



Law Council
OF AUSTRALIA

Office of the President

22 June 2017

Senator the Hon Ian Macdonald
Chair
Senate Legal and Constitutional
Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Senator,

Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017

1. The Law Council is grateful for the opportunity to comment on the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (**the Bill**).
2. The Law Council acknowledges the assistance of its National Criminal Law Committee, Indigenous Legal Issues Committee and the Law Society of New South Wales in the preparation of this submission.
3. The Bill would make amendments to the *Australian Federal Police Act 1979* (Cth), the *Crimes Act 1914* (Cth) (**Crimes Act**) and the *Criminal Code Act 1995* (Cth) (**Criminal Code**). The amendments include:
 - Clarifying the functions of the Australian Federal Police to enable cooperation with international organisations and non-government organisations;
 - Clarifying the custody notification obligations of investigation officials when they intend to question an Aboriginal or Torres Strait Islander person;
 - Creating separate offence regimes for ‘insiders’ and ‘outsiders’ for the disclosure of information relating to controlled operations in the Crimes Act;
 - Increasing the maximum penalty for general dishonesty offences in section 135.1 of the Criminal Code from five years to ten years;
 - Removing an obsolete reference to the death penalty in the Crimes Act;
 - Strengthening protections for vulnerable witnesses and complainants in Commonwealth criminal proceedings in the Crimes Act;
 - Authorising the collection, use and disclosure of information for the purposes of preventing, detecting, investigating or dealing with fraud or corruption against the Commonwealth and establishing safeguards to ensure these measures do not unduly interfere with privacy; and

- Allowing the New South Wales Law Enforcement Conduct Commission to use and disclose spent conviction information under the Commonwealth spent convictions scheme.

4. The Law Council makes the following comments in relation to particular amendments.

Schedule 2 – Obligations when questioning Aboriginal and Torres Strait Islander Persons

5. Schedule 2 of the Bill would make amendments to Part 1C of the Crimes Act to make clear that an investigating official must:
- Take reasonable steps to notify an Aboriginal legal assistance organisation prior to commencing questioning of an Aboriginal or Torres Strait Islander person;¹ and
 - Not question an Aboriginal or Torres Strait Islander person until that person has either had the opportunity to speak with an Aboriginal legal assistance organisation or two hours have passed since the attempt to notify.²
6. The amendments will also mandate that the obligation to notify an Aboriginal legal assistance organisation applies even where a person expressly waives his or her right to an interview friend.³
7. Following the decision of *R v CK*,⁴ it was not clear that investigating officials were obliged to notify an Aboriginal legal aid organisation *prior* to questioning. The amendments in the Bill are a welcome clarification in this respect.
8. However, the Law Council has some concern that the introduction of the ‘reasonable steps’ requirement may dilute the custody notification requirement. Section 23H currently requires an investigating official to ‘immediately’ notify an Aboriginal legal aid organisation and the removal of this particular requirement may undermine one of the purposes of the provision, namely, to prevent Aboriginal deaths in custody by ensuring that Aboriginal and Torres Strait Islanders have access to legal advice from someone who is representing their interests. The Law Council understands that this is the current practice in New South Wales and that it was part of a number of measures which have reduced deaths in custody. As such, ‘immediately’ should not be replaced with ‘take reasonable steps’ in section 23H of the Crimes Act.

Schedule 3 – Controlled Operations Offences

9. Schedule 3 of the Bill would create separate offence regimes for ‘insiders’ and ‘outsiders’ for the disclosure of information relating to controlled operations in the Crimes Act. The amendments to the controlled operations offences mirror recent amendments to section 35P of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**).⁵
10. The Law Council supports the proposed amendments to the controlled operations offences. The amendments are consistent with the amendments to section 35P of the

¹ Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017, Sch 2, Item 3.

² *Ibid.*, Sch 2, cl 23H(1AB).

³ *Ibid.*, Sch 2, cl 23H(1A).

⁴ [2013] ACTSC 251.

⁵ See *Counter-Terrorism Legislation Amendment Act (No 1) 2016* (Cth).

ASIO Act and those amendments, in turn, are consistent with the recommendations of the former Independent National Security Legislation Monitor in his report on section 35P of the ASIO Act.⁶ Further, the Law Council notes that the Australian Law Reform Commission recommended that secrecy offences, which included the controlled operations offences, be reviewed to determine whether they unjustifiably limit freedom of speech.⁷ The Law Council considers that, compared to the current offences, the proposed amendments are a more proportionate response to the danger of controlled operations and the safety of participants in controlled operations being compromised because of disclosure of information.

Schedule 4 – Increasing the Maximum Penalty for General Dishonesty Offences

11. Schedule 4 of the Bill would increase the maximum penalty for general dishonesty offences in subsections 135.1(1), (3), (5) and (7) of the Criminal Code from five years to ten years imprisonment. The amendments are a response to the situation:

*...where there is a continuum of behaviour that involves multiple breaches of the more specific sections 134.1 and/or 134.2 [of the Criminal Code], which would be best reflected by a charge under section 135.1 but for the lesser penalty available under that section.*⁸

12. The Explanatory Memorandum also notes that laying a representative charge under sections 134.1 or 134.2 of the Criminal Code, both of which carry a maximum penalty of ten years imprisonment, may not adequately reflect the full criminality of the accused's conduct and that having many counts on an indictment in order to fully reflect the accused's conduct risks overloading the indictment.⁹

13. The Law Council recognises the need for consistency in penalties. However, the Law Council does not support the increase in the maximum penalty as proposed by the Bill. It is noted that the Explanatory Memorandum to the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth), which introduced the general dishonesty offences, states:

*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 the 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 more serious fraud offences should be charged.*¹⁰

⁶ Independent National Security Legislation Monitor, *Report on the impact on journalists of section 35P of the ASIO Act*, (October 2015).

⁷ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (Report 129)* (December 2015), 126.

⁸ Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017, *Explanatory Memorandum*, 39.

⁹ *Ibid.*, 38.

¹⁰ *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth), Revised Explanatory Memorandum, 69.

14. In short, the general dishonesty offences were intended to capture less culpable conduct as compared to other dishonesty offences in the Criminal Code. The maximum penalty should continue to reflect this.
15. However, if the maximum penalty is increased, the Law Council considers that the general dishonesty offences should not come to be preferred over the more specific dishonesty offences in the Criminal Code. While the Law Council accepts that indictments should not be overloaded with a multitude of charges, it must be noted that representative charges have their own difficulties, even where the alleged incidents are adequately particularised. Where multiple instances of alleged fraudulent conduct are 'rolled up' into a general dishonesty offence, such a charge can be difficult to defend if the accused admits to some of the conduct that forms the representative count but denies the remainder of the alleged conduct. In this case, the representative count may have to be 'unpacked' into multiple counts to allow the accused to properly mount a defence.

Schedule 7 – Fraud and Corruption Information Sharing

16. Schedule 7 of the Bill contains amendments to the Crimes Act that would allow the collection, use and disclosure of personal information between Commonwealth entities for an 'integrity purpose'.
17. The definition of 'personal information' is the same as that in the *Privacy Act 1988* (Cth) (**Privacy Act**), namely information about an identified individuals or an individual who is reasonably identifiable, whether the information is true or not and whether the information is recorded in a material form or not.¹¹ Personal information may be used or disclosed only for an 'integrity purpose'. 'Integrity purpose' is defined as the purpose of preventing, detecting, investigating or dealing with any of the following:
 - Misconduct (within the meaning of the Privacy Act) of a serious nature by any of the following:
 - An official (as defined in section 13 of the *Public Governance, Performance and Accountability Act 2013* (Cth)) of a Commonwealth entity;
 - A person employed by, or in the service of, a Privacy Act agency or a wholly-owned Commonwealth company;
 - A person acting on behalf of, or for the purposes of activities of, a Privacy Act agency;
 - Conduct that may have the purpose or effect of inducing misconduct described in paragraph (a);
 - Fraud that has or may have a substantial adverse effect on the Commonwealth or a target entity; or
 - An offence against Chapter 7 of the Criminal Code.¹²

¹¹ Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017, Sch 7, Item 1; *Privacy Act 1988* (Cth), s 6.

¹² Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017, Sch 7, Item 1.

18. Private sector Australian Privacy Principle entities and State and Territory government entities will also be permitted to share information with the Commonwealth for an integrity purpose where the entity reasonably believes the information is related to one or more of the target entity's functions or activities.¹³
19. The Law Council supports measures to combat corrupt or fraudulent conduct provided those measures are necessary and proportionate. To this end, the Law Council supports the proposed information sharing amendments, subject to the agreement of the Office of the Australian Information Commissioner being obtained that the provisions do not raise privacy concerns.
20. In the first instance, please contact Dr Natasha Molt, Senior Legal Adviser, at _____ or _____, if you would like any further information or clarification.

Yours sincerely

Fiona McLeod SC
President

¹³ Ibid., cl 86E.