Australian Government
Attorney-General's Department

September 2021

Attorney-General's Department Submission

Crimes Amendment (Remissions of Sentences) Bill 2021

Senate Legal and Constitutional Affairs Legislation Committee

Introduction

The Attorney-General's Department (the department) provides the following submission to assist the Senate Legal and Constitutional Affairs Legislation Committee in its consideration of the Crimes Amendment (Remissions of Sentences) Bill 2021 (the Bill). This submission is provided in response to the Committee's invitation dated 26 August 2021.

On 25 August 2021, the Bill was introduced in the Senate. The Bill repeals section 19AA of the *Crimes Act 1914*, which provides for federal offenders to receive remissions and reductions of their sentence granted under State or Territory law. The measures in the Bill are necessary to address the significant sentence discounts being granted to federal offenders in Victoria as a result of the COVID-19 pandemic.

The amendments broadly fit into three categories:

- Removal of recognition of remissions granted under State or Territory law
- Amendments to 'clean street time' provisions
- Application provisions

The amendments are described in detail below.

Removal of remissions and the operation of section 19AA

Remissions are reductions to sentences that are applied after a sentence has been judicially determined. These remissions could be automatic, or a reward for good behaviour.[1]

Most States and Territories have abolished remissions. Victoria is the only jurisdiction with laws providing for remissions in the form of emergency management days, which are granted under the *Corrections Act 1986* (Vic). This is resulting in significant discounts for federal offenders under section 19AA of the Crimes Act.

Currently, section 19AA applies to federal offender sentences by deducting the number of granted emergency management days from the head sentence (subsections 19AA(1) and (1A)). By contrast, emergency management days for State offenders apply to reduce both the non-parole period and the head sentence. Emergency management days may only be deducted from a federal offender's non-parole period if it was granted as a result of industrial action taken by prison staff (subsection 19AA(4)).

The operation of section 19AA means that emergency management days granted to federal offenders are automatically recognised in relation to a federal offender's sentence. There is no discretion about the application of remissions and reductions to federal offender sentences.

Prior to the COVID-19 pandemic, only small numbers of emergency management days were granted to federal offenders – generally less than ten – for deprivations and disruptions experienced as a result of ad-hoc events such as natural disasters or staff shortages. These deprivations and disruptions may include not

[1] Australian Law Reform Commission, *Same Crime Same Time: Sentencing of Federal Offenders* (Report 103), 2006, paragraph 11.2

being able to access education and rehabilitation programs, not having access to in-person visits and being locked down in cells for longer periods of time.

As a result of the COVID-19 pandemic restrictions in prison, federal offenders in Victorian prisons have been granted a substantial number of emergency management days. Although those deprivations and disruptions can be expected to have been upsetting for Victorian offenders, they were similar to those experienced by the Victorian community and other communities around Australia, as necessary measures in response to the pandemic.

As a result of the operation of section 19AA, some federal offenders including terrorism-related offenders, child sex offenders and drug traffickers, are serving significantly less time than the sentences set by the sentencing court. Some case examples are included at **Attachment A**.

These sentence discounts pose significant operational challenges for intelligence and law enforcement authorities, particularly in relation to high risk terrorist offenders. Shifting and shortening sentence expiry dates can impact the post-sentence management options for offenders who are eligible for a continuing detention order (CDO) under Division 105A of the *Criminal Code Act 1995* (the Criminal Code) or a control order under Division 104 of the Criminal Code.

Under Division 105A of the Criminal Code, a Continuing Detention Order (CDO) can only be made against a person who:

- has been convicted of a specified terrorism or foreign incursions offence
- is detained in custody (under sentence, or an interim detention order or CDO), and
- is above 18 years of age at the expiration of their sentence.

As such, prisoners on remand who have been charged with a terrorism-related offence only become eligible upon sentencing. A CDO (or an Extended Supervision Order, should they become law[2]) application is complex, time consuming and can take upwards of 12 months to prepare. While each case is unique, it usually requires close collaboration with a range of Commonwealth and State and Territory agencies, the collection and analysis of large volumes of material (including translations), the commissioning of expert risk assessments, and detailed legal considerations. If an application for an order was not able to be made due to the application of sentence discounts curtailing available time, this serves to limit the tools available to law enforcement authorities to manage any risk posed by released offenders. This may mean high risk terrorist offenders are released into the community without any controls, despite the fact they may pose an unacceptable risk to the community.

Sentencing courts take into account a range of different considerations when sentencing federal offenders, including (but not limited to) the nature and circumstances of the offence, any assistance to law enforcement provided by the offender, an offender's guilty plea, whether an offender has shown remorse or contrition for their actions and the personal circumstances of the offender. Sentencing courts undertake a complex and

[2] The Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 amends Division 105A of the Criminal Code to establish the extended supervision order (ESO) scheme for high-risk terrorist offenders. ESO scheme would provide an alternative post-sentence management option for offenders who continue to pose an unacceptable risk to the community at the expiration of their custodial sentence. The Bill is currently before the House of Representatives.

detailed weighing and consideration of these factors in determining the appropriate sentence for offenders, informed by precedent and sentencing principles.

The application of significant remissions and reductions to sentences interferes with, and undermines, these careful and considered sentencing decisions made by the court. Significant sentence discounts applied to serious offenders undermines the seriousness of the conduct to which the sentences relate. In extreme cases, where a court has crafted a sentence to ensure a federal offender is able to access offence-specific rehabilitation programs in prison, such as sex offender treatment, the application of emergency management days may mean that the offender is unable to complete that program in custody. That offender would then be released into the community without the benefit of treatment designed to reduce the risk that they pose to community safety.

Recommendations from *Same Crime Same Time: Sentencing of Federal Offenders* – report by the Australian Law Reform Commission[3] (2006 ALRC Report)

The repeal of section 19AA means that emergency management days will no longer apply to federal offender sentences. The reform is consistent with the 'truth in sentencing' principle first endorsed by the ALRC in its 1988 report *Sentencing* (Report 44)[4].

In accordance with section 19AA, federal offenders incarcerated in Victoria may currently serve a significantly lower sentence than they would if they served their sentence in any other jurisdiction. The proposed amendments address issues of inequity between jurisdictions by ensuring that federal offenders across Australia serve the sentence that was determined by the court, without significant discounts being granted dependent on the jurisdiction in which the federal offender is imprisoned.

One concern raised by prison authorities is that the removal of emergency management days will adversely affect prisoner behaviour in prison. However, the 2006 ALRC Report had regard to a 1998 review of remissions in Western Australia, and noted that 'remissions, or the threat of their removal, were not a necessary motivator of prison conduct and that there were other ways of sanctioning prisoners for unacceptable behaviour.'[5]

In 2006 the ALRC also opined that 'Discretionary parole is a more appropriate means of promoting positive prison conduct than is earned remissions.'[6] Discretionary parole, rather than parole being automatically granted to federal offenders, means that prisoners have an incentive to behave well in prison, complete education and rehabilitative programs and effectively engage with corrections authorities. The ALRC also noted that other discretionary benefits and privileges within the custodial environment (such as access to equipment and facilities) could be used to incentivise good behaviour.[7]

Discretionary parole was introduced for federal offenders in 2012, and while it is difficult to quantify the impact this has had on prisoner behaviour, the department notes that the majority of federal offenders are well behaved in prison, engaging in work and educational opportunities when available to them, and

[3] Australian Law Reform Commission, *Same Crime Same Time: Sentencing of Federal Offenders* (Report 103), 2006
[4] ALRC, Sentencing, recommendation 23 and para 73
[5] ALRC, Same Crime Same Time, para 11.107
[6] ALRC, Same Crime Same Time, para 11.106
[7] ALRC, Same Crime Same Time, para 11.107

completing recommended rehabilitative programs. This not only assists to safeguard the safety and security of correctional facilities, it ensures that prisoners are well-placed to successfully reintegrate into the community upon their release, with robust and well-developed post-release plans and a positive attitude towards their rehabilitation.

The ALRC noted that while there was support from stakeholders for remissions to be granted to federal offenders, it considered a federal scheme for remissions, separate to existing State and Territory schemes, would be 'fraught with difficulties' due to administrative burdens and creating a 'disparity of treatment of State and federal offenders within the same prison.'[8]

The ALRC made the following recommendation (11-6):

> Ensure that federal sentencing legislation expressly picks up and applies state and territory laws that provide for the remission of non-parole periods because of an emergency within the prison or other unforeseen and special circumstances.

While this Bill does not implement the ALRC recommendation, it does address the key issues raised by the ALRC in its inquiry. The ALRC specifically raised the issue of disparate treatment of State and federal prisoners within the same prison, but did not consider that the proposed recommendation would result in disparate treatment between federal prisoners across jurisdictions. Implementation of the ALRC recommendation would mean that federal offenders in jurisdictions that do not have remissions will not be treated the same as those offenders in jurisdictions that do provide for remissions. The measures in this Bill ensure that federal offenders in all Australian jurisdictions are treated the same.

Amendments to 'clean street time' provisions

Commonwealth law recognises 'clean street time' for federal offenders. Recognising 'clean street time' means that, where an offender's parole order is revoked, any time served on parole in compliance with conditions can be recognised as counting towards their sentence. Recognition of 'clean street time' provides an incentive for offenders on parole to comply with their parole conditions while in the community. These conditions are designed to assist the offender's rehabilitation and protect community safety, and may include such requirements as participation in rehabilitation programs and engaging with corrections authorities.

All jurisdictions across Australia except for the Northern Territory have 'clean street time' provisions enshrined in their legislation. The effect of these provisions varies. In most jurisdictions (New South Wales, Queensland, South Australia, Western Australia and the Australian Capital Territory) any time spent on parole (until the date of the breach or the date of the parole revocation) is considered 'clean street time' and automatically counts towards an offender's sentence, subject to some limited exceptions. In Tasmania and Victoria, this time is not considered 'clean street time' and does not count towards an offender's sentence, unless directed by the relevant parole authority. In the Northern Territory, this time does not count towards an offender's sentence, and must be served in prison upon their return to prison.

[8] ALRC, Same Crime Same Time, paras 11.104 and 11.105

Recommendations from *Same Crime Same Time: Sentencing of Federal Offenders* – report by the Australian Law Reform Commission

The 2006 ALRC Report considered 'clean street time' and how it applies to federal offenders.

The ALRC considered that federal offenders should receive credit for 'clean street time', and recommended that 'clean street time' provisions should be included in federal legislation.[9] The ALRC considered that federal provisions should ensure that federal offenders receive credit for any time spent on parole until the date a further offence is committed (in the case of automatic parole revocation) or until 'the date on which it is shown to the federal parole authority's satisfaction that the offender first failed to comply with his or her obligations under the parole order or licence.'[10]

The proposed amendments implement the recommendation from the ALRC by providing for federal offenders to receive credit for such time.

Proposed amendments

The Bill simplifies the law by imposing a single provision that allows courts to consider good behaviour when dealing with federal offenders for breaches of parole. Currently, the law automatically applies the relevant State and Territory legislation on 'clean street time' to federal offenders (s19AA(2)).

The provisions do not provide for how that 'clean street time' should be calculated, instead referring this back to the court to determine. This ensures that federal offenders receive the benefit of 'clean street time' while still allowing courts flexibility and discretion to deal with this on a case by case basis.

The Bill also moves the amended provision (s19AA(3)) to section 19AW which deals with breaches of parole.

The amendments do not dictate how a court should take clean street time into account. A court is not bound to given an offender full credit for the time they spent on parole prior to committing a breach. This allows the court to take into account the facts and circumstances of the case and come to an appropriate decision.

Importantly, the amendments also remove the inconsistent legislation applying to clean street time for federal offenders based on which State or Territory they are in. The amendments ensure that federal offenders are subject to a consistent, Australia-wide framework for 'clean street time', which places decision-making in the hands of the court.

Application provisions

The Bill applies to all federal offenders who are serving sentences in a prison of a State or Territory.

Where a federal offender's sentence has already been served, and the offender has been released from prison, any remissions or reductions will continue to be recognised.

[9] ALRC, Same Crime Same Time, recommendation 24-4
[10] ALRC, Same Crime Same Time, para 24.31 and recommendation 24-4

Where a federal offender is still in prison serving a sentence, any remissions or reductions granted will no longer apply. This means that any federal offender who is in custody serving a sentence will no longer have any emergency management days applied to their sentence. Any emergency management days that were granted prior to commencement of the Bill will not be recognised in relation to their federal sentence.

Remissions and reductions from sentences are not an entitlement, and it is not unreasonable to expect that changes may be made from time to time to discretionary benefits such as these. The removal of the ability to confer sentence discounts in this manner does not impose any additional punishments on federal offenders, and does nothing to interfere with the sentence fixed by the court.

These principles have been upheld in other criminal justice contexts. For example, the High Court, in the matter of *Kevin Garry Crump v the State of New South Wales [2012] HCA 20*, determined that amendments made to NSW legislation to make it more difficult for the plaintiff to be released on parole did not interfere with the original sentence, or the order made in relation to the plaintiff declaring a minimum term he was required to serve before being eligible for release on parole. The majority considered that the relevant provision under NSW legislation 'did not impeach, set aside, alter or vary the sentence under which the plaintiff suffers his deprivation of liberty.'[11]

For offenders serving joint Commonwealth and State sentences, emergency management days may be recognised in relation to the State sentence.

Where a federal offender has had their parole order or licence revoked and 'clean street time' has been recognised under State or Territory legislation, that 'clean street time' will continue to be recognised.

Conclusion

The measures in the Bill are a proportionate response to federal offenders receiving significant discounts off their sentence as a result of the COVID-19 pandemic.

The repeal of section 19AA means that federal offenders will serve the sentence that was handed down by the sentencing court, as the sentencing court determined was appropriate for that federal offender.

[11] *Kevin Garry Crump v the State of New South Wales [2012] HCA 20*, para 60

Attachment A – Case Studies

As the following case studies demonstrate, some federal offenders are serving significantly less time than the sentences set by the sentencing court. The following examples have been used to demonstrate a number of serious offenders who have been granted large numbers of emergency management days, and (where relevant) highlight how the courts have already considered the impact of the COVID-19 pandemic in sentencing offenders to terms of imprisonment.

ADAM BROOKMAN

On 23 June 2021, the Supreme Court of Victoria sentenced Mr Brookman to 6 years and 8 months' imprisonment for one count of performing services in support or promotion of the commission of an offence against section 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978*, contrary to subparagraph 7(1)(e) of that Act. The court specified a non-parole period of 5 years, which, taking into account 2161 days of presentence detention, expired retrospectively on 22 July 2020.

Mr Brookman's head sentence was due to expire on **24 March 2022**. With the granting of **hundreds of emergency management days**, Mr Brookman's head sentence notionally expired several months before the sentence was handed down. Had emergency management days not been granted, Mr Brookman would have been eligible to be considered for an order under Division 105A of the Criminal Code. As a result, Mr Brookman was released from custody on the same day his sentence was handed down.

The sentencing court noted that 'the utilitarian value of a plea of guilty in the circumstances of the COVID-19 pandemic is greater than at other times, and should attract 'a more pronounced amelioration of sentence than at another time' because of the extraordinary pressures placed on court resources.'

The sentencing judge also recognised the additional hardship imposed on Mr Brookman as a result of his incarceration during the COVID-19 pandemic, and considered that his time on remand was 'more burdensome' than it would be in other times. Her Honour noted that applying weight to this hardship 'has some inherent limitations', and made reference to another case where the Supreme Court of Victoria – Court of Appeal found that the additional hardship resulting from the COVID-19 pandemic was not sufficient to establish a stand-alone ground of appeal.

OFFENDER A (A PSEUDONYM)

In December 2019, a Victorian court sentenced Offender A to a term of 3 years and 1 month imprisonment, for using a carriage service to procure persons under 16 years of age with the intention of procuring the recipient to engage in sexual activity with the sender contrary to subsection 474.26(1) of the *Criminal Code Act 1995* (Cth) (the Criminal Code), and using a carriage service to solicit child pornography material contrary to subsection 474.19(1) of the Criminal Code.

The court specified a non-parole period of 1 year and 6 months, which, taking into account presentence detention, expired on 13 November 2020. Offender A was refused release on parole on 27 July 2020 and 21 July 2021.

Offender A's head sentence as handed down by the sentencing court was due to expire on **15 June 2022**. Offender A was granted **304 emergency management days.** As a result, offender A's head sentence expired on **16 August 2021**.

For a period of approximately seven months from August 2018 to April 2019 Offender A used various messaging services to communicate in a sexual manner with a person who he believed was a 14 year old girl. The person Offender A was communicating with was an undercover police operative (the operative) attached to the Victorian Police Joint Anti Child Exploitation Team. Offender A initially befriended the operative on Facebook where her profile picture clearly displayed a picture of a young girl. Offender A was in his late 40s at the time.

At times Offender A's level of persistence was intense, taking the form of repeated phone calls. He sent audio messages as late as 3.41am in the morning and was told on two occasions that the operative could not answer her phone because she was at school. On six occasions Offender A sent the operative unsolicited photographs of his penis and twice sent a video of him masturbating, despite minimal encouragement. Offender A sought child pornography from the operative on multiple occasions.

Offender A has an extensive prior criminal history in Victoria, New South Wales and Queensland and has been subject to nine community based orders, seven of which were subsequently cancelled because he breached the conditions. He has also previously been subject to a parole order which he completed. However, it was noted at the time that he was assessed as unsuitable for any further periods on parole due to his unsatisfactory level of engagement in addressing the factors underpinning his offending.

Offender A refused to engage in the parole process. Offender A was assessed as a high risk of general offending and a high risk of sexual reoffending. Offender A was found suitable for a sex offender treatment program in custody, but declined to participate. Offender A continues to justify and minimise his offending, claiming he offended because he was under the influence of drugs. Offender A did not undergo any treatment in custody to address his substance abuse issues.

Offender A was involved in several incidents of misconduct while in prison. Offender A has limited supports in the community, with minimal close friends and limited family support. Offender A did not have any post-release accommodation – he had not proposed any accommodation as he did not wish to be considered for release on parole, and he had not engaged with community housing.

OFFENDER B (A PSEUDONYM)

Sentence

In December 2020, a Victorian court sentenced Offender B to a term of 16 years' imprisonment for intentionally doing an act in preparation for or planning a terrorist act, contrary to subsection 101.6(1) of the Criminal Code.

The court set a non-parole period of 12 years which, taking into account presentence detention, will expire on 26 November 2029.

Offender B's head sentence was due to expire on **26 November 2033**. With the granting of **158 emergency management days**, Offender B's head sentence will expire on **21 June 2033**.

During sentencing, the sentencing judge took into account the COVID-19 pandemic and noted that this would make conditions in custody more onerous than usual. The sentencing judge noted that he was not prepared to take into account that the additional restrictions would last for the entirety of Offender B's sentence.

Offender B had planned to carry out a large-scale terrorist attack in Melbourne.

OFFENDER C (A PSEUDONYM)

In September 2020, a Victorian court sentenced Offender C to a term of 8 years and 9 months' imprisonment for the following offences:

- trafficking commercial quantities of controlled drugs (3856 grams of methamphetamine) contrary to section 302.2(1) of the *Criminal Code Act 1995* (the Criminal Code)
- trafficking marketable quantities of controlled drugs (495.6 grams of heroin) contrary to section 302.3(1) of the Criminal Code
- possession of (or attempt to possess) a drug of dependence (2543.8 grams of 1,4-butanediol) contrary to subsection 73(1)(c) of the Drugs, Poisons and Controlled Substances Act 1981 (Vic)
- carrying a dangerous article (handgun) in a public place, contrary to section 7(1) of the *Control of Weapons Act 1990* (Vic)
- failing to comply with an order as described in subsections 3LA(1) to 3LA(4) of the Crimes Act where the warrant relates to a serious offence/serious terrorism offence, contrary to subsection 3LA(6) of the *Crimes Act 1914.*

The court set a non-parole period of 5 years and 3 months which, taking into account presentence detention, will expire on 1 September 2024.

Offender C's head sentence was due to expire on 2 March 2028. With the granting of 167 emergency management days, Offender C's head sentence will expire on 17 September 2027.

During sentencing, Offender C's counsel made submissions about the additional hardship being experienced by Offender C in custody as a result of the COVID-19 pandemic, including lockdowns, suspension of programs and a lack of physical visits. Offender C's counsel submitted that this should be taken into account in mitigation of penalty. The sentencing judge accepted that due to the COVID-19 pandemic, conditions in prison were more onerous than usual. This factor (along with other non-COVID related factors) was taken into account to moderate the sentences of imprisonment and the non-parole period imposed on Offender C and his co-offender.

Offender C and his co-offender were involved in a drug trafficking operation for several months in mid-2019. Offender C was responsible for collecting, testing and storing the drugs before selling the drugs to individual customers and collecting payment. When Offender C was arrested, over $300,000 in cash was found in his apartment with drug trafficking paraphernalia, drugs and a firearm.