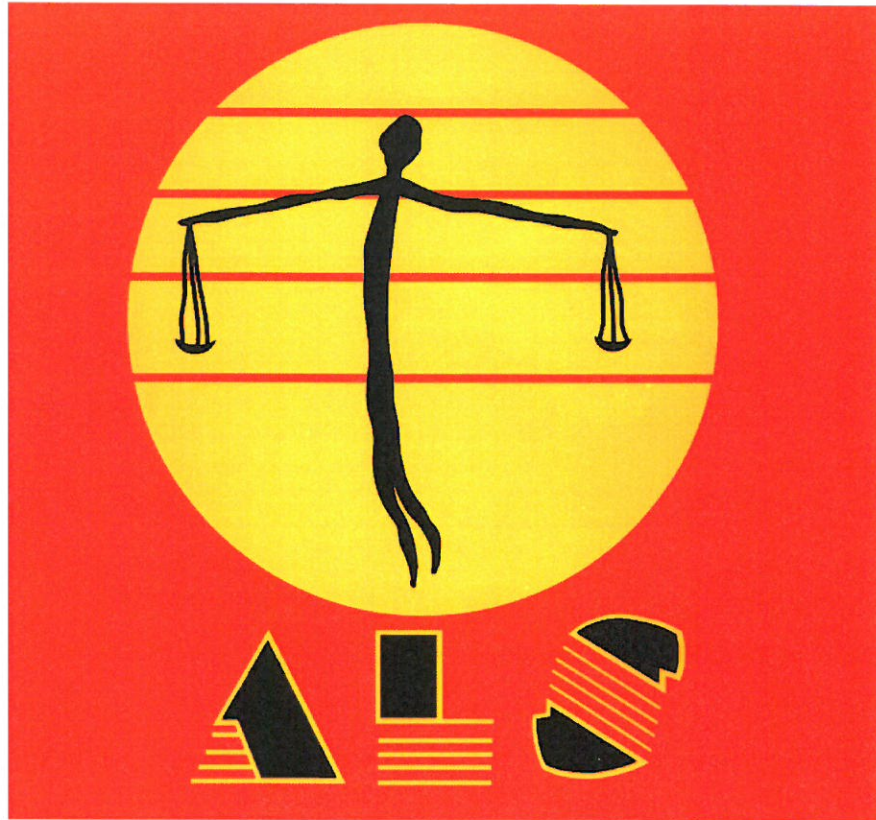


## ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA LIMITED



### SUBMISSION TO THE LEGAL AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE

Inquiry into the *Crimes Legislation Amendment (Powers, Offences and Other  
Measures) Bill 2017*

20 June 2017

## ABOUT THE ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (ALSWA)

ALSWA is a community-based organisation established in 1973. ALSWA's objective is to empower Aboriginal peoples and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA aims to:

- deliver a comprehensive range of culturally matched and quality legal services to Aboriginal peoples throughout Western Australia;
- provide leadership that contributes to participation, empowerment and recognition of Aboriginal peoples as the First Peoples of Australia;
- ensure that Government and Aboriginal peoples address the underlying issues that contribute to disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission into Aboriginal Deaths in Custody; and
- create a positive and culturally competent work environment by implementing efficient and effective practices and administration throughout ALSWA.

ALSWA uses the law and legal system to bring about social justice for Aboriginal peoples as a whole. ALSWA develops and uses strategies in areas of legal advice, legal representation, legal education, legal research, policy development and law reform.

ALSWA is a representative body with executive officers elected by Aboriginal peoples from their local regions to speak for them on law and justice issues. ALSWA provides legal advice and representation to Aboriginal peoples in a wide range of practice areas including criminal law, civil law, family law, child protection and human rights law. Our services are available throughout Western Australia via 14 regional and remote offices and one head office in Perth.

## ALSWA SUBMISSION

### Scope of submission

On 11 May 2017, the Senate referred an inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 to the Senate Legal and Constitutional Affairs Legislation Committee ('the Inquiry').

The Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 ('the Bill') contains a number of discrete areas, each included within a separate schedule. Because of its particular expertise and experience, ALSWA only responds in this submission to Schedule 2 – Obligations of investigating officials.

### Schedule 2– Obligations of Investigating Officials

The Bill proposes a number of amendments to Division 3, Part IC of the *Crimes Act 1914* (Cth) ('the *Crimes Act*'). This Division deals with the obligations imposed on investigating officials who are investigating Commonwealth offences (or, in some instances, offences under the law of other places such as the Australian Capital Territory).

### *Custody notification - requirements to notify an Aboriginal legal assistance organisation for Aboriginal and Torres Strait Islander people*

Section 23H of the *Crimes Act* currently sets out the obligations of investigating officials when dealing with a person who they believe, on reasonable grounds, to be an Aboriginal or Torres Strait Islander person. If the investigating officer intends questioning an Aboriginal or Torres Strait Islander person then, unless the official is aware the person has arranged for a lawyer to be present during the questioning, the official must:

1. immediately inform the person that a representative of an Aboriginal legal aid organisation will be notified; and
2. notify such a representative accordingly.

In *R v CK<sup>1</sup> Burns J* stated that the word ‘accordingly’ in s 23H(1) means ‘in due course’ and held that

*The use of the adverb accordingly in s 23H(1)(b) does not convert the obligation to immediately inform the arrested person into an obligation to immediately notify a representative.<sup>2</sup>*

Furthermore, the court observed that the plain words of the section do not require an official to notify a representative of an Aboriginal legal aid organisation before questioning commences.

The Bill attempts to rectify various issues raised by this case.<sup>3</sup>

#### **Definition of an Aboriginal legal aid organisation**

The Bill amends the definition of ‘an Aboriginal legal aid organisation’. Section 23B currently defines ‘an Aboriginal legal aid organisation’ as ‘an organisation that provides legal assistance to Aboriginal persons and Torres Strait Islanders, being an organisation identified in the regulations for the purposes of this definition’. Regulation 3A of the *Crimes Regulations 1990* (Cth) lists a number of Aboriginal legal aid organisations including ALSWA.

The Bill changes the terminology from ‘Aboriginal legal aid organisation’ to ‘Aboriginal legal assistance organisation’ and defines this to mean ‘an organisation that is funded by the Commonwealth, a State or a Territory to provide assistance to Aboriginal persons and Torres Strait Islanders’. The Bill repeals the relevant provisions relating to the list of organisation under Regulation 3A. ALSWA has no issue with the proposed new definition.

#### **Timing of the obligation to notify**

Currently, as noted above, it is not entirely clear whether the investigating official must notify an Aboriginal legal assistance organisation *before* the official commences questioning the person in custody. Clause 3 of Schedule 2 of the Bill amends s 23H(1) to provide that the investigating official must provide the relevant notification ‘*before starting to question the person*’. Because of the importance of ensuring that Aboriginal and Torres Strait Islander people are provided with culturally competent legal advice, support and assistance before questioning commences, ALSWA supports this amendment.

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1 [2013] ACTSC 251.

2 Ibid [23].

3 *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017*, Explanatory Memorandum, 9.

## The notification requirements

The Bill amends the notification requirements to provide that the investigating official must, before starting to question the person:

1. inform the person that reasonable steps will be taken to notify a representative of an Aboriginal legal assistance organisation in the State or Territory in which the person is located; and
2. take reasonable steps to notify such a representative.

ALSWA has some concerns about this proposed amendment. The term 'reasonable steps' is open to interpretation and provides little guidance to investigating officials as to the efforts they must make to notify a representative of an Aboriginal legal assistance organisation. 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.

ALSWA believes that the provisions should require actual notification to a representative of an Aboriginal legal assistance organisation without exception. This means in practice that governments must provide Aboriginal legal assistance organisations with additional funding to operate a 24 hour 7 days per week custody notification service (such as exists in New South Wales and Australian Capital Territory via the ALS (NSW/ACT)).

Therefore, ALSWA recommends that s 23H(1) should be provide that:

*Subject to section 23L, if the investigating official in charge of investigating a Commonwealth offence believes on reasonable grounds that a person who is under arrest, or who is a protected suspect, and whom it is intended to question about the offence is an Aboriginal person or a Torres Strait Islander, then, unless the official is aware that the person has arranged for a legal practitioner to be present during the questioning, the official must, **before starting to question the person**:*

- (a) immediately inform the person that a representative of an Aboriginal legal assistance organisation will be notified that the person is under arrest or a protected suspect (as the case requires); and*
- (b) **immediately** notify such a representative.*

The Bill proposes to insert a new s 23H(1AB) which provides that:

*If a representative of an Aboriginal legal assistance organisation is notified under subsection (1), the investigating officer must not question the person until the earlier of the following times:*

- (a) the representative has communicated with the person;*
- (b) 2 hours have elapsed since the representative was notified.*

ALSWA recommends that this new provision should state that once a representative of an Aboriginal legal assistance organisation is notified under subsection (1), the investigating officer must not question the person until the earlier of the following times:

- (a) The representative has communicated with the person'
- (b) 2 hours have elapsed since the representative was notified.

## Scope of the notification requirements

In *R v CK*<sup>4</sup> Burns J held that the obligations under s 23H(1) are a 'step in the process of ensuring that an interview friend is available to be present during the proposed questioning' and that if the person waives the right to an interview friend, there is no obligation to comply with s 23H(1).<sup>5</sup>

The Bill introduces a new s 23H(1A) which provides:

*To avoid doubt, the obligations imposed by subsection (1) do not limit and are not limited by any other obligations imposed, or rights conferred, by this subsection.*

ALSWA supports this proposed amendment because the obligations under s 23H(1) should not be limited by a decision made by the Aboriginal or Torres Strait Islander person in regard to the presence of an interview friend during questioning. The underlying purpose of s 23H(1) is to ensure that Aboriginal legal assistance organisations are notified whenever an Aboriginal or Torres Strait Islander person is taken into custody in order to check on both their mental and physical wellbeing as well as to ensure that their legal rights are protected. This should occur irrespective of whether the person wishes for an interview friend to be present during questioning.

## Questioning and interview friends

Section 23H(2) of the *Crimes Act* provides that an investigating official must not question an Aboriginal or Torres Strait Islander person unless an interview friend is present while the person is being questioned and that person has been allowed to communicate with the interview friend before the start of the questioning. However, if the person expressly and voluntarily waived his or her right to have an interview friend present, the official may question the person.

Generally, the person has the right to choose his or her own interview friend (unless he or she fails to exercise that right within a reasonable time or the chosen interview friend does not arrive within 2 hours after the person contacts them). Currently, if the person does not choose an interview friend, the official must choose a representative of an Aboriginal legal assistance organisation or a person whose name is included in the relevant list maintained by the Minister. Under the Bill, the requirement for the Minister to maintain a list of persons for this purpose will be repealed. The new provision states that if the person does not choose an interview friend, the investigating official must choose a representative of an Aboriginal legal assistance organisation in the State or Territory in which the person is located.

ALSWA does not have any objection to the proposed amendment; however, it highlights that ALSWA's capacity to provide a representative to act as an interview friend upon request will vary depending on the individual circumstances of each case.

## Exceptions

Section 23H(8) of the *Crimes Act* provides that:

*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.*

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<sup>4</sup> [2013] ACTSC 251.

<sup>5</sup> Ibid [28]-[29].



ALSWA is of the view that s 23H(8) should be repealed. This exception significantly relies on the subjective views of the investigating official and whilst the official's belief must be based on reasonable grounds, it is likely to be open to misjudgement and bias. The impact of language and cultural barriers and general lack of cultural awareness may affect an official's assessment of a person's level of education and understanding. For example, 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. Furthermore, the discrimination and disadvantages experienced by Aboriginal and Torres Strait Islander people when dealing with police and justice agencies demands a systemic approach. Aboriginal legal assistance organisations should be notified in all circumstances where an Aboriginal or Torres Strait Islander person is held in custody.

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