

## **Additional Comments by Australian Greens Senators**

1.1 The Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (the bill) seeks to make a range 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 Australian Greens Senators make the following additional comments in relation to the proposed amendments to the AFP Act, Criminal Code Act, and the processes for questioning people of Aboriginal and Torres Strait Islander origin contained in the Crimes Act.

### **Proposed amendments to the *Australian Federal Police Act 1979***

1.3 The proposed amendments to the AFP Act would more accurately reflect the international nature of some of the AFP's work. Greens Senators agree that the AFP must be able to work effective with international organisations, including the sharing of information to help combat crime.

1.4 However, the Australian Human Rights Commission (AHRC) has rightly highlighted that these amendments may enliven significant human rights under international law, which the Explanatory Memorandum has failed to analyse.<sup>1</sup> The Parliamentary Joint Committee on Human Rights (PJCHR) raised these same concerns earlier this year,<sup>2</sup> and sought copies of two AFP guidelines dealing with the death penalty and torture situations. At the date of this report that request had not been responded to.

1.5 As the AHRC submitted, cooperation between the AFP and international organisations, including the sharing of information, may enliven the right to life and the right to be free from torture and cruel, inhuman and degrading treatment.<sup>3</sup> This may be the case where cooperation from the AFP leads to an individual being arrested for a crime that carries a death penalty, or being held in or returned to a jurisdiction with a questionable human rights record.

1.6 As the AHRC points out,<sup>4</sup> the Australian Government describes global abolition of the death penalty as one of Australia's core human rights objectives.<sup>5</sup> It

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1 Australian Human Rights Commission (AHRC), *Submission 10*.

2 Parliamentary Joint Committee on Human Rights (PJCHR), *Human rights scrutiny report*, Report No 4 of 2017, 9 May 2017, pp. 3–6; Report No 5 of 2017, 14 June 2017, p. 41.

3 AHRC, *Submission 10*.

4 AHRC, *Submission 10*, p. 6.

5 Department of Foreign Affairs and Trade, *Australia's candidacy for the United Nations Human Rights Council 2018-2020*, <http://dfat.gov.au/international-relations/international-organisations/pages/australias-candidacy-for-the-unhrc-2018-2020.aspx> (accessed 7 August 2017).

would be, as the AHRC submits, incongruous if any action by the AFP makes it more likely that an individual will be subject to the death penalty.<sup>6</sup>

1.7 Greens Senators do not accept the Minister's argument that information and intelligence sharing with international organisations and non-government organisations will often not involve particular individuals, and so will not raise death penalty or torture implications.<sup>7</sup> Cooperation and information-sharing by the AFP in combating criminal activity may lead to such situations. It is therefore necessary to explain how these new functions will operate in situations where a person is at risk of the death penalty, or at risk of torture or other poor treatment.

1.8 The Explanatory Memorandum should be updated to include an explanation of how these new functions will operate where there is a risk of the death penalty, or other cruel treatment, as a result of the AFP's cooperation. This update should include an explanation of the AFP's guidelines on dealing with death penalty and torture situations, to which the Minister referred.<sup>8</sup>

### **Recommendation 1**

**1.9 Greens Senators recommend that the Explanatory Memorandum be updated to explain how the proposed amendments to the *Australian Federal Police Act 1979* may enliven the right to life and the right to be free from torture and other cruel, inhuman or degrading conduct.**

### **Proposed amendments to the *Criminal Code Act 1995***

1.10 Schedule 4 of the bill would double the maximum penalty for breaches of the general dishonesty offences found in section 135.1 of the Criminal Code.

1.11 The Law Council of Australia (LCA) argued that this amendment is not justified, and deviates from the intent behind the general dishonesty offences, which is to capture less culpable dishonest conduct.<sup>9</sup> They highlighted part of the Explanatory Memorandum to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, which made the same observations:

[T]he proposed [general dishonesty] offence does not require the prosecution to prove that an accused deceived a victim and as such falls below the appropriate level of culpability required for an offence with a maximum penalty of 10 years imprisonment. In recognition that the offence is much broader than fraud, it is proposed that section 135.1 should have a maximum penalty of 5 years imprisonment. Where there is evidence of deception, the most serious fraud offences should be charged.<sup>10</sup>

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6 AHRC, *Submission 10*, p. 7.

7 PJCHR, *Human rights scrutiny report*, Report No 5 of 2017, 14 June 2017, p. 39.

8 PJCHR, *Human rights scrutiny report*, Report No 5 of 2017, 14 June 2017, p. 39.

9 Law Council of Australia (LCA), *Submission 7*, p. 4.

10 Revised Explanatory Memorandum, p. 69, in LCA, *Submission 7*, p. 3.

1.12 Legal Aid NSW submitted that these amendments could disproportionately impact on vulnerable people being prosecuted for social security fraud, considering the prevalence of such matters being dealt with under these sections.<sup>11</sup>

1.13 The Commonwealth Director of Public Prosecutions (CDPP) argued that it's guidelines for the charging of dishonesty offences will remain in place:

[W]here alleged criminal conduct constitutes both an offence of obtaining property or financial advantage by deception and an offence of general dishonesty, ordinarily the appropriate course will be to charge the offence of obtaining.<sup>12</sup>

1.14 However, as Legal Aid NSW highlighted, an increase in the maximum penalty for the less culpable 'general dishonesty' offences may mean that sentencing judges regard the offences as being more serious.<sup>13</sup> It explained that the full bench of the High Court of Australia recently held that:

The maximum penalty for a statutory offence serves as an indication of the relative seriousness of the offence. An increase in the maximum penalty for an offence is an indication that sentences for that offence should be increased.<sup>14</sup>

1.15 Australian Greens Senators are concerned that doubling the maximum penalty for general dishonesty offences from five to 10 years imprisonment may lead to harsher penalties for vulnerable offenders, despite the discretion for sentencing judges to consider the individuals circumstances of each case.

### **Proposed amendments to the *Crimes Act 1914***

1.16 Australian Greens Senators agree with the recommendation contained in the report to define 'reasonable steps' in the context of contacting an Aboriginal legal assistance organisation where a person of Aboriginal or Torres Strait Islander origin is going to be questioned.

1.17 However, Australian Greens Senators are concerned about the proposed introduction of a two hour window for an Aboriginal legal assistance organisation to contact the person to be questioned, once 'reasonable steps' have been taken to notify the organisation. This is also concerning where an individual is being asked to consent to a forensic procedure, and in instances where the Aboriginal or Torres Strait Islander person has a cognitive or psychiatric impairment. A two hour window may not be sufficient time for a particular service to contact the individual who is to be questioned, whether this be due to the time of the arrest, or because of other factors such as poor phone signal or staffing levels at the particular service.

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11 Legal Aid NSW, *Submission 8*, p. 4.

12 Commonwealth Director of Public Prosecutions, *Submission 3*, p. 2.

13 Legal Aid NSW, *Submission 8*, p. 10.

14 *Muldrock v R* (2011) 281 ALR 652, p. 661.

1.18 For section 23H of the Crimes Act to continue to provide suspects of Aboriginal or Torres Strait Islanders origin with added protections where they are engaging with police, all states and territories must have a 24-hour, seven day per week Aboriginal and Torres Strait Islander custody notification service. The Government's decision to offer three years of initial funding to support the establishment of these services in each jurisdiction (contingent on the introduction of funding mandating its use and an agreement to fund from that point on) is positive,<sup>15</sup> but these services need greater security of funding. Custody notification services are a vital lifeline for vulnerable Aboriginal and Torres Strait Islander individuals.

1.19 Australian Greens Senators also noted concerns about the existence of section 23H(8) of the Crimes Act, which states that an investigating official does not have to comply with the custody notification measures set out in subsections (1), (2) and (2B) 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.

1.20 Australian Greens Senators agree with the NSW Council of Civil Liberties, and the Aboriginal Legal Services of Western Australia and NSW/ACT, that subsection 23H(8) should be repealed.<sup>16</sup> Subsection eight is inconsistent with the purpose of section 23H, which is to afford additional protection to Aboriginal and Torres Strait Islander people.<sup>17</sup> It also relies on the subjective judgment of individual officials, who may misjudge a person's capacity because of cultural and language barriers, or cultural bias.<sup>18</sup>

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15 Attorney-General's Department, *Submission 11*, p. 6.

16 Aboriginal Legal Service (ALS) NSW/ACT, *Submission 6*; ALS WA, *Submission 2*; NSW Council of Civil Liberties, *Submission 4*.

17 ALS NSW/ACT, *Submission 6*, p. 3.

18 ALSWA, *Submission 2*, p. 6.