



# ALS

Aboriginal Legal Service (NSW/ACT) Limited

ABN: 93 118 431 066

23 June 2016

Ms T Matulick  
Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO BOX 6100  
Parliament House  
**CANBERRA ACT 2600**

Dear Ms Matulick

**Re: Senate Legal and Constitutional Affairs Committee Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017**

I write to provide the Aboriginal Legal Service (NSW/ACT) Ltd (ALS) submission in response to the Senate Legal and Constitutional Affairs Committee's Inquiry (the Inquiry) into the *Crimes Legislation Amendment (Power, Offences and Other Measures) Bill 2017* (the Bill).

ALS provides legal assistance services to Aboriginal and Torres Strait Islander persons in New South Wales (NSW) and the Australian Capital Territory (ACT).

ALS will limit its response to the impact of Schedule 2 relating to obligations of investigating officials. ALS expresses strong concern regarding the proposed changes to custody notification requirements, as well as existing provisions under the *Crimes Act 1914* (Cth) (the Act), which relate to identification of Aboriginal and Torres Strait Islander people and provide a basis for non compliance with custody notification obligations.

**Custody notification requirements**

ALS is concerned about the proposed amendments to s 23H(1)(a)(b) of the Act which will require an investigating official to take 'reasonable steps' to notify an Aboriginal legal assistance organisation when an Aboriginal or Torres Strait Islander person is in custody.

It is essential that 'actual notification' to an Aboriginal legal assistance organisation occurs, rather than mere 'steps' towards it. We reinforce that Aboriginal or Torres Strait Islander people must be given access to an Aboriginal legal assistance organisation as soon as they are taken to custody.

ALS is particularly concerned that the insertion of 'reasonable steps' into the Act is ambiguous and could result in inconsistent application of the provision by investigating

officials. We note that the Bill does not provide further guidance as to what may constitute 'reasonable steps'. This ambiguity is likely to create unnecessary complexity for an investigating official when attempting to notify an Aboriginal legal assistance organisation that an Aboriginal or Torres Strait Islander person is in custody.

ALS strongly recommends that any legislative regime is framed in the manner outlined under reg 37 *Law Enforcement (Powers and Responsibilities) Regulation 2016* which legislates for 'actual notification' to an Aboriginal legal assistance organisation, rather than the weakened threshold of 'reasonable steps' in the Commonwealth Bill.

As reg 37 outlines:

If a detained person or protected suspect is an Aboriginal person or Torres Strait Islander, then, unless the custody manager for the person is aware that the person has arranged for a legal practitioner to be present during questioning of the person, the custody manager must:

- (a) immediately inform the person that a representative of the Aboriginal Legal Service (NSW/ACT) Limited will be notified:
  - (i) that the person is being detained in respect of an offence, and
  - (ii) of the place at which the person is being detained, and
- (b) notify such a representative accordingly.

Notification requirements have been a standard and essential practice in ensuring access to justice for Aboriginal and Torres Strait Islander people living in NSW and the ACT. ALS has provided a custody notification service to Aboriginal and Torres Strait Islander people 24 hours a day, 7 days a week, 365 days a year, for over a decade.

### **Identification of Aboriginal and Torres Strait Islander People**

ALS expresses concern regarding the existing provision of s 23H(2)(a) under the Act, which provides that the obligation to notify an Aboriginal legal assistance organisation only applies when an investigating official 'believes on reasonable grounds' that the detained person is Aboriginal or Torres Strait Islander.

This is a highly subjective test wholly dependent on the investigating official's formulated 'belief'. The unintended consequence of this may be that an Aboriginal or Torres Strait Islander person is not afforded the protections under s 23H of the Act which mandates notification to Aboriginal legal assistance organisations.

We reinforce the approach taken by NSW in reg 37 of the *Law Enforcement (Powers and Responsibilities) Regulation 2016* which respects that if a person identifies as Aboriginal, they are entitled to the safeguards provided by access to a custody notification service.

### **Grounds for non compliance**

Section 23H of the Act provides an exception for when investigating officials are required to notify an Aboriginal legal assistance organisation about an Aboriginal or Torres Strait Islander person taken into custody. ALS has concerns about the effectiveness and appropriateness of an investigation official's assessment of an Aboriginal or Torres Strait Islanders level of disadvantage.

s 23H(8) of the Act provides:

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 questioning referred to in that subsection in comparison with the members of the Australian community generally.

Aboriginal and Torres Strait Islander persons experience disadvantage at a systemic level. Accordingly, s 23H(8) appears inconsistent with the purpose of s 23H of the Act which is to afford Aboriginal and Torres Strait Islander people, as a whole, additional protection through access to a custody notification service. To undertake an assessment of an individual's level of disadvantage is not fitting with the broader aims of the legislation. Aboriginal legal assistance organisations should be notified in every instance an Aboriginal or Torres Strait Islander person is taken into custody.

Additionally, ALS considers it is too onerous in the circumstances for an investigating official to establish an Aboriginal person's level of education and understanding prior to their questioning. The test is highly subjective and is likely to differ based on the investigating official's own conception of what disadvantage constitutes.

Thank you for the opportunity to make this submission.

Yours sincerely,

Nadine Miles  
Chief Legal Officer  
Aboriginal Legal Service (NSW/ACT) Ltd