Law Council
OF AUSTRALIA

Crimes Amendment (Remissions of Sentences) Bill 2021

Senate Legal and Constitutional Affairs Legislation Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the contribution from the Law Institute of Victoria and the Law Council's National Criminal Law Committee, Indigenous Legal Issues Committee and its Indigenous Incarceration Working Group in the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (**Committee**) inquiry into the Crimes Amendment (Remissions of Sentences) Bill 2021 (**Bill**).

2. As the Bill is directed at the administration of prison sentences in Victoria, the Law Council's response is particularly informed by the input of the legal profession in that state and is grateful to the Law Institute of Victoria (**LIV**, a Constituent Body of the Law Council) for their input in this respect. However, the Law Council notes that the Bill will also apply to any State or Territory which has provisions that allow for the remission or reduction of federal sentences.

3. All federal offenders are detained or imprisoned in custodial institutions established and operated by the states and territories. State and territory corrections and juvenile justice agencies manage and are responsible for the rehabilitation of federal offenders currently in custody and on parole.

4. As the COVID-19 pandemic continues, prisons and youth detention centres remain faced with the challenge of ensuring a safe environment for inmates and detainees who live in close proximity in hotspots for communicable diseases. In these settings, Aboriginal and Torres Strait Islander peoples are particularly vulnerable to serious and critical outcomes should they be exposed to the SARS-CoV-2 virus. Prisons may also become dangerous vectors of spread to the broader community, and measures to limit infections across these facilities will have benefits well beyond those who are presently detained.[1]

5. In some jurisdictions, the sentence imposed by a court may be remitted or reduced by the executive through the royal prerogative.[2] More recently, these remissions have been undertaken pursuant to letters patent and statutory enactments. In the Australian Capital Territory, the Northern Territory, Queensland, Tasmania and Victoria, provision is still made for remission of sentences as an incentive or reward for good conduct in prison by prisoners.[3]

6. In this regard, the Law Council is concerned that the Bill removes an important tool available in some states and territories to incentivise federal offenders to comply with directions in times of emergency, including infection control measures such as mask-wearing, social distancing and quarantine. Evidence provided by government agencies and the legal profession indicates that these measures have been essential to preserve the orderly management of prisons and safeguard prisoner health.

7. Additionally, the Bill will result in offenders being treated unequally, where federal offenders will not have the opportunity to earn the same remissions or reductions available to their state/territory cellmates, and will create a broader inconsistency in the management of prisoners in the same facility. The Law Council queries both the public health (SARS-CoV-2 risk exposure) and broader equity impacts of the proposed legislative intervention.

8. The Law Council urges reconsideration of this Bill, noting that remission and reduction schemes serve an important function in acknowledging the significant

[1] Letter from Pauline Wright (President, Law Council of Australia) to the Hon Christian Porter MP (Attorney-General) in relation to the federal criminal justice system and COVID-19, 26 March 2020.
[2] See *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364 ; 57 ALR 37; 59 ALJR 96; 14 A Crim R 293.
[3] See Halsbury's Laws of Australia, 335 — Prisons, (8) Discharge from Prison [335-1040]

hardships and restrictions necessarily imposed on federal offenders and incentivise offender compliance with measures that prevent the spread of infectious disease, including the ongoing risk of COVID-19 in the vulnerable prison environment.

Repeal of section 19AA provisions relating to remissions and reductions

9. Principally, the Bill seeks to repeal section 19AA of the *Crimes Act 1914* (Cth) (**Crimes Act**). Currently, subsection 19AA(1) provides that a law of a State or Territory which provides for the remission or reduction of State or Territory sentences applies in the same way to the remission or reduction of a federal sentence in a prison of that State or Territory. Subsections (1A) and (4) presently provide that those remission or reduction provisions cannot operate to reduce the non-parole period or pre-release period in respect of the federal sentence except by reason of industrial action taken by prison staff.

10. In addition, the Bill makes various consequential amendments to the provisions of Part IB, Division 4 (which governs the fixing of non-parole periods (**NPP**) and the making of recognizance release orders (**RRO**) in federal sentences), including by:

    (a) removing all the references to remissions or reductions applicable in these provisions: for instance, when a court declines to fix a NPP or RRO (either at sentence or where parole or licence is taken to be revoked) it no longer must have regard to any remissions or reductions under section 19AA;

    (b) modifying the requirement under section 19AF that presently requires non-parole or pre-release periods not to exceed the remitted sentence, to remove the necessity to account for the remitted component of the sentence; and

    (c) modifying subsection 19AMA(3) (which calculates the end of a person's parole period) to remove any need to account for deductions for remissions in this calculation.

11. The Bill is directed at the granting of 'emergency management days' (**EMDs**) to federal offenders in Victorian prisons.[4] However, the Bill will also apply to any State or Territory which has provisions that allow for the remission or reduction of federal sentences.

Justification provided for the repeal

12. The justifications provided for the repeal of these provisions include that EMDs are being granted in high numbers to federal offenders in Victoria since the beginning of the COVID-19 pandemic, compared to being granted less than 10 EMDs during their period of incarceration before the pandemic in recognition of necessary emergency restrictions such as decreased out-of-cell time as a result of natural disasters or staffing shortages.

13. The Government states that sentence reductions due to the granting of EMDs are increasing in Victoria, creating risk to community safety including by:

    - causing unpredictable changes in sentence expiry dates for federal offenders incarcerated in Victoria which make it more challenging to apply for control orders; and
    - limiting rehabilitation and reintegration options and increasing the risk of reoffending for those granted parole, due to the shorter period available to

[4] Explanatory Memorandum, Crimes Amendment (Remissions of Sentences) Bill 2021, [4].

undertake and complete programs while under the supervision of community corrections.

COVID-19 in Victorian prisons

14. Whilst the Bill is particularly directed at the granting of EMDs to federal offenders in Victorian prisons, it must be equally recognised that (until the recent outbreak of COVID-19 in New South Wales) the 'second wave' outbreak of COVID-19 overwhelmingly occurred in Victoria and created a particular need to manage the spread of the disease in Victorian prisons.

15. The LIV has provided the following account of their member's experience relating to extraordinary restrictions placed on their clients in Victoria. Throughout the COVID-19 pandemic, the LIV has continued to advocate in favour of the realisation of EMDs in direct response to the impact of COVID-19 on clients in custody. This includes recognition of periods spent in forced quarantine and during periods of periodic and full lockdown.

16. During the pandemic, LIV members have observed significant disruption and restrictions imposed on their clients, where prisoners are deprived of family contact and have suffered substantial disruption to their rehabilitation and access to programs to reduce re-offending and assistance for mental health issues due to significant isolation and quarantine. It is the LIV's understanding that a prisoner at the Metropolitan Remand Centre tested positive for SARS-CoV-2 after arriving on Friday, 10 September 2021, with more than 750 prisoners forced into lockdown.

17. Since late March 2020, Victorian prisons have implemented a range of policies to restrict, protect and prevent COVID-19 from spreading in prisons by:

    - receiving and transferring prisoners in quarantine for up to 14 days;
    - isolating prisoners who have tested positive;
    - locking down units and prisons when there is a suspected case or outbreak;
    - banning contact visits and property drop-offs – including from legal representatives;
    - decreasing out-of-cell time and access to exercise yards and outdoor areas; and
    - ceasing in-person programs and services including education, rehabilitation, libraries, counselling, chaplaincy and religious services.

18. In August 2020, the LIV and Federation of Community Legal Centres jointly urged the Victorian Government to continue to use EMD provisions to proactively expedite the release of people from prisons who are soon to be released, in order to reduce the density of numbers held in custody and therefore reduce the catastrophic risk of the spread of the virus should it enter a prison, and to ensure the safe workplace of first responders and prison staff alike. The joint statement further recommended that the continued use of the power to grant EMDs must co-exist with increased post-prison supports, predominantly the provision of increased access to housing.[5] The Law Council continues to support this advocacy.

[5] Federation of Community Legal Centres, Law Institute of Victoria, *Decarceration Strategy: A Justice System Response to COVID-19* (August 2020).

The authority to grant EMDs

19. In Victoria, the Secretary to the Department of Justice and Community Safety is authorised to reduce the length of a sentence of imprisonment or non-parole period being served by a person on account of good behaviour while suffering disruption or deprivation during an industrial dispute or emergency existing in the prison in which the sentence is being served, except where the emergency, riot or other significant security incident is caused or contributed to by that prisoner or any other prisoner.[6] The Secretary may reduce the length of a sentence or non-parole period being served by up to 4 days for each day or part of a day on which the industrial dispute or emergency exists in the prison.[7] The Commissioner for Corrections Victoria (**Commissioner**) determines whether EMDs are granted. This is an administrative action by the executive and not within the purvey of the courts at the time of sentence.

20. EMDs are presently being granted to reduce a prisoner's sentence where they have been of good behaviour while suffering disruption or deprivation arising out of measures put in place to manage the outbreak of COVID-19 in Victorian prisons. The disruption and deprivation recognised includes prisoners complying with restrictive regimes or having their out-of-cell time significantly restricted when placed in a protective quarantine unit for 14 days on reception due to COVID-19.[8]

21. During the COVID-19 emergency, the Commissioner has stated a policy to grant EMDs equivalent to the number of days of disruption or deprivation and, as of August 2020, all related applications have been granted on a 'one for one' basis.[9]

The utility of EMDs in managing infectious disease in Victorian prisons

22. During the Inquiry into the Victorian Government's Response to the COVID-19 Pandemic, the Commissioner outlined the measures put in place to respond to outbreaks of SARS-CoV-2 and safeguard prisoners, and the effect those measures had on prisoners. The Commissioner noted that "[EMDs are] a strategy that has been used for decades to keep the system safe in these emergency times, and in this case it has done that". In responses to questions on notice she also noted that:

> *As part of the COVID-19 response in prisons, prisoners have experienced restrictive regimes, such as significantly less hours out of cell or lockdowns, or being placed in a quarantine regime, such as 14 days in protective quarantine upon reception into prison. In many instances, quarantine regimes result in prisoners being held in their cells for 23-24 hours per day.*
>
> *EMDs are a vital part of ensuring compliance with infection prevention and control measures (including mask wearing and social distancing), as EMDs are not granted for prisoners who demonstrate poor behaviour and do not comply with infection prevention measures. This approach*

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[6] *Corrections Act 1986* (Vic) s 58E.
[7] *Corrections Regulations 2019* (Vic) reg 100(a).
[8] Victorian Department of Justice and Community Safety, *Emergency Management Days – COVID-19, Fact sheet for prisoners*.
[9] Corrections Victoria, Response to Questions on Notice taken by Dr Emma Cassar, Commissioner to Public Accounts and Estimates Committee, *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic.*

has helped maintain a settled prison system despite significant restrictions being introduced for many prisoners.[10]

Impact of EMDs on applications for post-sentence orders

23. A purported justification for the Bill is that unpredictable changes in sentence expiry dates for federal offenders incarcerated in Victoria will make it more challenging to apply for control orders. The Explanatory Memorandum also argues that, by restoring certainty to these dates, the agencies responsible for managing the release of federal offenders will have certainty about whether offenders will have the necessary time to complete programs in custody or the community, and can refer offenders to such programs accordingly.

24. While the rationale that EMDs create difficulty in applying for control orders may have some validity, there are ways in which this could be mitigated without affecting the entire group of prisoners serving federal sentences. The Law Council considers that it would be a relatively small portion of offenders (those convicted of terrorism offences) who could be subject to control orders, and that to apply this difficulty as a basis to remove remissions from the wider cohort of federal offenders would be a disproportionate response.

25. Uncertain release dates are not a unique challenge to applications for orders sought in relation to federal offenders (such as control orders). In Victoria, state authorities may apply for similar orders for the continuing detention or supervision of a prisoner who presents a serious danger to the community (from the risk of committing a serious sexual or serious violent offence) if released from custody, or if released without a supervision order being made.[11] In Victoria, EMDs are calculated regularly, so a process could be agreed whereby the federal agency responsible for applying for control orders is notified when a new release date is calculated so that they are aware and can keep track of it.

26. The Law Council notes the lack of evidence that state authorities have been unable to manage the uncertain nature of release dates arising from the remission of sentences when they apply for similar orders under state and territory legislation. If no evidence of that kind can be produced, the Law Council submits that the federal agencies responsible for applying for control orders should be able to manage this uncertainty much the same as their state counterparts.

Impact of EMDs on community safety

27. The Law Council disagrees that the granting of remissions necessarily limits the rehabilitation and reintegration of prisoners and increases the risk of reoffending due to the shorter period available to complete programs in community corrections.

28. Whilst the Explanatory Memorandum states that federal offenders incarcerated in Victoria, including terrorists, child sex offenders and drug traffickers, are receiving substantial discounts off the sentence expiry date set by the sentencing court,[12] these amendments will affect prisoners awaiting trial and serving sentences for all Commonwealth offences including, for example, those serving sentences for social security fraud.

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[10] Ibid.
[11] See e.g. *Serious Offenders Act 2018* (Vic) s 14.
[12] Explanatory Memorandum, Crimes Amendment (Remissions of Sentences) Bill 2021 [5]-[6].

29. Federal offences are not concentrated on capturing offenders of the type above, and include many offences at the lower end of the range of objective seriousness. Moreover, terrorism and drug offences cover a wide range of conduct themselves (for example, terrorism offences specifically criminalise ancillary conduct). This makes it important that the authority of the government who is responsible for the day-to-day management of a federal offender has the ability to consider the circumstances of each case, including the person's offending, in making decisions about the application of remissions during times of emergency (such as a health pandemic of an infectious disease).

30. The remission or reduction of sentences (such as by granting EMDs) is a recognition of the restrictive regimes of segregation in quarantine units and restricted out-of-cell time, and the consequence that this has on limiting programs and services due to the disruptions. As the Explanatory Memorandum notes, during COVID-19, custodial-based rehabilitation and treatment programs have already been disrupted to the extent that they have not been offered for significant periods of time.[13] The basis of denying the application of EMDs because they would disrupt access and completion of courses does not apply in this context.

31. As noted above, some of the Law Council's Constituent Bodies have advocated that the use of remission and reduction schemes must co-exist with increased post-prison supports, including the provision of increased access to housing. This advocacy recognises that early release from custody ought to be accompanied by greater opportunities to continue rehabilitation programs in the community after release.

32. The expectation and application of remissions such as EMD are a fair and just form of compensation to prisoners for their compliance with exceptional restrictions during a pandemic. This is particularly the case for prisoners who were sentenced prior to the pandemic who are serving long sentences. They would not have any discount applied to their sentences, and yet they are experiencing incredibly harsh conditions in custody such as lockdowns and no visits. If imprisonment has effectively served its purpose and the person is monitored properly on parole, it does not follow that the granting of remissions such as EMDs are causing increased risks to community safety.

Impact of repeal on child federal offenders

33. The Law Council notes the potential impact of the Bill on federal offenders who are children. The Bill engages the obligation that, in all actions concerning children, whether undertaken by courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[14]

34. On 5 May 2020, National Cabinet agreed that jurisdictions would plan for and manage COVID-19 outbreaks in prisons in accordance with the Communicable Diseases Network Australia National Guidelines for the Prevention, Control and Public Health Management of COVID-19 Outbreaks in Correctional and Detention Facilities in Australia (**the Guidelines**).[15]

35. The Guidelines include procedures for the implementation of infection prevention and control measures, including the use of isolation and cohorting, and provide that

[13] Ibid [7].
[14] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 3.
[15] Prime Minister of Australia, 'Update on Coronavirus Measures', Media Statement, 5 May 2020.

unaffected, vulnerable prisoners who are at risk of severe COVID-19 disease should be separated from those who may have been exposed. Relevantly, the Guidelines provide that early release or alternative accommodation should be particularly applied to prisoners considered suitable for early release and to youth.[16]

36. Additionally, the Alliance for Child Protection in Humanitarian Action and UNICEF's *COVID-19 and Children Deprived of their Liberty* Technical Note, which highlights that new child protection risks are likely to emerge from the direct effects of COVID-19 as well as from measures to prevent and control its spread, emphasises that:

> *In responding to the COVID-19 pandemic, States must ensure that the human rights of every child who is deprived of her or his liberty are fully respected, protected and fulfilled. This includes providing adequate care and protection from harm, including by taking concrete steps to reduce overcrowding in all facilities in which they are detained and ensuring safe placement in non-custodial, family, or community-based settings. It also means that all decisions and actions concerning children must be guided by the principle of the best interests of the child, and children's rights to life, survival, and development, and to be heard.*[17]

37. The Law Council notes that the use of remission or reduction schemes (including EMDs) is consistent with these principles. Removing a state or territory's access to these schemes for federal offenders who are children would, in particular, be a regressive step away from the aims that they embody.

Retrospective application

38. The repeal of section 19AA will retrospectively apply to any federal offender who has not been released from prison prior to commencement of the Bill so that any remissions and reductions that would have applied before commencement will be taken to have no effect.

39. Retrospective laws are generally inconsistent with the rule of law. Lord Bingham has stated:

> *Difficult questions can sometimes arise on the retrospective effect of new statutes, but on this point the law is and has long been clear: you cannot be punished for something which was not criminal when you did it, and you cannot be punished more severely than you could have been punished at the time of the offence.*[18]

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[16] Guidelines, 26.
[17] The Alliance for Child Protection in Humanitarian Action and UNICEF, *COVID-19 and Children Deprived of their Liberty*, Technical Note, 8 April 2020, 2.
[18] Tom Bingham, *The Rule of Law* (Penguin UK, 2011). There are also prohibitions on retrospective criminal laws in international law. Article 15 of the *International Covenant on Civil and Political Rights* expressing a rule of customary international law (*Polyukhovich v Commonwealth* (1991) 172 CLR 501, 574 (Brennan CJ)), provides: 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

40. Retrospective measures offend rule of law principles that the law must be readily known and available, and certain and clear.[19] In this context, Lord Diplock has stated:

> *…acceptance of the rule of law as a constitutional principle requires that a citizen before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it.*[20]

41. The law should be certain and its reach ascertainable by those who are subject to it. Further:

> *A person cannot rely on ignorance of the law and is required to obey the law. It follows that he or she should be able to trust the law and that it should be predictable. A law that is altered retrospectively cannot be predicted. If the alteration is substantive it is therefore likely to be unjust. It is presumed that Parliament does not intend to act unjustly.*[21]

42. The Law Council considers the retrospective removal of remission and reduction schemes (including the eradication of a prisoner's EMD credit) to be unjustified and inconsistent with the expectations of prisoners and the purposes of granting EMDs, and contrary to the administration framework in place at the time these prisoners were sentenced. During the enduring period of the pandemic, a large proportion of prisoners have had an appropriate expectation that a certain number of EMDs will be recognised. The Law Council is concerned that the proposal to retrospectively erase these credits will have a significant adverse impact on prisoner mental health and remove recognition of the extremely restrictive regime that each person is subject to when remanded in custody for the first time.

[19] Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), Principle 1.
[20] *Black-Clawson International Ltd v Papierwerke Waldhof-Ascjaffenburg* [1975] AC 591.
[21] *Director of Public Prosecutions (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), quoting Francis Bennion and K Goodall, *Bennion on Statutory Interpretation* (Lexis Nexis UK, 5th ed, 2008).