Additional Comments by Labor Senators

1.1 The Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (the bill) would make a number of changes to the *Australian Federal Police Act 1979* (AFP Act), *Crimes Act 1914* (Crimes Act), and *Criminal Code Act 1995* (the Criminal Code).

1.2 Labor Senators make the following additional comments in relation to the proposed amendments to the Aboriginal and Torres Strait Islander custody notification scheme found in the Crimes Act.

Problems with these proposed amendments

1.3 Schedule 2 of the bill would amend aspects of the Crimes Act as they relate to the questioning of people of Aboriginal and Torres Strait Islander origin, by investigating officials. It purports to both:

- rectify the problematic judicial precedent in *R v CK* [2013] ACTSC 251, in which the Australian Capital Territory Supreme Court found that, due to a legislative drafting error, the words used in section 23H did not require an investigating official to contact an Aboriginal legal aid organisation *before* commencing questioning; and
- 'clarify' the content of the notification obligation itself.

1.4 Labor Senators support the amendment insofar as it will rectify the judicial finding in *R v CK*. The provisions in the Crimes Act which deal specifically with the process of questioning a person of Aboriginal or Torres Strait Islander origin exist to provide those individuals with extra protection when engaging with the criminal justice system. If those provisions did not require an investigating official to contact an Aboriginal legal assistance organisation before questioning began, the capacity of those provisions to achieve that goal would be fatally compromised.

1.5 However, the proposed amendments would not merely fix the drafting error which led to the decision in *R v CK*. They would change the content of the custody notification scheme from an absolute requirement to notify an Aboriginal legal aid organisation (to now be known as an Aboriginal legal 'assistance' organisation), to an obligation to take 'reasonable steps' to notify said organisation, and provide a two hour window for that organisation to contact the individual to be questioned.

1.6 The term 'reasonable steps' is vague and poorly defined. The Explanatory Memorandum provides little explanation of what reasonable steps might entail in practice:

> [T]his could include an investigating official leaving a voice message on a custody notification telephone service. This clarification will take into account that in some instances an Aboriginal legal assistance organisation may be unable to answer a telephone call or immediately respond to a notification by an investigating official. The officer should therefore be permitted to make reasonable attempts to notify such an organisation and request a response when a representative from the organisation is available,

> rather than, for example, having to continually call the organisation until actual contact is made.[1]

1.7 The Explanatory Memorandum does not expand on whether 'reasonable steps' would entail one phone call, or one voice message, or an attempt to reach out to just one Aboriginal legal assistance organisation where more than one may be able to assist. The definition offered by the Attorney-General's Department, '"reasonable steps" means investigating officials must take all reasonable steps to make contact with an [organisation]' does nothing to clarify what this phrase actually means.[2]

1.8 These issues are compounded by the inclusion of a two hour window during which an Aboriginal legal assistance organisation can get back in touch with the investigating officials before the individual will be questioned. The policy rationale behind this two hour window is unclear. The Explanatory Memorandum does not state why a two hour window, rather than a four hour window (for example), is reasonable. It does not link the proposed window of time to the length of time during which an individual may be held in custody before they must be released if no charges have been laid (for example). It does not set out any practical justifications for the proposed window of time, outlining, for example, a series of instances in which investigating officials have waited significant lengths of time for an organisation to contact an individual in custody so that questioning may commence.

A poor solution

1.9 Labor Senators believe that a recommendation to amend the Explanatory Memorandum to update the definition of the phrase 'reasonable steps' is insufficient. The words should be removed from this bill.

1.10 The intention of the legislation as it stands is that such an organisation is notified in every instance that an individual is taken into custody.[3]

1.11 The proposed introduction of an obligation to take 'reasonable steps' to notify an Aboriginal legal assistance organisation is a poor legislative response to the recognised vulnerabilities of Aboriginal and Torres Strait Islander people who come into contact with the criminal justice system. Labor Senators do not agree with the department's assertion that the inclusion of this phrase is not intended to dilute the custody notification requirement.[4] Clearly, it would water down the provisions of the Crimes Act which should protect these individuals, and weaken custody notification laws.

---

1 Explanatory Memorandum, p. 28.

2 Attorney-General's Department (AGD), *Submission 11*, p. 5.

3 AGD, *Submission 11*, p. 5.

4 AGD, *Submission 11*, p. 5.

1.12 As the Aboriginal Legal Services of Western Australia and NSW/ACT, and the CCL noted,[5] it is entirely conceivable that a legal assistance organisation may be uncontactable for a range of reasons—for example because they are in a rural area visiting clients, or the call comes in very late at night or early in the morning. Even a carefully drafted definition of 'reasonable steps' would not guarantee proper notification for people in these circumstances.

Labor's alternative approach

1.13 An absolute obligation to notify an Aboriginal legal assistance organisation prior to questioning a person of Aboriginal or Torres Strait Islander origin must be maintained.

1.14 It is well-established that custody notification prevents Aboriginal and Torres Strait Islander deaths in custody.[6] The NSW Council for Civil Liberties (CCL) argued that the NSW legislative scheme—which requires that police must defer an interview until a lawyer can be contacted—is a preferable custody notification model.[7] The Council highlighted that the NSW legislative scheme can be connected to the low levels of deaths in custody in the state, despite the state also having one of the highest per capita rates of Aboriginal people in police custody.[8]

1.15 Last year the Government agreed to fund the States to implement 24 hour custody notification services.[9] Instead of watering down the protections for Aboriginal and Torres Strait Islanders, the Government should honour this commitment to establishing nation-wide Custody Notification Services.

1.16 Labor urges the Government to quickly establish the Custody Notification Services and maintain the absolute requirement to notify.

Senator Louise Pratt
Deputy Chair

---

5 Aboriginal Legal Service of Western Australia Limited (ALSWA), *Submission 2*, p. 3; ALS NSW/ACT), *Submission 6*, p. 2; NSW Council for Civil Liberties (CCL), *Submission 4*, pp. 4–5.

6 ABC News, *Hotline credited with saving lives of Aboriginal people in custody to be rolled out nationally*, 21 October 2016, www.abc.net.au/news/2016-10-21/indigenous-custody-notification-service-to-become-nationwide/7955152 (accessed 8 August 2017).

7 CCL, *Submission 4*, pp. 4–5.

8 CCL, *Submission 4*, p. 5.

9 Department of Prime Minister and Cabinet, *Coalition offers to fund national roll out of CNS*, 21 October 2016, https://ministers.pmc.gov.au/scullion/2016/coalition-offers-fund-national-roll-out-cns (accessed 8 August 2017).