The Senate

# Legal and Constitutional Affairs Legislation Committee

## Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 [Provisions]

August 2017

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# Members of the committee

**Members**

Senator the Hon Ian Macdonald (LNP, QLD) (Chair)

Senator Louise Pratt (ALP, WA) (Deputy Chair)

Senator David Fawcett (LP, SA)

Senator Nick McKim (AG, TAS)

Senator Jane Hume (LP, VIC)

Senator Murray Watt (ALP, QLD)

**Secretariat**

Mr Timothy Watling, Committee Secretary

Ms Toni Matulick, Committee Secretary

Ms Charlotte Fletcher, Senior Research Officer

Ms Jo-Anne Holmes, Administrative Officer


Suite S1.61 Telephone: (02) 6277 3560

Parliament House Fax: (02) 6277 5794

CANBERRA ACT 2600 Email: legcon.sen@aph.gov.au

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# Recommendations

**Recommendation 1**

**2.19 The committee recommends that the Explanatory Memorandum be updated to include a more extensive analysis of the privacy implications of the proposed amendment to the *Australian Federal Police Act 1979*.**

**Recommendation 2**

**2.63 The committee recommends that the Explanatory Memorandum be updated to include a more extensive explanation of 'reasonable steps' in section 23H(1) of the *Crimes Act 1914*, including further examples of what taking 'reasonable steps' may entail in practice.**

**Recommendation 3**

**2.105 Subject to the previous recommendations the committee recommends that the Senate pass the bill.**

# Chapter 1

# Introduction

1.1 On 10 May 2017 the Senate referred the provisions of the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 8 August 2017.[1]

1.2 The Selection of Bills Committee recommended that the bill be referred to the committee, commenting that:

> This is an omnibus bill which contains a range of measures relating to Commonwealth criminal justice arrangements. The Bill would create new offences, increase penalties for certain offences, expand access to personal information and alter the procedural protections for Aboriginal and Torres Strait Islanders in the Crimes Act.
>
> Given the complexity of these areas and the capacity for this Bill to significantly affect the individuals' rights and freedoms, it would be appropriate to refer the Bill to committee for careful consideration.[2]

## Background and overview of the bill

1.3 This bill, consisting of eight schedules, seeks to amend the *Australian Federal Police Act 1979*, the *Crimes Act 1914*, and the *Criminal Code Act 1995* to:

- alter the functions of the Australia Federal Police;
- alter the custody notifications of investigating officials intending to question an Aboriginal or Torres Strait Islander person;
- create separate offence regimes for 'insiders' and 'outsiders' for the disclosure of information relating to 'controlled operations';
- double the maximum penalty for general dishonesty offences;
- remove an obsolete reference to the death penalty (which no longer exists at either a federal or state level);
- strengthen protections for vulnerable witnesses and complainants in Commonwealth criminal proceedings;
- authorise information collection, use and disclosure for the purposes of preventing, detecting, investigating and dealing with fraud or corruption against the commonwealth; and
- permit the New South Wales Law Enforcement Conduct Commission to use and disclose spent convictions.

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1 *Journals of the Senate*, No. 41, 11 May 2017, p. 1347.

2 Selection of Bills Committee, *Report No.5 of 2017*, 11 May 2017, p. 1 and appendices 4–5.

## Conduct of the inquiry

1.4 Details of this inquiry were advertised on the committee's website, including a call for submissions to be received by 23 June 2017.

1.5 The committee received 12 submissions, which are listed at appendix 1 of this report.

1.6 No public hearings were held.

## Financial implications of the proposed measures

1.7 The Explanatory Memorandum deals only with financial implications arising from schedule 7 to the bill: proposed fraud investigation measures. It explains that these measures will have a positive financial impact by helping to prevent fraud against the Commonwealth and increase recovery efforts:

> [F]rom 2012 to 2015 the Australian Institute of Criminology estimated there was over $1.2 billion in reported fraud, but only $50 million was recovered during that period. The Bill reduces the complexity of investigating or otherwise controlling fraud against the Commonwealth to help increase recoveries and prevent fraud occurring.[3]

## Compatibility with human rights

1.8 The Explanatory Memorandum addresses, in detail, the human rights implications of these proposed amendments, and concludes that each schedule is compatible with human rights.[4]

1.9 The Parliamentary Joint Committee on Human Rights (PCJHR) considered the bill in May 2017 and noted that it enlivens the right to privacy, right to life, and prohibition on torture or cruel, inhuman and degrading treatment and punishment.[5] The committee sought a response from the Minister for Justice in relation to the proportionality of the proposed measures, and this was reported on the following month.[6] The committee considered this response, and asked the Minister to provide further response in the form of providing Australian Federal Police Guidelines relating to information sharing in death penalty situations and offshore situations involving potential torture or cruel, inhuman or degrading treatment or punishment.[7] At the date of this report no such further response has been published.

## Structure of this report

1.10 This report consists of two chapters:

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3 Explanatory Memorandum, p. 4.

4 Explanatory Memorandum, pp. 8–24.

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

6 PJCHR, *Human rights scrutiny report*, Report No 5 of 2017, 14 June 2017, pp. 34–41.

7 PJCHR, *Human rights scrutiny report*, Report No 5 of 2017, 14 June 2017, p. 41.

- This chapter provides a brief background and overview of the bill, as well as the administrative details of the inquiry.
- Chapter 2 outlines the provisions of the bill in more detail, discusses the concerns raised by submitters, and sets out the committee's view.

## Acknowledgements

1.11 The committee thanks the submitters to this inquiry.

# Chapter 2

# Issues raised

2.1 This chapter outlines the proposed amendments contained within the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (the bill), discusses the issues raised by submitters, and outlines the committee view.

2.2 This chapter addresses the proposed amendments in the following order:

- *Australian Federal Police Act 1979* (AFP Act);
- *Criminal Code Act 1995* (Criminal Code Act); and
- *Crimes Act 1914* (Crimes Act).

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

2.3 Schedule 1 of the bill would amend sections 4(1) and 8(1) of the AFP Act to update the functions of the Australian Federal Police (AFP).

2.4 These amendments relate to the provision of 'police services' and 'police support services' by the AFP. 'Police services' include services for the prevention of crime and protection of persons from death or injury, and property from damage, whether arising from criminal acts of otherwise.[1] 'Police support services' mean services related to the provision of police services by an Australian or foreign law enforcement agency, or provision of services by an Australian or foreign intelligence, security or regulatory agency.[2]

2.5 Under the proposed amendments, the functions of the AFP would be updated to include assisting and cooperating with 'an international organisation' or 'a non-governmental organisation, in relation to acts, omissions, matters or things outside Australia' in the provision of police services or police support services. The term 'International organisation' would be defined in section 4(1).

2.6 The Explanatory Memorandum states that, as currently framed, section 8 does not clearly encompass the AFP's cooperation with international organisations and bodies including the International Criminal Court, Interpol, and International Committee of the Red Cross.[3] It advises that the proposed amendments will ensure that the Act reflects this international cooperation:

> International partnerships allow the AFP to meet operational challenges and threats, and progress Australia's national interests. The AFP's core work across all crime types is becoming increasing global and, as a result,

1 *Australian Federal Police Act 1979* (Cth), s. 4.

2 *Australian Federal Police Act 1979* (Cth), s. 4.

3 Explanatory Memorandum, p. 27.

> international cooperation is becoming more and more important to the AFP's operations.[4]

2.7 The South Australian Commissioner for Victims' Rights, Mr Michael O'Connell AM APM, commended the proposed amendment, submitting that it would help to ensure the AFP could continue to play a central role in 'exchanging and sharing information' and 'honouring victims' rights obligations'.[5] Mr O'Connell noted that the implementation of international victims' rights instruments require cooperation between authorities like the AFP and international police agencies and victim support organisations.[6] He also highlighted practical examples of instances where he had collaborated with police to assist Australian victims of crime overseas, as well as non-Australians who have been the victims of crime in Australia:

> For these and like victim assistance, I rely very much on the exchange of information from the Australian Federal Police and other agencies (for example, Department of Foreign Affairs and Trade, and Department of Immigration and Border Control). In order to respond in a timely and respectful (often compassionate) manner, it is essential that the information flow is unimpeded yet also respectful of victims' right to privacy…[7]

2.8 The Australian Human Rights Commission (AHRC), however, raised some human rights concerns about Australia's involvement in information-sharing which might lead an individual to be charged with an offence carrying a death sentence. The Commission noted that the abolition of the death penalty is a core human rights objective in Australia, and therefore any action by the AFP that makes it more likely that the death penalty will be imposed on a person is 'incongruous'.[8] It further argued that information-sharing leading to such an outcome would contravene Australia's international human rights commitments,[9] a view espoused by the United Nations Human Rights Committee in its 2009 report on Australia.[10] The AHRC highlighted that in the contexts of extradition and mutual assistance a request may be refused where the death penalty may be imposed on an individual, and argued that the lack of a similar restriction on AFP information-sharing represents an inconsistency which should be rectified.[11]

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4 Explanatory Memorandum, p. 27.

5 South Australian Commissioner for Victims' Rights, *Submission 9*, p. 2.

6 South Australian Commissioner for Victims' Rights, *Submission 9*, p. 2.

7 South Australian Commissioner for Victims' Rights, *Submission 9*, p. 2.

8 Australian Human Rights Commission (AHRC), *Submission 10*, p. 7.

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

10 United Nations Human Rights Committee, *Consideration of reports submitted by states parties under Article 40 of the International Covenant on Civil and Political Rights*, CCPR/C/AUS/CO/5, Ninety-Fifth Session, New York, 16 March to 3 April 2009 (7 May 2009), at [20].

11 AHRC, *Submission 10*, p. 8.

2.9 The AHRC argued that the bill should be amended to prevent any support in the investigation and prosecution of offences which may result in the imposition of a death penalty, or (in the alternative) at a minimum make such information-sharing conditional on an assurance from the requesting organisation that the death penalty will not be imposed, and a rigorous assessment concluding that the assurance is sufficient.[12] In making this alternative recommendation, the Commission noted that it did not regard reliance on diplomatic assurances to be sufficient where there are grounds to believe that a person would face a real risk of the death penalty, considering that the separation of powers would mean an assurance from the executive branch of government would not generally bind the judiciary.[13] The Commission also argued that these reservations also apply to circumstances where there are substantial grounds for believing that the sharing of information may lead to a person being subjected to torture or cruel, inhuman or degrading treatment.[14]

2.10 The Parliamentary Joint Committee on Human Rights raised similar concerns in relation to this proposed amendment in May 2017, and sought a response from the Minister for Justice.[15] The Minister argued that information and intelligence sharing with international organisations and NGOs for the purposes of this proposed new function will often not involve particular individuals, and so not raise death penalty or torture implications.[16] The Minister made reference to two sets of AFP guidelines dealing with death penalty and torture situations, but did not provide them. The PJCHR concluded that 'without knowing what the guidelines state it is not possible to conclude that they would provide adequate and effective protection for these rights', and requested copies of them.[17] At the date of this report the PJCHR is awaiting a response to this request.[18]

2.11 Mr Timothy Pilgrim PSM, Australian Information Commissioner and Australian Privacy Commissioner, outlined some technical concerns in relation to the drafting of the proposed amendments. Mr Pilgrim noted that for the proposed information-sharing to be permissible under the Australian Privacy Principles (APP), an exception to the general requirement that an agency should not use or disclose 'personal information' for a secondary purpose would need to be set out in 'clear and direct language'.[19] Mr Pilgrim submitted that, as currently drafted, it is unclear what kinds of personal information would be collected, used or disclosed under these

12 AHRC, *Submission 10*, p. 8.

13 AHRC, *Submission 10*, p. 9.

14 AHRC, *Submission 10*, p. 10.

15 Parliamentary Joint Committee on Human Rights (PJCHR), *Human rights scrutiny report*, Report No 4 of 2017, 9 May 2017, pp. 3–6.

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

17 PJCHR, *Human rights scrutiny report*, Report No 5 of 2017, 14 June 2017, p. 41.

18 PJCHR, *Index of bills and instruments considered by the committee as at 20 June 2017* (accessed 28 July 2017).

19 Office of the Australian Information Commissioner (OAIC), *Submission 5*, p. 2.

amendments, which NGOs would be captured by the new function, or what steps an AFP entity would have to take to protect personal information before it is disclosed overseas.[20]

2.12 Mr Pilgrim submitted that it is difficult to assess whether those impacts would be reasonable, necessary and proportionate to achieve the relevant policy objective, and recommended that more clear, specific and direct language be employed in the drafting of this schedule.[21] He recommended that a Privacy Impact Assessment (PIA) be completed in relation to these provisions, and that the establishment of administrative arrangements (such as memoranda of understanding) be considered in relation to the sharing of information overseas to help establish 'mutually agreeable standards'.[22] The AHRC echoed these concerns.[23]

2.13 In response, the Attorney-General's Department (AGD) highlighted the numerous safeguards which would regulate the sharing of information in this context, including internal AFP governance and procedures, and obligations under the *Privacy Act 1988* and the Australian Privacy Principles:

> 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.[24]

2.14 The department also explained that the AFP is considering whether additional memoranda of understanding or protocols should be introduced to ensure that shared information will be protected.[25]

2.15 The department also addressed the Commissioner's specific concerns relating to the definition of an NGO in this context, advising that the term will have its 'natural and ordinary meaning', and explaining that a definition would be unnecessary and could limit the AFP's ability to utilise this function on an ad hoc basis.[26]

***Committee view***

2.16 The proposed amendments to the AFP Act are timely and necessary. The AFP must be able to work effectively with international organisations, including being able

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20 OAIC, *Submission 5*, p. 3.

21 OAIC, *Submission 5*, p. 3.

22 OAIC, *Submission 5*, pp. 2–3.

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

24 Attorney-General's Department (AGD), *Submission 11*, p. 3.

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

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

to share information. These amendments clarify that this is already part of the AFPs core functions.

2.17 By their nature provisions setting out the functions of an organisation as large as the AFP may need to be drafted in a broad manner in order to allow the organisation to work in a flexible and responsive way. As the Explanatory Memorandum states, 'the AFP's core work across all crime types is becoming increasingly global'.[27] The AFP must have the flexibility to work with international partners of all kinds, and to respond swiftly to individual and unique cases.

2.18 The committee has carefully considered the comments made by Mr Pilgrim. In light of these comments, the committee agrees that the Explanatory Memorandum should be updated to include further detail about the kinds of personal information that would be collected, used or disclosed under these amendments, what kinds of NGOs would be captured by the new function (or perhaps, which types of NGOs would not be captured), and what steps an AFP entity would take to protect personal information before it is disclosed overseas. The committee also agrees that the establishment of administrative arrangements between the AFP and other nations or individual entities would be useful in managing the sharing of information, and is pleased that the AFP is currently considering this.

**Recommendation 1**

**2.19 The committee recommends that the Explanatory Memorandum be updated to include a more extensive analysis of the privacy implications of the proposed amendment to the *Australian Federal Police Act 1979*.**

2.20 The committee also notes the detailed comments from the AHRC regarding the sharing of information that may relate, or contribute, to a person being charged with an offence punishable by death. The Australian Government has a long-standing commitment to ending the death penalty. While this amendment will largely enshrine the international cooperation already taking place, this bill does represent an opportunity for Australia to further strengthen its opposition to the death penalty. The sharing of information by the AFP with international organisations and non-government organisations in the context of police services and police support services may involve offences which carry a death penalty, or involve countries with questionable human rights records.

2.21 The Committee acknowledges the issues raised by submitters regarding the potential implications of the amendments on the right to life, and the right to be free from torture and cruel, inhuman and degrading treatment. The Committee is, however, satisfied that sufficient oversight exists and that the proper consideration has been given to the human rights implications.

27 Explanatory Memorandum, p. 27.

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

2.22 Schedule 4 of the bill would double the maximum penalty for a breach of the general dishonesty offences contained in sections 135.1(1), (3), (5) and (7) of the Criminal Code Act from five years imprisonment to 10 years.

2.23 The Explanatory Memorandum explains that this amendment is designed to address inconsistencies between penalties for similar conduct contained elsewhere in the Code, and provide judges with the scope to address 'the full range of criminality that is most appropriately prosecuted under the general dishonesty offence'.[28]

2.24 The Commonwealth Director of Public Prosecutions (CDPP) expressed its strong support for this amendment,[29] noting that it would bring these maximum penalties into line with those for obtaining property by deception (section 134.1), obtaining financial advantage by deception (section 134.2), and the general dishonesty provision contained in the *Corporations Act 2001* (section 1041G).[30] The CDPP argued that the Code is structured such that substantive offences, and offences of conspiring to commit substantive offences, carry the same penalties, and it is anomalous that conspiring to commit an offence should carry a greater penalty than committing the offence.[31]

2.25 The CDPP explained that, in practice, where alleged criminal conduct constitutes both an offence of obtaining property or financial advantage by deception and an offence of general dishonesty, the appropriate course of action will ordinarily be to charge the individual with the offence of 'obtaining'.[32] However, they highlighted that sometimes a charge of obtaining property or financial advantage by deception will not be available, such as where a fraudulent scheme consists of a number of individual deceptions, or where the benefit in question was obtained via an omission.[33]

2.26 The CDPP proposed that, should this amendment proceed, prosecutors would be directed to lay charges of obtaining property or financial advantage by deception where appropriate, as the guidelines currently direct.[34]

2.27 However, the Law Council of Australia argued that the general dishonesty offences were intended to capture conduct which is less culpable than that covered by the other dishonesty offences, and the maximum penalties should reflect this.[35] The

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28 Explanatory Memorandum, p. 16.

29 Commonwealth Director of Public Prosecutions (CDPP), *Submission 3*, p. 1.

30 CDPP, *Submission 3*, p. 2.

31 CDPP, *Submission 3*, p. 3.

32 CDPP, *Submission 3*, p. 2.

33 CDPP, *Submission 3*, p. 2.

34 CDPP, *Submission 3*, p. 2–3.

35 Law Council of Australia, *Submission 7*, p. 4.

Council also pointed to the Explanatory Memorandum to an earlier bill to amend the Criminal Code, which explained that:

> Consistent with decisions such as that of the House of Lords in Scott [1975] AC 819 and Australian cases such as O'Donovan v Vereker (1987) 76 ALR 97 at 110 and Eade (1984) 14 A Crim R 186, the 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.[36]

2.28 The Law Council also cautioned that if multiple instances of alleged fraud are 'rolled up' into single general dishonesty offences, the charge could be difficult to defend because an accused may admit to some of the conduct and deny the remainder.[37]

2.29 In response, the CDPP explained that general dishonesty offences have a role to play in some instances of serious offending, although they are used more sparingly than deception charges.[38] The CDPP further argued that it is not envisaged that general dishonesty offences would be used as 'a vehicle to pursue a duplicitous, rolled-up charge', although repetitive conduct constituting an 'ongoing course of conduct' would fit within the scope of the charge.[39]

2.30 Legal Aid NSW expressed concern about these proposed amendments.[40] Drawing on statistics for prosecutions under sections 135.1(1) and (5), they argued that increasing the penalties for these offences would disproportionately and unfairly impact on vulnerable people being prosecuted for social security fraud.[41] Legal Aid explained that between April 2012 and March 2017, 93 individuals were prosecuted for offences under sections 135(1) and (5) either summarily or by indictment.[42] Forty-four of those prosecutions were for social security fraud, and 20 resulted in a sentence of imprisonment (none of which exceeded two years, and half of which were for less than one year).[43]

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36 *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth), Revised Explanatory Memorandum, p. 69, Law Council of Australia, *Submission 7*, p. 3.

37 Law Council of Australia, *Submission 7*, p. 4.

38 CDPP, *Supplementary Submission 3*, pp. 2–3.

39 CDPP, *Supplementary Submission 3*, p. 3.

40 *Submission 8*.

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

42 Legal Aid NSW, *Submission 8*, pp. 4–7.

43 Legal Aid NSW, *Submission 8*, pp. 4–7.

2.31 Legal Aid used these statistics to draw the conclusion that courts already have scope 'to address the full range of criminality that comes before them', and the amendments are unnecessary.[44] They also submitted that, in their experience, social security fraud prosecutions typically involve a 'vulnerable group of first offenders who have engaged in less complex offences involving overpayment', the majority of whom are women.[45] Legal Aid also noted that these considerations have been taken into account in sentencing decisions, including acknowledgement that offenders had not been spending the money they fraudulently obtained on luxury items but rather on basic family needs.[46] They submitted that, considering this prevalence of social security offences in prosecutions for general dishonesty offences:

> …a more appropriate response…would be one which emphasises early intervention and diversion so as to minimise a person's contact with the criminal justice system and the exacerbation of existing disadvantage and marginalisation.[47]

2.32 Legal Aid also highlighted precedent from the High Court of Australia in *Muldrock v The Queen* (2011) 244 CLR 120, in which the court found that an increase in the maximum penalty for an offence 'is an indication that sentences for that offence should be increased'.[48]

2.33 The CDPP responded to these arguments from Legal Aid, submitting that the amendments would not disproportionately impact people being prosecuted for social security fraud.[49] They highlighted the CDPP's *General charging policy in social security fraud matters*, which states that only more serious offending should proceed on indictment, and ordinarily the CDPP will charge more serious offenders with obtaining financial advantage by deception.[50] They explained that judges would retain the discretion to take circumstances of hardship into account, and would merely have greater latitude to address very serious frauds under these sections as amended.[51] They also cautioned that the statistics which Legal Aid had used to draw these conclusions should be used with care, because they reflect the prosecution handed down in relation to each prosecution.[52] That is, if an individual were prosecuted for multiple offences, the database would only show the sentence imposed on one of the charges (usually the highest individual sentence).

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44 Legal Aid NSW, *Submission 8*, p. 6.

45 Legal Aid NSW, *Submission 8*, p. 8.

46 Legal Aid NSW, *Submission 8*, p. 9.

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

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

49 CDPP, *Supplementary Submission 3*, p. 1.

50 CDPP, *Supplementary Submission 3*, p. 2.

51 CDPP, *Supplementary Submission 3*, p. 2.

52 CDPP, *Supplementary Submission 3*, p. 2.

### *Committee view*

2.34 The committee believes that amending the Criminal Code to double the maximum penalty for the general dishonesty offences will provide both prosecutors and sentencing judges the scope to address a much greater range of criminality, which would be most appropriately prosecuted under these offences.

2.35 The committee was convinced by the evidence from the CDPP explaining that these amendments would merely serve to expand the potential application of general dishonesty offences. As the CDPP explained, they do not intend to use these amendments in order to pursue 'duplicitous, rolled-up' charges, or to deviate from their *General charging policy in social security fraud matters*, which will remain in place.[53]

2.36 The committee does not believe that an increase in the available penalties will automatically lead to unfair outcomes for social security fraud offenders or any other section 135.1 offenders. As required, sentencing judges will refer to judicial precedent in sentencing all offenders in this area, including social security offenders, as well as considering all of the unique characteristics of the individual cases.

## Proposed amendments to the *Crimes Act 1914*

2.37 The bill seeks to make six amendments to the *Crimes Act 1914* (the Crimes Act).

### *Obligations of investigating officials*

2.38 Schedule 2 of the bill seeks to amend aspects of the Crimes Act in relation to the questioning of Aboriginal and Torres Strait Islander individuals.

2.39 In its current form, section 23H states that where an investigating official intends to question an arrestee or protected suspect who they believe to be Aboriginal or Torres Strait Islander they must (in some instances) 'immediately inform' that person that an Aboriginal legal aid organisation will be notified, and then 'notify such a representative accordingly'.[54]

2.40 In 2013, the Supreme Court of the Australian Capital Territory held that section 23H(1) did not require an investigating official to notify an Aboriginal legal assistance organisation that they intended to question an Aboriginal or Torres Strait Islander person before commencing that questioning.[55] The Explanatory Memorandum states that the amendment proposed in this bill is intended to address this judicial precedent. It advises that this finding was contrary to the intention of section 23H(1), which is to give effect to recommendation 224 of the Royal Commission into Aboriginal Deaths in Custody: 'to make it mandatory for an Aboriginal legal assistance organisation to be notified upon the arrest or detention of any Aboriginal or Torres Strait Islander'.[56]

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53 CDPP, *Supplementary Submission 3*, pp. 2–3.

54 *Crimes Act 1914* (Cth), s. 23H(1).

55 *R v CK* [2013] ACTSC 251.

56 Explanatory Memorandum, p. 9.

2.41 The bill seeks to amend section 23H(1) to require that, before an investigating official starts to question the person, they must notify the person that 'reasonable steps' will be taken to notify an Aboriginal legal assistance organisation of their arrest or status as a protected suspect, and then take those steps (before commencing the questioning). Item five of the bill would also add a new subsection, section 23H(1AB) to state that if such a representative is notified under subsection (1), the investigating official must not question the person until either the representative has communicated with the person, or two hours have elapsed since notification, whichever is earlier.[57]

2.42 The Explanatory Memorandum provides some guidance as to the meaning of 'reasonable steps' in this context:

> The term 'reasonable steps' is intended to clarify what is required by an investigating official in order to discharge their obligation to notify an Aboriginal legal assistance organisation under section 23H(1): reasonable steps, or reasonable attempts, to make contact with such an organisation. For example, this 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.[58]

2.43 The Explanatory Memorandum states that the requirement that an official must wait two hours for a response from a legal assistance organisation, will give the organisation 'a reasonable period of time within which to respond to the investigating official's notification'.[59]

2.44 Item 15 of the bill seeks to amend section 23WG, which deals with the provision of informed consent by Aboriginal and Torres Strait Islanders to forensic procedures. The proposed amendment, which is largely identical to the amendment proposed in relation to the commencement of questioning as outlined above, would require that before an officer asks a suspect to consent to a forensic procedure, they must inform a suspect that reasonable steps will be taken to notify a representative of a legal assistance organisation that the suspect is being asked to consent to a forensic procedure, and take reasonable steps to notify said representative.[60]

2.45 The bill also proposes to add a statement to clarify that the obligations imposed under subsection 1 do not limit, and are not limited by, any other obligations imposed, or rights conferred, by section 23H.

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57 Explanatory Memorandum, p. 28.

58 Explanatory Memorandum, p. 28.

59 Explanatory Memorandum, p. 28.

60 Explanatory Memorandum, p. 31.

2.46 The bill also seeks to repeal section 23J, which requires that the Minister establish and update a list of interview friends and interpreters to help Aboriginal and Torres Strait Islanders who are being investigated for Commonwealth offences. The Explanatory Memorandum states that the lists quickly become outdated and are generally not relied on.[61] Item 10 of the bill would amend section 23H(9) to reflect that decision, and re-define 'interview friend' to mean a relative or other person chosen by the person to be questioned, a legal practitioner acting for that person, or a representative of an Aboriginal legal assistance organisation in the State or Territory in which the person is located.

2.47 The bill seeks to replace the definition of an 'Aboriginal legal aid organisation' with the new description 'Aboriginal legal assistance organisation', and define this to mean 'an organisation that is funded by the Commonwealth, a State or a Territory to provide legal assistance to Aboriginal persons and Torres Strait Islanders'. The Explanatory Memorandum advises that this definition:

> …is to ensure that, in the absence of a list maintained by the Minister under section 23J, investigating officials consult an organisation that can provide culturally sensitive and appropriate services to Aboriginal persons and Torres Strait Islanders.[62]

*Views from submitters*

2.48 The committee heard a range of concerns from submitters, particularly specialist Aboriginal and Torres Strait Islander legal services, as to the potential impacts of these proposed amendments. In large part, submitters who did address this proposed amendment expressed concern that:

- the term 'reasonable steps' is vague;
- the proposed amendment goes beyond addressing the legal outcome resulting from the decision in *R v CK* [2013] ACTSC 251; and
- subsection 23H(8) permits an investigating official to bypass the notification obligations outlined in section 23H, and should be repealed.

2.49 The Aboriginal Legal Service of Western Australia Limited (ALSWA) expressed support for the proposed amendment to clarify that an investigating official must notify an Aboriginal legal assistance organisation before beginning to question the person in question.[63] It did, however, submit that the term 'reasonable steps' would not give investigating officials sufficient guidance in terms of their obligations:

> Some officials might consider that sending an email or a facsimile out of office hours is sufficient notification; however, this is highly unlikely to result in effective notification.[64]

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61 Explanatory Memorandum, p. 30.

62 Explanatory Memorandum, p. 27.

63 Aboriginal Legal Service of Western Australia Limited (ALSWA), *Submission 2*, p. 3.

64 ALSWA, *Submission 2*, p. 4.

2.50 ALS NSW/ACT echoed this concern, arguing that the ambiguity of the term 'reasonable steps' would likely create 'unnecessary complexity' for investigating officials attempting to notify the relevant organisation.[65]

2.51 ALSWA suggested that the proposed section 23H(1AB) should be amended to specify that an investigating official must not commence questioning a person until the representative of an Aboriginal legal assistance organisation has communicated with that person, or two hours have passed since the representative was notified, whichever is earlier.[66] It did note, however, that if the legislation required officials to effect 'actual notification' to a representative 'without exception', this would require additional funding to enable those organisations to operate a 24 hour 7 day custody notification service.[67]

2.52 The NSW Council for Civil Liberties (CCL) argued that the proposed amendments constitute 'an unacceptable interference with the procedural and fair trial rights of some of the most vulnerable people within the criminal justice system'.[68] Like the ALSWA, the Council argued that it could be very easy for a legal assistance organisation to be uncontactable, whether it is due to the timing of the arrest, the absence of a custody notification service, poor phone reception in rural and regional areas, or a late night phone line which happens to be unmanned at that time.[69]

2.53 CCL argued that the model used by the NSW Custody Notification Service is preferable, largely because the relevant state legislation is silent on the amount of time which may elapse after reaching out to a legal service.[70] CCL highlighted that in NSW, common law has determined that 'police must defer an interview until such time as a lawyer from an Aboriginal legal assistance organisation can be contacted'.[71] The Council submitted that the NSW legislative scheme can be linked to the low levels of Aboriginal deaths in custody in the state, despite it having one of the highest per capita rates of Aboriginal people in police custody.[72] The Council further argued that these rules should be extended to apply to individuals who have been taken into protective police custody, including for mental health related reasons.[73]

2.54 The AGD reiterated that these amendments are designed to clarify the custody notification obligations incumbent on investigating officials. They explained that, while the intention of the legislation is that an organisation is notified in every

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65 Aboriginal Legal Service (NSW/ACT) Limited, (ALS NSW/ACT), *Submission 6*, p. 2.

66 ALSWA, *Submission 2*, p. 4.

67 ALSWA, *Submission 2*, p. 4.

68 NSW Council for Civil Liberties (CCL), *Submission 4*, p. 4.

69 CCL, *Submission 4*, p. 4.

70 CCL, *Submission 4*, pp. 4–5.

71 *Campbell and 4 Ors v Director of Public Prosecutions (NSW)* [2008] NSWSC 1284.

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

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

instance, this 'is not always possible or realistic'.[74] The department argued that the inclusion of the phrase 'reasonable steps' clarifies that investigating official are not expected to call an organisation repeatedly until contact is made, even where there has been no response or return phone call.[75] The department disagreed that the phrase is vague, and argued that investigating officials are neither required nor permitted to hold an Aboriginal or Torres Strait Islander person in custody indefinitely if an Aboriginal legal assistance organisation does not get back to them.[76] The department also highlighted recent developments in the funding of custody notification services in each state and territory.[77]

2.55 Several submitters raised concerns about the existence of section 23H(8), which states:

> 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.[78]

2.56 CCL argued that this provision creates practical difficulties because it relies on the subjective judgement of individual investigating officials, and may render their assessment open to legal challenge at a later time. It recommended that this subsection be repealed.[79] ALSWA submitted that it should be repealed because of its reliance on the subjective views of the investigating official which are 'likely to be open to misjudgement and bias'.[80] They highlighted that cultural and language barriers could affect an official's assessment of a person, if that official lacked cultural awareness:

> [A] person may state that they completed Year 10 and provide 'yes' or 'no' answers to various questions posed by the official (eg, 'Do you understand the caution?'). This will not necessarily be any indication of the person's education competence nor their understanding of the process. It is preferable that officials are not required to make individual assessments about a person's capacity to understand the process.[81]

2.57 ALS NSW/ACT agreed with this view, arguing that section 23H(8) is inconsistent with the purpose of section 23H: 'to afford Aboriginal and Torres Strait Islander people, as a whole, additional protection through a custody notification

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

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

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

77 AGD, *Submission 11*, p. 6.

78 *Crimes Act 1914* (Cth).

79 CCL, *Submission 4*, p. 6.

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

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

service'.[82] They likewise submitted that an Aboriginal legal assistance organisation should be notified every time an Aboriginal or Torres Strait Islander person is taken into custody.[83]

2.58 In response, the department explained that section 23H(8) is used sparingly, but where utilised it enables police to respect the wishes of individuals who 'for reasons of reputation and privacy' do not want to draw attention to their arrest.[84]

*Committee view*

2.59 The proposed amendments to the Crimes Act relating to the questioning of Aboriginal and Torres Strait Islanders by investigating officials may have a significant practical impact.

2.60 The proposed amendments would clarify that section 23H(1) involves a requirement to inform an Aboriginal or Torres Strait Islander person that reasonable steps will be taken to notify an Aboriginal legal assistance organisation of their arrest or status as a protected suspect, and then take those reasonable steps will be taken before questioning commences. The committee regards that the phrase 'must before starting to question the person' is very clear, and will sufficiently address the legal precedent established in *R v CK* [2013] ACTSC 251, in which the court found that section 23H(1) did not require an official to take such steps before commencing questioning. The committee believes that, in this respect, this amendment will ensure that section 23H ensure that the disadvantages Aboriginal and Torres Strait Islander persons can face when coming in contact with the criminal justice system continue to be recognised and addressed.

2.61 However, the committee notes that the proposed amendments go further than merely addressing this legislative uncertainty, and seek to amend the substance of the notification process itself. The bill proposes that an investigating official should take 'reasonable steps' to notify an Aboriginal legal assistance organisation representative, but does not define that term. It states only that if an official does notify such a representative, they must not commence questioning until either the representative has communicated with the person or two hours have passed since the time of 'notification', whichever is earlier. The Explanatory Memorandum states that 'reasonable steps' could include leaving a voice message on a custody notification telephone service. The department's circular explanation of the term ('"reasonable steps" means investigating officials must take all reasonable steps to make contact with an [organisation]')[85] does little to provide further clarity.

2.62 The committee notes the concerns raised by submitters commenting on the importance of achieving 'effective notification' of a legal assistance organisation,[86] and

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

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

84 AGD, *Submission 11*, p. 6.

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

86 ALSWA, *Submission 2*, p. 4.

highlighting the factors which could hinder this (including the timing of the arrest, the absence of a dedicated custody notification phone line, or poor phone reception in remote areas).[87] The committee agrees that the phrase 'reasonable steps' in this context, and as described in the Explanatory Memorandum, is quite broad, and would benefit from a more detailed analysis of the practicalities of taking steps to notify an Aboriginal legal assistance organisation, including in challenging remote and regional locations. This would also provide the opportunity to expand on the policy rationale behind this amendment, and outline the particular challenges which have become apparent under current notification schemes.

**Recommendation 2**

**2.63 The committee recommends that the Explanatory Memorandum be updated to include a more extensive explanation of 'reasonable steps' in section 23H(1) of the *Crimes Act 1914*, including further examples of what taking 'reasonable steps' may entail in practice.**

***Controlled operation disclosure***

2.64 Schedule 3 of the bill seeks to amend aspects of the Crimes Act relating to 'controlled operations'. A 'controlled operation' is a law enforcement operation which is carried out for the purpose of obtaining evidence that may lead to the prosecution of a person for a serious Commonwealth offence, or State offence with a federal aspect.[88] The Explanatory Memorandum states that these operations are a valuable tool for the investigation of organised crime and corruption because they enable law enforcement officers to infiltrate criminal organisations and target 'serious and systemic corruption'.[89]

2.65 As the law currently stands, a person who discloses information about a controlled operation may be guilty of an offence punishable by 2 years imprisonment.[90] A person who discloses such information, and the disclosure will endanger the health or safety or any person or prejudice the effective conduct of a controlled operation, or the person intended the disclosure to have such an effect, may be guilty of a more serious offence punishable by imprisonment for 10 years.[91]

2.66 Schedule 3 seeks to repeal these two offences and replace them with two disclosure offence regimes: one for 'insiders' (or individuals who obtained knowledge

87 CCL, *Submission 4*, p. 4.

88 *Crimes Act 1914* (Cth), s. 15GD.

89 Explanatory Memorandum, p. 31.

90 *Crimes Act 1914* (Cth), s. 15HK.

91 *Crimes Act 1914* (Cth), s. 15HL.

about the controlled operation in their capacity as an 'entrusted person'),[92] and another for everyone else (or 'outsiders').[93]

2.67 The Explanatory Memorandum also notes that the amendments will mirror amendments made to section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act), which implemented recommendations made by the Independent National Security Legislation Monitor on the impact of that section on journalists.[94] It also states that the higher threshold for prosecuting outsiders for an offence reflect 'the higher standard of conduct that insiders should be held to', and greater risk to which entrusted persons may potentially be exposed should information about a controlled operation be disclosed.[95]

2.68 An addendum to the Explanatory Memorandum clarifies that the proposed new offences would only apply to the disclosure of details relating to a Commonwealth controlled operation, and would not encompass operations authorised under state and territory legislation (including cross-border controlled operations or local controlled operations).[96] The addendum further explains that any state or territory disclosure offence law which would purport to capture the conduct of an individual who would otherwise be protected under this new Commonwealth offence regime would be inconsistent, and therefore be excluded by virtue of sections 109 or 122 of the Constitution.[97]

2.69 Under section15HK(1), an entrusted person who discloses information about a controlled operation, which came to their knowledge or into their possession in their capacity as an entrusted person, would commit an offence punishable by imprisonment for two years. An entrusted person would commit a more serious 'aggravated' disclosure offence if they were to disclose information about a controlled operation, which came to the knowledge or into the possession of that person in their capacity as an entrusted person, with the intention of endangering the health or safety of any person or prejudicing the effective conduct of a controlled operation, or where the disclosure would endanger the health or safety of any person or prejudice the effective conduct of a controlled operation. This more serious offence would carry a penalty of ten years imprisonment.

2.70 Under section 15HK(1D), an outsider would commit an offence if they disclosed information about a controlled operation, and the disclosure would endanger the health or safety or any person, or prejudice the effective conduct of a controlled operation. They may commit the more serious aggravated offence if the outsider

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92 'Entrusted person' would be defined in section 15GC of the *Crimes Act 1914* (Cth) to mean a participant in a controlled operation, as well as a number of other law enforcement officers and staff members.

93 Explanatory Memorandum, p. 14.

94 Explanatory Memorandum, p. 32.

95 Explanatory Memorandum, p. 14.

96 Explanatory Memorandum, Addendum, p. 1.

97 Explanatory Memorandum, Addendum, p. 1.

intended to endanger the health or safety of any person, or prejudice the effective conduct of the controlled operation, or knew that the disclosure could have this result. These two new offences would carry the same penalties as above, being imprisonment for two and ten years respectively.

2.71 The bill would also insert an exception to the 'outsider' offence regime. The two 'outsider' offence provisions would not apply to a person who could prove that the information in question had already been published and they were not themselves involved in that publication.

2.72 The committee received limited feedback in relation to these proposed amendments. The Law Council of Australia expressed its support owing to their consistency with the ASIO Act, and because they reflect the Australian Law Reform Commission's recommendation that secrecy offences including the controlled operations offences be reviewed.[98] The Council described the proposed new offences as 'a more proportionate response' to the danger of controlled operations, and the safety of participants being comprised because of a disclosure.[99]

*Committee view*

2.73 In the committee's view, the creation of two controlled operation offence regimes for insiders and outsiders strikes an appropriate balance between preserving the integrity of controlled offences, permitting the disclosure of some information relating to controlled operations by outsiders, and holding insiders to a high standard of accountability.

2.74 The additional element to the outsiders offence (that the disclosure will endanger the health or safety of any person, or prejudice the effective conduct of an operation) will protect individuals who disclosure information about controlled operations for legitimate purposes, for example a journalist writing about a police operation. By contrast, the absence of this extra element in the insiders offence reflects the level of accountability to which entrusted persons should be held.

2.75 The committee also notes that these amendments reflect those changes to section 35P of the ASIO Act, which in turn implemented recommendations by the Independent National Security Legislation Monitor in relation to journalists.

***Protecting vulnerable persons***

2.76 Schedule 6 of the bill seeks to amend section 15YR of the Crimes Act, which relates to the publication of information that identifies a child witness or vulnerable adult complainant.

2.77 Under section 15YR it is an offence to publish any matter (without the leave of the court) which identifies or is likely to identify a vulnerable person (other than a defendant) in relation to a proceeding. This does not include an official publication in the course of the proceedings, or a document prepared for use in particular legal

98 Law Council of Australia, *Submission 7*, p. 3.

99 Law Council of Australia, *Submission 7*, p. 3.

proceedings.[100] A person can apply for leave from the court to publish such information. In making a decision, the court must have regard to any trauma to, or damage to the reputation of, a vulnerable person that the publication could cause, and consider whether the purpose of the publication would be to supply transcripts of the proceedings to persons with a genuine interest in the proceedings, or for genuine research purposes.[101]

2.78 The Explanatory Memorandum notes that there is currently no requirement, under section 15YR, for parties to the relevant proceedings to be notified that an application to publish information about the case has been made, or for those parties to be notified of the judge's subsequent decision.[102] It explains that as a result, there is a risk that parties do not have the opportunity to provide submissions and evidence to the court on the impact of such a decision to permit disclosure, especially where an application for disclosure is made years after the original proceedings concluded.[103]

2.79 The bill provides further guidance in relation to applications for leave to publish information of this nature under section 15YR. The proposed additions to section 15YR would require that:

- a person who applies for leave must take reasonable steps to give written notice of the application to the prosecutor, each defendant and each party to the proceeding (or their parent, guardian or legal representative if a relevant party is a child);
- such written notice must be given no later than three business days before the day the application is to be heard, and include a copy of the application; and
- the application for leave must not be determined unless the court is satisfied that the applicant has taken all reasonable steps in relation to the above, and has considered such submissions and other evidence as it thinks necessary for determining the application.

2.80 The Explanatory Memorandum states that this amendment will 'promote procedural fairness and better protect vulnerable persons in criminal proceedings', and help to ensure that they have the change to make submissions in relation to applications which 'may significantly affect their privacy and other interests'.[104] It also explains that the amendments will 'give the court confidence that they are making decisions with full regard to the trauma and reputational damage that may result from publication, and other relevant evidence'.[105]

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100 *Crimes Act 1914*, s. 15YR(2).

101 *Crimes Act 1914*, ss. 15YR(3)–(6).

102 Explanatory Memorandum, p. 18.

103 Explanatory Memorandum, p. 18.

104 Explanatory Memorandum, p. 18.

105 Explanatory Memorandum, p. 18.

2.81 The South Australian Commissioner for Victims' Rights, Mr Michael O'Connell, described this proposed amendment as 'vital reform', and highlighted the need for the parliament to ensure that the physical and psychological integrity of victims is protected in all stages of the criminal justice system.[106] Mr O'Connell also provided a number of case studies to illustrate the need for further reforms to other elements of the trial process (such as the ability for a defendant to subpoena documents relating to the plaintiff without the plaintiff's knowledge).[107]

2.82 Judge Graeme Henson AM, Chief Magistrate of the Local Court of New South Wales (NSW), noted the practical difficulties which third party applicants may face in attempting to locate and notify a vulnerable person of an application.[108] He submitted that to achieve the stated protecting purpose of the proposed amendment, it would be preferable if the legislation (or subordinate legislation) permitted a more effective method of notice:

> One option would be for the written notice to be given to the prosecutor, who is required to ensure that a copy is provided to the vulnerable person (for instance, see s 299C *Criminal Procedure Act 1986* (NSW), which concerns the notification of an application for leave to seek the production of counselling documents relating to a complainant in sexual assault proceedings).[109]

2.83 In response, the department explained that that, where an application is being made years after a matter was heard, the prosecutor would not necessarily be in a better position to locate a vulnerable person than a third party.[110] It also highlighted that, setting aside these practical considerations, attempting to locate the vulnerable person is beyond the powers and functions of the CDPP.[111]

*Committee view*

2.84 The committee believes that this amendment would help to better protect children and vulnerable adult complainants, even after some time has passed since a court matter has concluded. It would ensure that the privacy and safety of vulnerable victims of crime and child witnesses is given priority.

2.85 The committee believes that the amendment is drafted clearly, and would provide applicants with a clear understanding of their obligation to give written notice of the application to relevant parties. The involvement of the prosecutor, defendant/s and other parties would maximise the chances that the vulnerable person can be located and advised in a timely manner. The committee notes Judge Henson's suggestion that a prosecutor be required to ensure that a copy of the order is provided

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106 South Australian Commissioner for Victims' Rights, *Submission 9*, p. 3.

107 South Australian Commissioner for Victims' Rights, *Submission 9*, p. 4.

108 *Submission 1*, pp. 1–2.

109 *Submission 1*, p. 2.

110 AGD, *Submission 11*, p. 7.

111 AGD, *Submission 11*, p. 8.

to a vulnerable person, however the committee believes that this would place too great a burden on the prosecutor. The committee also notes that, as the department submitted, if an application were to be made years after a matter concluded the prosecutor may not be in a greater position to notify a vulnerable complainant.

2.86 The role of the court in determining an application for leave in these matters would also serve as a safeguard in protecting the interests of the vulnerable person. The court would be required to determine that reasonable steps had in fact been taken to give the vulnerable person notice of the application, in order to determine the application itself.

***Personal information and integrity purposes***

2.87 Schedule 7 of the bill seeks to add a new Part to the Crimes Act (Part VIID), which would permit the collection, use and disclosure of personal information for the purposes of preventing, detecting, investigating or dealing with fraud or corruption against the Commonwealth.

2.88 Currently, the Commonwealth Fraud Control Framework requires individual Commonwealth entities to manage fraud matters, however the *Privacy Act 1988* (Cth) generally restricts the sharing of personal information about criminal matters to law enforcement agencies.[112] The Explanatory Memorandum states that the proposed amendments seek to address this limitation, and 'reflect the reality that most fraud and corruption matters are dealt with by the agency where they occur'.[113] It provides the following case study to illustrate the difficulties this can create in proving and prosecuting fraud:

> [W]hen Commonwealth Agency A is investigating a fraud by Person X against it and seeks personal information of Person X from Entity B, Entity B cannot pass the information to Commonwealth Agency A as the fraud does not relate to the activities or function of Entity B. Consequently, many instances of fraud or corruption against the Commonwealth are not fully investigated or resolved, leaving to a significant cost to the Commonwealth.[114]

2.89 The amendment seeks to insert three new sections which would permit the collection of data for 'integrity purposes', meaning the purpose of preventing, detecting, investigating or dealing with any of the following:

- serious misconduct by a public official, or Commonwealth company officer or employee, or *Privacy Act 1988* agency employee or agent;
- conduct that may have the purpose or effect of inducing such serious misconduct;

112 Explanatory Memorandum, pp. 20–21.

113 Explanatory Memorandum, p. 21.

114 Explanatory Memorandum, p. 41.

- fraud that has or may have a substantial adverse impact on the Commonwealth or a 'target entity' (being a *Privacy Act 1988* agency or wholly-owned Commonwealth company); or
- an offence against Chapter 7 of the *Criminal Code* (which relates to the proper administration of Government).

2.90 Proposed section 86C would permit a target entity to collect 'sensitive information' for an integrity purpose where it is reasonably necessary for one or more of the entity's functions or activities.[115]

2.91 The Explanatory Memorandum provides a further case study to explain how these amendments would enhance the ability of Commonwealth agencies to combat fraud:

> [I]f Person X defrauds a program administered by Commonwealth Agency A, [section 86C] authorises Commonwealth Agency A to collect sensitive information on Person X for the purposes of investigating that fraud. However, if Person X defrauds a program administered by Commonwealth Agency B that does not relate to the functions of Commonwealth Agency A, this section could not authorise Agency A to collect sensitive information about Person X. If Commonwealth Agency A sought to collect sensitive information on Person X for one of its activities but it was not for an integrity purpose, Commonwealth Agency A would not be able to use this Part to collect sensitive information.[116]

2.92 Section 86D would permit a target entity to use 'personal information' for an integrity purpose relating to the entity.[117]

2.93 Section 86E 'enables personal information to be disclosed to a target entity for an integrity purpose related to that entity'.[118] Subsection 1 explains that section 86E would apply if a law limits disclosure of some or all personal information by a person, body or authority unless otherwise authorised by a law of the Commonwealth. Subsection 2 provides the authority to disclose personal information by permitting a person, body or authority to disclose 'personal information' to a target entity for an integrity purpose, if that person, body or authority reasonably believes that personal information is related to one or more of the target entity's functions or activities. Subsection 3 limits the authority to make such a disclosure to a person who is authorised to make such disclosures for integrity purposes. It also expressly excludes

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115 'Sensitive information' is defined in section 6 of the *Privacy Act 1988* (Cth), and includes information about an individual's political opinion, religious beliefs and affiliations, membership of a trade union, sexual orientation or practices, criminal record, health and genetic information and biometric templates and information.

116 Explanatory Memorandum, p. 44.

117 'Personal information' is defined in section 6 of the *Privacy Act 1988* (Cth), to mean information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not, and whether the information or opinion is recorded in a material form of not.

118 Explanatory Memorandum, p. 45.

the AFP from these proposed arrangements, as it has its own information sharing arrangements.[119]

2.94 The Explanatory Memorandum explains that the impact on privacy of the proposed amendments on privacy is minimised by facilitating information sharing, not compelling the disclosure of personal information.[120] It also highlights the safeguards included in the amendments, including limitations on the bodies which can collect, use and receive personal information for integrity purposes, a requirement that the transfer of such information can only occur through authorised officials, the fact that the amendments do not override or impact on other related laws, and the potential publication of guidelines to assist entities to understand how information sharing is intended to occur.[121]

2.95 The Explanatory Memorandum also notes that a Privacy Impact Assessment has been conducted in relation to Schedule 7.[122]

2.96 Legal Aid NSW submitted that there is insufficient explanation for why it is necessary to collect, use and disclose 'sensitive information' for the purposes of combatting fraud and corruption.[123] Legal Aid also highlighted the existence of exemptions to the APP where entities suspect that an unlawful activity, or serious misconduct has been, is being, or may be engaged in, and the possibility of otherwise obtaining a warrant to access and use information for investigation and law enforcement purposes.[124]

2.97 Mr Timothy Pilgrim noted that the APPs do not permit the disclosure of personal information to non-law enforcement agencies investigating fraud.[125] He explained that the proposed amendments will, therefore, impact on privacy by authorising disclosure in these situations, and stated that any law which invokes exceptions to the APP 'should be drafted as narrowly as possible and be a reasonable, necessary and proportionate response to meeting the specific policy objectives of the Bill'.[126] He encouraged the department to publish the PIA which is referred to in the Explanatory Memorandum, and to update it as necessary.[127]

2.98 The Commissioner also commended the proposed inclusion of section 86G, which permits the publication of Guidelines approved by the Information

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119 Explanatory Memorandum, p. 46.

120 Explanatory Memorandum, p. 21.

121 Explanatory Memorandum, pp. 21–22.

122 Explanatory Memorandum, p. 20.

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

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

125 OAIC, *Submission 5*, p. 4.

126 OAIC, *Submission 5*, p. 4.

127 OAIC, *Submission 5*, p. 4.

Commissioner on the operation of the new Part.[128] He explained that clear, rigorous and practical guidelines will help agencies to understand their obligations:

> I would expect the guidelines to outline steps that should be taken to ensure a robust privacy management framework, and to seek to build in safeguards and embed a culture of privacy that enables compliance. The guidelines should also outline how agencies will ensure transparency in relation to the way that they collect, use and disclose their employees' personal information.[129]

2.99 The CDPP expressed its support for this proposed amendment, arguing that it will enhance the means available to the Commonwealth as a whole to combat fraud and corruption.[130] The Law Council of Australia likewise expressed its support for measures designed to combat corruption and fraud, provided those measures are necessary and proportionate.[131]

*Committee view*

2.2 In the committee's view, these proposed amendments are a logical response to the practical reality that most cases of fraud and corruption are dealt with within the agency where they occur, including non-law enforcement agencies. Clearly, the personal information framework within the Crimes Act hampers the ability of some Commonwealth agencies to investigate allegations of fraud or corruption against the Commonwealth, and this is rightfully being remedied.

2.3 The committee noted Mr Pilgrim's submission that any amendment which will impact on the right to privacy should be drafted as narrowly as possible, and be a reasonable, necessary and proportionate response to meeting the policy objective.[132] The committee believes that these amendments meet this description, as they will enable agencies to share information to feasibly investigate serious criminal allegations, while not compelling the disclosure of personal information.

2.4 The committee also notes the many safeguards which are included in the amendments, including limitations on the types of agencies which can collect information, and the officials who can request that information, and the proposed publication of guidelines dealing with this information sharing. The committee also notes that the department has completed a PIA in relation to these amendments, and would welcome its publication, if appropriate.

***Exemptions to the spent conviction scheme***

2.100 Schedule 8 of the bill proposes to amend section 85ZL of the Crimes Act to include the Law Enforcement Conduct Commission of New South Wales

128 OAIC, *Submission 5*, p. 5.

129 OAIC, *Submission 5*, p. 5.

130 CDPP, *Submission 3*, p. 3.

131 Law Council of Australia, *Submission 7*, p. 5.

132 OAIC, *Submission 5*, p. 4.

(LECCNSW) under the definition of a 'law enforcement agency', enabling the LECCNSW to use and disclose spent convictions pursuant to sections 85ZZH and 85ZZJ of the Act.

2.101 The LECCNSW was established under the *Law Enforcement Conduct Commission Act 2016* (NSW) to replace the NSW Police Integrity Commission, the Police Division of the Office of the Ombudsman, and the Inspector of the Crime Commission. The Explanatory Memorandum states that by enabling the LECCNSW to access information about spent convictions, the agency will be able to take this information into account in assessing prospective employees, disclosing the information to other law enforcement agencies, and using this information to investigate or prevent crimes.[133] It highlights the primary function of the LECCNSW—to identify and investigate serious misconduct and corruption by law enforcement officers and maladministration by law enforcement agencies—as a reason for permitting the use and disclosure of spent convictions. It explains that, because LECC officers 'will have access to highly sensitive police and crime commission information and intelligence' comprehensive vetting is essential.[134]

*Committee view*

2.102 The committee did not receive any comment in relation to this proposed amendment. The committee believes that the LECCNSW should be permitted to access information about spent convictions, considering the functions of the organisation and the high level of trust to be placed in its employees.

***An obsolete reference to the death penalty***

2.103 Schedule 5 of the bill would remove a reference in section 20C(2) of the Crimes Act to offences which are punishable by death. The Explanatory Memorandum explains that, as the death penalty has been abolished in Australia at both a Federal and State and Territory level, the reference has no utility.[135]

2.104 The committee notes that this is an uncontroversial amendment, which will have no practical impact.

133 Explanatory Memorandum, p. 23.

134 Explanatory Memorandum, p. 23.

135 Explanatory Memorandum, p. 17.

**Recommendation 3**

**2.105 Subject to the previous recommendations the committee recommends that the Senate pass the bill.**

**Senator the Hon Ian Macdonald**
**Chair**

# 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**

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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).

# 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.[1] The Parliamentary Joint Committee on Human Rights (PJCHR) raised these same concerns earlier this year,[2] 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.[3] 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,[4] the Australian Government describes global abolition of the death penalty as one of Australia's core human rights objectives.[5] 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.[6]

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.[7] 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.[8]

**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.[9] 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.[10]

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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.[11]

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.[12]

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.[13] 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.[14]

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,[15] 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.[16] Subsection eight is inconsistent with the purpose of section 23H, which is to afford additional protection to Aboriginal and Torres Strait Islander people.[17] 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.[18]

**Senator Nick McKim**
**Australian Greens**

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.

# Appendix 1

## Public submissions

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| 1 | Judge Graeme Henson AM, Local Court of New South Wales |
| 2 | Aboriginal Legal Service of Western Australia Limited |
| 3 | Commonwealth Director of Public Prosecutions |
| 4 | NSW Council for Civil Liberties |
| 5 | Office of the Australian Information Commissioner |
| 6 | Aboriginal Legal Service (NSW/ACT) Ltd |
| 7 | Law Council of Australia |
| 8 | Legal Aid NSW |
| 9 | Commissioner for Victims' Rights (SA) |
| 10 | Australian Human Rights Commission |
| 11 | Attorney-General's Department |
| 12 | National Aboriginal and Torres Strait Islander Legal Services |