Australian Government
Attorney-General's Department

Submission of the Attorney-General's Department

Senate Legal and Constitutional Affairs Legislation Committee

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017

The Attorney-General's Department (the department) thanks the Senate Legal and Constitutional Affairs Legislation Committee (the Committee) for the opportunity to make a submission to its inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (the Bill). The Department welcomes the submissions made to the Committee.

The Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 contains a range of measures to improve and clarify Commonwealth criminal justice arrangements. The department keeps the Commonwealth's criminal justice framework under constant review – our agencies, policies, laws, and processes – to ensure that we have a regime in place that is equipped to tackle crime effectively.

The department has had the benefit of reviewing other submissions made to the Committee. This submission is provided in response to the submissions received by the Committee. To assist the Committee's consideration, this submission provides additional explanation in response to issues raised in other submissions about Schedules 1, 2, and 6 of the Bill.

This submission is provided to supplement the information contained in the Explanatory Memorandum to the Bill. In preparing this submission, the department has consulted with the Australian Federal Police (AFP), the Commonwealth Director of Public Prosecutions (CDPP), and the Department of the Prime Minister and Cabinet about issues relating to Schedules 1, 2, and 6.

Schedule 1 – functions of the Australian Federal Police – assistance and sharing information

Schedule 1 would insert a new function in section 8 of the *Australian Federal Police Act 1979* (the AFP Act) to allow the AFP to assist or cooperate with international organisations and non-government organisations in relation only to acts, omissions, matters, or things outside Australia. Cooperation is only authorised under this function in relation to the provision of police services or police support services. The Bill also inserts a definition of an 'international organisation' to include public international organisations as defined in the Criminal Code and bodies established by an international agreement or arrangement.

The Office of the Australian Information Commissioner (OAIC) provided a submission to the Committee regarding the privacy impacts of Schedule 1. Specifically, the OAIC has raised concerns about how the provisions will authorise the sharing of personal information, which non-government organisations the provisions are intended to capture, and protections around cross-border disclosure of personal information.

<u>Authorisation of information sharing</u>

The OAIC has suggested it is unclear what kinds of personal information will be collected or disclosed. The proposed new function puts beyond doubt the AFP's ability to engage with a variety of international organisations, including the United Nations and its organs, Interpol, international judicial bodies, and the International Committee of the Red Cross.

Under its existing functions, the AFP already engages with an extensive range of international bodies. The AFP's engagement with international bodies, both currently and under the new AFP function, may include engagement for law enforcement purposes, such as to share information and intelligence or to facilitate the provision of police services. In many cases, the provision of information will not involve personal information

or information relating to any particular investigation. In such cases, as the circumstances of specific individuals are not at issue, the right to privacy will not be enlivened.

The AFP may also disclose information for purposes related to its functions that are not specifically linked to law enforcement, such as to assist with policy development or to share general information on law enforcement methodologies or trends of criminal activity. In all cases, the AFP has a robust set of governance and procedures in place to ensure engagement is compatible with human rights.

As noted in the Explanatory Memorandum, the *Privacy Act 1988* will apply to any relevant disclosure of information pursuant to the new function in section 8 of the AFP Act. The proposed new function does not override the AFP's obligations under the Privacy Act. To the extent that the new function will enable the disclosure of personal information to international organisations and non-government organisations, the Privacy Act, the AFP Act, the Australian Privacy Principles (APPs) and AFP internal policy provide effective and adequate safeguards to protect the right to privacy. Furthermore, only a small proportion of the cooperation undertaken pursuant to the new function is likely to relate to specific individuals or cases where personal information would be relevant.

As an Australian Privacy Principle entity, the AFP is bound by the APPs, which are contained in Schedule 1 of the Privacy Act. The APPs govern the way the AFP collects, uses, discloses, and stores personal information. The APPs apply irrespective of whether the AFP is cooperating with a domestic or international body.

The APPs contain some exceptions allowing the use and disclosure of personal information for a purpose other than the primary purpose for which it was collected. As noted by the OAIC, one such exception is where use or disclosure of information is required or authorised by law. The new AFP function inserted by the Bill is not intended to operate as a 'requirement or authorisation by law' for the purpose of this exception.

Non-government organisations

The OAIC has also suggested that, as there is no definition of a 'non-government organisation' (NGO) in the AFP Act, it is unclear which types of organisations the new function is intended to cover. For the purposes of the new function, the term NGO is intended to have the natural and ordinary meaning, noting that common characteristics of NGOs include that they are formed voluntarily, are independent of government, and operate not for private profit. An example of this type of cooperation is the AFP Victim Based Crime area working closely with a number of NGOs, including the Salvation Army and A21 (in regards to human trafficking). The engagement may include referrals for investigation by AFP, research and discussion of issues, and witness and victim support.

Including a definition of an NGO in the AFP Act is not necessary and may limit the ability of the AFP to utilise the function and to cooperate with bodies established on an ad hoc basis to deal with specific issues. The work undertaken by the AFP on an international level is extremely varied and the bodies the AFP may need to engage with changes from day to day, depending on the types of issues on foot.

Cross-border disclosure of personal information

The OAIC has also raised concerns about whether the measure ensures the appropriate handling of information when disclosed to bodies outside of Australia.

As noted above, the AFP's engagement with international organisations and non-government organisations may include sharing for law enforcement or related purposes.

In all cases involving the use or disclosure of personal information, AFP appointees must consider whether the Privacy Act permits use or disclosure of the personal information. In relation to information disclosure, AFP appointees are also bound by the secrecy provision in section 60A of the AFP Act and must consider whether the release of information is consistent with AFP functions. Each disclosure must be considered on a case-by-case basis.

As noted by the OAIC, the AFP is bound by the APPs, which include an exception that allows the use or disclosure of personal information where this is reasonably necessary for enforcement-related activity conducted by, or on behalf of, an enforcement body. 'Enforcement related activity' is defined broadly and includes prevention, detection, investigation, prosecution or punishment of criminal offences. 'Enforcement body' includes the AFP together with a number of other domestic agencies.

The use or disclosure of personal information pursuant to the new AFP function inserted by the Bill may qualify under this exception where the use or disclosure of personal information with respect to the international organisation or non-government organisation is reasonably necessary for enforcement-related activity conducted by, or on behalf of, an enforcement body as defined by the Privacy Act. As noted above, in many cases, the provision of information will not involve personal information or relate to any particular investigation.

The APPs govern all non-law enforcement cooperation involving personal information undertaken under the new function. APP 8 provides that before an entity discloses personal information to an overseas recipient, the entity must take reasonable steps to ensure the overseas recipient does not breach the APPs in relation to the information. When sharing any information with any overseas organisation, the AFP must ensure that the organisation will handle an individual's personal information in accordance with the APPs. The AFP is also accountable if the organisation mishandles the information.

In addition to the protections outlined in the *Privacy Act 1988* and the APPs, the AFP's Privacy Policy also outlines AFP appointees' obligations under the Privacy Act and all AFP appointees are required to be familiar with, and comply with, the Guideline.

More generally, the AFP National Guideline on Information Management governs disclosure of information. When deciding to release or withhold information, AFP personnel must follow the principles of:

- compliance with policies, legislative requirements, and directives of the AFP and the Australian Government
- protection of individual interest, third parties, and intellectual property rights
- facilitation of AFP, government, and community outcomes
- accountability of the individual for releasing information, and
- the need-to-know.

The AFP is considering whether additional memoranda of understanding or protocols are required to ensure the protection of information that is shared.

Schedule 2—Obligations of investigating officials

The Committee has published a number of submissions commenting on the custody notification amendments in Schedule 2 of the Bill. These support some aspects of the amendments, particularly the clarification of the timing of the custody notification obligation in section 23H of the *Crimes Act 1914*. However, the department notes they also raise concerns around certain aspects of the amendments—chiefly the inclusion of 'reasonable steps' in existing paragraph 23H(1)(a) and the retention of subsection 23H(8), which the Bill does not propose to amend or repeal. The department's submission deals primarily with these two concerns. The department is considering the issues that have been raised in the submissions made to the Committee in relation to these amendments.

Reasonable steps

The Bill amends section 23H to, among other things, clarify the *content* of the custody notification obligation in subsection 23H(1) incumbent upon investigating officials. As the explanatory memorandum (EM) notes, the inclusion of the term 'reasonable steps', which would require an investigating official to take reasonable steps to notify an Aboriginal legal assistance organisation (ALAO), is intended to clarify what is required by investigating officials in order to discharge the obligation—given subsection 23H(1) is currently silent on this.

As the EM notes (on page 28), this amendment reflects the reality that in some instances, an investigating official may not be successful when attempting to contact an ALAO, for example because the custody notification telephone service is unattended by an ALAO official at the time and calls are not returned, or it is late at night. The intention of the legislation is that an ALAO is successfully notified in *every* instance that an Aboriginal or Torres Strait Islander person is taken into custody, but this is not always possible or realistic. The inclusion of 'reasonable steps' along with proposed new subsection 23H(1AB) (requiring investigating officials to wait two hours once they have taken reasonable steps to notify an ALAO) would clarify that investigating officials are not required to call repeatedly for an indefinite period of time until they make contact with an ALAO even where there is no response or return call from the ALAO. This recognises the practical constraints on police (that is, that they may not be able to spend a significant amount of time in attempting to contact an ALAO) and simultaneously protects Aboriginal and Torres Strait Islander persons from being held in custody for longer than reasonably necessary awaiting a return call from an ALAO, which in turn could risk their welfare—the very risk that section 23H (and the recommendation of the Royal Commission upon which that section is based) is designed to mitigate.

The inclusion of 'reasonable steps' is not intended, as suggested by the Law Council of Australia (LCA) and Legal Aid NSW, to dilute the custody notification requirement in subsection 23H(1)—it is intended to add clarity, and balance the duties of investigating officials with the interests of Aboriginal and Torres Strait Islander persons being held in custody. The department does not consider that it is vague or open to interpretation, as suggested by the Aboriginal Legal Service of Western Australia Limited (ALSWA) and the Aboriginal Legal Service (NSW/ACT) Ltd (ALS (NSW/ACT))—'reasonable steps' means investigating officials must take all reasonable steps to make contact with an ALAO. Investigating officials are not required (nor permitted) to hold an Aboriginal or Torres Strait Islander person in custody indefinitely if an ALAO does not get back to them.

The Law Council has suggested that 'reasonable steps' should not replace the term 'immediately' in subsection 23H(1)(a), as this would dilute the notification requirement. Legal Aid NSW and ALSWA have also

raised concerns about the removal of the word. The Bill would remove 'immediately' from current paragraph 23H(1)(a) because new subsection 23H(1) will include the caveat 'before starting to question the person', meaning both obligations in paragraphs 23H(1)(a) and (b) will need to be discharged prior to questioning. The department does not consider that the term 'immediately' would be necessary in light of the proposed amendments, and considers the application of 'before starting to question the person' to *both* obligations in paragraphs 23H(1)(a) and (b), in tandem with the two hour period proposed by new subsection 23H(1AB), negates the need for the term 'immediately'.

The Minister for Indigenous Affairs, Senator the Hon Nigel Scullion, has written to state and territory governments offering to provide funding to support the establishment of custody notification services in each jurisdiction for three years conditional upon jurisdictions introducing legislation mandating its use and agreeing to take on funding responsibility at the end of that period. The aim of the custody notification service offer is primarily to provide welfare support to Aboriginal and Torres Strait Islander Australians detained in custody in order to prevent deaths in custody. The Department of the Prime Minister and Cabinet (PMC) is working with states and territories to develop models that best achieve this outcome, and it is up to states and territories to propose the role they would like ALAOs to have in the delivery of such a service. Provisions already exist in relevant legislation to ensure access to legal assistance. Any legal assistance provided by ALAOs will continue to be supported by existing funding through the Indigenous Legal Assistance Programme provided by AGD to ALAOs for this purpose.

Subsection 23H(8)

The submissions made by ALSWA, the NSW Council for Civil Liberties and ALS (NSW/ACT) argue for the removal of existing subsection 23H(8), which the Bill does not propose to amend or repeal. Subsection 23H(8) reads:

> An investigating official is not required to comply with subsection (1), (2) or (2B) in respect of a person if the official believes on reasonable grounds that, having regard to the person's level of education and understanding, the person is not at a disadvantage in respect of the questioning referred to in that subsection in comparison with members of the Australian community generally.

The AFP (and ACT Policing) has advised the department that this subsection enables them to respect the wishes of Aboriginal and Torres Strait Islander persons who, for reasons of reputation and privacy, do not wish to bring undue attention to their arrest, and therefore do not want an ALAO to be contacted. The second reading speech for the *Crimes (Investigation of Commonwealth Offences) Bill 1990*, which amended the *Crimes Act 1914* to include section 23H, indicated in relation to subsection 23H(8) that the investigating official "should bear in mind that cultural as well as purely linguistic factors may contribute to disadvantage and that the onus will be on the prosecution to prove that the investigating official had reasonable grounds for the belief."[1]

The AFP has advised the department that this section is used sparingly.

[1] Parliament of Australia Hansard, House of Representative, *Crimes Investigation Bill*, 4223.

Schedule 6—Protecting vulnerable persons

The Committee has published two submissions commenting on the vulnerable person protection amendments in Schedule 6 of the Bill. The submission made by Michael O'Connell AM APM, the South Australian Commissioner of Victims' Rights, is supportive of the amendments to section 15YR of the *Crimes Act 1914* (Cth) as an important means of providing procedural justice for vulnerable persons. The submission made by the Chief Magistrate of the Local Court of New South Wales, Judge Graeme Henson AM, raises concerns about the practicality of implementing the notice requirement in proposed section 15YR(6) and proposes measures to address these. The department thanks Judge Henson and Mr O'Connell for their submissions and addresses the concerns raised below

Reasonable steps to give written notice of a section 15YR application

As outlined in the explanatory memorandum, the Bill seeks to amend section 15YR of the Commonwealth *Crimes Act 1914* (Crimes Act) to introduce an additional procedural requirement relating to applications for leave to publish material that identifies, or is likely to identify, a vulnerable witness or complainant ('vulnerable person') in particular Commonwealth criminal proceedings. Under proposed subsections 15YR(6), (7), (8) and (9), applicants would be required to take reasonable steps to give written notice of the application to parties to the original proceedings (including the prosecutor and vulnerable person) at least three business days prior to hearing by the court. The key objective of Schedule 6 is to provide for procedural justice, allowing the vulnerable person to make a submission to the court on the impact of publishing their identity in relation to particular Commonwealth criminal proceedings.

The Chief Magistrate of the Local Court of New South Wales, Judge Graeme Henson AM, has identified the potential for practical challenges in a third party applicant locating parties to the original proceedings, including the vulnerable person.

The issues raised by Judge Henson AM were anticipated in the drafting of Schedule 6. The 'reasonable steps' requirement (proposed subsection 15YR(10)(a)) was included to accommodate the potential practical challenges of locating a vulnerable person, particularly, where an application is made several years after the original proceeding (as provided for by subsection 15YR(5)). Proof of the provision of notice is not an absolute requirement and the court may consider an application for leave if it is satisfied the applicant took 'reasonable steps' in the circumstances to give notice as required.

To address the potential practical issues, Judge Henson AM suggests consideration of an alternative method for giving notice, such as placing the onus on the prosecutor to locate and notify a vulnerable person, as per section 299C of the *Criminal Procedure Act 1986* (NSW). However, the application for leave under section 15YR can be made at any time, including several years, after proceedings are concluded, and can be heard by a different judicial officer not involved in the original criminal proceeding (subsection 15YR(5)). At the time of the application, the prosecution would not necessarily be in a better position to locate and notify a vulnerable person than a third party. This is a point of departure with the circumstances envisaged by section 299C of the Criminal Procedure Act (NSW), which applies to the adducing of evidence during the course of proceedings where the proceedings are initiated by the prosecution, and the matters are currently before the court. In that situation, it is appropriate for the prosecutor to provide notice to a vulnerable person.

The department further notes that fulfilling a requirement to attempt to locate the vulnerable person is beyond the powers and functions of the CDPP, which may not have the means or ability to perform such a function.

On consideration of the above factors, the department considers Schedule 6 should be retained in its current form.