Australian Government
Attorney-General's Department

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Submission to the Senate Legal and Constitutional Affairs Legislation Committee

Crimes and Other Legislation Amendment (Omnibus) Bill 2023

Introduction

The Attorney-General's Department (the department) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Crimes and Other Legislation Amendment (Omnibus) Bill 2023 (the Bill). This submission should be read alongside the Bill and its explanatory materials.

Overview of the Bill

The Bill makes a number of minor and technical amendments to crime-related Commonwealth legislation. The amendments update, improve and clarify the intended operation of key provisions and improve the administration of a range of government, regulatory, law enforcement, oversight and judicial processes. The amendments do not expand powers for regulatory or law enforcement agencies, or reduce existing scrutiny and oversight mechanisms.

Providing clarification and efficiencies in legislation through these amendments will result in improved outcomes for stakeholders interacting with Australian government agencies and processes, such as members of the public who come into contact with the judicial system, international partners, and state and territory agencies.

The Bill amends the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act), *Australian Crime Commission Act 2002, Crimes Act 1914* (Crimes Act), *Criminal Code Act 1995* (Criminal Code), *Criminology Research Act 1971* (Criminology Research Act), *Foreign Evidence Act 1994* (Foreign Evidence Act), *International Transfer of Prisoners Act 1997* (ITP Act), *Mutual Assistance in Criminal Matters Act 1987* (Mutual Assistance Act), *Privacy Act 1988* (Privacy Act), *Surveillance Devices Act 2004* (SD Act), *Telecommunications (Interception and Access) Act 1979* (TIA Act) and *Witness Protection Act 1994* (Witness Protection Act).

The amendments have been developed and settled in consultation with relevant Commonwealth agencies, including the Australian Federal Police (AFP), the Australian Criminal Intelligence Commission (ACIC), the Australian Institute of Criminology (AIC), the Australian Transactions Reports and Analysis Centre (AUSTRAC), the Australian Securities and Investments Commission (ASIC) and the Department of the Treasury.

Strengthening and clarifying the AML/CTF Framework

Amendments to the AML/CTF Act in Schedule 1 of the Bill will strengthen and clarify aspects of Australia's anti-money laundering and counter-terrorism financing (AML/CTF) regime and assist AUSTRAC to discharge its regulatory functions in an efficient manner.

Clarifying the penalty for failure to enrol

This amendment will enable AUSTRAC to more effectively enforce serious and ongoing breaches of the obligation for entities to enrol before commencing to provide a designated service under the AML/CTF Act and create a stronger deterrence for entities to fail to enrol.

The amendment clarifies the civil penalty provision for a person failing to enrol with AUSTRAC within 28 days of commencing to provide a designated service under the AML/CTF Act. Infringement notices can only be issued within 12 months from the day when the contravention has occurred. Currently the AUSTRAC CEO can only issue a person with a single infringement notice, even when the person has provided multiple and ongoing designated services while unenrolled. There is also no ability for AUSTRAC to enforce serious and ongoing breaches of the enrolment obligation past 12 months.

This amendment clarifies the requirement to enrol is a 'continuing obligation'. The amendment establishes that a separate contravention occurs each day that a person fails to apply for enrolment for the period between the enrolment deadline and the day the obligation to apply for enrolment ends.

Reinstating protections for certain types of AUSTRAC information

This amendment will reinstate safeguards on the use and disclosure of the most sensitive types of AUSTRAC information. The amendment makes it clear that sensitive AUSTRAC information obtained under specified provisions of the AML/CTF Act and the *Financial Transaction Reports Act 1988* (FTR Act) cannot be inappropriately disclosed by officials of Commonwealth, State or Territory agencies for the purposes of, or in connection with, court or tribunal proceedings. This includes Suspicious Matter Report (SMR) information, which is intended to be used only as intelligence to prompt further investigation and could contain the reporting entities' subjective and unsubstantiated suspicions of wrongdoing.

Protecting this information from disclosure in connection with court or tribunal proceedings helps to protect the reporting entities and their employees from possible legal claims or reprisal. It may also prevent the tipping off of the subject of the sensitive information reporting or others who may seek to alter their behaviour to avoid raising the suspicions of reporting entities. Protecting the reporting entities and their employees who are the sources of SMR information is important to maintaining the overall integrity and efficacy of the SMR regime.

Computer-assisted decision making

This amendment will explicitly authorise the AUSTRAC CEO to arrange for a computer program to be used to take administrative actions on their behalf under relevant provisions of the AML/CTF Act, the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No.1)* (AML/CTF Rules), or other instruments made under the AML/CTF Act. Currently, the AML/CTF Act does not explicitly authorise the AUSTRAC CEO to use computer programs (including automated programs) to execute any of their administrative decision-making responsibilities, or to assist with doing so. As a result, all decisions, including basic administrative decisions, must be made by the AUSTRAC CEO.

The types of decisions that may be made using a computer program will be appropriately limited to administrative process decisions under specific parts of the AML/CTF Act that relate to registration and enrolment, and will only include 'positive' decisions that do not result in an adverse outcome for a person. As such, this measure will not introduce any new risks to the operation of the AML/CTF regime, but rather will create certainty and efficiencies for both reporting entities and AUSTRAC. Further, the amendments include a safeguard to allow the AUSTRAC CEO to override a computer-assisted decision if they are satisfied that it is not the correct or preferable decision.

The use of computer programs in these specifically prescribed circumstances will streamline the administration of routine approvals, reduce administrative workload and create efficiencies for reporting entities and AUSTRAC. In turn, this will allow AUSTRAC to focus its resources on areas of greatest money laundering and terrorism financing risk.

Types of decisions that may be automated

The types of decisions that will be able to be made by a computer will be appropriately limited to decisions related to administrative processes in the AML/CTF Act that AUSTRAC takes to maintain the Reporting Entities Roll in Part 3A, the Remittance Sector Register in Part 6 and the Digital Currency Exchange Register in Part 6A. Additionally, computer-assisted decisions will only include 'positive' decisions that do not result in an

adverse outcome for a person or require the application of procedural fairness principles, as any adverse decision must be subject to human scrutiny under the Reviewable Decisions framework in Part 17A of the AML/CTF Act. For example, a computer may be used to approve the renewal of registration on the Remittance Sector Register where the reporting entity has been compliant with their AML/CTF obligations since it was last registered.

The specific decisions within Parts 3A, Part 6 and Part 6A of the AML/CTF Act to be automated will be prescribed in the AML/CTF Rules. This will allow for the prescription of specific provisions under those Parts and for the criteria to remain necessarily flexible. This will ensure the decisions and relevant criteria remain consistent with emerging money laundering and terrorism financing threats, while still being subject to parliamentary scrutiny and oversight.

Safeguards

The amendments provide a specific safeguard by allowing the AUSTRAC CEO to override a computer-assisted decision if they are satisfied that it is not the correct or preferable decision, for example where the decision is affected by systems error. The AUSTRAC CEO is required to ensure that any computer-assisted decision is consistent with the objects of the AML/CTF Act and will continue to be ultimately responsible for the actions and decisions made using computer assistance.

Improving international cooperation processes

Improving foreign evidence processes

Schedule 5 of the Bill makes 3 technical amendments to the Foreign Evidence Act to improve the operation of provisions regarding the use of foreign material in Australian proceedings.

The first amendment expands the category of persons who can sign or certify testimony in the relevant foreign country to ‘a person authorised to administer an oath or affirmation or put a person under an obligation to tell the truth’. The amendment will ensure consistency with the categories of persons who may administer oaths or affirmations or put a person under an obligation to tell the truth in Australia, such as a legal practitioner, and reflects current international and Australian domestic practice.

The second amendment addresses current issues whereby foreign countries must formally annex any accompanying documents to the testimony in order for it to be admissible in Australian courts. By removing the term ‘annexed to’ and replacing it with ‘produced by or with’, this amendment retains an appropriate connection between the documents and the testimony while allowing countries to provide evidence in different formats. It also supports the movement towards the electronic production of evidence in Australia and other countries.

Any evidence which is sought to be adduced under the Foreign Evidence Act will remain subject to the rules of evidence applicable in the proceedings, and the relevant court will retain the discretion as to whether or not to admit any testimony or accompanying documents or things.

The third amendment replaces references to ‘exhibit’ throughout the Foreign Evidence Act with ‘documents or things’. The term ‘exhibit’ is associated with the terminology used in court rules governing affidavits, which may not be the most appropriate term for material from non-common law countries. This amendment reflects the fact that Australia receives material from common law countries as well as civil law countries, the latter which typically do not recognise or use affidavits.

International transfer of prisoners

Amendments in Schedule 6 of the Bill will allow the Attorney-General to refuse consent to a request for transfer to or from Australia at an earlier stage in the process, without the need to seek other parties' consent where the Attorney-General would be minded to ultimately refuse consent to the transfer.

The circumstances in which the Attorney-General may refuse consent to a transfer will not change. Before making a decision, the Attorney-General must still consider the requirements set out in the ITP Act, the relevant treaty, the circumstances of the case, the Australian Government's International Transfer of Prisoners Statement of Policy (ITP Statement of Policy), and any other relevant information.

The amendments will provide for the following:

- For transfers from Australia, the Attorney-General may refuse the transfer prior to seeking consent of the relevant state or territory Minister and the prisoner (or prisoner's representative).
- For transfers to Australia, the Attorney-General may refuse the transfer prior to seeking consent of the relevant state or territory Minister, the prisoner (or prisoner's representative) and the transfer country or Tribunal as the case may be.

The amendments will result in a more efficient process, by avoiding unnecessary consultation, and ensuring that the prisoner is not waiting longer than necessary to receive the final outcome of their transfer application.

The existing framework

Currently, under the ITP Act, the Attorney-General must seek the consent of all parties, including relevant state and territory ministers, before deciding whether to agree to an international prisoner transfer. This raises practical difficulties where the Attorney-General, after providing due consideration to the application and relevant information (including the prisoner's application, and other information from the transfer country, other Australian government agencies, and state or territory corrective services as the case may be), would be minded to refuse consent to the transfer but still needs to seek consent from all other parties before making that decision. This results in a lengthy but ultimately unnecessary administrative process.

Decision to refuse consent to a transfer

The amendments allow for the decision to refuse consent to be made at an earlier point in the process, but do not otherwise alter existing decision-making processes and considerations.

There are a range of mandatory conditions under the ITP Act which must be satisfied before the Attorney-General can decide whether or not to consent to a transfer. These include that:

- the prisoner is eligible for transfer from Australia (in broad terms, that the person is a national or has community ties with the country they are transferring to) (subsection 10(a) and section 12)
- the relevant transfer conditions are satisfied (which includes that the sentence not be subject to appeal, that dual criminality is satisfied and that there is at least 6 months remaining to be served on the sentence) (subsections 10(e) and 14(1))
- the transfer of the prisoner is not likely to prevent the prisoner's surrender to an extradition country (subsection 10(f)).

The amendments do not alter the Attorney-General's residual broad discretion to refuse consent to a transfer, which may be exercised once these threshold conditions under the ITP Act are satisfied. When exercising this discretion, the Attorney-General considers factors listed in the ITP Statement of Policy including:

- sentence enforcement
- the extent to which the transfer would assist the prisoner's rehabilitation and reintegration
- community safety
- humanitarian considerations
- dual citizenship
- relevant law enforcement and prosecutorial agency views.

The ITP Statement of Policy is publicly available on the Attorney-General's Department's website and is provided to the prisoner at the time their application is received. The prisoner is provided with an opportunity to make representations on the factors listed in the policy before the Attorney-General makes a decision on whether or not to consent to a transfer, including under new subsection 19(1).

Procedural fairness

This amendment will maintain the prisoner's access to procedural fairness. The amendments do not change the prisoner's current ability to make representations to the Attorney-General in respect of any matters. For example, the prisoner may make representations to the Attorney-General when making their application, including on matters which the Attorney-General may consider when deciding whether to provide or refuse consent to a transfer as listed in the ITP Statement of Policy.

Further, in the event that there was a failure to accord procedural fairness, the prisoner may seek judicial review of the Attorney-General's decision to refuse consent under the *Administrative Decisions (Judicial Review) Act 1977*. Judicial review may also be available under section 39B of the *Judiciary Act 1903* or paragraph 75(v) of the *Constitution*.

Expanding safeguards in mutual assistance processes

Schedule 7 of the Bill amends the Mutual Assistance Act to provide that the mandatory ground of refusal relating to torture applies where there are substantial grounds to believe that any person would be in danger of being subjected to torture if the request for assistance was granted. The existing ground of refusal applies only in relation to the person who is the subject of the request. There is a separate discretionary ground of refusal which allows assistance to be refused where it may prejudice the safety of any person, whether in or outside Australia.

Changing the wording from 'the person' to 'a person' expands the scope of the mandatory ground of refusal. This provides a stronger safeguard against providing assistance where there are substantial grounds for believing there is a risk that any person could be in danger of being subjected to torture, beyond the existing discretionary ground of refusal.

Improving administration of the National Witness Protection Program

Ensuring past program participants are covered by the legislation

The amendments in Part 1 of Schedule 9 of the Bill clarify that all participants of previous AFP-run witness protection programs are included under the Witness Protection Act. Currently, there is ambiguity about the extent to which the AFP can provide protection and assistance to past participants.

This amendment clarifies that all past participants, including those who were not in the program immediately before the Witness Protection Act commenced, can receive assistance from the AFP, such as applying for documents that support the ongoing maintenance of their identity.

Enabling temporary suspension of protection and assistance

Amendments in Part 2 of Schedule 9 of the Bill will enable the AFP to temporarily suspend the provision of protection and assistance under the National Witness Protection Program (NWPP). This will create flexibility in the AFP's ability to respond to situations where a participant does, or intends to do, something that may prevent the AFP from providing the participant with protection and assistance. For example, if the participant were to put themselves in a situation where they were outside the AFP's jurisdiction. Currently, in situations where the AFP's ability to provide protection or assistance may be limited, the AFP must consider terminating a person's participation in the NWPP.

Providing for temporary suspension of the provision of protection and assistance is significantly less restrictive for an individual than terminating their participation in the NWPP. Further, the amendments allow for protection and assistance to be provided, regardless of a suspension, if the decision-maker is satisfied that it is necessary and reasonable to do so in the circumstances (proposed subsections 17A(6) and 17B(6)). This might be appropriate, for example, where the participant has ongoing employment or education requirements through the suspension period and the AFP provides assistance to facilitate and ensure continuity of these.

Application of provisions to a participants' possible future actions

Having the ability to suspend protection and assistance as a result of a participant's actions, or intended actions, ensures the AFP can respond to emerging circumstances if the AFP becomes aware that a participant has done, or intends to do, something that may limit the AFP's ability to provide adequate protection and assistance. Suspension of protection and assistance takes effect at a time determined by the decision-maker, or at a time the decision-maker decides to suspend the protection and assistance[1]. This allows the decision-maker to respond appropriately to operational circumstances that may warrant either an immediate or delayed commencement of the suspension of protection and assistance.

When making a decision about whether to suspend protection or assistance for a participant, proposed subsection 17B(1) appropriately requires that the decision-maker must be satisfied that the circumstances of the case warrant the suspension of protection and assistance. Further, proposed subsection 17B(3) requires

[1] The Bill currently provides that this decision-maker is the Commissioner. As noted in its response to the Senate Standing Committee for the Scrutiny of Bills, the department will amend the Bill to ensure these decisions may be subject to internal review, which will amend the decision-maker accordingly. See further detail under *Merits review for decisions relating to suspension of protection and assistance*

that the duration of a suspension must be reasonable in all circumstances and the decision may be revoked if the decision-maker is satisfied that paragraph 17B(1)(a) or (b) no longer applies. Once the reason for suspension has ceased, these provisions would support the rapid reinstatement of protection and assistance for that participant.

Delegations for decisions to suspend protection and assistance

Amendments in Part 2 of Schedule 9 of the Bill will enable the decision-maker to delegate their powers to temporarily suspend and re-instate protection and assistance to an Assistant Commissioner, with the Assistant Commissioner able to sub-delegate the powers in writing to a Commander or Superintendent in the AFP in serious and urgent circumstances.

It is appropriate that officers in close proximity to the operational issues (such as Commanders and Superintendents) are empowered to make decisions to suspend protection and assistance in these circumstances. Serious and urgent circumstances require prompt decision-making, meaning that it may not be feasible to seek a decision from a higher-ranking officer, such as an Assistant Commissioner. This will ensure the AFP is able to respond quickly and flexibly to circumstances that require immediate operational decisions, where the AFP's ability to provide assistance and protection may be limited.

In its *Scrutiny Digest 5/23* the Senate Standing Committee for the Scrutiny of Bills sought further advice on the intended meaning of the term 'Assistant Commissioner', noting this term is not currently defined in the Witness Protection Act. In response to the Committee's comments on this matter, the department intends to propose amending the Bill to provide for a definition of 'Assistant Commissioner' in the Witness Protection Act. This amendment would clarify that the term 'Assistant Commissioner' is taken to mean an Assistant Commissioner of the Australian Federal Police, consistent with the definitions for 'Commissioner' and 'Deputy Commissioner'.

Merits review for decisions relating to suspension of protection and assistance

The department notes comments made by the Senate Standing Committee for the Scrutiny of Bills *Scrutiny Digest 5 of 2023* and the Parliamentary Joint Committee on Human Rights *Human rights report number 5 of 2023* relating to the absence of a merits review process for suspension decisions that are made personally by the Commissioner.

As outlined in paragraph 280 of the notes on clauses in the Explanatory Memorandum, it is already the case under the Witness Protection Act that some decisions made personally by the Commissioner are not subject to merits review. One example of this is the Commissioner's power under paragraph 18(1)(a) to terminate an individual's participation in the NWPP.

Consistent with this approach, decisions made personally by the Commissioner under new subsection 17A(1), are not subject to merits review, as decisions to suspend the provision of protection and assistance at the request of the participant are unlikely to have a significantly adverse impact on the rights and interests of the individual. However, for suspension decisions made under new section 17B of the Bill, in situations where protection and assistance may be suspended as a result of the actions (or intended actions) of the participant, it is appropriate to provide for internal review of these decisions. As such, the department will propose amending the Bill to ensure these decisions may be subject to internal review.

External merits review is not provided for in relation to the suspension of protection and assistance under the NWPP, largely due to the need to limit knowledge of a participant's individual circumstances and the broader

administration of the NWPP. External merits review in these circumstances could also cause unintended delays where operational decisions are required to be made promptly. Further, the department notes the Senate Standing Committee for the Scrutiny of Bills, in its review of the Bill in *Scrutiny Digest 5 of 2023*, acknowledged that it may be appropriate to exclude external merits review in these circumstances.

Delegation of powers

Currently, under subsection 25(4) of the Witness Protection Act, the Commissioner's powers in respect of taking actions to protect former participants may only be delegated to a Deputy Commissioner or an Assistant Commissioner. The amendments in Part 2 of Schedule 9 of the Bill remove the restriction on delegation of these powers, allowing the Commissioner to delegate these powers to the position that they assess is operationally appropriate. This aligns the decision-making powers for former participants with those for current participants.

Improving the administration of other government, judicial and oversight processes

Updating the definition of 'judicial officer' in the Crimes Act

The amendments in Part 1 of Schedule 3 of the Bill repeal the definition of 'judicial officer' in subsection 23B(1) and replace references throughout the rest of the Part with 'bail authority'. Bail authority is a broader term, which is defined in section 3 of the Crimes Act as 'a court or person authorised to grant bail under a law of the Commonwealth, a State or a Territory'.

The amendments will provide greater flexibility in who can grant bail in these particular circumstances. In certain circumstances, this will reduce the amount of time an arrested person could be held in custody if a magistrate is not available in the relevant jurisdiction, for example, where the person is arrested after hours or on weekends.

Currently, Part IC of the Crimes Act requires that an arrested person is brought before a judicial officer, as defined in subsection 23B(1), before, or as soon as practicable after, the end of the investigation period. This allows a decision to be made about whether the person is to be remanded on bail or brought into custody to await their court appearance. As currently drafted, the definition of ***judicial officer*** in subsection 23B(1) means that a person who commits a Commonwealth offence in one state, but is arrested in a different state, can only be brought before a magistrate to have their bail application heard.

Strengthening oversight of Public Interest Monitors in the TIA Act

The amendments to the TIA Act in Schedule 8 of the Bill will expand the matters on which Public Interest Monitors (PIMs) can make submissions to ensure PIMs can undertake their oversight functions properly. The amendments will ensure PIMs can make submissions on the same matters that an issuing authority may consider when making a decision to issue a warrant or International Production Order (IPO) relating to Part 5.3 supervisory orders.

Before an eligible Judge or nominated Administrative Appeals Tribunal member can issue a warrant or IPO, they must have regard to a list of matters set out in the TIA Act. This list includes any submissions made by a PIM, where an interception agency of Queensland or Victoria makes the application. The way the provisions are currently drafted means PIMs are unable to make submissions on some matters relevant to warrants and

IPOs relating to Part 5.3 supervisory orders (being control orders, extended supervision orders and interim supervision orders).

The amendments correct inconsistencies in the legislation that were inadvertently introduced as a result of concurrent amendments to the TIA Act, through the *Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Act 2021* and *Telecommunications Legislation Amendment (International Production Orders) Act 2021*. It has always been the policy intention that PIMs should be able to make submissions on the same criteria that the issuing authority will consider in issuing a warrant or IPO.

Other amendments

Amendments in Schedule 10 to the TIA Act, the Crimes Act, the Surveillance Devices Act, the Criminal Code, and the Privacy Act will replace references to the 'Independent Commissioner Against Corruption' of South Australia with its new name the 'Independent Commission Against Corruption' of South Australia. On 7 October 2021, the *Independent Commissioner Against Corruption (CPIPC Recommendations) Amendment Act 2021* (SA) amended the *Independent Commissioner Against Corruption Act 2012* (SA) to become the *Independent Commission Against Corruption Act 2012* (SA). The amendments in Schedule 10 of the Bill will ensure the entity's correct name is reflected in Commonwealth legislation.

Amendments to the Criminology Research Act in Schedule 4 of the Bill will allow the Minister to appoint a Commonwealth representative to the Criminology Research Advisory Council by designation of a position, rather than by designation of a specified person. The amendments will improve administrative processes by removing the need for the Minister to make a new appointment each time there is a change in personnel within the Attorney-General's Department.

Amendments to the *Australian Crime Commission Act 2002* in Schedule 2 of the Bill relocate the existing penalty provision for non-compliance to immediately under the subsection which creates the obligation, to improve clarity and readability. The amendment does not change or create new penalties, or alter the powers available to the ACIC.

Amendments to the Crimes Act in Part 2 of Schedule 3 of the Bill correct a number of drafting errors, such as incorrect section referencing, and correct references to repealed or incorrect legislation.