation to the substances listed.

Section 12 – Controlled plants

This section lists controlled plants and identifies the threshold quantities that apply to these substances.

Paragraph 12(a) of the Regulations provides that a growing plant listed in the table in this section is a controlled plant for the purposes of the serious drug offences in Part 9.1 of the Code. The definition of ‘controlled plant’ can be found at section 301.2 of the Code. A controlled plant includes substances listed indefinitely in the Regulations as a controlled plant and substances listed temporarily by emergency determination as a controlled plant. Offences relating to controlled plants can be found at Divisions 303, 304, 308 and 309 of the Code.

Paragraph 12(b) of the Regulations provides that the commercial quantity of the controlled plant is the quantity listed in the table in this section. Section 301.10 of the Code contains the definition of ‘commercial quantity’ which includes quantities listed as such in the Regulations.

Paragraph 12(c) of the Regulations provides that the marketable quantity of the controlled plant is the quantity listed in the table in this section. Section 301.11 of the Code contains the definition of ‘marketable quantity’ which includes quantities listed as such in the Regulations.

Paragraph 12(d) of the Regulations indicates that the trafficable quantity of the controlled plant listed at subsection 12(1) is the quantity listed in the table in this section. Section 301.12 of the Code contains the definition of ‘trafficable quantity’ which includes quantities listed as such in the Regulations.

Section 301.7 of the Code contains criteria of which the Minister must be satisfied before a controlled plant may be listed indefinitely. These criteria are largely based on the detrimental effect the drug has on the individual and the risk to the community. The Minister is satisfied that these criteria have been met in relation to the substances being listed, on the basis of advice from operational agencies. In relation to paragraph 301.7(b) of the Code, the Minister is satisfied that the criterion at paragraph (b)(iv) has been met in relation to the substances listed.

Section 13 – Controlled precursors

This section lists controlled precursors and identifies the threshold quantities that apply to these substances.

Paragraph 13(a) of the Regulations provides that a substance listed in the table in this section is a controlled precursor for the purposes of the serious drug offences in Part 9.1 of the Code. The definition of ‘controlled precursor’ can be found at section 301.3 of the Code. A controlled precursor includes substances listed indefinitely in the Regulations as a controlled precursor, salts or esters of a controlled precursor, and substances listed temporarily by emergency determination as a controlled precursor. Offences relating to controlled precursors can be found at Division 306, 308 and 309 of the Code.

Paragraph 13(b) of the Regulations provides that the commercial quantity of the controlled precursor is the quantity listed in the table in this section. Section 301.10 of the Code contains

the definition of ‘commercial quantity’ which includes quantities listed as such in the Regulations.

Paragraph 13(c) of the Regulations indicates that the marketable quantity of the controlled precursor is the quantity listed in the table in this section. Section 301.11 of the Code contains the definition of ‘marketable quantity’ which includes quantities listed as such in the Regulations.

The note to this section provides that a salt or ester of a substance listed in the table in this section is also a controlled precursor.

Section 301.8 of the Code contains a requirement for the Minister to be satisfied that there is a risk the substance will be used to unlawfully manufacture a controlled drug before a controlled precursor may be listed indefinitely. The Minister is satisfied that section 301.8 of the Code has been met in relation to the substances being listed, on the basis of advice from operational agencies.

Section 14 – Border controlled drugs

This section refers to the list of controlled drugs inserted in clause 1 of Schedule 2 to the Regulations. Section 14 also identifies the threshold quantities that apply to border controlled drugs and the location of these on the list at Schedule 2.

Paragraph 14(a) of the Regulations provides that the drugs listed in clause 1 of Schedule 2 are border controlled drugs for the purposes of the serious drug offences in Part 9.1 of the Code. The definition of ‘border controlled drug’ can be found at section 301.4 of the Code. A border controlled drug includes substances listed indefinitely in Regulations as a border controlled drug, analogues of a listed border controlled drug, and substances listed temporarily by emergency determination as a border controlled drug. Offence provisions that relate to border controlled drugs can be found at Division 307 of the Code.

Paragraph 14(b) of the Regulations provides that the commercial quantity of the border controlled drug is the quantity listed in the table in clause 1 of Schedule 2. Section 301.10 of the Code contains the definition of ‘commercial quantity’ which includes quantities listed as such in the Regulations.

Paragraph 14(c) of the Regulations provides that the marketable quantity of the border controlled drug is the quantity listed in the table in clause 1 of Schedule 2. Section 301.11 of the Code contains the definition of ‘marketable quantity’ which includes quantities listed as such in the Regulations.

Section 301.7 of the Code contains criteria of which the Minister must be satisfied before a border controlled drug may be listed indefinitely. These criteria are largely based on the detrimental effect the drug has on the individual and the risk to the community. The Minister is satisfied that these criteria have been met in relation to the substances being listed, on the basis of advice from operational agencies. In relation to paragraph 301.7(b) of the Code, the Minister is satisfied that the criterion at paragraph (b)(iv) has been met in relation to the substances listed.

Section 15 – Border controlled plants

This section lists border controlled plants and identifies the threshold quantities that apply to these substances.

Paragraph 15(a) of the Regulations provides that a growing plant listed in the table in this section is a border controlled plant for the purposes of the serious drug offences in Part 9.1 of the Code. The definition of ‘border controlled plant’ can be found at section 301.5 of the Code. A border controlled plant includes substances listed indefinitely in the Regulations as a border controlled plant and substances listed temporarily by emergency determination as a border controlled plant. Offence provisions that relate to border controlled plants can be found at Division 307 of the Code.

Paragraph 15(b) of the Regulations provides that the commercial quantity (if any) of the border controlled plant is the quantity listed in the table in this section. Section 301.10 of the Code contains the definition of ‘commercial quantity’ which includes quantities listed as such in the Regulations.

Paragraph 15(c) of the Regulations provides that the marketable quantity (if any) of the border controlled plant is the quantity listed in the table in this section. Section 301.11 of the Code contains the definition of ‘marketable quantity’ which includes quantities listed as such in the Regulations.

Section 301.7 of the Code contains criteria of which the Minister must be satisfied before a border controlled plant may be listed indefinitely. These criteria are largely based on the detrimental effect the drug has on the individual and the risk to the community. The Minister is satisfied that these criteria have been met in relation to the substances being listed, on the basis of advice from operational agencies. In relation to paragraph 301.7(b) of the Code, the Minister is satisfied that the criterion at paragraph (b)(iv) has been met in relation to the substances listed.

Section 16 – Border controlled precursors

This section lists border controlled precursors and identifies the threshold quantities that apply to these substances.

Paragraph 16(a) of the Regulations indicates that a substance listed in the table in this section is a border controlled precursor for the purposes of the serious drug offences in Part 9.1 of the Code. The definition of ‘border controlled precursor’ can be found at section 301.6 of the Code. A border controlled precursor includes substances listed indefinitely in the Regulations as a border controlled precursor, salts or esters of a border controlled precursor, immediate precursors of a border controlled precursor, and substances listed temporarily by emergency determination as a border controlled precursor. Offence provisions that relate to border controlled precursors are found at Division 307 of the Code.

Paragraph 16(b) of the Regulations provides that the commercial quantity (if any) of the border controlled precursor is the quantity listed in the table in this section. Section 301.10 of the Code, contains the definition of ‘commercial quantity’ which includes quantities listed as such in the Regulations.

Paragraph 16(c) of the Regulations provides that the marketable quantity (if any) of the border controlled precursor is the quantity listed in the table in this section. Section 301.11 of the Code contains the definition of ‘marketable quantity’ which includes quantities listed as such in the Regulations.

The note to this section provides that a salt or ester of a substance listed in the table in this section and an immediate precursor of a substance listed in the table in this section are also border controlled precursors.

Section 301.8 of the Code contains a requirement for the Minister to be satisfied that there is a risk the substance will be used to unlawfully manufacture a controlled drug before a border controlled precursor may be listed. The Minister is satisfied that section 301.8 of the Code has been met in relation to the substances being listed, on the basis of advice from operational agencies.

Division 2 – Psychoactive substances

Section 17 – Importing psychoactive substances

This section refers to the requirements for a person to be able to import a psychoactive substance that is otherwise prohibited under section 320.2 of the Code.

This section excludes substances that are imported in compliance with the requirements of section 19 of the Regulations from the offence in section 320.2 of the Code. Section 320.2 bans the importation of all substances that have a psychoactive effect, unless they are excluded under subsection 320.2(2) of the Code.

Section 18 – Importing substances represented to be serious drug alternatives

This section refers to the requirements for a person to be able to import a substance that is represented to be a serious drug alternative that is otherwise prohibited under section 320.3 of the Code.

This section excludes substances that are imported in compliance with the requirements of section 19 of the Regulations from the offence in section 320.3 of the Code. Section 320.3 bans the importation of all substances that include a representation that the substance is a serious drug alternative, unless they are excluded under subsection 320.3(3) of the Code.

Section 19 – Conditions for importing certain substances

This section sets out the conditions that a person must satisfy in order to import a psychoactive substance or serious drug alternative under sections 17 and 18 of the Regulations. The person importing the substance must satisfy all relevant conditions before he or she is able to import the substance. Subsections 19(1) and 19(2) of the Regulations refer to the person importing the substance as the importer.

Paragraph 19(1)(a) requires the importer to hold a licence to import drugs under subsection 5(5) of the Prohibited Imports Regulations. A licence enables the holder to import drugs listed in Schedule 4 of the Prohibited Imports Regulations. Under paragraph 320.2(3)(k) of the Code, drugs listed in the Prohibited Imports Regulations are not psychoactive substances.

Under subsection 5(7) of the Prohibited Import Regulations, a person may only obtain a licence to import drugs if, among other things, he or she is a fit and proper person to be granted a licence to import drugs, his or her agents or employees are also fit and proper persons, and his or her premises are sufficiently secure to store any drugs imported.

An importer must already hold a licence to import drugs under the Prohibited Imports Regulations in order to satisfy paragraph 19(1)(a) of the Regulations. As psychoactive substances are not drugs listed in Schedule 4 of the Prohibited Imports Regulations, an importer cannot obtain such a licence solely in order to import psychoactive substances. An importer also cannot obtain such a licence solely in order to import serious drug alternatives.

Paragraph 19(1)(c) requires the importer to give the Health Secretary or his or her delegate written notice about the importer's intention to import the psychoactive substance or serious drug alternative. The importer must give this notice before importing the substance.

Subparagraphs 19(1)(c)(i) to (v) sets out the minimum information that an importer needs to include in a notice. These minimum information requirements are:

- the identity and amount of the substance being imported
- the purpose of the importation
- a 30-day period during which the importation is likely to occur
- the importer's name and import licence number
- if paragraph 19(2)(a), (d), (e) or (f) applies and the importer is employed by the body mentioned in the applicable paragraph – the name of the importer's employer, and
- any other information required by the Health Secretary.

Paragraph 19(1)(b) provides that it is a condition for importing certain substances that the importer is covered by subsection 19(2). An importer is covered by subsection 19(2) if one of the circumstances prescribed in paragraphs 19(2)(a) to (f) applies.

Under paragraph 19(2)(a), a forensic laboratory is able to import a psychoactive substance or serious drug alternative for the purposes of forensic analysis. A person who is employed by such a laboratory is also able to import a psychoactive substance or serious drug alternative for the purposes of forensic analysis. This is necessary to allow for circumstances where an individual in a forensic laboratory holds a licence under section 5 of the Prohibited Imports Regulations on behalf of that laboratory. Neither 'forensic laboratory' nor 'forensic analysis' are defined. These terms have their ordinary meaning.

Under paragraph 19(2)(b), the AFP and State and Territory police forces are able to import a psychoactive substance or serious drug alternative for the purposes of law enforcement. The term 'purposes of law enforcement' is not defined. This term has its ordinary meaning.

Under paragraph 19(2)(c), the Commissioner or a Deputy Commissioner of the AFP, and persons in the equivalent positions in State and Territory police forces, are also able to import psychoactive substances or serious drug alternatives for the purposes of law enforcement. This subparagraph is necessary to allow for circumstances where an individual in a police force holds a licence under section 5 of the Prohibited Imports Regulations on behalf of that police force.

Under paragraph 19(2)(d), a medical research facility is able to import a psychoactive substance or serious drug alternative for the purposes of medical research. A person who is employed by such a facility is also able to import a psychoactive substance or serious drug alternative for the purposes of medical research. This is necessary to allow for circumstances where an individual in a medical research facility holds a licence under section 5 of the Prohibited Imports Regulations on behalf of that facility. Neither ‘medical research facility’ nor ‘purposes of medical research’ are defined. These terms have their ordinary meaning.

Under paragraph 19(2)(e), a scientific research facility is able to import a psychoactive substance or serious drug alternative for the purposes of scientific research. A person who is employed by such a facility is also able to import a psychoactive substance or serious drug alternative for the purposes of scientific research. This is necessary to allow for circumstances where an individual in a scientific research facility holds a licence under section 5 of the Prohibited Imports Regulations on behalf of that facility. Neither ‘scientific research facility’ nor ‘purposes of scientific research’ are defined. These terms have their ordinary meaning.

Paragraph 19(2)(f) allows an importer to import a psychoactive substance or serious drug alternative on behalf of a forensic laboratory, Commonwealth, State or Territory police force (or the head or deputy head of such a police force) or medical or scientific research facility. This paragraph is intended to allow the Australian distributors of international chemical wholesalers to import psychoactive substances or serious drug alternatives at the request of a forensic laboratory, law enforcement agency, or medical or scientific research facility. There are circumstances where contractual or licencing arrangements will require such organisations to purchase psychoactive substances through an Australian distributor.

Subsection 19(3) of the Regulations gives the Health Secretary the power to determine two matters in relation to notices given to the Secretary or his or her delegate under paragraph 19(1)(c).

Under paragraph 19(3)(a), the Secretary is able to determine the information that an importer needs to provide in a notice in order to comply with paragraph 19(1)(c). This paragraph allows the Secretary to obtain additional information about the substance and the importation to that set out in subparagraphs 19(1)(c)(i) to (vi).

Under paragraph 19(3)(b), the Secretary is able to determine the form in which an importer must provide the notice to the Secretary or his or her delegate.

Division 3 – Cross-border firearms trafficking

Section 20 – Firearm law

This section prescribes the relevant State and Territory laws to give effect to the cross-border firearm trafficking offences in subsections 360.2(3) and 360.3(2) of the Code. This section would prescribe the following laws, as in force from time to time:

- the *Firearms Act 1996* (NSW)
- the *Firearms Act 1996* (Vic.)
- the *Weapons Act 1990* (Qld)
- the *Firearms Act 1973* (WA)
- the *Firearms Act 2015* (SA)

- the *Firearms Act 1996* (Tas.)
- the *Firearms Act 1996* (ACT)
- the *Firearms Act 1997* (NT)
- the *Firearms and Prohibited Weapons Act 1997* (Norfolk Island), and
- any regulations made under any of the Acts referred to in paragraphs (a) to (i).

The cross-border firearm trafficking offences in subsections 360.2(3) and 360.3(2) of the Code make it unlawful, in the course of trade and commerce between the States and Territories, to:

- dispose of or acquire a firearm or a firearm part where the disposal or acquisition of that firearm or firearm part is an offence under a State or Territory firearm law, or
- to take or send a firearm or firearm part from one state or territory to another, intending that the firearm or firearm part will be disposed of in the other State or Territory in circumstances that would constitute an offence against the firearm law of that other State or Territory.

Part 4 – National infrastructure

Section 21 – Dangerous or harmful substances and things that must not be carried by post

This section prescribes the following dangerous or harmful substances or things which must not, without exception, be carried by post under subparagraph 471.15(1)(b)(ii) of the Code:

- gas that is so toxic or corrosive to humans as to pose a hazard to health
- a thermally unstable substance that is likely to undergo a strongly exothermic decomposition, and
- a substance that ignites or self-heats when in contact with air.

Subsection 471.15(1) of the Code provides that a person is guilty of an offence if the person causes an article to be carried by post and the article consists of, encloses or contains an explosive or a dangerous or harmful substance or thing that the regulations say must not, without exception, be carried by post.

Part 5 – Application, saving and transitional provisions

Division 1 – Provisions for this instrument as originally made

This section provides the application, saving and transitional provisions in relation to the instrument as originally made. In particular, this section is intended to cover transitional issues that may arise in relation to Division 1 of Part 2 (Control orders) and Division 2 of Part 3 (Psychoactive substances) of the Regulations.

Section 22 – Things done under the *Criminal Code Regulations 2002*

This section inserts an application provision relating to things done under the 2002 Regulations. This section ensures that decisions made under the 2002 Regulations continue to have effect.

Subsection 22(1) of the Regulations provides that, if a thing that was done for a particular purpose under the old regulations as in force immediately before those Regulations were

repealed, and the thing could be done for that purpose under this instrument, the thing has effect for the purposes of this instrument as if it had been done for that purpose under this instrument.

Subsection 22(2) of the Regulations clarifies that a reference to a thing being done includes a reference to a notice, application or other instrument being given or made.

Section 23 – Conduct, event, circumstances occurring before commencement

This section inserts an application provision relating to conduct, events and circumstances occurring before the commencement of the Regulations.

Subsection 23(1) of the Regulations provides that, to avoid doubt, a function or duty may be performed, or a power exercised, under this instrument in relation to conduct engaged in, an event that occurred, or a circumstance that arose, before this section commences.

Subsection 23(2) provides that this section does not limit section 22 of the Regulations or section 7 of the *Acts Interpretation Act 1901* (as that Act applies in relation to this instrument because of paragraph 13(1)(a) of the *Legislation Act 2003*).

Schedule 1 – Controlled drugs

This Schedule inserts the controlled drug list. The controlled drug list contains 249 substances subject to the serious drug offences in Part 9.1 of the Code.

The controlled drug list is inserted by section 11 of the Regulations. The list of substances are included in the Schedule, rather than at section 11, as there are a large number of substances on the list. These substances will remain in the Regulations indefinitely until removed.

The Schedule also lists commercial, marketable, and trafficable threshold quantities for each of the substances which is used by law enforcement to determine appropriate charges and by the court to determine penalty levels.

Section 301.7 of the Code contains criteria of which the Minister must be satisfied before a controlled drug may be listed indefinitely. These criteria are largely based on the detrimental effect the drug has on the individual and the risk to the community. The Minister is satisfied that these criteria have been met in relation to the substances being listed, on the basis of advice from operational agencies. In relation to paragraph 301.7(b) of the Code, the Minister is satisfied that the criterion at paragraph (b)(iv) has been met in relation to the substances listed.

The note to this section indicates that a drug analogue of a substance listed in the table in this section is also a controlled drug.

Schedule 2 – Border controlled drugs

This Schedule inserts the border controlled drug list. The border controlled list contains 209 substances subject to the serious drug offences in Part 9.1 of the Code.

The border controlled drug list is inserted by section 14 of the Regulations. The list of substances are included in the Schedule, rather than at section 14, as there are a large number of substances on the list. These substances will remain in the Regulations indefinitely until removed.

The Schedule also lists commercial and marketable threshold quantities for each of the substances which is used by law enforcement to determine appropriate charges and by the court to determine penalty levels.

Section 301.7 of the Code contains criteria of which the Minister must be satisfied before a border controlled drug may be listed indefinitely. These criteria are largely based on the detrimental effect the drug has on the individual and the risk to the community. The Minister is satisfied that these criteria have been met in relation to the substances being listed, on the basis of advice from operational agencies. In relation to paragraph 301.7(b) of the Code, the Minister is satisfied that the criterion at paragraph (b)(iv) has been met in relation to the substances listed.

The note to this section indicates that a drug analogue of a substance listed in the table in this section is also a border controlled drug.

ATTACHMENT B**Statement of Compatibility with Human Rights**

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

Criminal Code Regulations 2019

This Disallowable 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

The Criminal Code Regulations 2019 (the Regulations) remake the Criminal Code Regulations 2002 (the 2002 Regulations) in their current form, with minor amendments to ensure that the Regulations remain up-to-date, are fit for purpose, and support the Commonwealth's ability to respond in a timely way to new and emerging criminal activity.

In addition to the remaking of the matters prescribed in the 2002 Regulations, Division 3 of Part 2 of the Regulations includes amendments to prescribe relevant officers from the Attorney General's Department (AGD) responsible for the administration of federal parole, who may share information to facilitate the administration or execution of the continuing detention order regime in Division 105A of the *Criminal Code Act 1995* (the Code).

Part 1 of the Regulations - Preliminary

Sections 1, 2, 3 and 4 of the Regulations provide the name of, commencement details, authority for, and definitions used in, the Regulations.

Division 1 of Part 2 of the Regulations – Control orders

The provisions under Division 1 of Part 2 of the Regulations are made for the purposes of subsection 104.28(6) of the Code. In short, under subsection 104.28(4) of the Code, a court must appoint a lawyer to act for a young person (a person who is at least 14 but under 18 years old) in relation to proceedings relating to a control order, unless an exception under subsection 104.28(5) applies. Subsection 104.28(6) of the Code provides that the Regulations may provide in relation to the appointing of lawyers under subsection 104.28(4) of the Code.

Sections 5, 6 and 7 of the Regulations provide an administrative framework to support the appointment of lawyers for young persons who are the subject of control order proceedings. Broadly, section 6 of the Regulations provides that an issuing court may request a legal aid commission to arrange the legal representation of a young person in proceedings relating to a control order. Section 7 of the Regulations provides an Australian Federal Police (AFP) member, or a legal representative of the AFP must, in writing, inform the CEO of the legal aid commission of the request and give them certain information listed in paragraph 7(2)(b), such as the young person's name and residential address. Additionally, the AFP member or legal representative of the AFP must (in part) inform the young person of the request, and inform a parent or guardian of the young person of the request (and give them the legal aid commission's contact details) as soon as practicable.

Division 2 of Part 2 of the Regulations – Preventative detention orders

Section 8 of the Regulations declares the corresponding State preventative detention laws for the purposes of subsection 100.1(1) of the Code.

Division 3 of Part 2 of the Regulations – Continuing detention orders

Subsection 105A.15A(3) of the Code applies if a continuing detention order proceeding relating to a terrorist offender is before a Supreme Court of a State or Territory and, if due to circumstances beyond the offender's control, the offender is unable to engage a legal representative. In such circumstances, the court may make certain orders. **Section 9** of the Regulations provides guidance to the Court on matters it may take into account in determining whether circumstances are beyond an offender's control. These include (in part) the offender's financial circumstances.

Additionally, subsections 105A.19(1) and (3) of the Code provide for the sharing (requesting and disclosing) of information of persons prescribed in the Regulations. **Section 10** of the Regulations prescribe persons for the purpose of sharing information. The Regulations add the following persons to the current list of prescribed persons:

- a person who is an authorised officer (within the meaning of Division 9A of Part IB of the *Crimes Act 1914* (the Crimes Act)), or
- a person who, under a delegation from such an authorised officer, exercises powers or performs functions of the authorised officer under Division 9A of Part IB of the Crimes Act.

Division 1 of Part 3 of the Regulations – Serious drugs and precursors

Part 9.1 of Chapter 9 of the Code contains Commonwealth serious drug offences. These offences are divided into domestic offences involving 'controlled' drugs, plants and precursors and import/export offences involving 'border controlled' drugs, plants and precursors. The definitions of a drug, plant and precursor are found at Division 301 of the Code.

Section 11 and **Schedule 1** of the Regulations insert a list of controlled drugs and identify the threshold quantities that apply to these substances.

Section 12 of the Regulations lists controlled plants and identifies the threshold quantities that apply to these substances.

Section 13 of the Regulations lists controlled precursors and identifies the threshold quantities that apply to these substances.

Section 14 and **Schedule 2** of the Regulations insert a list of border controlled drugs and identify the threshold quantities that apply to these substances.

Section 15 of the Regulations lists border controlled plants and identifies the threshold quantities that apply to these substances.

Section 16 of the Regulations lists border controlled precursors and identifies the threshold quantities that apply to these substances.

Division 2 of Part 3 of the Regulations – Psychoactive substances

Sections 17, 18 and 19 of the Regulations set out the requirements for a person to be able to import a psychoactive substance that would otherwise be prohibited under sections 320.2 or 320.3 of the Code.

Division 3 of Part 3 of the Regulations – Cross-border firearms trafficking

Section 20 of the Regulations prescribes the relevant State and Territory laws to give effect to the cross-border firearm trafficking offences in subsections 360.2(3) and 360.3(2) of the Code.

Part 4 of the Regulations – National infrastructure

Section 21 of the Regulations identifies prescribed substances and things which must not, without exception, be carried by post under subparagraph 471.15(1)(b)(ii) of the Code. One example of a substance prescribed in the Regulations includes gas that is so toxic or corrosive to humans as to pose a hazard to health.

Part 5 of the Regulations – Application, saving and transitional provisions

Sections 22 and 23 of the Regulations provide the application, saving and transitional provisions in relation to the instrument as originally made.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- the right to a fair trial and fair hearing, and minimum guarantees in criminal proceedings under article 14 of the *International Covenant on Civil and Political Rights* (ICCPR) and article 40 of the *Convention on the Rights of the Child* (CRC)
- the opportunity to be heard in any judicial and administrative proceedings under article 12 of the CRC
- the prohibition on the interference with privacy under article 17 of the ICCPR
- the right to health under article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and
- the inherent right to life under article 6 of the ICCPR.

The right to a fair trial and fair hearing, and minimum guarantees in criminal proceedings

Article 14(1) of the ICCPR provides (in part) that all persons shall be equal before the courts and tribunals and that, in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be treated to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 14(3) of the ICCPR provides that, in the determination of any criminal charge against him, everyone shall be entitled to minimum guarantees which include (in part) to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

The Regulations also engage article 40 of the CRC, which provide (in part) a child's right to a fair trial and minimum guarantees in criminal proceedings.

The Regulations engage and promote the right to a fair trial and a fair hearing, the right to minimum guarantees in criminal proceedings and in a suit at law in article 14 of the ICCPR and article 40 of the CRC.

Sections 5, 6 and 7 – Control orders

Control orders are a tool that have been available to law enforcement under Division 104 of Part 5.3 of the Code since 2005.

Control orders are a protective mechanism and constitute an important element of Australia's counter-terrorism strategy. They provide the AFP with a means to request that a court impose obligations, prohibitions and restrictions (controls) on a person for the purpose of protecting the public from a terrorist act. Law enforcement may have sufficient credible information or intelligence that an individual poses a threat to security to take action in relation to the person before they have gathered sufficient admissible evidence to support a criminal prosecution for terrorism or terrorism-related conduct. In these circumstances, control orders provide a mechanism to manage the threat. Use of a control order is therefore considered in conjunction with, and is complementary to, criminal prosecution, and allows a balance to be achieved between mitigating the risk to community safety and allowing criminal investigations to continue.

Sections 5, 6 and 7 of the Regulations engage and promote the right to a fair trial and fair hearing and the right to minimum guarantees in criminal proceedings by ensuring an issuing court actively considers whether a young person is legally represented, and requiring the AFP to take certain action to ensure the young person has the opportunity to obtain legal representation, including in circumstances where the young person does not have the resources to pay for those services.

The Regulations strengthen the existing safeguards in the Act and support the implementation of Recommendation 2 of the Parliamentary Joint Committee on Intelligence and Security's (the Committee) Advisory Report on the Counter-Terrorism Legislation Amendment Bill (No.1) 2015. In its report, the Committee recommended that the Bill be amended to expressly provide that a young person has the right to legal representation in control order proceedings. The Committee further recommended that the Bill be amended to remove the role of the court appointed advocate. The Committee considered that, given the existing safeguards in the control order regime, the ability of the issuing court to have recourse to expert evidence and concerns regarding the operation of the court appointed advocate, a more effective and appropriate safeguard would be to ensure the right of a young person to legal representation.

Section 9 – Terrorist offender unable to engage legal representative in continuing detention order proceedings - Matters court may take into account in determining whether circumstances beyond offender's control

Section 9 of the Regulations promotes the right to a fair trial and a fair hearing as all persons shall be equal before the courts and tribunals under article 14 of the ICCPR. Section 9 of the Regulations also promotes the right to minimum guarantees in criminal proceedings under article 14(3) of the ICCPR.

Section 105A.15A of the Code was introduced following a recommendation from the Committee on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016. The Committee recommended that the Bill be amended so that if an offender, through no fault of his or her own, is unable to obtain legal representation:

- the Court has the explicit power to stay proceedings for a continuing detention order, and
- the Court is empowered to make an order for reasonable costs to be funded to enable the offender to obtain legal representation.

In making this recommendation, the Committee considered that ensuring access to legal representation is a vital protection of an offender's rights.

Under section 105A.15A, the Supreme Court of a State or Territory may make an order to stay the continuing detention order proceedings, and/or require the Commonwealth to bear the reasonable costs and expenses of the offender's legal representation for the proceeding. The Court may make an order under section 105A.15A of the Code where an offender subject to a continuing detention order application, due to circumstances beyond their control, is unable to engage a legal representative in relation to the proceeding.

Section 9 of the Regulations provides guidance to the Court in making an order under section 105A.15A of the Code. In particular, it prescribes matters the Court may take into account in determining whether circumstances are beyond an offender's control. The matters prescribed by the Regulations seek to ensure the Court has considered key issues in determining the appropriateness of making the order. Section 9 of the Regulations expressly provides that it does not limit the ability of the Court to consider additional matters to those prescribed.

It is ultimately a decision for the Court as to whether to make an order under section 105A.15A of the Code.

Examples of the types of matters that a Court may take into account in determining whether circumstances are beyond an offender's control include the offender's financial circumstances, and whether the offender has engaged in unreasonable conduct during the proceeding that has contributed to their inability to afford any or all of the costs and expenses of obtaining legal representation for the proceeding. By ensuring, where appropriate, the offender has the benefit of legal representation, the Regulations promote the offender's right to a fair trial and fair hearing, as well as the right to minimum guarantees as discussed above and as expressed in article 14 of the ICCPR.

Opportunity to be heard in any judicial and administrative proceedings

The Regulations also engage and promote article 12 of the CRC, which provides that a child shall, in particular, be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The administrative framework to support the appointment of lawyers for young persons the subject of control order proceedings promotes article 12 of the CRC by ensuring that, where the young person does not have legal representation in control order proceedings (other than proceedings the issuing court has determined should be held *ex parte* or where the young person refused a lawyer previously appointed), a lawyer is made available to represent a young person. It should be noted the section does not require the young person to accept the legal representation offered under the section. The young person retains the right to select – and meet the costs associated with – a different source of legal representation.

Protection against unlawful and arbitrary interference with privacy

The Regulations engage article 17 of the ICCPR, which provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. A limitation on the prohibition is permitted only if it is lawful and is not arbitrary.

An interference will be ‘lawful’ where it is authorised by law. However, an interference authorised under domestic law may still be arbitrary. A limitation will not be arbitrary provided it is reasonable in the particular circumstances. The United Nations Human Rights Committee has considered that ‘any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case’.

Section 7 – AFP to inform relevant persons of request and contact details

Relevantly, where an issuing court requests a legal aid commission to arrange the legal representation of a young person in proceedings relating to a control order under section 6 of the Regulations, section 7 of the Regulations requires that an AFP member or a legal representative of the AFP inform the chief executive officer (CEO) of the legal aid commission (in writing) of the request and to give to the legal aid commission certain information including (in part) the young person’s name and residential address.

Additionally, section 7 of the Regulations also requires an AFP member or a legal representative of the AFP to take reasonable steps to inform at least one parent or guardian of the young person of the request, and to give the parent or guardian the legal aid commission’s contact details.

Section 7 of the Regulations clearly limits the prohibition against unlawful and arbitrary interference with privacy as it requires the personal details of a young person to be disclosed to the CEO of the relevant legal aid commission, and requires an AFP member or a legal representative of the AFP to inform a parent or guardian of the young person of the request. However, such a limitation is lawful given it is clearly provided for in the Regulations.

Additionally, the limitation is reasonable in the circumstances because it is aimed at the legitimate objective of ensuring the young person has access to the relevant legal representation. It is also reasonable, necessary and proportionate to disclose such information in the interests of justice. Noting a young person is a person who is at least 14 but under 18 years old, the measure to inform the young person’s parent or guardian is not arbitrary because it would ensure that at least one parent or guardian of the young person subject to a control order is made aware that the issuing court has requested legal aid to provide a lawyer for the young person.

Section 10 – Sharing information – prescribed persons

Section 10 of the Regulations interacts with the right to privacy by allowing, in limited circumstances, the sharing (requesting and disclosing) of information to a prescribed list of persons. The sharing of personal information without a person’s consent will engage, and limit, the protection from arbitrary or unlawful interference with their privacy.

Section 10 of the Regulations also prescribe two new categories of persons, thereby expanding the list of persons with whom information about federal parole where it relates to high risk terrorist offenders eligible for a continuing detention order may be shared.

Sharing information with the prescribed list of persons are a permissible limitation on the right to privacy because the information would be shared to facilitate the administration or execution of the continuing detention order regime in Division 105A of the Code.

Section 10 of the Regulations specifically limits the list of persons who may have access to information to ensure that information is only provided to those with a relevant purpose. The section also works within the framework established by section 105A.19 of the Code, which limits the requesting of information to that which the AFP Minister reasonably believes to be relevant to the administration or execution of Division 105A of the Code, and sharing of information to those who require the information to enable them to exercise the powers or perform their duties.

This framework appropriately limits the unnecessary or further disclosure of information. To the extent that the measures in section 10 limit the right in article 17 of the ICCPR, they are lawful and not arbitrary.

The right to health and the right to life

Article 12(1) of the ICESCR recognises the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Article 6(1) of the ICCPR and CRC preserves the inherent right to life. The right to life includes protection from arbitrary deprivation of life and imposes on states parties an obligation to protect this right by law. The United Nations Human Rights Committee has commented that States parties should take measures to prevent and punish deprivation of life by criminal acts. The following provisions in the Regulations promote both the right to health and the right to life:

- Division 1 of Part 3 of the Regulations which list drugs, plants and precursors, and
- Part 4 of the Regulations, which prescribe the dangerous and harmful substances which must not be carried by post.

These parts of the Regulations promote the right to health and right to life by banning the importation into Australia of potentially dangerous substances, particularly where the substances listed create a risk of death or serious harm.

Substances cannot be listed unless the conditions in sections 301.7 and 301.8 of the Code are satisfied. Further, many of the substances listed in the Regulations are included in the following United Nations Conventions:

- the *Single Convention on Narcotic Drugs 1961*, as amended by the 1972 Protocol, and
- the *Convention on Psychotropic Substances 1971*.

The Regulations also provide additional exemptions to the offences of importing a psychoactive substance or serious drug alternative under sections 320.2 and 320.3 of the Code. Exemptions to the offences of importing a prohibited psychoactive substance or a prohibited serious drug alternative are necessary because there are a number of substances that have important social or economic uses – whether as foods, medicines or industrial, agricultural or veterinary chemicals – but which may also have a psychoactive effect when consumed by a person. The Regulations do not change the nature of the exceptions set out in subsections 320.2(2) and 320.3(3) of the Code.

The Regulations also promote the right to health and the right to life by banning dangerous articles to be carried by post. The Regulations reflect the harm that can be caused by the

sending of dangerous material such as gas that is toxic to humans as to pose a hazard to health, or substances that ignite or self-heat when in contact with air.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as they engage and promote certain rights. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon Peter Dutton MP, Minister for Home Affairs