

CRIMES REGULATIONS 2019

EXPLANATORY STATEMENT

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

The *Crimes Act 1914* (the Crimes Act) provides a procedural framework for the investigation and prosecution of Commonwealth criminal offences, along with a number of offences against the Commonwealth. The *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (the Amendment Act) made amendments to strengthen the Commonwealth response to organised crime.

Section 91 of the Crimes Act and Section 19 of the Amendment Act provide 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.

The Attorney-General has administrative responsibility for the Crimes Act, with the exception of Parts IAA, IAAA, IAAB, IAB, IAC, IC, ID and IE, which are administered by the Minister for Home Affairs. The Minister for Home Affairs also has policy responsibility for Parts IACA, II, IIA, IV, VII and VIIA of the Crimes Act, and administrative and policy responsibility for *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010*. Both the Attorney-General and the Minister for Home Affairs have approved the *Crimes Regulations 2019* (the Regulations).

Under section 50 of the *Legislative Instruments Act 2003*, the *Crimes Regulations 1990* (the 1990 Regulations) are scheduled to sunset on 1 October 2019. They were originally due to sunset on 1 October 2018 but this date was deferred under paragraph 51(1)(c) of the *Legislative Instruments Act 2003*.

The Regulations remake the 1990 Regulations in their entirety, with minor amendments to reflect current drafting practices, account for recent legislative changes and enhance the clarity and consistency in the application of the Regulations.

The Regulations prescribe relevant forms, functions, laws and authorities to ensure proper functioning of the criminal justice processes set out in the Crimes Act, including processes relating to spent convictions, management of federal offenders and court orders, sentencing alternatives available in criminal matters, protections for those involved in controlled operations and vulnerable witnesses, assumed identities and forensic procedures. The Regulations also facilitate a coordinated approach between Commonwealth, State and Territory jurisdictions with respect to these processes.

Section 85ZZGE of the Crimes Act requires that before the Governor-General makes a regulation prescribing a person or body to which information may be disclosed or by which information may be taken into account or disclosed for the purposes of sections 85ZZGB,

85ZZGC or 85ZZGD of the Crimes Act, the Minister must be satisfied that the person or body:

- (i) is required or permitted by or under a Commonwealth law, a State law or a Territory law to obtain and deal with information about persons who work, or seek to work, with children; and
- (ii) complies with applicable Commonwealth law, State law or Territory law relating to privacy, human rights and records management; and
- (iii) complies with the principles of natural justice; and
- (iv) has risk assessment frameworks and appropriately skilled staff to assess risks to children's safety.

Sections 85ZZGB, 85ZZGC and 85ZZGD of the Crimes Act deal with information in relation to persons who work, or seek to work, with children. Section 7A of the Regulations prescribes persons or bodies for the purposes of these sections. As the responsible Minister for section 85ZZGE of the Crimes Act, the Attorney-General is satisfied that the above criteria have been met in relation to the Regulations.

The Regulations were informed by consultation with relevant Commonwealth agencies including the Department of Home Affairs, Australian Criminal Intelligence Commission, the Australian Federal Police, Australian Border Force, Commonwealth Director of Public Prosecutions, the Department of Foreign Affairs and Trade and the Office of the Australian Information Commissioner. States and Territories were also consulted on the Regulations regarding corresponding State and Territory legislation.

The Office of Best Practice Regulation was consulted in the preparation of the Regulations and advised that a Regulatory Impact Statement was not required: OBPR ID 23356.

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

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

Authority: Section 91 of the *Crimes Act 1914*
Section 19 of the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010*

NOTES ON SECTIONS

Part 1 - Preliminary

Section 1 - Name of Regulations

This section provides that the title of the instrument is the *Crimes Regulations 2019* (the Regulations).

Section 2 - Commencement

This section inserts a table which specifies the commencement date of the Regulations.

Item 1 of the table provides that the whole of the Regulations commence on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 - Authority

This section provides that the Regulations are made under the *Crimes Act 1914* and the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010*.

Section 4 - Definitions

The note to this section provides a non-exhaustive list of expressions for which the definitions in the Crimes Act are to be used for the purposes of the Regulations. The purpose of the note is to facilitate understanding of terms used throughout the Regulations, including ‘chief officer’, ‘controlled operation’ and ‘designated offence’.

This section inserts definitions for the terms ‘Act’, ‘aviation security offence’, ‘drug offence’, ‘forensic scientist’, ‘forensic technician’, ‘health security offence’, and ‘maritime security offence’ into the Regulations.

Act

The term ‘Act’ is defined to mean the *Crimes Act 1914*.

Aviation security offence

The term ‘aviation security offence’ is defined to mean an offence against the *Crimes (Aviation) Act 1991* (other than section 15) or Part 5.3 of the *Criminal Code Act 1995* (Criminal Code).

This consolidates the list of offences outlined in items 14, 21, 22 and 24 of Schedule 4 to the *Crimes Regulations 1990* (the 1990 Regulations). Existing items 14, 21, 22 and 24 are duplicative, and the consolidation of the items under the term ‘maritime security offence’ removes duplication and improves the ease of use of the Regulations.

Drug offence

The term ‘drug offence’ is defined to mean an offence constituted by the production, possession, supply, import or export of a substance that is a narcotic substance within the meaning of the *Customs Act 1901*, or a drug within the meaning given by subregulation 9A(1) of the *Customs (Prohibited Exports) Regulations 1958* or subregulation 5(20) of the *Customs (Prohibited Imports) Regulations 1956*. This definition is relevant to exemptions to the spent convictions regime contained in Schedule 2 to the Regulations.

Forensic scientist

The term ‘forensic scientist’ is defined to mean a person engaged (whether as an employee or otherwise) in that capacity by the Australian Federal Police or the police force or police service of a State or Territory. This definition is relevant to section 17 of the Regulations, which contains a table listing persons appropriately qualified to carry out forensic procedures.

Forensic technician

The term ‘forensic technician’ is defined to mean a person engaged (whether as an employee or otherwise) in that capacity by the Australian Federal Police or the police force or police service of a State or Territory. This definition is relevant to section 17 of the Regulations, which contains a table listing persons appropriately qualified to carry out forensic procedures.

Health security offence

The term ‘health security offence’ is defined to mean an offence against the *Crimes (Aviation) Act 1991* (other than section 15), or Part 5.1 or 5.3 of the *Criminal Code*, or section 9, 10, 11 or 14 of the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*.

This consolidates the list of offences outlined in items 21 and 24 of Schedule 4 of the existing Regulations. Existing items 21 and 24 are duplicative, and the consolidation of the items under the term ‘health security offence’ removes repetition and improves the ease of use of the Regulations.

Maritime security offence

The term ‘maritime security offence’ is defined to mean an offence against *Part 4 of the Australian Passports Act 2005*, the *Crimes (Aviation) Act 1991* (other than section 15), Division 73, Chapter 5 or Division 145, 307 or 400 of the *Criminal Code*, section 233, 233A, 233BAA or 233BAB of the *Customs Act 1901*, Division 10 of Part IV of the *Navigation Act 1912*, Subdivision B of Division 4 of Part 4 of Chapter 3 of the *Navigation Act 2012*, or section 9, 10, 11 or 14 of the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995*.

This consolidates the list of offences outlined in items 20, 21, and 23 of Schedule 4 of the 1990 Regulations to remove repetition, and facilitate future amendments. Existing items 20,

21 and 23 are duplicative, and the consolidation of the items under the term ‘maritime security offence’ removes repetition and improves the ease of use of the Regulations.

Part 2 – Forms

Section 5 – Prescribed forms

This section inserts a table that prescribes the use of forms in Schedule 1 of the Regulations for certain provisions of the Crimes Act. For the purposes of a provision of the Act mentioned in column 1 of an item in the table, the form in Schedule 1 mentioned in column 2 of the item is prescribed.

Forms that are prescribed are:

- Form 1 for Section 16BA of the Crimes Act;
- Form 3 for subsection 19AU(2) of the Crimes Act;
- Form 4 for subsection 19AV(2) of the Crimes Act;
- Form 5 for subsection 19AW(1) of the Crimes Act.

The prescribed forms are included in Schedule 1 to the Regulations.

Section 6 – Optional forms

This section inserts a table that provides for optional forms contained in Schedule 1 to the Regulations for certain provisions of the Crimes Act. The form in Schedule 1 mentioned in column 2 of an item in the table is used for the purposes of the provision of the Crimes Act mentioned in column 1 of the item. These forms are used for purposes including warrants, orders, recognisance, summons, and reparation certificates. This provision is made under the “necessary or convenient” power in section 91 of the Crimes Act.

The optional forms are included in Schedule 1 to the Regulations.

Part 3 – Controlled operations

Section 7 – Corresponding State controlled operations laws

This section inserts a table that prescribes corresponding State controlled operations laws for the purpose of the definition of section 15GC of the Crimes Act. A controlled operation is a law enforcement operation in which a person is authorised to engage in certain unlawful conduct to obtain evidence of a serious criminal offence.

Section 15GC of the Crimes Act provides definitions for the purposes of Part IAB – Controlled operations. Section 7 indicates that the provisions mentioned in column 3 of the corresponding laws mentioned in column 2 of the table, as in force from time to time, are prescribed.

This section applies, adopts or incorporates State and Territory Acts as in force from time to time. This is appropriate as the legislative context of section 15GC of the Crimes Act, under which section 7 is made, demonstrates a contrary intention as per section 14(2) of the *Legislation Act 2003* (Legislation Act). The purpose of prescribing State and Territory laws in regulations (as is done by section 7) is to create a national scheme for the recognition and

protection from criminal liability of authorised law enforcement officers participating in controlled operations, in all jurisdictions. For the purposes of the proper and intended operation of the Commonwealth component of that scheme, the regime necessarily must be one that requires the incorporation of State and Territory laws as in force from time to time.

Section 8 – Requirements for indemnification of participants against civil liability

This section prescribes the requirements for indemnification of participants in a controlled operation against any civil liability for the purposes of section 15HB of the Crimes Act – Indemnification of participants against civil liability, as per the regulation power at paragraph 15HB(f). This section ensures that indemnification of participants in controlled operations against civil liability is available, where appropriate.

Requirements to which a participant in a controlled operation must adhere for the Commonwealth to indemnify the participant against civil liability include a requirement to notify the chief officer of the authorising agency for the controlled operation of particular matters, a requirement for the conduct of proceedings brought in relation to the participant's conduct in the course of, and for the purposes of, the controlled operation, and a requirement that the participant not make any written or oral agreement to settle any related proceedings unless the terms of any such settlement have been approved by the chief officer of the authorising agency.

Part 4 – Assumed identities

Section 9 - Corresponding assumed identity laws

This section inserts a table that prescribes corresponding assumed identity laws for the purpose of the definition of section 15K of the Crimes Act. An assumed identity is a lawfully authorised false identity used for the purpose of investigating or gathering intelligence on criminal activity, or conducting other intelligence or security activities.

Section 15K of the Crimes Act provides definitions for the purposes of Part IAC – Assumed Identities. Section 9 indicates that the provisions mentioned in column 3 of the corresponding laws mentioned in column 2 of the table, as in force from time to time, are prescribed.

This section applies, adopts or incorporates State and Territory Acts as in force from time to time. This is appropriate as the legislative context of section 15K of the Crimes Act, under which section 9 is made, demonstrates a contrary intention as per section 14(2) of the Legislation Act. The purpose of prescribing State and Territory laws in regulations (as is done by proposed section 9) is to create a national scheme for the lawfully authorised acquisition or use of assumed identities, in all jurisdictions. For the purposes of the proper and intended operation of the Commonwealth component of that scheme, the regime necessarily must be one that requires the incorporation of State and Territory laws as in force from time to time.

Section 10 – Requirements for indemnification of authorised person

This section prescribes indemnification requirements for the purposes of paragraph 15KS(2)(c) of the Crimes Act. Section 15KS provides that an authorised person, acting under

an authority granted by the chief officer of a law enforcement or intelligence agency, must be indemnified for any liability incurred by the person because of something done by the person, subject to the person having met certain requirements. Section 10 ensures that indemnification of authorised persons acquiring or using an assumed identity against civil liability is available, where appropriate.

Requirements to which an authorised person acquiring or using an assumed identity must adhere for the Commonwealth to indemnify the authorised person for liabilities incurred include a requirement to notify the chief officer who granted the authority of particular matters, a requirement for the conduct of proceedings brought in relation to things done by the authorised person in the course of acquiring or using an assumed identity, and a requirement that the authorised person not make any written or oral agreement to settle any related proceedings unless the terms of any such settlement have been approved by the chief officer.

Part 5 – Witness identity protection for operatives

Section 11 – Corresponding witness identity protection laws

This section inserts a table that prescribes corresponding witness identity protection laws for the purposes of the definition in subsection 15M(1) of the Crimes Act. Witness identity protection allows undercover operatives (those engaged in a controlled operation or using an assumed identity) to give evidence without disclosing their true identities.

Subsection 15M(1) of the Crimes Act provides definitions for the purposes of Part IACA – Witness identity protections for operatives. Section 11 indicates that the provisions mentioned in column 3 of the corresponding laws mentioned in column 2 of the table, as in force from time to time, are prescribed.

This section applies, adopts or incorporates State and Territory Acts as in force from time to time. This is appropriate as the legislative context of subsection 15M(1) of the Crimes Act, under which section 11 is made, demonstrates a contrary intention to the operation of section 14(2) of the Legislation Act. The purpose of prescribing State and Territory laws in regulations (as is done by proposed section 11) is to create a national scheme for corresponding witness identity protection laws for operatives, in all jurisdictions. For the purposes of the proper and intended operation of the Commonwealth component of that scheme, the regime necessarily must be one that requires the incorporation of State and Territory laws as in force from time to time.

Section 12 – Meaning of *civil proceeding*

This section defines the meaning of civil proceeding for the purposes of paragraph 15MB(2)(d) of the Crimes Act. Both a proceeding under Part 2-1 of the *Proceeds of Crime Act 2002* and an examination conducted under Part 3-1 of that Act are prescribed as part of a civil proceeding.

Part 6 – Protecting vulnerable persons

Section 13 – Video recordings – persons who may conduct interview

Section 13 specifies members of a police force or other law enforcement agency of a foreign country as authorities who may conduct a video recording interview of a person to whom subsection 15YM(1A) of the Crimes Act applies, and enable such a video to be admitted as evidence in chief under paragraph 15YM(1)(a) of the Crimes Act if the court gives leave.

Section 15YM of the Crimes Act provides for the use of video recordings as part of protecting vulnerable persons who are required to give evidence in proceedings. These vulnerable persons are laid out in subsection 15YM(1A) of the Crimes Act, and include child witnesses, vulnerable adult complainants, and special witnesses under section 15YM. Paragraph 15YM(1)(a) provides that a video recording of an interview may be admitted as evidence in chief if a constable, or a person of a kind specified in the regulations, conducted the interview.

Part 7 – Sentencing, imprisonment and release of federal offenders

Section 14 – State and Territory pre-release permit schemes that apply to federal offenders

This section prescribes pre-release permit schemes in Western Australia, South Australia and the Northern Territory for the purposes of subsection 19AZD(3) of the Crimes Act, and prescribe conditions in which a federal offender is not eligible to participate in a pre-release permit scheme.

The Crimes Act contains mechanisms to enable federal offenders to be treated consistently with non-federal offenders serving a sentence at the same State or Territory facility. Section 19AZD of the Crimes Act provides for a law of a State or Territory relating to a leave of absence from prison and pre-release to apply to a federal offender.

Subsection 19AZD(3) provides that a law of a State or Territory providing for a State or Territory offender to be released from prison under a prescribed pre-release permit scheme applies to a federal offender who is serving a sentence in that State or Territory, subject to any conditions relating to eligibility to participate, are specified in the regulations that prescribe that scheme, as if the federal offender were a State or Territory offender serving an equivalent State or Territory sentence in that State or Territory.

This section contains a list of prescribed pre-release permit schemes and conditions in which a federal offender is not be eligible to participate in the pre-release permit scheme for the purposes of that subsection.

The effect of this section is that prescribed State and Territory pre-release permit schemes continue to apply to federal offenders serving a sentence in that State or Territory subject to the prescribed conditions. A federal offender will not be able to participate in a pre-release permit scheme where participation in the scheme would render the offender liable for detention and removal or deportation from Australia.

Section 15 – Additional sentencing alternatives – State and Territory sentences and orders

This section prescribes State and Territory orders as additional sentencing alternatives which a court may impose on a person who is convicted of a federal offence in a participating State or Territory under paragraph 20AB(1AA)(c) of the Crimes Act.

The Crimes Act contains mechanisms to make the treatment of federal offenders consistent with other non-federal offenders convicted before participating State or Territory courts. Section 20AB of the Crimes Act provides for additional sentencing alternatives in respect of a person convicted before the court in a participating State or Territory for a federal offence. Subsection 20AB(1AA) provides for a variety of sentences that can be passed by the court in such a case including those prescribed under paragraph 20AB(1AA)(c).

This section lists prescribed State and Territory orders. The list removes orders which already fall under the categories of orders under paragraph 20AB(1AA)(a) and update references to State and Territory legislation.

The effect of this section is that participating State or Territory courts may continue to impose on a federal offender the same sentencing alternatives that would have been available had they been convicted of a non-federal offence.

Section 16 – Offences for which a court may impose certain conditions

This section prescribes offences for which, if charged or convicted, a court may impose conditions in relation to remaining in or leaving Australia under paragraph 22(1)(b) of the Crimes Act.

The Crimes Act contains mechanisms to promote national security, border protection, Australian law enforcement measures and international law enforcement cooperation. Section 22 of the Crimes Act provides for the conditions that a court may impose on certain offenders in relation to remaining in and leaving Australia. Subsection 22(1) of the Crimes Act provides the offences for which a court may impose those conditions including those prescribed under paragraph 22(1)(b) of the Crimes Act.

This section lists prescribed offences for the purpose of that paragraph.

The effect of this section is that courts may continue to make conditions in relation to remaining in or leaving Australia when an offender is charged with or convicted of the prescribed offence.

Part 8 – Forensic procedures

Section 17 – Persons appropriately qualified to carry out forensic procedures

This section inserts a table that prescribes persons for the purposes of paragraph (b) of the definition of ‘appropriately qualified’ in subsection 23WA(1) of the Crimes Act. This section provides that a person mentioned in column 2 of the table will be appropriately qualified to carry out a forensic procedure mentioned in column 1 of the table. Subsection 23WA(1) of the Crimes Act provides definitions for the purposes of Part 8 of the Crimes Act, which relates to forensic procedures.

For the purposes of forensic procedures mentioned in column 1 of the table that include the words “or in the case of a female, the breasts”, the term “female” is also intended to apply to a transgender person who identifies as a female.

Section 18 – Persons authorised to access information on DNA databases

This section prescribes persons authorised to access information on a DNA database for the purposes of paragraphs 23YDAE(2)(d) and 23YO(2)(a) and (d) of the Crimes Act. Persons are prescribed under this section if they are employed or otherwise engaged by a forensic laboratory accredited by the National Association of Testing Authorities, Australia, and provide forensic services to law enforcement officers of the Commonwealth, a State or a Territory in that capacity.

Section 23YDAE of the Crimes Act provides for the use of information on the Commonwealth DNA database system or the National Criminal Investigation DNA Database and section 23YO provides for the disclosure of such information.

The Australian Privacy Principles will continue to apply to the information collected under this clause insofar as the information is personal information.

Section 19 – Corresponding laws—forensic procedures and DNA databases

This section prescribes laws for the purposes of the definition of ‘corresponding law’ in section 23YUA of the Crimes Act. Section 23YUA provides definitions for Division 11 – Interjurisdictional enforcement, and defines ‘corresponding law’ as a law that relates to the carrying out of forensic procedures and DNA databases, and either substantially corresponds to Part ID of the Crimes Act or is prescribed by the regulations. This section prescribes State and Territory Acts, as in force from time to time, relevant to the carrying out of forensic procedures and DNA databases for purposes prescribed under the Crimes Act, including registration of orders, carrying out of forensic procedures, and information use.

This section applies, adopts or incorporates State and Territory Acts as in force from time to time. This is appropriate as the legislative context of section 23YUA of the Act, under which section 19 is made, demonstrates a contrary intention to the operation of section 14(2) of the Legislation Act. The purpose of prescribing State and Territory laws in regulations (as is done by section 19) is to create a national scheme for the carrying out of forensic procedures and DNA databases, in all jurisdictions. For the purposes of the proper and intended operation of the Commonwealth component of that scheme, the regime necessarily must be one that requires the incorporation of State and Territory laws as in force from time to time.

Part 9—Pardons, quashed convictions and spent convictions

Section 20 – Exclusions from Divisions 2 and 3 of Part VIIC of the Crimes Act

This section prescribes State and Territory persons and bodies and the relevant laws under which they are authorised for the purposes of sections 85ZZGB, 85ZZGC and 85ZZGD of the Crimes Act. The purpose of this section is to specify the persons and bodies that are exempt from restrictions related to disclosure of pardons, quashed convictions and spent convictions under the Crimes Act, as informed by the Council of Australian Governments’

Intergovernmental Agreement on National Exchange of Criminal History Information for People Working with Children.

The Crimes Act contains mechanisms to protect children from sexual, physical and emotional harm by permitting criminal history information to be disclosed and taken into account in assessing the suitability of persons for work with children. Divisions 2 and 3 of the Crimes Act contain restrictions to the disclosure of information related to pardons, quashed convictions and spent convictions. Sections 85ZZGB, 85ZZGC and 85ZZGD provide the circumstances in which prescribed persons or bodies required or permitted under a prescribed Commonwealth, State or Territory law are exempt from the restrictions provided for under Division 2 and 3 of Part VIIC of the Crimes Act.

This section lists prescribed persons and bodies and the Commonwealth, State or Territory law under which they are required or permitted to be exempt from Divisions 2 and 3 of Part VIIC of the Crimes Act with amendments to ensure the Regulations refer to the appropriate authorities and can continue to be effective into the future. The list reflects changes in names and administrative functions.

The effect of this section is that the prescribed persons and bodies may continue to access and take into account criminal history information when assessing the suitability of persons for work with children.

This section prescribes persons or bodies and laws as in force from time to time. This is appropriate as the operation of this section is not to be determined by a matter contained in State or Territory law. Rather, this section identifies particular State and Territory laws for the purposes of sections 85ZZGB, 85ZZGC and 85ZZGD. To the extent the prescribed State or Territory laws are applied, adopted or incorporated, this is by operation of the provisions of the Crimes Act and not by the Regulations. As such, it is open to prescribe the State and Territory laws as in force from time to time. The prescription of such laws as in force from time to time also ensures that information can continue to be shared appropriately between relevant bodies, as per the policy intention underpinning this section.

Section 21 – Exclusions from Division 3 of Part VIIC of the Crimes Act (spent convictions)

This section provides that Schedule 2 to the Regulations prescribes persons, purposes and offences that are exempt from disclosure restrictions under Division 3 of Part VIIC of the Crimes Act for the purposes of paragraph 85ZZH(k) of the Crimes Act. The exemptions primarily relate to employment processes where non-disclosure of certain offences would result in an unacceptably high risk if the person convicted of those offences was employed in a particular position.

The Crimes Act contains mechanisms to permit criminal history information to be disclosed and taken into account in assessing the suitability of persons for various types of employment. Division 3 of Part VIIC of the Crimes Act contains restrictions to the disclosure of information related to spent convictions. Paragraph 85ZZH(k) provides that Division 3 does not apply in relation to the disclosure of information to or by a prescribed person or body, or the taking into account of information by a prescribed person or body, for a prescribed purpose, in relation to a conviction for a prescribed offence.

The effect of this section is that prescribed persons and bodies may continue to access and

take into account criminal history information relating to specific offences when assessing the suitability of persons for various purposes.

Part 10—Miscellaneous

Section 22 – ACC delegates

This section prescribes the persons occupying certain positions within the Australian Crime Commission (ACC) (also known as the Australian Criminal Intelligence Commission) for the purposes of subparagraphs 15HG(5)(c)(ii) and 15MX(3)(c)(ii) of the Crimes Act. These subparagraphs refer to notification requirements for controlled operations where property damage or personal injury has occurred, and for the delegation of the functions of a chief officer under Part IACA of the Crimes Act.

Section 15HG provides that loss, damage or injury must be reported to the chief officer of the law enforcement agency, who must then take reasonable steps to notify the owner of the property of the loss or damage or that a personal injury occurred in the course of a controlled operation. Notification is not required where it would compromise the controlled operation or a related investigation, endanger the life or safety of a person, prejudice a legal proceeding, or otherwise be contrary to the public interest. Subparagraph 15HG(5)(c)(ii) provides that the chief officer's powers or functions under section 15HG may be delegated to a person occupying a position at the ACC, as prescribed by the regulations.

Section 15MX refers to delegations for Part IACA of the Crimes Act, and provides that a chief officer may delegate any functions to a senior officer of a law enforcement agency. In relation to the ACC, 'senior officer' is defined as either the Executive Director Operational Strategies, the Executive Director Intelligence Strategies, a person occupying an equivalent or higher position in the ACC, or a person occupying a position prescribed by the regulations.

This section prescribes a position occupied by a person mentioned in subsection 47(1) of the Australian Crime Commission Act 2002 who is an SES employee, or any position in the ACC that is equivalent to or higher than that position, for the purposes of subparagraphs 15HG(5)(c)(ii) and 15MX(3)(c)(ii) of the Crimes Act. The effect of this section is that a chief officer could continue to delegate their powers or functions under subsection 15HG(5) or section 15MX to a person occupying one of the prescribed positions.

Part 11—Application, saving and transitional provisions

Division 1—Transitional matters relating to the *Crimes Regulations 1990*

Section 23 – Things done under the *Crimes Regulations 1990*

This section provides transitional rules for things done under the 1990 Regulations. This section provides that if a thing was done for a particular purpose under the 1990 Regulations as in force immediately before they were repealed, and the thing could be done for that purpose under the Regulations, the thing has effect for the purpose of the Regulations as if it had been done for that purpose under the Regulations. The section also provides that, without limiting subsection 23(1), a reference to a thing being done in that subsection includes a reference to a notice, application or other instrument being given or made.

This section facilitates a smooth transition from the 1990 Regulations to the Regulations by ensuring that things done under the 1990 Regulations remain valid.

Section 24 – Conduct, event, circumstances occurring before commencement

This section provides that a function or duty may be performed, or a power exercised, under the Regulations or under the Crimes Act in connection with something prescribed by the Regulations, in relation to conduct engaged in, an event that occurred, or a circumstance that arose, before the section commences. This section facilitates a smooth transition from the 1990 Regulations by ensuring that conduct, events, or circumstances arising before the commencement of the Regulations are captured by the Regulations.

This section provides that it does not limit section 23, or section 7 of the *Acts Interpretation Act 1901*, which relates to the effect of repealing or amending an Act and applies to instruments under paragraph 13(1)(a) of the *Legislation Act 2003*.

Section 25 – Forms prescribed under the *Crimes Regulations 1990*

This section provides sections of the Crimes Act for which forms under the 1990 Regulations remain prescribed. This section ensures that forms in the 1990 Regulations continue to be used as appropriate, and facilitates a smooth transition from the 1990 Regulations to the Regulations.

Section 26 – Applications of indemnification requirements

This section provides detail regarding the application of requirements for indemnification under various sections of the Regulations.

This section provides that section 8 applies in relation to any conduct engaged in after the commencement of this provision in the course of, and for the purposes of, a controlled operation, whether the controlled operation is authorised before or after that commencement. Section 8 contains requirements for indemnification of participants in controlled operations against civil liability.

This section also provides that section 10 applies in relation to anything done after the commencement of this provision in the course of acquiring or using an assumed identity, whether the authority to acquire or use the identity is granted before or after that commencement. Section 10 contains requirements for the indemnification of authorised persons for things done in the course of acquiring or using an assumed identity.

This section further provides that, despite the repeal of the 1990 Regulations by the Regulations, sections 4B and 4C of the 1990 Regulations continue to apply, as if the repeal had not happened, in relation to conduct before commencement of this provision either in the course of, and for the purposes of, a controlled operation, or for anything done before commencement in the course of acquiring or using an assumed identity. This will ensure that circumstances both before and after the passage of the Regulations are captured adequately by indemnification requirements.

Section 27 – Sentences or orders under section 20AB of the Crimes Act

This section provides that nothing in the Regulations or the *Crimes Legislation Amendment (2019 Measures No. 1) Regulations 2019* affects a sentence passed, or order made, before the commencement of the Regulations, under section 20AB of the Crimes Act. This section facilitates a smooth transition from the 1990 Regulations to the Regulations.

Division 2—Transitional matters relating to the Crimes Legislation Amendment (Serious and Organised Crime) Act 2010

Section 28 – Transitional matters relating to the Crimes Legislation Amendment (Serious and Organised Crime) Act 2010

This section provides detail regarding transitional matters relating to the *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010*. This section provides that annual reports that are required to be tabled in each House of Parliament under sections 15HN and 15T of the Act, in relation to the authorisation of controlled operations, may be combined. Section 15T of the Crimes Act was repealed by the Crimes Legislation Amendment (Serious and Organised Crime) Act 2010, however the Minister may still be mandated to include information in a report tabled under section 15HN that was previously excluded from a report tabled under section 15T.

If the information was not previously disclosed under section 15T of the Crimes Act, as disclosure would have endangered the safety of a person or prejudiced an investigation or prosecution, and such a risk would no longer apply should the information be disclosed, then subsection 15T(4) requires the Minister to include the previously excluded information in a later report. As it is feasible that previously excluded information may still be required to be reported upon, subsection 11(1) enables such information to be combined in a report tabled under section 15HN of the Crimes Act, rather than requiring a separate report to be tabled.

This section also provides that the 1990 Regulations, as in force immediately before 19 February 2010, continue to apply to a pre-commencement controlled operation, that being a controlled operation authorised under Part IAB of the Crimes Act before 19 February 2010, whether or not the pre-commencement controlled operation had been completed as at that time.

This section also prescribes State controlled operations laws for the purposes of the definition in item 16 of Schedule 3 to the Crimes Legislation Amendment (Serious and Organised Crime) Act 2010. Subsection 28(3) indicates that the provisions mentioned in column 3 of the corresponding laws mentioned in column 2 of the table, as in force when the authority mentioned in Schedule 3 was granted under that law, are prescribed.

This section also defines ‘amendment Act’ to mean the Crimes Legislation Amendment (Serious and Organised Crime) Act 2010 for the purposes of this section.

This section is made under subsection 19(2) of Schedule 4 to the Crimes Legislation Amendment (Serious and Organised Crime) Act 2010, which provides a specific power to make transitional regulations relating to amendments or repeals made by the amendment Act.

Schedule 1—Forms

The note to the schedule refers to sections 5 and 6 regarding Schedule 1. Sections 5 and 6 contain tables listing prescribed and optional forms, and the specific purposes for which they are prescribed or may be used under the Crimes Act.

Form 1 —Document relating to other offences to be taken into account

Form 1 creates the form prescribed under section 16BA of the Crimes Act.

Section 16BA relates to the taking into account of other federal or prescribed external Territory offences by the court in sentencing procedures for federal offences. Section 16BA requires the filing in the court of a document containing a list of federal offences in the prescribed form, which may be taken into account in passing sentence in certain circumstances.

Form 1 is the prescribed form for section 16BA, as per section 5 of the Regulations.

Form 2 —Warrant authorising the detention of a person where parole or licence automatically revoked

Form 2 creates the optional form to be used for the purposes of section 19AS of the Crimes Act.

Section 19AS relates to the issuing of a warrant of detention by a court where a person is required to serve the balance of their sentence. Such a warrant authorises the detention of a person who, while serving a federal sentence or federal sentences and released on parole or licence under the Crimes Act, becomes liable to serve the outstanding sentence under section 19AQ because of the imposition of a new Federal, State or Territory sentence.

Form 2 is the relevant optional form for a warrant under section 19AS, as per section 6 of the Regulations.

Form 3 —Notice of proposed revocation of parole order or licence

Form 3 creates the form prescribed under subsection 19AU(2) of the Crimes Act.

Subsection 19AU(2) relates to the provision of notice by the Attorney-General prior to the revocation of a parole order or a licence. The person to whom the parole order or licence relates must be notified of the condition of the order or licence alleged to have been breached and the fact that the Attorney-General proposes to revoke the order or licence at the end of 14 days after the day the notice is issued unless the person, within that period, gives the Attorney-General written reasons why the order or licence should not be revoked and those reasons are accepted by the Attorney-General.

Form 3 is the prescribed form for a notice under subsection 19AU(2), as per section 5 of the Regulations.

Form 4 —Warrant for arrest where parole order or licence has been revoked

Form 4 creates the form prescribed under subsection 19AV(2) of the Crimes Act.

Subsection 19AV(2) relates to the Attorney-General or Director of Public Prosecutions applying to a prescribed authority for a warrant in relation to a person whose parole order or licence has been revoked by the Attorney-General.

Form 4 is the prescribed form for subsection 19AV(2), as per section 5 of the Regulations.

Form 5 —Warrant authorising detention where parole order or licence has been revoked

Form 5 creates the form prescribed under subsection 19AW(1) of the Crimes Act.

Subsection 19AW(1) relates to the issuing of a warrant in a prescribed form where a person is brought before a prescribed authority. Where the prescribed authority, before whom a person is brought under section 19AV of the Crimes Act because of an order revoking a parole order or licence, is satisfied that the person is the person named in that revocation order, that the person was notified by the Attorney-General, and that the revocation order is still in force, the prescribed authority must issue a warrant in the prescribed form authorising the taking of the person to a specified prison, directing that the person be detained in prison for the outstanding sentence, and in some situations fixing a non-parole period in respect of the outstanding sentence or sentences.

Form 5 is the prescribed form for a warrant under subsection 19AW(1), as per section 5 of the Regulations.

Form 6 —Warrant authorising the remand of a person where parole order or licence has been revoked

Form 6 creates the optional form to be used for the purposes of subsection 19AW(2) of the Crimes Act.

Subsection 19AW(2) relates to situations where prescribed authorities cannot complete a hearing for the purposes of subsection 19AW(1) immediately, and allows the prescribed authority to issue a warrant for the remand of the person in custody pending completing of the hearing.

Form 6 is the relevant optional form for a warrant under subsection 19AW(2), as per section 6 of the Regulations.

Form 7 —Order for the detention of a person where parole order or licence has been revoked

Form 7 creates the optional form to be used for the purposes of paragraph 19AX(1)(b) of the Crimes Act.

Paragraph 19AX(1)(b) relates to situations where a prescribed authority before whom a person is brought under section 19AV because of an order revoking a parole order or licence is satisfied that the person so brought is the person named in that revocation order but is not satisfied that the person was notified by the Attorney-General of the proposal to make that

revocation order. Under paragraph 19AX(1)(b), the prescribed authority must order that the person be detained in custody until the Attorney-General orders that the revocation order be rescinded or until the completion of proceedings under subsection 19AW(1) of the Crimes Act as applied by subsection 19AX(6).

Form 7 is the relevant optional form for paragraph 19AX(1)(b), as per section 6 of the Regulations.

Form 8 —Notification of breach of conditions where parole order or licence has been revoked

Form 8 creates the optional form to be used for the purposes of subsection 19AX(2) of the Crimes Act.

Subsection 19AX(2) relates to situations where the Attorney-General is notified that a person has been brought before a particular prescribed authority. In such cases the Attorney-General must, as soon as practicable, notify the person, in writing, of the conditions of the parole order or licence alleged to have been breached and request that the person give him or her, within 14 days of notification of those reasons, a written submission stating why that parole order or licence should not have been revoked.

Form 8 is the relevant optional form for subsection 19AX(2), as per section 6 of the Regulations.

Form 9 —Summons to appear

Form 9 creates the optional form to be used for the purposes of subsection 19AZ(2) of the Crimes Act.

Subsection 19AZ(2) relates to the issuing of a summons by a prescribed authority where the prescribed authority is exercising powers under Part IB Division 5 of the Crimes Act. This includes summons to appear to give evidence and to produce such documents and articles as are referred to in the summons.

Form 9 is the relevant optional form for subsection 19AZ(2), as per section 6 of the Regulations.

Form 10 —Order and recognisance where discharge without conviction

Form 10 creates the optional form to be used for the purposes of subsection 19B(1) of the Crimes Act.

Subsection 19B(1) relates to the discharge of offenders without proceeding to conviction and the making of orders by the court.

Form 10 is the relevant optional form for subsection 19B(1), as per section 6 of the Regulations.

Form 11—Order and recognisance where release without passing sentence

Form 11 creates the optional form to be used for the purposes of paragraph 20(1)(a) of the Crimes Act.

Paragraph 20(1)(a) relates to the conditional release of offenders after conviction and the making of associated orders.

Form 11 is the relevant optional form for paragraph 20(1)(a), as per section 6 of the Regulations.

Form 12—Order and recognisance where sentenced

Form 12 creates the optional form to be used for the purposes of paragraph 20(1)(b) of the Crimes Act.

Paragraph 20(1)(b) relates to the conditional release of offenders where sentenced and the making of associated orders.

Form 12 is the relevant optional form for paragraph 20(1)(b), as per section 6 of the Regulations.

Form 13 —Warrant under paragraph 20BF(3)(b) of the Crimes Act for arrest where release order revoked

Form 13 creates the optional form to be used for the purposes of paragraph 20BF(3)(b) of the Crimes Act.

Paragraph 20BF(3)(b) relates to the revocation of a release order in relation to a person, and the application by the Attorney-General or Director of Public Prosecutions' application to a prescribed authority for a warrant for the arrest of the person.

Form 13 is the relevant optional form for paragraph 20BF(3)(b), as per section 6 of the Regulations.

Form 14—Warrant under subsection 20BF(5) of the Crimes Act authorising the detention of a person where release order revoked

Form 14 creates the optional form to be used for the purposes of subsection 20BF(5) of the Crimes Act.

Subsection 20BF(5) relates to the issuing of a warrant by a prescribed authority authorising the taking of the person to a specific prison or hospital in the state or territory, and directing the detention of the person as per paragraph 20BF(5)(d). Subsection 20BF(5) relates to situations where a person is brought before a prescribed authority.

Form 14 is the relevant optional form for subsection 20BF(5), as per section 6 of the Regulations.

Form 15—Warrant under subsection 20BF(6) of the Crimes Act authorising the remand of a person where release order revoked

Form 15 creates the optional form to be used for the purposes of subsection 20BF(6) of the Crimes Act.

Subsection 20BF(6) relates to the issuing of a warrant by a prescribed authority pending completion of a hearing under subsection 20BF(5).

Form 15 is the relevant optional form for subsection 20BF(6), as per section 6 of the Regulations.

Form 16—Warrant under paragraph 20BM(3)(b) of the Crimes Act for arrest where release order revoked

Form 16 creates the optional form to be used for the purposes of paragraph 20BM(3)(b) of the Crimes Act.

Paragraph 20BM(3)(b) relates to an application by the Attorney-General or Director of Public Prosecutions to a prescribed authority for a warrant for the arrest of a person upon revocation of a release order in relation to that person.

Form 16 is the relevant optional form for paragraph 20BM(3)(b), as per section 6 of the Regulations.

Form 17—Warrant under subsection 20BM(5) of the Crimes Act authorising the detention of a person where release order revoked

Form 17 creates the optional form to be used for the purposes of subsection 20BM(5) of the Crimes Act.

Subsection 20BM(5) relates to the issuing of a warrant authorising the detention of a person upon the revocation of a release order, where the person is brought before a prescribed authority and relevant conditions are met.

Form 17 is the relevant optional form for paragraph 20BM(3)(b), as per section 6 of the Regulations.

Form 18—Warrant under subsection 20BM(6) of the Crimes Act authorising the remand of a person where release order revoked

Form 18 creates the optional form to be used for the purposes of subsection 20BM(6) of the Crimes Act.

Subsection 20BM(6) relates to the issuing of a warrant authorising the detention of a person upon the revocation of a release order, where the person is brought before a prescribed authority and a hearing cannot be completed immediately.

Form 18 is the relevant optional form for subsection 20BM(6), as per section 6 of the Regulations.

Form 19—Summons in relation to breach of psychiatric probation order or program probation order

Form 19 creates the optional form to be used for the purposes of paragraph 20BW(1)(a) of the Crimes Act.

Paragraph 20BW(1)(a) relates to the issuing of a summons to appear by a magistrate regarding the failure of a person to comply with a psychiatric probation order under section 20BV.

Form 19 is the relevant optional form for paragraph 20BW(1)(a), as per section 6 of the Regulations.

Form 20—Warrant in relation to breach of psychiatric probation order or program probation order

Form 20 creates the optional form to be used for the purposes of paragraph 20BW(1)(b) of the Crimes Act.

Paragraph 20BW(1)(b) relates to the issuing of a warrant for the arrest of a person by a magistrate upon the failure of that person to comply with a psychiatric probation order under section 20BV.

Form 20 is the relevant optional form for paragraph 20BW(1)(b), as per section 6 of the Regulations.

Form 21—Warrant for arrest in relation to breach of psychiatric probation order or program probation order

Form 21 creates the optional form to be used for the purposes of subsection 20BW(2) of the Crimes Act.

Subsection 20BW(2) relates to the issuing of a warrant for the arrest of a person by a magistrate upon the failure of that person to attend the court as required by the summons, or the failure of that person to attend before the court as required by their bail conditions.

Form 21 is the relevant optional form for paragraph 20BW(2), as per section 6 of the Regulations.

Form 22—Certificate in relation to reparation for offences

Form 22 creates the optional form to be used for the purposes of subsection 21B(3) of the Crimes Act.

Subsection 21B(3) relates to a certificate in relation to reparation for offences as ordered for a federal offender.

Form 22 is the relevant optional form for paragraph 21B(3), as per section 6 of the Regulations.

Schedule 2—Spent convictions

The note to Schedule 2 refers to section 21 of the Regulations. Section 21 indicates that Schedule 2 prescribes persons, purposes and offences for the purposes of paragraph 85ZZH(k) of the Crimes Act. Paragraph 85ZZH(k) indicates that the Crimes Act's spent convictions regime does not apply in relation to a prescribed person or body, for a prescribed purpose, in relation to a conviction for a prescribed offence. Items in Schedule 2 are therefore exempt from the spent convictions regime as per paragraph 85ZZH(k) of the Crimes Act.

Section 1 – Exclusions from Division 3 of Part VIIC of the Crimes Act (spent convictions)

This section inserts a table that prescribes exclusions from Division 3 of Part VIIC of the Crimes Act. The section specifies that Division 3 of Part VIIC of the Crimes Act does not apply in relation to the disclosure of information to or by, or the taking into account of information by person or body prescribed in the table, for a purpose prescribed in the table, in relation to a conviction for an offence prescribed in the table. The table updates references to State and Territory legislation and removes outdated items that should no longer be prescribed.

Items 9 to 11 of the table are prescribed as in force from time to time. This is appropriate as these items do not apply, adopt or incorporate State law – rather, the purpose of the reference to a particular State law in these items is as a reference point for a prescribed purpose. The substantive operation of these items and the corresponding provisions of the Act are not determined by a matter contained in the State law.

The effect of this section is that exclusions from the spent convictions regime continue to operate effectively, and allow information to be taken into account.

As per subsection 85ZZ(1) of the Crimes Act, the Office of the Australian Information Commissioner has been consulted in relation to this section.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Crimes Regulations 2019

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

Overview of the Disallowable Legislative Instrument

Under section 50 of the *Legislative Instruments Act 2003*, the *Crimes Regulations 1990* (the Existing Regulations) are scheduled to sunset on 1 October 2019. They were originally due to sunset on 1 October 2018 but this date was deferred under paragraph 51(1)(c) of the *Legislative Instruments Act 2003* (see *Legislation (Deferral of Sunsetting—Crimes Regulations) Certificate 2018 – F2018L01221*).

The *Crimes Regulations 2019* (the Regulations) remake the *Crimes Regulations 1990* in their entirety, with minor amendments to reflect current drafting practices, account for recent legislative changes and enhance the clarity and consistency in the application of the Regulations.

The Regulations prescribe relevant forms, functions, laws and authorities to ensure proper functioning of the criminal justice processes set out in the *Crimes Act 1914* (the Crimes Act), including processes relating to spent convictions, management of federal offenders and court orders, sentencing alternatives available in criminal matters, protections for those involved in controlled operations and vulnerable witnesses, assumed identities and forensic procedures. The Regulations also facilitate a coordinated approach between Commonwealth, State and Territory jurisdictions with respect to these processes.

Human rights implications

The Regulations engage the following human rights:

- the right to privacy under Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR);
- the right to freedom of movement under Article 12 of the ICCPR; and
- the right to a fair trial under Article 14 of the ICCPR.

The right to privacy (Article 17)

Article 17 of the ICCPR provides that no-one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances.

The Regulations engage the right to privacy by prescribing circumstances within which pardons for persons wrongly convicted, quashed convictions and spent convictions (within the meaning of section 85ZM of the Crimes Act) may be disclosed.

Broadly, Division 2 of Part VIIC of the Crimes Act prevents persons from disclosing or considering convictions where:

- the person was granted a pardon for an offence because the person was wrongly convicted, or
- if the person was convicted of the offence – the conviction has been quashed or set aside, or
- if the person was found guilty of the offence, but discharged without conviction – the finding of guilt has been quashed or set aside, or
- if the person was not found guilty of the offence, but a court has taken it into account in passing sentence on the person for another offence – the person’s conviction of the other offence has been quashed or set aside, or
- if the person was not found guilty of the offence, but a court has taken it into account in passing sentence on the person for another offence – the court’s decision to take the offence into account has been set aside.

Division 3 of Part VIIC of the Crimes Act prevents persons from disclosing or considering convictions where:

- the person was granted a pardon for the conviction for a reason other than that the person was wrongly convicted of the offence, or
- if the person was convicted as an adult – the conviction is over 10 years old and the penalty imposed was less than 30 months’ imprisonment, or
- if the person was convicted as a minor – the conviction is over 5 years old and the penalty imposed was less than 30 months’ imprisonment.

Section 20 – Working with children

Section 20 engages the right to privacy by establishing exemptions to the restrictions in Divisions 2 and 3 of Part VIIC of the Crimes Act. Specifically, the Regulations allow convictions to be disclosed to prescribed persons or bodies that are required to obtain and deal with information about persons who work, or seek to work with children. The prescribed persons and bodies may also take into account the disclosed information and disclose the information where required or permitted to deal with information about persons who work, or seek to work, with children.

The prescribed list of bodies and persons that are excluded from the restrictions to disclosure replicates the list of bodies and persons formerly prescribed in the *Crimes Regulations 1990* with amendments to reflect change in names and administrative functions.

Section 20 protects children from sexual, physical and emotional harm by permitting criminal history information to be disclosed and taken into account in assessing the suitability of persons for work with children by prescribed persons and bodies. As such, to the extent that the regulation limits the right to privacy, it is consistent with the ICCPR and is reasonable in the circumstances.

Section 21 – other exclusions

The Regulations also engage the right to privacy by prescribing persons and bodies that are exempt from restrictions under Division 3 of Part VIIC of the Crimes Act in relation to prescribed types of offences and purposes.

The limitation to the right of privacy is necessary to ensure that criminal offences that may impact on the suitability of a person to undertake the function, for which they are being assessed for, are able to be taken into account. The exemptions cover circumstances within which disclosure of convictions is crucial to ensuring the integrity and security of public services, for example in relation to assessing a person for employment which is likely to involve access to national security information classified as secret or top secret, appointment as a justice of the peace or for employment that is likely to involve direct contact with minors.

In these circumstances, the Regulations create reasonable limitations on the right to privacy.

Section 18 – persons authorised to access information on DNA databases

Section 18 engages the right to privacy by prescribing persons who are authorised to access information on a DNA database for the purposes of paragraph 23YDAE(2)(d) and paragraphs 23YO(2)(a) and (d) of the Crimes Act.

The ability for prescribed forensic staff to access and disclose information on the National DNA database is lawful and necessary to ensure the assessment and review of forensic material in law enforcement investigations, for example of crime scenes, missing person cases and unknown deceased persons, is undertaken by appropriately qualified staff. The measure is proportionate and reasonable because it only captures staff who are appropriately accredited, and they are only authorised to access the database for law enforcement and investigation purposes prescribed by the Crimes Act.

In these circumstances, the Regulations create reasonable limitations on the right to privacy.

The right to freedom of movement (Article 12)

Section 16 – additional conditions – prescribed offences

Article 12 of the ICCPR provides that everyone lawfully within a country shall have the right to move freely within the country, have the right to leave any country and have the right to enter a country of which they are a citizen. In order for an interference with the right to freedom of movement to be permissible, the interference must be for a legitimate objective, lawful and necessary to protect national security and the rights and freedom of others.

Section 16 engages the right to freedom of movement by allowing a court to order that, where a person has been convicted of an indictable offence against the *Australian Passports Act 2005* or the *Foreign Passports (Law Enforcement and Security) Act 2005*, that a person remain in Australia, refrain from applying for, or obtaining, an Australian travel document or surrender possession of any Australian travel document held by that person. Offences for which these conditions may be applied include making false or misleading statements, giving false or misleading information or producing false or misleading documents in relation to Australian and foreign travel documents, improper use or possession of Australian or foreign travel documents and possessing, making or providing false Australian and foreign travel documents. The misuse of Australian or foreign travel document may result in the travel documents being used to facilitate conduct which threatens national security and the rights and freedoms of others.

The ability to restrict a person's ability to obtain or maintain possession of an Australian travel document or remain in Australia is lawful and necessary to promote national security, border protection, Australian law enforcement measures and international law enforcement cooperation. The measure is proportionate and reasonable because it only captures those who have been convicted in a court of law for offences against the prescribed offences.

In these circumstances, the Regulations create a permissible limitation that is for a legitimate objective, lawful and necessary to protect national security and the rights and freedoms of others.

The right to a fair trial (Article 14)

Section 13 – video recordings – person who may conduct interview

Article 14 of the ICCPR provides that all persons shall be equal before the courts and tribunals, and that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 14 also contains a range of minimum guarantees in criminal proceedings.

The Regulations engage the right to a fair trial by specifying persons who may conduct a video recorded interview for the purposes of paragraph 15YM(1)(a) of the Crimes Act, those persons being a member of a foreign police force or other law enforcement agency of a foreign country. This means that a video recording conducted by this class of person may be admitted as evidence in chief. This may occur where the court gives leave, and only for a child witness in a child proceeding, a vulnerable adult complainant in a vulnerable adult proceeding, or a special witness (for whom an order under subsection 15YAB(3) of the Crimes Act is in force) in a special witness proceeding.

These measures limit the right to a public hearing in Article 14 by allowing video recordings of vulnerable and special witnesses to be admitted in evidence in chief, rather than such witnesses being heard before the court. This limits the right to examine, or have examined, the witnesses against a person and to obtain the attendance and examination of witnesses on a person's behalf under the same conditions as witnesses against a person. Such limitations are permissible where they seek to achieve a legitimate objective and are reasonable, necessary and proportionate to that objective.

The Regulations serve a legitimate objective of ensuring vulnerable or special witnesses have adequate protections, even in situations where foreign police or law enforcement are the only law enforcement bodies that are accessible. The prescription of foreign police and law enforcement that vulnerable or special witnesses do not have to reengage in traumatising or difficult recollection for the purpose of evidence in chief. It is well established that the right of the public to open justice must be balanced against the right of participants in the criminal justice system to safety and protection from undue distress or public embarrassment.

Further, the class of witnesses that such protections are extended to is highly limited, and only includes:

- child witnesses in child proceedings
- a vulnerable adult complainant in a vulnerable adult proceeding
- a special witness for whom an order under subsection 15YAB(3) is in force for section 15YM in a special witness proceeding.

Further, while video recordings may be admitted as evidence in chief, witnesses are still available for cross-examination. The court must also give leave before video recordings are able to be admitted as evidence in chief, and must not give such leave if satisfied that this would not be in the interests of justice.

The Regulations do not create new protections for vulnerable witnesses, but rather ensure existing protections are available for such witnesses in circumstances where a member of a police force or other law enforcement agency of a foreign country conducts an interview that is video recorded.

To the extent that this measure limits the right to a fair trial, these limitations are reasonable, necessary and proportionate.

Conclusion

The measures in the Regulations 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.