



Law Council
OF AUSTRALIA

Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016

Senate Legal and Constitutional Affairs Committee

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2017 Executive as at 1 January 2017 are:

- Ms Fiona McLeod SC, President
- Mr Morry Bailes, President-Elect
- Mr Arthur Moses SC, Treasurer
- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgment

The Law Council is grateful for the assistance of its National Criminal Law Committee and National Human Rights Committee Death Penalty Sub-Committee in the preparation of this submission.

Executive Summary

1. Thank for the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Committee's (**the Committee**) Inquiry into the Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016 (**the Bill**).
2. The Bill would amend a range of Commonwealth criminal justice legislation, including in relation to enhancing Australia's international crime cooperation arrangements, strengthening the anti-money laundering and counter-terrorism financing regime and the Commonwealth's anti-human trafficking and slavery regime.
3. The Law Council's submission focuses on the following issues:
 - Schedule 1 death penalty implications;
 - Schedule 2 proceeds of crime;
 - Schedule 4 amendments to the *Foreign Evidence Act 1994* (**FE Act**);
 - Schedule 5 protection of child complainants through amendments to the *Crimes Act 1914* (Cth) (**Crimes Act**);
 - Schedule 5 Schedule 5 amendments to the *Crimes Legislation Amendment (Law Enforcement Integrity, Vulnerable Witness Protection and Other Measures) Act 2013* (Cth) (**Vulnerable Witness Act**);
 - Schedule 6 definition of 'debt bondage';
 - Schedule 6 relocation of debt bondage as a slavery-like offence; and
 - Schedule 6 amendments regarding slavery like offences and relevant evidence.
4. The Law Council supports the amendments in Schedules 5 and 6 of the Bill as a means to strengthening Australia's criminal justice legislative response to human trafficking, slavery and slavery-like offences. Amendments in relation to foreign evidence do not appear problematic.
5. However, the Law Council is concerned that applications can still be made for information from the full range of coercive processes referred to by this amending Bill for offences which carry the death penalty. This may be of concern if the reforms recommended by the Joint Standing Committee on Foreign Affairs, Defence and Trade's (**JSCFADT**) *A World Without the Death Penalty* Report¹ have not been addressed. The Law Council recommends prompt implementation of these recommendations.
6. The Law Council does not oppose in principle measures in Schedule 2 which seek to ensure consistency between the *Mutual Assistance in Criminal Matters Act 1987* (**MA**

¹ Joint Standing Committee on Foreign Affairs, Defence and Trade, *A World Without the Death Penalty*, (May 2016) available at http://www.aph.gov.au/~-/media/02%20Parliamentary%20Business/24%20Committees/244%20Joint%20Committees/JFADT/Foreign%20Affairs%20Defence%20and%20Trade/Death%20Penalty/full_report.pdf?la=en.

Act) and the *Proceeds of Crime Act 2002* (Cth) (**POCA**). However, measures in the latter are in need of reform to align with the rule of law.

Schedule 1 death penalty implications

7. The Law Council supports amendments in Schedule 1 of the Bill which would allow the Australian Government to provide assistance (including via agency-to-agency assistance) in criminal matters to the International Criminal Court (**ICC**) and international war crimes tribunals (**IWCTs**) in a manner consistent with our ability to assist foreign countries under the MA Act. However, it is essential that recommendations made by the JSCFADT *A World Without the Death Penalty* Report² be swiftly implemented.
8. The Law Council notes that the Bill does not seek to implement the first three recommendations of this Report. These recommendations included for example that:
 - The Attorney- Attorney-General's Department conduct a review of the current legislative arrangements for extradition and mutual assistance to ensure that they uphold Australia's obligations as a signatory to the Second Optional Protocol to the International Covenant on Civil and Political Rights;³
 - The *Australian Federal Police (AFP) National Guideline on International Police-to-Police Assistance in Death Penalty Situations (the Guideline)* be amended to include a stronger focus on preventing exposure of all persons to the risk of the death penalty;⁴
 - In light of the United Nations' position that drug crimes, including drug trafficking, do not constitute 'most serious crimes' for which the death penalty may be applied under international law, the Committee recommends that the Australian Federal Police (**AFP**) obtain guarantees that prosecutors in partner countries will not seek to apply the death penalty before providing information in relation these crimes. In situations where such guarantees cannot be obtained, the AFP should withhold provision of information that may be relevant to the cases concerned.⁵
9. The fact that the Bill does not seek to implement these recommendations is particularly apparent at Item 32 in Part 3 of Schedule 1. The new definition of 'serious foreign intervention' in (a)(i) extends the definition to offences carrying the death penalty. This is not a change because the removed definition of 'mutual assistance application' also applied to the same offences.
10. However, the fact that applications can still be made for information from the full range of coercive processes referred to by this amending Bill for offences which carry the death penalty may be of concern if the reforms recommended by the JSCFADT have not been addressed.
11. Generally, providing information to the ICC or IWCTs is not a problem, in itself, because those bodies are not empowered to order the death penalty.

² Joint Standing Committee on Foreign Affairs, Defence and Trade, *A World Without the Death Penalty*, (May 2016) available at

http://www.aph.gov.au/~media/O2%20Parliamentary%20Business/24%20Committees/244%20Joint%20Committees/JFADT/Foreign%20Affairs%20Defence%20and%20Trade/Death%20Penalty/full_report.pdf?la=en.

³ Ibid, Recommendation 1.

⁴ Ibid, Recommendation 2.

⁵ Ibid, Recommendation 3.

12. The Bill merely extends the availability of information to bodies like ICC and IWCTs obtained through existing processes contained in Australian law.

Schedule 2 proceeds of crime

13. Schedule 2 of the Bill would amend the MA Act to ensure that the provisions relating to proceeds of crime investigative tools in the MA Act align with and are consistent with the POCA provisions to which they refer, and that the POCA provisions are modified for the foreign context. They also clarify the types of foreign proceeds of crime orders to which the MA Act applies and confirm that the MA Act applies to interim foreign proceeds of crime orders that are issued by non-judicial government bodies. They also make other minor or technical changes to the MA Act to facilitate its operation.
14. The Law Council does not oppose in principle measures in Schedule 2 which seek to ensure consistency between the MA Act and the *Proceeds of Crime Act 2002* (Cth) (POCA).
15. However, the Law Council has a number of concerns with the POCA including:
- The unavailability of restrained assets to fund legal costs;
 - Insufficient judicial discretion to avoid unduly harsh and disproportionately punitive outcomes under the Act;
 - The use of coercive examinations powers;
 - The standard of proof required to restrain and seize assets; and
 - The imposition of a reverse onus of proof.
16. While consistency is desirable between the MA Act and the POCA, the measures in the latter are in need of reform to align with the rule of law.

Schedule 4 foreign evidence

17. Schedule 4 would amend the FE Act to ensure foreign evidence can be appropriately certified and to extend the application of foreign evidence rules to proceedings in the external territories and the Jervis Bay territory.
18. The Law Council does not consider that the proposed amendments to the FE Act are problematic.

Schedule 5 protection of child complainants

19. Schedule 5 would amend section 15YR of the Crimes Act to clarify the scope of the offence of publishing any matter that identifies, or is likely to identify, vulnerable witnesses or complainants without leave of the court.
20. The Law Council supports the amendment which will allow for the protection of a child complainant who is not a witness in a proceeding, including in serious sexual

exploitation, human trafficking, slavery and slavery-like practices such as forced marriage proceedings.

21. This is consistent with Australia's international obligations under the *Protocol to Prevent, Suppress and Punish trafficking in Persons, Especially Women and Children* (the Protocol).⁶ The Protocol requires State Parties to assist victims of human trafficking to enable their views and concerns to be presented and considered during criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.⁷ The Protocol also requires State Parties to take into account the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children.⁸ The Law Council notes that this obligation is incorporated into the 2015-2019 *National Action Plan to Combat Human Trafficking and Slavery*.⁹

Schedule 5 amendments to the Vulnerable Witness Act

22. Schedule 5 would also amend the Vulnerable Witness act to extend the application of supports and protections in Schedule 2 of that Act to proceedings commenced after the commencement of Schedule 5 of the Bill.

23. Currently, the supports and protections available under the Vulnerable Witness Act apply only to proceedings for alleged offences committed after the commencement of that Act (29 June 2013).

24. The supports and protections include (but are not limited to):

- testimonial aids such as the ability to give evidence by means of closed-circuit television, video recording or video link, or the provision of an offence relating to the unauthorised publication of a witness' name or identifying characteristics; and
- disallowing inappropriate or aggressive cross-examination of a vulnerable adult complainant or special witness;
- limiting the circumstances in which a defendant can conduct cross-examination in person rather than through counsel; and
- preventing publication of a matter identifying a vulnerable adult complainant, without leave of the court.

25. The Law Council supports the Schedule 5 amendments to the Vulnerable Witness Act as essential to allowing appropriate protections and supports to be in place to ensure vulnerable witnesses are in a position to present their testimony to the court whereby the risk of intimidation, trauma, fear and/or undue public embarrassment are

⁶ *United Nations Convention against Transnational Organized Crime*, GA Res 55/25, UN GAOR, 55th sess, 62nd plen mtg, Agenda Item 105, Supp No 49, UN Doc A/RES/55/25 (8 January 2001) annex II ('Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime').

⁷ *Ibid*, art 6(2)(a).

⁸ *Ibid*, art 6(4).

⁹ Commonwealth of Australia, *National Action Plan to Combat Human Trafficking and Slavery 2015 -19* (2014) Items 40.3, 50.4.

minimised. The Law Council notes that the provisions are procedural in nature and do not affect the elements or penalties of any offence.

Schedule 6 definition of 'debt bondage'

26. Item 6 of Schedule 6 will expand the existing definition of debt bondage in the Dictionary in the *Criminal Code Act 1995* (Cth) (**Criminal Code**) to specifically cover the condition of a person whose personal services are pledged by another person as security for the other person's debt.

27. Debt bondage remains one of the most prevalent forms of modern slavery in the world.¹⁰ The *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (**the Supplementary Convention**) defines debt bondage as:

*... the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.*¹¹

28. The Law Council therefore supports the proposed amendment in Schedule 6 of the Bill to expand the definition of 'debt bondage' as it is consistent with the Supplementary Convention. The amendment will also assist in combating this serious form of debt bondage.

Schedule 6 relocation of debt bondage as a slavery-like offence

29. Schedule 6 will also move the offences relating to debt bondage from Subdivision C in Division 271 (trafficking in persons) to Division 270 (slavery and slavery-like conditions). The offences in Division 271 criminalise the trafficking or harbouring of a person and relate to the physical movement of the victim. The offences in Division 270 covering slavery and slavery-like offences do not require an element of movement. The Explanatory Memorandum to the Bill explains that: 'for consistency, the debt bondage offences will be moved to Division 270 as they do not require an element of movement'.¹²

30. Schedule 6 will also amend existing section 270.1A in the Criminal Code to include a reference to debt bondage as a slavery-like offence. This will allow the aggravated offence and jurisdictional requirement provisions at existing sections 270.8 and 270.9 to apply to debt bondage, and allow existing section 271.9 and the references to 271.8

¹⁰ Office of the High Commissioner for Human Rights, *Debt bondage remains the most prevalent form of forced labour worldwide - New UN report* (15 September 2016) United Nations Human Rights Office of the High Commissioner <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20504&LangID=E>>.

¹¹ Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, ESC Res 608(XXI), (adopted 7 September 1956) art 1 (a).

¹² Explanatory Memorandum to the Crimes Legislation Amendment (International Crime Cooperation and Other Measures) Bill 2016 [28].

and 271.9 at existing section 271.10 to be omitted, simplifying the existing offence regime.

31. The Law Council supports the amendments in Schedule 6 which move offences relating to debt bondage from Division 271 of the Criminal Code to Division 270. Given that debt bondage focuses on the provision of personal services in circumstances involving exploitation rather than movement, it is reasonable to include it as a slavery-like offence. The aggravated offence and jurisdictional requirement provisions will also ensure that the offences are appropriately targeted to prevent and combat debt bondage.

Schedule 6 relevant evidence

32. Schedule 6 will also expand the application of the existing relevant evidence provision in Division 270 to ensure a trier of fact can take into account relevant evidence (such as personal circumstances) in determining whether a person was incapable of understanding the nature and effect of a marriage ceremony, and whether a person was significantly deprived of personal freedom.
33. The Law Council supports the proposed amendments on the basis that they will allow an alleged victim's particular vulnerabilities and the particular economic or personal relationship between the alleged victim and another to be considered by a jury in determining the elements of slavery-like offences. This will assist in securing appropriate prosecutions of slavery-like offences, particularly those related to forced marriage.