Crimes Legislation Amendment Bill (No. 2) 1989

Date Introduced: 5 October 1989
House: House of Representatives
Portfolio: Attorney – General

Digest of Bill

Purpose
To provide for the sentencing, imprisonment and release of persons who have committed federal offences, including mentally ill and intellectually disabled persons. The Bill will also amend the Cash Transaction Reports Act 1988 to allow authorised access to cash dealer’s premises to inspect certain records and extend the search powers of customs and police officers.

Background
Federal offenders are persons convicted of offences against Commonwealth laws. The principal criminal law statute of the Commonwealth is the Crimes Act 1914 (the Crimes Act). In broad terms, federal offences are either offences against the Commonwealth or its institutions, or offences to enforce a federal law, such as customs, taxation and quarantine. Generally, federal offences involve fraud or the importation of prohibited drugs or other goods, or are offences concerned with Commonwealth property or injury to Commonwealth personnel. In 1987 there were 505 federal prisoners, this compares with 343 in 1984.1

Section 17A of the Crimes Act requires that where a person is imprisoned the court is to state the reasons for its decision why no other sentence was appropriate and enter those reasons in the records of the court. This does not apply to offences that are punishable by imprisonment for a period of more than 7 years, or federal offences punishable only by imprisonment.

The Crimes Act provides no statutory guidance to judicial officers on sentencing discretion (i.e. matters judicial officers take into account in determining a sentence). Despite this, judicial officers take a variety of facts into account in determining a sentence, including prior convictions; social, medical and psychiatric history; what sentencing options are available; and the effect of the offence upon any victim. The ways in which, and frequency with which, judicial officers use information of these kinds may vary considerably given the unregulated nature of the present law and the personal preferences of judicial officers.
The principal means by which a federal prisoner may be released from prison before the end of the period imposed by a sentencing court are release on parole and release on licence. Release on parole of federal offenders is governed by the provisions of the Commonwealth Prisoners Act 1967 (the Prisoners Act). The Prisoners Act provides that if a State or Territory law requires a court to fix a non-parole period when sentencing an offender to imprisonment, the court is to do the same when sentencing a federal offender. The Prisoners Act cannot be applied where the length of non-parole periods are prescribed by statute and where a court has declined to fix a non-parole period.

The procedure for release on parole under the Prisoners Act involves the Governor-General making a release order on the advice of the Attorney-General (A-G). Release on parole or licence is normally conditional. Under the Prisoners Act, federal prisoners must be supervised by a parole officer and obey all reasonable directions of the officer. A parole order may be revoked at any time by the Governor-General. Commonwealth parolees are supervised by State and Territory parole officers and where a federal offender has breached or is reasonably suspected of having breached a condition of parole, they may be arrested without a warrant.

Under section 19A of the Crimes Act, a federal prisoner may apply to the Governor-General for release on licence. The most important distinction between this form of conditional release and release on parole is that a federal prisoner may apply for release on licence at any time during their imprisonment. A federal prisoner may also be released on licence where either the Prisoners Act does not apply (see above), or where its operation causes injustice. Release on licence is also used for federal prisoners who are, or are likely to be, deported from Australia. A licence is granted by the Governor-General acting with the advice of the A-G. A licence may be subject to conditions and may be revoked by the Governor-General at any time. Section 19A of the Crimes Act does not specify how much of the remainder of a sentence should be served in the event of the revocation of a licence, or provide for the consequences of the imposition of another sentence of imprisonment.

The phrase 'unsoundness of mind' is used in the federal justice system to cover both mentally ill and intellectually disabled offenders. Federal offenders found 'unfit to be tried by reason of unsoundness of mind' are detained in strict custody until the Governor-General is satisfied, by a certificate from at least two medical practitioners, that they have become of sound mind and are fit to be tried. The Crimes Act does not prescribe any time limitation on the period for which a person may be detained pending either being found fit to stand trial or a decision not to proceed with the case. There are no statutory procedures for reviewing the case of a person who has been detained pending becoming fit to stand trial. Federal offenders found not guilty by reason of unsoundness of mind are also detained until the Governor-General's pleasure is know. In most States and Territories special sentencing options are available to courts sentencing offenders with mental disorders (e.g. hospital orders and interim hospital orders). No special sentencing options are available to courts sentencing federal offenders.
In 1980 and 1988 the *Australian Law Reform Commission* (ALRC) released interim reports titled *Sentencing of Federal Offenders* and *The Commonwealth Prisoners Act*. A final report, titled *Sentencing* was also released in 1988. The Bill gives effect to many of the ALRCs recommendations.

**Main Provisions**

**Amendments to the *Crimes Act 1914***

Proposed sections 16 – 16G will be inserted in the Act by clause 6 and deal with sentencing discretion, the commencement of sentences, explanation of certain sentences, and the adjustment of a sentence where no State or Territory remission or sentence reduction laws apply. A sentencing court is to impose the least severe sentence or order appropriate for an offence. In addition to any other matters a court has to take into account when sentencing a person, a court is to take into account certain matters, including any injury, loss or damage resulting from the offence; the effect of a sentence or order on the defendants family or dependents; the effect of the offence on any victim; and the financial circumstances of an offender where a fine is to be imposed (proposed sections 16A – 16C). A court is not to impose a sentence involving any form of corporal punishment and no federal prisoner is to be subject to corporal punishment (proposed section 16D). State or Territory laws relating to the commencement of sentences and non-parole periods will apply to federal offenders. Where State and Territory laws do not take into account time spent in custody for an offence, the sentencing court is to (proposed section 16E).

Where a court sentences a person to imprisonment and fixes a non-parole period or recognizance release order (i.e. a bond subject to court conditions), it is to explain the purpose and consequences attached to the non-parole or recognizance order (proposed section 16F). Where a federal sentence is to be served in State or Territory where sentences are not subject to remission or reduction, the sentencing court is to take that into account when setting the length of a sentence and adjust the sentence accordingly (proposed section 16G).

A court is not to sentence a federal offender, who has not been imprisoned before, to imprisonment where they are convicted of offences relating to property, money or both, whose value is less than $2000, unless in the opinion of the court there are exceptional circumstances that warrant it (clause 7).

Proposed sections 19 – 19AZD will be inserted in the Act by clause 9 and will deal with remissions and reductions of sentences; the fixing of non-parole periods and recognizance release orders; and release on parole or licence. State or Territory remission or reduction of sentence laws, other than those relating to the remission or reduction of non-parole periods or pre-release periods, will apply to federal prisoners. State or Territory laws which provide that a person is to be taken to be serving there head sentence while under a parole order or licence, or provide for the remission or reduction of a non-parole or pre-release period because of industrial action taken by prison warders, will also apply to federal prisoners (proposed section 19AA).
Proposed section 19AB provides that a court is to fix a single non-parole period where a federal offender is sentenced to imprisonment for more than 3 years, unless it makes a recognizance release order. Where a federal offender is already subject to a federal sentence, a court imposing a further sentence is to fix a single non-parole period for both sentences, unless it makes a recognizance release order. A court is not to set a single non-parole period that would allow the prisoner to be released earlier than if the later sentence had not been imposed. Proposed section 19AC provides that where a non-parole period has been fixed and a court imposes a further sentence, a court is to fix a single non-parole period for both sentences. The new single non-parole period is not to allow the prisoner to be released on parole earlier than would have been the case if the latter sentence had not been imposed. Similar provisions will apply to persons subject to a recognizance release order where an additional sentence is imposed.

Where a federal offender is sentenced to imprisonment for less than 3 years, a court is to make a recognizance release order and not to fix a non-parole period (proposed section 19AD). Where a federal offender already serving a sentence becomes subject to an additional sentence, and the total of the unserved portion and new sentence is less than 3 years, a court is to make a recognizance order for both sentences and not fix a non-parole period. The new recognizance order is not to allow the prisoner to be released earlier than would have been the case had the latter sentence not been imposed.

A court may decline to fix a non-parole period or make a recognizance release order where, having regard to the nature and circumstances of the offence and the prisoners prior record, it would not be appropriate. Where this occurs the court is to give reasons for its decision and enter them in the court record (proposed section 19AE).

When fixing a non-parole or pre-release period, the court is to take into account that there will be no remission or reduction of this period except in relation to warders disputes (proposed section 19AG).

Where a sentence has been imposed on a federal offender of more than 3 but less than 10 years, and a non-parole period has been fixed, the A-G is to order their release on parole at the end of the non-parole period or up to 30 days before then (proposed section 19AL). Basically, the same procedure will be required in relation to federal offenders sentenced to 10 or more years where a non-parole period has been fixed. The A-G may direct that a person is not to be released on parole at the end of a non-parole period. Where this occurs, the order is to include reasons why the decision was made and, if release on parole is to be considered later, when the A-G proposes to reconsider the matter. A parole order will be authority for an offenders release from prison only if the prisoner accepts, in writing, the conditions attached to the order. A parole order will be subject to certain conditions, including that the offender be of good behaviour and not violate any laws. The A-G may at any time, before the end of a parole period, amend a parole order (proposed section 19AN).
Proposed section 19AP provides that a federal prisoner, or a person acting on their behalf, may apply to the A - G for a licence to be released from prison. The A - G is not to grant a licence unless satisfied exceptional circumstances justify doing so. A licence will be subject to certain conditions, including that the offender must be of good behaviour and not break any laws. The A - G may, at any time impose additional conditions, or vary or revoke a condition, of a licence.

A parole order or licence will be automatically revoked where a parolee or licensee is sentenced to imprisonment for more than 3 months for an offence committed during the parole or licence period (proposed section 19AQ). The A - G may revoke a parole order or licence where there has been a breach of a parole or licence condition, or there are reasonable grounds for suspecting a breach. Where parole or release on licence is revoked, the prisoner will be liable to serve the remainder of the sentence. Before making a revocation, the A - G is to notify the parolee or licensee of the condition alleged to have been breached and that their parole order or licence will be revoked in 14 days unless reasons not to are provided and accepted by the A - G. Notice will not be required where an offenders whereabouts are not known; the circumstances, in A - Gs opinion, are urgent; the offender has left Australia; or, in the A - Gs opinion, it is necessary in the interests of the administration of justice (proposed section 19AU).

State or Territory laws providing for leave of absence from prison; release from prison up to 24 hours before the time of release, or before a weekend or public holiday where the time for release falls on one of those days; or under a pre-release permits scheme, will apply to federal offenders (proposed section 19AZD).

Proposed sections 20B - 20BY will be inserted into the Act by clause 15 that deal with federal offenders found unfit to be tried or not guilty on grounds of mental illness, the summary disposition of persons suffering mental illness or intellectual disability, and sentencing alternatives. Proposed sections 20B - 20BH deal with federal offenders found unfit to be tried on grounds of mental illness. Basically, if at a committal hearing the question of a persons fitness to be tried is raised, the magistrate is to refer the proceedings to the court to which the proceedings would have been referred had the defendant been committed for trial. Where a court decides that a prima facie case has not been established, it is to dismiss the charge and order the release of the defendant from custody. Where a court decides that a prima facie case has been established but court considers, having regard to certain factors, including the character, prior record, age, health or mental condition of the person, that it is inappropriate to inflict any punishment, the court is to dismiss the charge and order the release of the person from custody. Where a court decides not to dismiss the charge it is to decide as soon as practicable and on the balance of probabilities, when within the next 12 months the person will be fit to be tried. The court is also to decide whether or not the person is suffering from a mental illness for which treatment is available in a hospital. Where a court
makes such a decision it is to order the person to be held in hospital; held in another place; or be granted bail on condition they live at the place specified by the court for a period ending on the earlier of the time the person is fit for trial or 12 months. Similar procedures will be required in relation to a person found not fit to be tried within 12 months, although they may be detained for a period equivalent to the maximum sentence they could have been sentenced to if convicted.

Where a court considers it more appropriate, it may order a person's release either absolutely or subject to conditions, which may be applied for up to 3 years. The A-G is to review the detention order of a person found not likely to be fit to be tried every six months to determine whether they should be released. The review is to consider psychiatric, psychological, medical, and any other reports considered necessary, and take into account any representations made by the person or on their behalf. After reviewing a detention order, the A-G may order a person's release. The A-G is not to order a person's release from detention unless satisfied they are not a danger to themselves or the community. The A-G may revoke a release order at any time where a person has breached, without reasonable excuse, a condition of an order, or there are reasonable grounds for suspecting they have failed, without reasonable excuse, to comply with an order.

Where a person is acquitted on the grounds of mental illness, the court is to order that the person be detained in a prison or hospital for the period specified in the order. The maximum period will be equal to the maximum period of imprisonment that could have been imposed if the person was convicted of that offence. Similar review provisions to those that will apply to federal offenders found unfit to be tried on grounds of mental illness will apply to persons acquitted on grounds of mental illness (proposed sections 20BJ – 20BP).

Where, in proceedings in a court of summary jurisdiction, it appears to the court that the person is suffering from a mental illness or an intellectual disability, it may dismiss the charge and discharge the person: conditionally or unconditionally into the care of a responsible person for a period that does not exceed 3 years; on condition that the person undergo treatment, for a period that does not exceed 3 years; or adjourn the proceedings, remand the person on bail, or make any other order that the court considers appropriate (proposed section 20BO).

Proposed sections 20BS – 20BY deal with sentencing alternatives for persons suffering from mental illness or intellectual disability. The additional sentencing alternatives include hospital orders, psychiatric probation orders, and program probation orders.

Clause 29 will repeal the Commonwealth Prisoners Act 1967.
Amendments to the *Cash Transaction Reports Act 1988*

A new section 14A will be inserted into the Act by clause 38 that will allow the Director of the Cash Transaction Reports Agency to require a cash dealer to give an authorised officer access to their business premises for the purposes of monitoring whether they have reported significant cash transactions.

Proposed sub-sections 33(3) and 33(3A) will be inserted into the Act by clause 45 that deal with the search powers of police and customs officers. A person may be searched when about to leave or enter Australia if the officer has reasonable grounds to believe the person is carrying currency in breach of the Act. Articles in such a person's possession may also be searched to determine if the Act is being breached.

References


For further information, if required, contact the Law and Government Group.

17 October 1989

Bills Digest Service

Legislative Research Service

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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