

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument 2012 No. 275**

Issued by the authority of the Attorney-General

*Crimes (Overseas) Act 1964*

*Crimes (Overseas) (Declared Foreign Countries) Amendment Regulation 2012 (No. 1)*

Section 9 of the *Crimes (Overseas) Act 1964* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The Act extends the application of the criminal laws of the Jervis Bay Territory to certain categories of Australian citizens and permanent residents working overseas on behalf of, or at the direction of, the Commonwealth. The extension of the criminal law of the Jervis Bay Territory is consistent with other Commonwealth legislation that applies criminal law with extraterritorial effect. As well as in the Act, Jervis Bay Territory criminal laws are also applied in the *Defence Force Discipline Act 1982*, *Crimes (Aviation) Act 1991* and the *Crimes at Sea Act 2002*.

The Act automatically applies to Australians citizens or permanent residents who are:

- granted diplomatic or consular immunity, or granted immunity from criminal prosecution in a foreign country because of their relationship with an international organisation, or
- granted immunity from prosecution in a foreign country under an agreement or arrangement between Australia and the United Nations, the United Nations and the foreign country or Australia and another country, and the person is undertaking a task or performing a function under that agreement or arrangement.

The Act may also apply to Australian citizens or permanent residents who are undertaking a task or project, or performing a function on behalf of the Commonwealth, or pursuant to directions given by, or on terms determined by the Commonwealth in a foreign country, and the foreign country (or part of a foreign country) is a declared foreign country.

The *Crimes (Overseas) (Declared Foreign Countries) Regulations 2003* (the Principal Regulations) prescribe countries for the purposes of section 3C of the Act. Currently, Iraq, Solomon Islands, Afghanistan and Papua New Guinea are listed in the Principal Regulations as ‘declared foreign countries’.

The Regulation adds Nauru to the list of declared foreign countries in the Principal Regulations under paragraph 3C(1)(a) and extends the Act to apply to a person in Nauru if:

- the person is an Australian citizen or permanent resident;
- the person is undertaking a task or project or performing a function on behalf of the Commonwealth; and
- that foreign country has been declared by regulations to be a declared foreign country for the purposes of the Act.

The Regulation will not affect Australians employed in Nauru by the Government of Nauru or Australians in Nauru for private purposes.

The purpose of the Regulation is to ensure that all Australian citizens or permanent residents working for, or on behalf of the Commonwealth in Nauru are subject to appropriate criminal jurisdiction arrangements whilst they are engaged by the Commonwealth in Nauru.

Subsection 3C(4) of the Act provides that before the Governor-General makes the regulations, the Attorney-General, after consulting the Minister for Foreign Affairs, must be satisfied it is appropriate to do so having regard to:

- whether the Act would apply to Australians in the foreign country even if the regulations were not made
- the nature of the activities engaged in by Australians in the foreign country
- the period during which those activities are to be engaged in
- the number of Australians likely to be engaging in those activities
- the circumstances in which Australians engaged in activities in the foreign country are subject to, or immune from, the foreign country's criminal laws, and
- any other relevant matter.

The Attorney-General was satisfied that it was appropriate to make the Regulation having regard to these factors. The Minister for Foreign Affairs has been consulted and supports the making of the Regulation.

Subsection 3C(3) provides that the regulations must specify the day on which the foreign country is to start being a declared foreign country, and the day on which the foreign country is to cease being a declared foreign country. Nauru starts being a declared foreign country for the purposes of the Act on 10 December 2012 and ceases to be a declared foreign country for the purposes of the Act on 11 November 2017. After this time, the Regulation can be reviewed and remade if required.

The Regulation commenced on the day after it was registered on the Federal Register of Legislative Instruments.

Consultation outside the Australian Government was not undertaken for this legislative instrument as it relates to criminal justice and law enforcement matters.

The Office of Best Practice Regulation advised that a Regulation Impact Statement was not necessary for any of these amendments.

The amendment Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

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

### ***Crimes (Overseas) (Declared Foreign Countries) Amendment Regulation 2012 (No. 1)***

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 Legislative Instrument**

The *Crimes (Overseas) (Declared Foreign Countries) Amendment Regulation 2012 (No. 1)* (the Regulation) will amend the *Crimes (Overseas) (Declared Foreign Countries) Regulations 2003* (the Principal Regulations) to add Nauru to the list of countries to which the *Crimes Overseas Act 1964* (the Act) applies.

The Act extends the application of the criminal laws of the Jervis Bay Territory to certain categories of Australian citizens and permanent residents working overseas. The extension of criminal law of the Jervis Bay Territory is consistent with other Commonwealth legislation that applies criminal law extraterritorially (for example, the *Defence Force Discipline Act 1982*, *Crimes (Aviation) Act 1991* and the *Crimes at Sea Act 2000*).

The Act automatically applies to Australians citizens or permanent residents who are:

- granted diplomatic or consular immunity, or granted immunity from criminal prosecution in the foreign country because of their relationship with an international organisation, or
- granted immunity from prosecution in the foreign country under an agreement or arrangement between Australia and the United Nations, the United Nations and the foreign country or Australia and the foreign country, and the person is undertaking a task or performing a function under that agreement or arrangement.

The Act may also apply to Australian citizens or permanent residents who are undertaking a task or project, or performing a function on behalf of the Commonwealth, or pursuant to directions given by, or on terms determined by the Commonwealth in a foreign country, and the foreign country (or part of a foreign country) is a declared foreign country.

The Regulation will not affect Australians employed in Nauru by the Government of Nauru or Australians in Nauru for private purposes.

#### **Human Rights Implications**

This instrument engages the following human rights:

- right to a fair trial, including minimum guarantees in criminal proceedings, and
- rights to equality and non-discrimination.

### *Right to a fair trial*

The Regulation engages the right to a fair trial and minimum guarantees in criminal proceedings; however neither of these rights will be prejudiced by the Regulation. The rights to a fair trial and minimum guarantees in criminal proceedings are protected by Article 14 of the *International Covenant on Civil and Political Rights* (ICCPR). Article 14 is aimed at ensuring the proper administration of justice by upholding, among other things, the right to a fair hearing and the right of a person to have a sentence or conviction reviewed by a higher court.

While the Regulation engages with the rights in Article 14, it does not alter Australia's laws or arrangements in relation to criminal procedure. The Regulation will not create new criminal offences or alter the laws of criminal procedure in operation in Australia. It will only operate to extend the criminal law of the Jervis Bay Territory to apply with extraterritorial effect to Australians engaged by the Commonwealth in Nauru, in the same way it applies to persons in Australia. If a person were to be prosecuted by Australia, under the Act, the prosecution would occur in Australia, under Australian law. All of the safeguards in place under Australian law to protect the rights of individuals in criminal investigations and prosecutions will also apply to persons who commit an offence in Nauru and are prosecuted by Australia under the Act.

### *Rights of equality and non-discrimination*

The Regulation engages with rights of equality and non-discrimination in Article 26 of the ICCPR. Article 26 prohibits discrimination in law or in practice in any field regulated by public authorities. The grounds of prohibited discrimination include race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth, disability or other status. Decisions by the United Nations Human Rights Committee suggest that a clearly definable group of people linked by their common status is likely to fall under the definition of 'other status'.

The effect of the Regulation would be to apply the Act to categories of persons in a selective manner. In this instance, the Act would only apply to Australian citizens or permanent residents undertaking a task or project, or performing a function on behalf of the Commonwealth, or pursuant to directions given by or on terms determined by the Commonwealth in Nauru.

Such differences in treatment will not amount to prohibited discrimination if the reasons for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate. Although the Regulation would apply the Act selectively, it is appropriate for Australia to be able to hold persons deployed by the Commonwealth to Nauru accountable for their conduct in Nauru that would be in violation of Australia's criminal law. In this circumstance, the Commonwealth does not have the power to legislate to apply criminal laws with extraterritorial effect to non-Australian citizens or permanent residents. Therefore it is necessary to restrict the application of the Act to Australian nationals.

The Regulation will also engage with human rights in a positive way. The purpose of the Regulation is to ensure that there is a comprehensive and appropriate scheme of criminal sanctions in place to govern the conduct of Australians engaged by the Commonwealth in Nauru. The Regulation will ensure that these persons are not shielded from criminal sanctions that they would otherwise be subjected to under Australian law in situations where Nauru is unable to prosecute the person for their conduct; for example where the conduct engaged in by a person is an offence against Australian law, but is not an offence under Nauruan law.

*Conclusion*

While the Regulation engages with some human rights, it does so in a reasonable and proportionate way and it does not operate to limit or restrict those rights. As such, the Regulation is compatible with human rights.

**The Hon Nicola Roxon MP**  
**Attorney-General**