# Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2026

## National Legal Aid Submission to the Senate Legal and Constitutional Affairs Legislation Committee

**13 April 2026**

National Legal Aid

# Acknowledgement of Country

*National Legal Aid acknowledges Traditional Owners of Country throughout Australia and recognises the continuing connection to lands, waters and communities. We pay our respects to Aboriginal and Torres Strait Islander cultures, and to Elders both past and present.*

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# About National Legal Aid

## Who are we?

National Legal Aid represents the eight state and territory Legal Aids across Australia. In 2022–23, the LAs provided more than 1.7 million legal services nationally. This submission draws on the practice experience of legal aid lawyers within the criminal justice system nationwide.

## What do we do?

Legal Aids are the main publicly funded providers of criminal law representation in Australia. Each year Legal Aids deliver 1.7 million legal assistances, including 150,000 legal representation grants – 65 per cent of which are for criminal law. Legal Aids deliver early intervention and advice services, duty lawyer services in courts including for people facing criminal charges, ongoing case representation including serious criminal matters and assistance for appeals.

## Why do we do it?

Legal Aids are the 'safety net' of the legal system – offering to assist families and individuals in times when they are in highest need. NLA's vision for the future is one where all people experiencing disadvantage have access to legal assistance and fair justice outcomes that contribute to safe, thriving families and communities.

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# Summary of Recommendations

**Recommendation 1:** That s 300.7(2) of the Bill be amended to require that each person whose acts or involvement are the subject of a continuity certificate be individually named.

**Recommendation 2:** That the Bill be amended to remove s. 300.9(4)(b) and that cross examination should be permitted provided the defendant gives the prosecution notice under s. 300.9 (4)(a).

**Recommendation 3:** That if s. 300.9(4)(b) remains in the Bill, the Bill is be amended to expressly set out the test in s.300.9 (4)(b), with broad application such that permission to cross-examine is granted unless the application is clearly vexatious or an abuse of process.

**Recommendation 4:** That the Committee consider an alternative model requiring pre-trial defence disclosure of whether continuity is in issue, modelled on s 143(1)(i) of the *Criminal Procedure Act 1986* (NSW), as a less restrictive means of achieving the Bill's stated efficiency objectives.

**Recommendation 5:** That the Bill be amended to require that a continuity certificate only certify matters within the personal knowledge of the issuing officer, and that the certificate include a statement to that effect.

**Recommendation 6:** That the purity-based system for measuring border-controlled drugs should be retained in the *Criminal Code Act 1995* (Cth), and the Bill be amended to remove provisions to adopt a gross-weight (admixture) approach.

**Recommendation 7:** If the admixture provisions in the Bill are retained, thresholds for Controlled Drugs and Border-Controlled Drugs under the Criminal Code Regulations 2019 should be reviewed.

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# Executive Summary

National Legal Aid (NLA) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the *Crimes and Other Legislation Amendment (Omnibus No. 1) Bill 2026* ("**the Bill**").

NLA's submission primarily relates to Schedule 2, which introduces two substantive changes to Commonwealth drug law: continuity certificates and admixture provisions. NLA submits that both measures, as currently drafted, raise significant access to justice concerns.

On continuity certificates, NLA opposes the mechanism in its current form. The removal of individual continuity statements will reduce defence practitioners' ability to identify evidentiary deficits before trial, erode prosecutors' ethical obligation to detect and disclose continuity issues, and risk frustrating the right of accused persons to require witnesses for cross-examination. NLA recommends targeted amendments to strengthen the safeguards in the proposed provisions and invites the Committee to consider an alternative model (modelled on s 143(1)(i) of the *Criminal Procedure Act 1986* (NSW)) requiring pre-trial defence disclosure of whether continuity is genuinely in issue.

NLA opposes shifting Commonwealth drug offences to a gross weight (admixture) approach. The proposed approach risks arbitrary outcomes, particularly where concealment materials or low purity substances inflate weight. The existing purity based system more accurately reflects the nature and seriousness of the offence and supports fair and proportionate sentencing. The Bill does not address consequential adjustments to statutory thresholds.

NLA is concerned that a shift to gross-weight measurement will disproportionately affect lower-level participants in drug supply chains, including mules, runners and others at the bottom of criminal enterprises, who are more likely to handle substances of lower purity and who make up the majority of legal aid clients in Commonwealth drug matters. Some accused may face significantly higher maximum penalties on the same factual basis as a result of the change. If admixture is retained, NLA urges a review of thresholds and the explicit preservation of purity as a mitigating factor to protect fair trial rights, ensure accurate sentencing, and avoid disproportionate punishment without demonstrable deterrent benefit.

NLA makes seven recommendations in this submission, set out in full at the relevant sections below.

# Schedule 2 – Drug Offences

## Continuity certificates

### Background

Schedule 2 introduces a new evidentiary certificate mechanism under proposed s 300.7 of the *Criminal Code Act 1995*, allowing a certificate to stand as prima facie evidence of chain of custody for seized substances. The Explanatory Memorandum (EM) states that this is intended to streamline prosecutions by removing the need for individual written statements from each officer involved in handling the substance, and for those witnesses to make themselves available to give oral evidence.

### NLA's position

NLA opposes the measures in the Bill in their current form to introduce continuity certificates and recommends that the mechanism be amended to include stronger safeguards before it is enacted.

While NLA acknowledges that chain of custody is rarely genuinely contested in Commonwealth drug matters, the proposed mechanism raises serious concerns about the rights of accused persons (including those relying on legal aid) to meaningfully challenge the prosecution's evidence.

NLA also considers that the premise advanced to justify the introduction of an evidentiary certificate regime is fundamentally flawed. The EM assumes that because continuity evidence is unchallenged and uncontroversial in most matters, formal proof of continuity is unnecessary. However, continuity commonly becomes unchallenged precisely because relevant material is properly disclosed. That disclosure typically includes recordings of search and seizure processes, recordings of exhibit handling and bagging processes, exhibit logs and statements from participants in the continuity process. NLA therefore disagrees with the reasoning used to justify the introduction of these measures in the Bill – that because of the experience that disclosure of continuity evidence commonly leads to that evidence not being challenged or controversial, the practice of disclosing that evidence should be dispensed with.

NLA also notes that like other aspects of investigative procedures by police, there have historically been occasions of corrupt, illegal or unfair conduct in relation to the obtaining, handling and examination of exhibit items. It is these events which were causative of stricter investigative and disclosure practices which reduced that risk and have led to it, now, mostly being unchallenged and uncontroversial.

NLA is particularly concerned about the potential impacts of the Bill as currently drafted for self-represented accused, who may lack the legal knowledge to identify whether continuity is genuinely in issue, to navigate the court permission process under s 300.9(4), or to effectively cross-examine a certifier. Legal Aids regularly assist clients in Commonwealth drug matters who are unrepresented at various stages of proceedings. The currently drafted regime risks placing self-represented accused at a significant disadvantage in challenging the prosecution's evidence.

## Removal of individual statements

The EM states at paragraph [116] that the certificate regime would remove the need for individual written statements from witnesses. This has a significant practical consequence: once officers are no longer required to prepare individual statements, defence practitioners will lose visibility of potential deficits in the chain of custody, including improper storage, contamination risk or other irregularities, before those issues become apparent at trial.

In Legal Aids' experience, individual continuity statements are rarely prepared now. For example, the committal system in NSW means that the prosecution brief need only be sufficient for charge certification purposes. Legal Aids advise it is not currently the case that – as the EM suggests – police are having to prepare individual statements and "have to be called to give oral evidence at trial". Continuity is usually not the issue, and provided there is sufficient documentary record keeping and witness evidence setting out movement of exhibits it allows defence to review chain of custody early and either put it in issue or concede it.

In NSW, Legal Aid defence lawyers advise they are usually served with an Exhibit Management record or similar setting out movement and handling of exhibits. Given this is usually not in issue, evidence of chain of custody is usually adduced as Agreed Facts at trial, meaning there actually is not a resource burden for the police or prosecution where they properly disclose and can provide records supporting continuity. In Legal Aids' experience, courts are not wasting time hearing "unchallenged evidence" about continuity from individual officers, and therefore resources saved through implementation of these amendments are unlikely to be substantial.

Currently, disclosure of individual continuity statements or other official exhibit management records that identifies all relevant chain of custody information allows both defence practitioners and prosecutors to identify and address such issues at an early stage. Prosecutors have an ethical duty to detect and disclose problems affecting continuity. The certificate regime risks removing this layer of scrutiny entirely. Legal

Aids have identified current matters before the courts where continuity has proven to be a significant issue, compounded by late or inadequate disclosure, illustrating why the existing disclosure framework should not be weakened.

NLA also considers that the reasoning that a certificate regime will remove the need for individual written statements from witnesses is flawed. If a certificate regime contemplates that on occasions when certified continuity is challenged, witnesses may be required to attend and give evidence at trial or *voir dire* proceedings, there should be disclosure of written statements and other evidentiary material relevant to the issue. Production of these items of evidence should still be required even if this certificate regime is introduced.

Further, it may be that AFP investigations lead to prosecution of offences contrary to state laws instead of, or together with, Commonwealth offences, in which case this certificate regime may not apply in substitute of state laws which require the disclosure of evidentiary material (including witness statements) relevant to the issue continuity.

## Broad drafting of s 300.7(2)

NLA is concerned that s 300.7(2) is broadly drafted in a number of respects.

Section 300.7(2)(a) permits the certificate to specify "any detail or description relating to the seizure or detention of the substance or object." This goes beyond streamlining exhibit continuity and could, on its face, extend to statements allegedly made by the accused at the time of seizure, which is a matter that goes to guilt rather than continuity of evidence.

Section 300.7(2)(b) also permits a police officer to certify that a particular label was affixed to an exhibit. In practice, officers can and do get exhibit or seal numbers mixed up. Without individual statements or photographic evidence of exhibit seals, these errors are more likely to go undetected. The certificate mechanism reduces the prospect of such errors being identified and disclosed at an early stage.

Significantly, there is no requirement in the proposed provisions that the person issuing the certificate have personal knowledge of the matters they are certifying. A certifier could, in theory, certify facts based entirely on what they have been told by others, without any personal verification. If a certifier is required to give evidence under cross-examination and simply states that they do not know the answer to a

question, this could cause significant disruption to proceedings, potentially at a late stage when it is too difficult to obtain and properly analyse the underlying continuity evidence.

A further concern is that the proposed provisions contain no requirement that the person issuing the certificate have personal knowledge of the matters they are certifying. This creates a risk that a certifier signs off on facts relayed by others without independent verification. NLA recommends that the provisions be amended to require that a continuity certificate only certify matters within the personal knowledge of the issuing officer, and that this requirement be reflected on the face of the certificate itself.

## Right to require witnesses

NLA notes that proposed s 300.9(3)(b) provides a right to require witnesses named in the certificate to be called for cross-examination. However, s 300.7(2) does not appear to require that individual officers be named in the certificate. NLA is concerned that without a requirement to identify specific named officers, the certificate could be drafted using generic language (such as "a member of the Australian Federal Police") which would effectively frustrate the right to call witnesses for cross-examination.

NLA recommends that s 300.7(2) be amended to require that each person whose acts or involvement are the subject of the certificate be individually named.

## Court permission to cross-examine

NLA is also concerned about proposed s 300.9(4), which requires the accused to obtain the court's permission before exercising the right to require a witness to be called for cross-examination. The test for granting such permission is not specified in the Bill or addressed in the EM.

NLA submits that requiring an accused to obtain judicial permission to revert to the standard that currently applies – requiring the prosecution to prove its case through oral evidence – places an inappropriate burden on the defence. The defence should not be required to justify, or to reveal aspects of its case, simply to exercise a right that currently exists as of right.

These amendments will have the effect of reversing the onus of proof in a criminal trial because the Bill creates a requirement that an accused must justify why they want to test evidence, when in fact they do not need to prove anything at all.

## Recommended alternative

NLA recommends that the Bill be amended to adopt an alternative approach modelled on s 143(1)(i) of the *Criminal Procedure Act 1986* (NSW), which requires defence to disclose prior to trial whether continuity of evidence is in issue. This approach balances the legitimate interest in streamlining proceedings where continuity is not genuinely disputed, while preserving the existing evidentiary framework for matters where it is.

## Recommendations

**Recommendation 1:** That s 300.7(2) be amended to require that each person whose acts or involvement are the subject of a continuity certificate be individually named.

**Recommendation 2:** That the Bill be amended to remove s. 300.9(4)(b) and that cross examination should be permitted provided the defendant gives the prosecution notice under s. 300.9 (4)(a).

**Recommendation 3:** That if s. 300.9(4)(b) remains in the Bill, the Bill be amended to expressly set out the test in s.300.9 (4)(b), with broad application such that permission to cross-examine is granted unless the application is clearly vexatious or an abuse of process.

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**Recommendation 5:** That the provisions be amended to require that a continuity certificate only certify matters within the personal knowledge of the issuing officer, and that the certificate include a statement to that effect.

## Admixture provisions

### Background

Schedule 2 also amends the *Criminal Code Act 1995* (Cth) to change how the weight of border-controlled drugs is measured, adopting a gross-weight (admixture) approach. In practice, this means the total weight of a substance – including any cutting agents or diluents – counts toward the applicable threshold quantity, rather than only the weight of the pure drug.

The stated objectives in the EM (at paragraph [63]) are to ensure penalties reflect criminal intention and market reality, to prevent offenders from diluting drugs to avoid penalty exposure, and to reduce forensic risks and resource burdens on law enforcement and prosecution authorities.

### NLA's position

It is NLA's view that the purity-based system for measuring border-controlled drugs should be retained. Despite the Bill's stated aim of ensuring consistency with other jurisdictions, there are cogent reasons for taking a different approach in Commonwealth matters. While Part 9.1 of the Criminal Code contains offences relating to the trafficking of drugs domestically, the vast majority of Commonwealth drug matters that are actually prosecuted concern the importation of drugs into Australia or the possession of drugs shortly after their importation.

Importation offences are necessarily of a different nature and type to trafficking offences. They involve bringing drugs into Australia compared to the distribution of a product to other sellers or users. Importations often involve significant quantities of drugs that are not in the form that will ultimately be distributed. The harm inherent in importation offences stems from the pure weight of the drug, as opposed to the overall weight of the substance imported. Importation offences usually involve the concealment of the drug in some manner. Legal Aids note this can take on a myriad of different forms, including the following examples:

- Impregnating the drug into clothes;
- Impregnating the drug into furniture, such as couches and mattresses;
- Concealing the drug within various types of machinery;
- Concealing the drug concrete ceiling fixtures; and
- Concealing the drug within liquid disguised as shampoo and lotions.

It is unclear in the current drafting of the Bill whether the admixture would include the entire weight of the concealment method. If it is intended that the concealment method is taken into account when



determining weight, for instance taking the total weight of the clothing in the example above, there is significant potential for disparate results based simply on the method of concealment chosen. This would likely have the most impact on lower-level operatives who have no control over the concealment method utilised but could face significantly more severe penalties by reason of the method chosen.

NLA is also concerned that there is no indication in the Bill that there will be a consequential reconsideration of the thresholds for Controlled Drugs and Border-Controlled Drugs under the Criminal Code Regulations 2019. By way of example, the current threshold for both a commercial and marketable quantity of Psilocybine is 0.1 kilograms. Psilocybine is found in mushrooms. Psilocybine content in mushrooms ranges significantly but averages around 1% of dry weight. Under the current system, the relevant threshold would require around 10kg of dried mushrooms; under the proposed system this amount would be reduced to 100 grams. This discrepancy would be further exacerbated if the mushrooms in question were fresh or in the process of being dried.

The current system effectively avoids the pitfalls highlighted above by the simple expediency of testing the purity of the drug. In contrast, the proposed admixture approach has the potential to create a system where thresholds essentially become arbitrary and unrelated to the nature and quantity of prohibited drug that is the very reason for criminal sanction.

If the admixture provisions in the Bill are retained, thresholds for Controlled Drugs and Border-Controlled Drugs under the Criminal Code Regulations 2019 should be reviewed.

NLA also notes the EM's stated objective of the proposed amendments in reducing "forensic risks and resource burdens" on government analytical laboratories. NLA submits that efficiency gains in the administration of drug prosecutions should not come at the cost of fair trial rights or the accuracy of sentencing outcomes. The existing purity analysis regime serves an important function in ensuring that the weight attributed to a drug offence reflects the true nature and seriousness of the substance involved. Removing that analysis risks producing outcomes that are disproportionate to the actual harm caused by the offending, particularly for lower-level participants handling heavily diluted substances.

NLA has significant concerns about the disproportionate impact this change will have on lower-level participants in drug supply and recommends that important sentencing safeguards be preserved. We also consider that heavier penalties are highly unlikely to have significant deterrent effect or result in less importation of border-controlled drugs.

## Disproportionate impact on lower-level participants

The most significant practical impact of the admixture provisions will fall on lower-level participants in drug supply chains, including mules, runners and others at the bottom of the criminal enterprise, who are more likely to handle substances of lower purity, as drugs are progressively diluted as they pass through the supply chain. These individuals are also the most likely to be prosecuted, as they are the most visible and accessible to law enforcement. By contrast, those at the top of the criminal enterprise, who are closer to the source of manufacture and therefore closer to pure substances, are both less likely be prosecuted and likely to be less affected by the change in measurement approach.

In Legal Aids' experience many low-level operators are now carrying drugs of purity around 70-80%. Legal Aids also report seeing outlier cases where purity is relatively low - for example, where couriers are sent on an initial trip to test their ability/reliability to be a mule with a largely benign bulk/mix product, or where the method of concealment is such that the gross weight exceeds the pure weight of the prohibited drug to such a degree that there is no rational relationship between the gross weight and the drug itself.

One of the Bill's objectives, as set out in the EM, is to ensure penalties reflect the criminal intention and market reality (for example, preventing offenders from diluting drugs to increase profit without increasing penalty exposure). This objective is most directly applicable to those who exercise control over the supply chain and profit substantially from it. It does not accurately describe the position of lower-level participants, who typically have little control over the purity of the substances they handle and derive little financial benefit from the enterprise. Legal Aids report that they have not seen offenders who are prosecuted dilute drugs simply to avoid certain thresholds. Even if offenders were cognisant of legal thresholds for various offences, dilution as the EM suggests might happen would appear to run counter to economic incentives typically involved in large scale drug supply. In Legal Aids' experience, drug mules in particular typically have very low levels of knowledge and autonomy over the substance or the business. They are often vulnerable individuals with limited knowledge of the law.

NLA considers that criminal intention and market reality is already reflected in the current purity approach. The admixture approach that would be introduced by the measures in this Bill has the potential to distort both of these, creating a system where thresholds essentially become arbitrary and unrelated to the nature and quantity of prohibited drug that is the very reason for criminal sanction.

If the Bill is enacted in its current form, the consequence will be that some cases that would previously have attracted a marketable quantity charge (carrying a maximum penalty of 25 years' imprisonment) may

now attract a commercial quantity charge (carrying a maximum penalty of life imprisonment) on the same factual basis, simply because the substance was of lower purity. This represents a significant and disproportionate increase in criminal exposure for the most vulnerable accused.

## Sentencing impact

NLA is also concerned about the broader impact of this change on sentencing. Courts routinely rely on comparative sentencing statistics to identify appropriate sentencing ranges for drug offences. The admixture amendment will fundamentally alter the sentencing landscape for Commonwealth drug matters, making existing comparative cases of lesser utility, given those cases were decided under a lesser maximum penalty regime. It will take time for a new body of cases to develop, during which there is a real risk that courts will interpret the increased maximum penalties as a signal to increase sentences across the board, to the detriment of lower-level offenders.

## Purity as a mitigating factor

NLA notes that under NSW sentencing law – which already uses an admixture approach – courts continue to treat the purity of a drug as a relevant factor in assessing the objective seriousness of an offence.[1] NLA submits that it is essential that Commonwealth sentencing law similarly preserves purity as a relevant mitigating factor.

## Recommendations

**Recommendation 6:** That the purity-based system for measuring border-controlled drugs should be retained in the *Criminal Code Act 1995* (Cth), and the Bill be amended to remove provisions to adopt a gross-weight (admixture) approach.

**Recommendation 7:** If the admixture provisions in the Bill are retained, thresholds for Controlled Drugs and Border-Controlled Drugs under the Criminal Code Regulations 2019 should be reviewed.

[1] *Jenkinson v R* [2024] NSWCCA 34.