Law Council
OF AUSTRALIA

Crimes and Other Legislation Amendment (Omnibus) Bill 2023

Senate Legal and Constitutional Affairs Committee

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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 its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
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The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgement

The Law Council acknowledges the assistance of its National Criminal Law Committee, National Security Law Working Group, National Human Rights Committee and (with respect to proposed amendments to Schedule 1 of the Bill) the Financial Services Committee of the Business Law Section in the preparation of this submission.

Executive Summary

1. The Law Council is grateful for the opportunity to respond to the Senate Legal and Constitutional Affairs Committee's review of the Crimes and Other Legislation Amendment (Omnibus) Bill 2023 (the **Bill**).

2. The Law Council has not been able to consider all aspects of the Bill in detail because of the limited time for consultation, nor has it had the opportunity to consult adequately with its membership on the proposed reforms noting that the Bill was referred to the Senate Legal and Constitutional Affairs Committee on 10 May 2023. In the time available, the following preliminary comments have been prepared with the view to assisting the Committee with its scrutiny role.

3. The Law Council supports the passage of the Bill subject to some targeted recommendations for amendment and provision of further information in the Explanatory Memorandum as outlined below.

4. The Law Council makes the following recommendations.

- In relation to Part 1 of Schedule 1 of the Bill which involves amendments to the provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) pertaining to obligations for providers of designated services to enrol with the Australian Transaction Reports and Analysis Centre (**AUSTRAC**), the treatment of multiple contraventions proposed in new subsections 51B(2B) to (2D) should be reconsidered on the basis that it may lead to the imposition of a disproportionate penalty. This compounds the disproportionality of penalties under existing arrangements.
- In relation to Part 3 of Schedule 1 of the Bill, AUSTRAC should conduct detailed consultation with stakeholders prior to any change to the AML/CTF Rules to implement automated decision-making ("**ADM**"). It is critical to this consultation process that AUSTRAC provide detailed reasoning addressing the following matters:
  - an assessment on the suitability of using AI and ADM in respect of processes 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;
  - publishing arrangements for the use of ADM and any suitability assessment which underpins it;
  - applicable safeguards including regular review by a multidisciplinary team to ensure the rules remain lawful and up-to-date, including auditing, testing and reporting obligations;
  - any affected individual must be notified where there is significant use of automation, including AI, in making an administrative decision; and
  - an automated decision must be capable of being reduced to a statement of reasons explicable by a human.
- Before introducing a computer assisted decision-making process, AUSTRAC should be required to document:
  - its assessment of the risks of using technology in the place of humans to make the decision;

- what measures it has taken to mitigate those risks;

- If a computer assisted decision-making process is used with respect to enrolment by remittance service providers, the decisions should be translated into major foreign languages commonly used by the remitter community; and
- After the computer assisted decision-making process has been operating for a period of 12 months, an independent review of the decisions made through that process be undertaken to assess whether:
  - the measures AUSTRAC has taken to manage the above-mentioned risks were adequate; and
  - any changes ought to be made to that process to better manage those risks.
- In relation to Schedule 6 of the Bill which makes changes to the mechanism by which the Attorney-General and other interested parties provide consent for the international transfer of a prisoner from Australia to a transfer country, consideration should be given to legislative amendments directed to ensuring a decision maker making a decision under Part 3 of the ITP Act must have regard to the following matters:
  - sentence enforcement;
  - rehabilitation and reintegration;
  - community safety;
  - humanitarian considerations;
  - dual citizenship;
  - views of relevant agencies; and
  - any submission made by the prisoner under Section 16 of the ITP Act.
- In relation to Schedule 6 of the Bill, to improve procedural fairness, the Law Council recommends amendments directed to:
  - there being a mandatory time period between notification under subsection 19(2) to the prisoner of the proposed terms on which the transfer country has consented to the transfer and the Attorney-General making a decision to refuse consent under proposed subsection 19(1);
  - the decision maker must have regard to any submission made by the prisoner under Section 16 of the ITP Act. However, the decision maker should be free to give this submission the weight that they think appropriate, and are not bound by it;
  - section 52 of the ITP Act, which requires the Attorney-General to arrange for a prisoner or their representative 'to be kept informed'[1] of the progress of any application under section 16 of the ITP Act or a request under sections 23 or 33 of the ITP Act, should be strengthened by an additional obligation to provide written reasons for a decision to the prisoner and transfer country. These written reasons should also provide

[1] Section 52 of the ITP Act.

sufficient information regarding the process for merits and judicial review of the decision;

- require that the prisoner, or their representative, be provided with all available information relevant to the critical issues that will determine their matter (including positive and adverse information gathered by agencies) to ensure they can effectively advocate their case; and

- in the context of vulnerable members of the prisoner population, including prisoners with limited literacy and culturally and/or linguistically diverse backgrounds, in order to avoid practical injustice, require that communications to prisoners are drafted in a manner that is easily understood and reasonable steps are taken to assist any vulnerable prisoners with comprehending this information. Notably, subsection 6(3) of the ITP Act already provides that a prisoner or prisoner's representative must be informed, through an interpreter, if necessary, in language in which the prisoner is able to communicate with reasonable fluency, of the legal consequences of transfer of the prisoner under this Act before consenting to the transfer.[2] However, this requirement should also apply to communication of a decision to refuse consent to a transfer and the reasons for a decision.

- In relation to Schedule 6 of the Bill, the Law Council supports consideration of legislative amendments to clarify that transfer decisions under proposed subsection 19(1) in Schedule 6 to the Bill are subject to merits review, as this is an administrative decision affecting a person's rights.
- The Law Council supports Schedule 8 of the Bill, which proposes amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth) directed to expanding the scope for jurisdictional Public Interest Monitors. However, more broadly, the Law Council supports consideration of expanding the role of the independent contradictor established by the TIA Act, the Public Interest Advocate, beyond applications for journalist information warrants to other applications for intrusive powers under the TIA Act.

[2] Section 6(3) of the ITP Act.

Schedule 1 – Anti-Money Laundering and Counter-Terrorism Financing

Part 1 – failure to enrol

5. Part 1 of Schedule 1 of the Bill involves amendments to the provisions of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) (**AML/CTF Act**) which contain obligations for providers of designated services to enrol with the Australian Transaction Reports and Analysis Centre (**AUSTRAC**) as a reporting entity.

6. The Law Council has no objection to:

   (a) the proposed redrafting of the current subsection 51B(1), which will continue to have the effect that enrolment with AUSTRAC is required no later than 28 days after commencing to provide a designated service; or

   (b) the insertion of proposed new subsection 51B(2A) which clarifies that, where a provider is already enrolled as a reporting entity, there is no further obligation to enrol when they commence to provide an additional designated service.

7. The Law Council notes that:

   (a) currently section 51B is drafted such that non-compliance is treated as a singular contravention and not treated as a separate contravention in respect of each day of non-compliance;[3]

   (b) proposed new subsections 51B(2B) to (2D) will provide that, where there has been a failure to enrol as a reporting entity within the required timeframe under subsection 51B(1), a separate contravention will occur for every day on which the non-compliance persists;

   (c) existing subsection 51B(3) provides that subsection 51B(1) is a civil penalty provision;

   (d) the current value of a penalty unit is $275; and

   (e) the maximum pecuniary penalty which the Federal Court may impose by way of a civil penalty order for contravention of a civil penalty provision under section 175 of the AML/CTF Act is 100,000 penalty units ($27.5 million) for a body corporate and 20,000 penalty units ($5.5 million) for an individual.

8. Further, existing paragraph 184(1A)(aaa) provides that subsection 51B(1) is an infringement notice provision, which means the AUSTRAC CEO has the power to issue an infringement notice with regard to an alleged contravention. The applicable penalty under existing subsection 186A(1) is 60 penalty units, which currently equates with $16,500 per contravention. If an entity does not wish to pay the relevant penalty, the costs associated with challenging the infringement notice could be significant. More broadly, the Law Council has previously stated that it does not support any increase in the use of non-judicial enforcement processes.[4]

9. The Law Council is concerned that a reporting entity which is even one day late in enrolling with AUSTRAC potentially faces a heavy punishment, which may not

[3] *Explanatory Memorandum*, 25 [21].
[4] Law Council of Australia, Anti-Money Laundering and Counter Terrorism Financing Amendment Bill 2017 (15 September 2017) 3 [10].

necessarily be proportionate to the severity of the contravention. This risk of a disproportionate penalty being imposed, by way of a non-judicial enforcement process, is heightened by the increased penalties envisaged in proposed new subsections 51B(2B) to (2D). In this regard, the Law Council notes that enrolment is a predominantly administrative requirement which may be overlooked or delayed accidentally. The registration requirements for digital currency exchanges and remittance providers also attract the civil penalty, as well as being criminal offences.

10. The Law Council considers that it would be preferable for all these relatively administrative registration requirements to be treated consistently, and for the consequences of contravening such provisions to reflect the lesser gravity of a failure to comply. This failure should be compared to contraventions of more fundamental compliance requirements such as the sections 81 and 82 obligations to establish a compliance AML/CTF Program and to comply with that Program (which are more likely to result in consumer harm or detriment).

11. The Law Council notes that:

    (a) even if a reporting entity is not a large enterprise, the potential pecuniary penalty of $27.5 million (noting that this is a maximum penalty) for enrolling one day late may be significantly more than the entire assets of the reporting entity; and

    (b) there can be “grey areas” of uncertainty and confusion in the industry as to whether an entity has the obligation to enrol with AUSTRAC. In the experience of members of the Financial Services Committee within the Law Council’s Business Law Section, at times entities may receive legal advice, at a point when a significant amount of time has passed since they commenced the activity which is captured as a designated service. The advice is often to the effect that they should in fact have been registered within 28 days of commencing that activity.

12. The Law Council has also observed that the Bill does not seek to make conforming changes to the following provisions of the AML/CTF Act, including:

    (a) subsection 51F(1) – which requires a reporting entity to notify AUSTRAC of a change in their enrolment details within 14 days; and

    (b) section 76A(1) - which requires a provider of registrable digital currency exchange services to register with AUSTRAC as a digital currency exchange provider,

    (c) both of which are also civil penalty provisions.

13. The Law Council therefore questions whether the outcome which the proposed amendment would produce is appropriate in all the circumstances.

Recommendation

- The treatment of multiple contraventions, proposed in new subsections 51B(2B) to (2D), should be reconsidered on the basis that it may lead to the imposition of a disproportionate penalty, which compounds the existing disproportionality. There should be greater consistency in the calibration of civil and criminal penalties across the AML/CTF Act, the gravity of the penalty should reflect the corresponding consumer harm or detriment.

Part 2 – disclosure of sensitive AUSTRAC information in connection with court proceedings

14. The Law Council generally supports Part 2 of Schedule 1 of the Bill, which will reimpose safeguards on derivative use and disclosure for the purposes of, or in connection with, court or tribunal proceedings in relation to some types of sensitive AUSTRAC information. These types of sensitive AUSTRAC information include:

    (a) a 'suspicious matter report' (**SMR**) given to the AUSTRAC CEO under section 41 of the AML/CTF Act;

    (b) information obtained under section 49 of the AML/CTF Act; and

    (c) reports of suspect transactions given to the AUSTRAC CEO under section 16 of the *Financial Transaction Reports Act 1988* (Cth).

15. The Law Council notes the explanation provided in the Explanatory Memorandum that Part 2 of Schedule 1 of the Bill addresses an inadvertent anomaly introduced by the *Anti-Money Laundering and Counter-Terrorism Financing and Other Legislation Amendment Act 2020* (Cth) which 'erroneously omitted' to ensure that sensitive AUSTRAC information cannot be disclosed by AUSTRAC's partner agencies. In this regard, the Explanatory Memorandum notes:

16. This would address the current incongruent situation where sensitive AUSTRAC information cannot be admitted in evidence and is not required to be disclosed to the court or tribunal in the course of a proceeding, but the same sensitive AUSTRAC information may be disclosed to any other person for the purposes of, or in connection with, the court or tribunal proceeding, including to persons who are the subject of the sensitive AUSTRAC information (for example, in accordance with prosecution disclosure requirements or "party-party disclosure" regimes contained in various Australian jurisdictions' legislation).[5]

17. The Law Council is supportive of this proposal.

Part 3 – computer-assisted decision-making

18. Proposed section 228A(1) is expressed broadly and would permit the AUSTRAC CEO to authorise a computer program to be used to take administrative actions on their behalf under relevant provisions of the AML/CTF Act and the AML/CTF Rules. This broad discretion is limited by proposed subsection 228A(2) which outlines the parts of the AML/CTF Act under which the AML/CTF Rules may prescribe a provision for the purposes of subsection 228A(1).

19. The Law Council recognises that the current arrangements which require all decisions, including basic administrative decisions to be made by the AUSTRAC CEO, are cumbersome. Technological advances have made it easier for agencies to make greater use of computer programs, including automated systems, which have the potential to significantly improve consistency, accuracy and efficiency. However, these potential benefits must be balanced against the need to ensure compliance with administrative law requirements, privacy safeguards, appropriate governance, quality assurance and accountability. This is because assisted decision-making processes which are poorly designed or carelessly implemented could adversely impact

[5] Explanatory Memorandum, 29 [46].

individuals and businesses who are affected by a decision that is made in an automated manner.

20. The Law Council has previously considered the issues which arise from regulating the use of artificial intelligence (**AI**) and automated decision making (**ADM**) by government agencies performing functions and powers under Commonwealth legislation.[6] The Law Council maintains its position that comprehensive regulatory reform is required to ensure that Commonwealth legislation which authorises the use of ADM and AI to exercise statutory powers is consistent with administrative law principles.

21. In this regard, the Law Council reiterates its recommendations that:[7]

- the Australian Government commission an audit of all current or proposed use of AI and automation to make or assist in making administrative decisions by or on behalf of Government agencies;
- legislative amendments be made to ensure that where it is intended that a statutory power be exercised by using ADM or AI, the statute expressly authorises the use of ADM or AI;
- all legislation which authorises the use of ADM and AI to exercise, or assist in the exercise, of statutory powers should:
  - be consistent with regard to types of powers which may be exercised by ADM or AI, and employ standard statutory language for expressing the power to use ADM or AI;
  - require an assessment be undertaken of the suitability of the proposed automated system to exercise the statutory power, as a precondition to making arrangements for use of AI or ADM;
  - require that all arrangements for the use of ADM be subject to ongoing governance requirements by a multidisciplinary team to ensure they remain lawful and up-to-date, including auditing, testing and reporting obligations;
  - require that officials publish all arrangements for the use of ADM and any suitability assessment which underpins it, including sufficient information to enable a broad understanding of how AI or ADM operates to produce lawful administrative decisions;
  - require that any affected individual must be notified where there is significant use of automation, including AI, in making an administrative decision;
  - require that an automated decision must be capable of being reduced to a statement of reasons explicable by a human, produce a full audit trail of the decision-making path, for the purpose of enabling it to be reviewed by a tribunal or court, and the person affected by the decision should have a right to request such reasons; and
  - provide for the automated decision to be subject to internal review, preferably by a human within the agency, and the person affected by the decision must be informed of that review avenue.

[6] Law Council of Australia, Submission to the Department of Prime Minister and Cabinet, Positioning Australia as a Leader in Digital Economy Regulation – Automated Decision Making and AI Regulation (3 June 2022).
[7] Ibid, 6-7 [5].

22. The Law Council recognises that proposed section 228A provides some limitations on the ambit of the use of computer assisted decision making by AUSTRAC, for example, it will be limited to decisions related to the administrative processes 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.

23. Due to the Reviewable Decisions framework in Part 17A of the AML/CTF Act automation of administrative action will only relate to 'positive' decision making responsibilities which do not impact the application of procedural fairness principles, or result in an adverse outcome for a person. Provisions which contain decisions that can be automated are to be prescribed in the AML/CTF Rules by the AUSTRAC CEO to allow for the use of information technology developments, whilst maintaining a scheme that is flexible and consistent with emerging money laundering and terrorism financing threats. This will provide efficiencies to regulated agencies and AUSTRAC, while still being subject to the parliamentary scrutiny and oversight that applies to delegated legislation.[8]

24. In principle, the Law Council accepts that decisions related to the administrative processes 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 may be characterised broadly as administrative in nature. However, the Law Council notes that it is difficult to assess the overall suitability of using AI and ADM in relation to these administrative processes without reviewing the AML/CTF Rules which have not been released.

25. While it is true that, before making a decision adverse to the applicant (a reviewable decision in Part 17A of the AML/CTF Act), a decision maker must provide a written notice[9] setting out the terms and basis of the proposed decision and give the applicant an opportunity to make submissions in relation to the proposed decision, it does not necessarily follow that 'this measure will not allow adverse decisions to be made by a computer program.'[10] Critically, if the automated decision is not capable of being reduced to a statement of reasons explicable by a human, the scope for human intervention and scrutiny may be limited.

26. Additionally, it is essential that the written notice provide sufficient information of the degree to which the decision has been influenced by AI or ADM decision making. Moreover, the efficacy of internal and external review will depend on the degree to which there is transparency around the use of AI and ADM. Without reviewing the general form of the written notices that will be issued, it is difficult to assess these matters.

27. It is noted that the specific provisions within Parts 3A, 6 and 6A of the AML/CTF Act under which a computer-based action can be taken will be prescribed in the AML/CTF Rules which are subject to Parliamentary disallowance.

Recommendation

- AUSTRAC should conduct detailed consultation with stakeholders prior to any change to the AML/CTF Rules to implement automated decision-making. It is critical to this consultation process that AUSTRAC provide

[8] Ibid, 31 [58]
[9] For example, before making a decision adverse to the applicant (a reviewable decision) under Part 6 or 6A of the AML/CTF Act, the AUSTRAC CEO is required under section 75Q or 76S to give the applicant a written notice setting out the terms and basis of the proposed decision and give the applicant an opportunity to make submissions in relation to the proposed decision.
[10] Explanatory Memorandum, 31 [59].

detailed reasoning addressing the Australian Government's *8 Artificial Intelligence Ethics Principles,*[11] the Commonwealth Ombudsman's *Automated Decision-making Better Practice Guide*[12] and the following matters:

- an assessment on the suitability of using AI and ADM in respect of processes 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;
- publishing arrangements for the use of ADM and any suitability assessment which underpins it;
- applicable safeguards including regular review by a multidisciplinary team to ensure they remain lawful and up-to-date, including auditing, testing and reporting obligations;
- notification to any affected individual where there is significant use of automation, including AI, in making an administrative decision; and
- an automated decision must be capable of being reduced to a statement of reasons explicable by a human.

- Before introducing a computer assisted decision-making process, AUSTRAC should be required to document:
  - its assessment of the risks of using technology in the place of humans to make the decision;
  - what measures it has taken to mitigate those risks;
- If a computer assisted decision-making process is used with respect to enrolment by remittance service providers, the decisions should be translated into major foreign languages commonly used by the remitter community; and
- After the computer assisted decision-making process has been operating for a period of 12 months, an independent review of the decisions made through that process be undertaken to assess whether:
  - the measures AUSTRAC has taken to manage the above-mentioned risks were adequate; and
  - any changes ought to be made to that process to better manage those risks.

Further observations

28. The Law Council notes that the title of the Bill does not provide any indication that it is seeking to amend the AML/CTF Act in a non-consequential manner, and is of the view that presenting a legislative change in this manner makes it difficult for stakeholders who are regulated under the AML/CTF Act, and may therefore be impacted by the proposed legislative change, to become aware of it.

[11] Commonwealth of Australia, Department of Industry, Science and Resources, Australia's Artificial Intelligence Ethics Framework, Australia's AI Ethics Principles.
[12] Commonwealth Ombudsman, Automated Decision-making: Better Practice Guide (2020) 6.

29. Therefore, the Law Council recommends that, should the Bill be passed, AUSTRAC conduct an information awareness campaign with a view to putting affected stakeholders on notice of what would be a significant regulatory change.

Schedule 6 – Refusal of consent to international transfer of prisoners

30. The *International Transfer of Prisoners Act 1997* (Cth) (the **ITP Act**) allows Australians imprisoned overseas to apply to serve the remainder of their sentence in Australia. The ITP scheme also allows foreign nationals who are imprisoned in Australia to apply to serve the balance of their sentence in their home country.

31. The ITP scheme is voluntary and requires the formal consent of the prisoner, Australia's federal Attorney-General, and the government of the relevant transfer country (or Tribunal, as the case may be) before a transfer can take place.

32. Proposed subsection 19(1), which would be inserted into the ITP Act by item 2 of Schedule 6 to the Bill, provides that, if the transfer country consents to a transfer of a prisoner from Australia on terms it proposes, the Attorney-General may decide to refuse consent to the transfer on those terms. The discretion in proposed subsection 19(1) is broad, with a limited range of mandatory considerations which must be satisfied before the Attorney-General can decide whether or not to consent to a transfer.[13]

33. For context, the Explanatory Memorandum clarifies that proposed section 19 is intended to overcome the 'inefficiencies' associated with the current drafting of the ITP Act, which requires the Attorney-General to, before making a decision on an application for transfer from Australia under subsection 20(3), obtain consent from:

- the transfer country under section 18;
- the relevant state or territory minister; and
- the prisoner (or prisoner's representative) under subsections 20(1) and 20(2).[14]

34. The Law Council notes that the ITP Act defines a 'transfer country' as a foreign country or a region that is declared by the regulations under section 8 of the ITP Act to be a 'transfer country.' Currently, Australia is able to undertake transfers with over sixty countries through the Council of Europe Convention on the Transfer of Sentenced Persons[15] and a number of bilateral treaties. These are all captured in regulations made under the ITP Act. This means that international transfer of prisoners can only

[13] The mandatory conditions under the ITP Act 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)).

[14] Explanatory Memorandum, 49 [170].

[15] *International Transfer of Prisoners (Transfer of Sentenced Persons Convention) Regulations 2002* (Cth) reg 4 states for the definition of transfer country in the ITP Act, a foreign country for which the Convention is in force is a transfer country; *Convention on the Transfer of Sentenced Persons*, Council of Europe, ETS No. 112 (entered into force on 1 July 1985). ('***Council of Europe Convention***'). Notably, the chart of signatures and ratifications of Treaty 112 shows a number of states outside the Council of Europe have signed the Council of Europe Convention such as Australia, Brazil, Canada, India, Israel and Japan.

occur in the context of commitments by Australia and the respective transfer country which are directed to the continuing enforcement of the sentence imposed by the sentencing state[16] and rules regulating the conversion of sentences imposed by the sentencing state.[17] For example, these include the rule that, when converting a sentence, the administering state 'shall not aggravate the penal position of the sentenced person…'[18]

35. The policy objective of Schedule 6 of the Bill is to amend the ITP Act to enable the Attorney-General to refuse to provide his/her consent to requests or applications for transfer to/ from Australia at an earlier stage in the process.

36. The Law Council considers it a fundamental tenet of the rule of law that Executive powers should be carefully defined by law, such that it is not left to the Executive to determine for itself what powers it has and when and how they may be used.[19]

37. The Senate Standing Committee for the Scrutiny of Bills (the **Senate Scrutiny Committee**) has considered Schedule 6 of the Bill and provided recommendations for improvement that are directed to constraining executive discretion and providing greater protection for procedural fairness.[20] Those recommendations are that:[21]

- the Attorney-General's Department provide further advice specifying the considerations contained in legislation or administrative guidance to constrain the Attorney-General's discretion to refuse a decision to transfer a prisoner from Australia;
- consideration of legislative amendments to embed the considerations listed in the explanatory memorandum as relevant or mandatory considerations on the face of the statute;
- consideration of whether the Bill can be amended to provide for additional mechanisms to allow procedural fairness; and
- the Attorney-General's Department provide further advice as to whether independent merits review is available for decisions made under proposed subsection 19(1), with reference to the Administrative Review Council's guide: *What decisions should be subject to merit review*?[22]

38. The Law Council agrees with the Senate Scrutiny Committee's recommendations and considers that these recommendations ought to be addressed in order for this Bill to proceed.

39. The Law Council provides some additional observations regarding taking relevant matters into account, procedural fairness and merits review below.

Taking relevant matters into account

40. Currently, in relation to a decision to transfer a prisoner from Australia under Part 3 of the ITP Act, a prisoner may apply to the Attorney-General using a form prescribed by Section 16 of the ITP Act for transfer of the prisoner to a transfer country. However,

[16] See, for example, Council of Europe Convention, Art. 10.
[17] See, for example, Council of Europe Convention, Art. 11.
[18] Council of Europe Convention, Art. 11(1)(d).
[19] Law Council of Australia, Policy Statement: Rule of Law Principles (March 2011) 4.
[20] Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5/23 (10 May 2023) 14-18. ('***Senate Scrutiny Committee'***)
[21] Ibid, 17 [1.65]
[22] Commonwealth of Australia, Attorney-General's Department, Administrative Review Council, What decisions should be subject to merit review? (1999).

there is no obligation requiring the Attorney-General to have regard to the submission made by the prisoner under Section 16 of the ITP Act.

41. The Law Council recommends that the matters currently listed in the Attorney-General's Department's International Transfer of Prisoners – Statement of Policy (**Statement of Policy**)[23] be entrenched in primary legislation as matters to which the decision maker must have regard in making a decision under Part 3 of the ITP Act. Those matters are:

- sentence enforcement;
- rehabilitation and reintegration;
- community safety;
- humanitarian considerations;
- dual citizenship; and
- views of relevant agencies.

42. Additionally, the Law Council recommends legislative amendment to require the decision maker to have regard to any submission made by the prisoner under Section 16 of the ITP Act. The Law Council also considers that procedural fairness in relation to a submission made by the prisoner can be strengthened. This is considered in the following section.

43. With respect to the current arrangements, the Law Council is concerned that the Statement of Policy describes the Attorney-General's consideration of rehabilitation and reintegration in discretionary terms. Specifically it is noted the factors relevant to rehabilitation 'may' be considered when a prisoner's rehabilitation and reintegration into the community would be assisted by transfer.

44. The Law Council submits, in keeping with Australia's international human rights law obligations,[24] the decision maker must take into account rehabilitation and reintegration. The importance of rehabilitation in this context is supported by Rule 4 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the **Nelson Mandela Rules**)[25] which states:

45. The purposes of a sentence of imprisonment or similar measures that deprive a person' of their liberty are primarily to protect society against crime and to reduce recidivism. Those purposes can be achieved only if the period of imprisonment is used

[23] Commonwealth of Australia, Attorney-General's Department, International Transfer of Prisoners Statement of Policy (1 February 2019).
[24] In 1992, the United Nations Human Rights Committee explained that states have '*a positive obligation toward persons who are particularly vulnerable because of their status as persons deprived of liberty*' and observed:

> '*not only may persons deprived of their liberty not be subjected to [torture or other cruel, inhuman or degrading treatment or punishment], including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the [ICCPR], subject to the restrictions that are unavoidable in a closed environment.'*

UN Human Rights Committee, ICCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty) (10 April 1992)
[25] *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175 70th session, Agenda Item 106, UN Doc A/Res/70/175 (8 January 2016). ('***Nelson Mandela Rules***')

to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life.[26]

46. In this context, regard should also be had to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment[27] and the Nelson Mandela Rules.[28]

Recommendation

The Law Council recommends that consideration be given to legislative amendments directed to ensuring a decision maker making a decision under Part 3 of the ITP Act must have regard to the following matters:

- sentence enforcement;
- rehabilitation and reintegration;
- community safety;
- humanitarian considerations;
- dual citizenship;
- views of relevant agencies; and
- any submission made by the prisoner under Section 16 of the ITP Act.

Procedural fairness

47. In general, the fair hearing aspect of procedural fairness requires ensuring that a person who may be affected by an exercise of power is given an opportunity to be heard, a real opportunity to advocate their case for a favourable exercise of the power and to make meaningful submissions.[29]

48. It is well established that the procedural fairness of a procedure is dependent on the statutory and factual context. As Mason J stated in *Kioa v West* (1985) 159 CLR 550 at 585, 'the expression 'procedural fairness'… conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of a particular case.'

49. Practically, Australian Courts have found the fair hearing rule may require of a decision maker that they:

- provide an affected person with prior notice that a decision that may adversely affect their interests will be made;[30]

[26] Nelson Mandela Rules, Rule 4.
[27] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, GA Res 43/173 UN Doc A/43/173 (9 December 1988).
[28] *United Nations Standard Minimum Rules for the Treatment of Prisoners*, GA Res 70/175 70th session, Agenda Item 106, UN Doc A/Res/70/175 (8 January 2016).
[29] *Khazaal v Attorney-General* (Cth) [2020] FCA 448 [55] citing *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 [82] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).
[30] *Ekinci v Civil Aviation Safety Authority* (2014) 227 FCR 459.

- disclose any new evidence to an affected person to enable them the opportunity to rebut or comment on the new material presented;[31]
- bring an affected person's attention to the critical issues upon which an administrative decision is likely to turn.[32]

Recommendation

Consideration should be given to the following legislative amendments directed to improving procedural fairness:

- stipulate that there be a mandatory time period elapsed between notification under subsection 19(2) to the prisoner of the proposed terms on which the transfer country has consented to the transfer and the Attorney-General making a decision to refuse consent under proposed subsection 19(1);
- the decision maker must have regard to any submission made by the prisoner under Section 16 of the ITP Act. However, the decision maker should be free to give this submission the weight that they think appropriate, and is not bound by it;
- section 52 of the ITP Act, which requires the Attorney-General to arrange for a prisoner or their representative 'to be kept informed'[33] of the progress of any application under section 16 of the ITP Act or a request under sections 23 or 33 of the ITP Act, should be strengthened by an additional obligation to provide written reasons for a decision to the prisoner and transfer country. These written reasons should also provide sufficient information regarding the process for merits and judicial review of the decision;
- require that the prisoner, or their representative, be provided with all available information relevant to the critical issues that will determine their matter (including positive and adverse information gathered by agencies) to ensure they can effectively advocate their case; and
- in the context of vulnerable members of the prisoner population, including prisoners with limited literacy and culturally and/or linguistically diverse backgrounds, in order to avoid practical injustice, require that communications to prisoners are drafted in a manner that is easily understood and reasonable steps are taken to assist any vulnerable prisoners with comprehending this information. Notably, subsection 6(3) of the ITP Act already provides that a prisoner or prisoner's representative must be informed, through an interpreter, if necessary, in language in which the prisoner is able to communicate with reasonable fluency, of the legal consequences of transfer of the prisoner under this Act before consenting to the transfer.[34] However, this requirement should also apply to communication of a decision to refuse consent to a transfer and the reasons for a decision.

[31] *Comcare v Wuth* [2018] FCAFC 13.
[32] *Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 195 ALR 502.
[33] Section 52 of the ITP Act.
[34] Section 6(3) of the ITP Act.

50. In this regard, consideration should be given to whether Australia should enshrine its commitment to furnish information in relation to the Council of Europe Convention to affected prisoners, as required by Article 4, in the ITP Act.[35]

Merits review

51. The Explanatory Memorandum refers to the availability of judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) or more broadly under section 39B of the *Judiciary Act 1903* (Cth) or in the High Court's original jurisdiction under paragraph 75(v) of the Constitution where there are grounds to do so.[36]

52. The Law Council agrees with the Senate Scrutiny Committee recommendation that legislative amendments clarify that transfer decisions under proposed subsection 19(1) in Schedule 6 to the Bill are subject to merits review, as this is an administrative decision affecting a person's rights.

53. The Law Council considers that the Senate Scrutiny Committee has correctly applied *Principle (i) – availability of independent review* contained in the Standing Committee for the Scrutiny of Delegated Legislation Guidelines[37] which provides:

> *Where an instrument empowers a decision-maker to make discretionary decisions which have the capacity to affect rights, liberties, obligations or interests, those decisions should ordinarily be subject to independent merits review. Accordingly, the explanatory statement to any instrument including such powers should explain:*
>
> - *whether independent merits review is available; and*
> - *if merits review is not available, the characteristics of the relevant decisions which justify their exclusion from merits review, by reference to the Administrative Review Council's guide, What decisions should be subject to merit review?.*

54. In this regard, the Administrative Review Council observed:

> *As a matter of principle, the Council believes that an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review. That view is limited only by the small category of decisions that are, by their nature, unsuitable for merits review, and by particular factors that may justify excluding the merits review of a decision that otherwise meets the Council's test.*[38]

55. The Law Council submits that the decision to transfer a prisoner from Australia under Section 16 of the ITP Act does not fall within the categories of decision described by the Administrative Review Council as 'unsuitable' for merits review. Critically, the decision to provide consent to an application for transfer from Australia under Part 3 of the ITP Act requires an application of discretion to the factual circumstances of a particular prisoner and the type of factors considered in the Statement of Policy including sentence enforcement considerations in relation to a particular transfer country. Therefore, the decision making required, does not fall within 'legislation-like

[35] Council of Europe Convention, Art. 4.
[36] Explanatory Memorandum, 50-51 [181].
[37] The Senate, Standing Committee for the Scrutiny of Delegated Legislation, Guidelines – 2nd Edition (February 2022).
[38] Commonwealth of Australia, Attorney-General's Department, Administrative Review Council, What decisions should be subject to merit review? (1999) [2.1].

decisions' of broad application or 'decisions that automatically follow from the happening of a set of circumstances' which are considered unsuitable for merits review.[39] Conversely, the decision to transfer may have a significant impact on the rehabilitation of a prisoner because they are able to take greater advantage of reintegration programs, community and family supports in a transfer country.

56. Moreover, the Law Council agrees with the view of the Administrative Review Council that it does not follow from the fact that an original decision may be subject to judicial review, that such a decision is inappropriate for merits review.[40] Judicial review, as an exercise of the Commonwealth's judicial power, results in findings in law. Merits review which is an administrative process results in a correct and preferrable decision. In this regard, the Administrative Review Council note: '(t)he different realms of operation of the two forms of review mean that they can, and often do, co-exist.'[41]

Recommendation

- Consideration should be given to legislative amendments to clarify that transfer decisions under proposed subsection 19(1) in Schedule 6 to the Bill are subject to merits review, as this is an administrative decision affecting a person's rights.

Schedule 7 – Grounds to refuse mutual assistance requests

57. Schedule 7 to the Bill would amend the *Mutual Assistance in Criminal Matters Act 1987* (Cth) to provide that the existing 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. It presently refers to 'the person'.

58. Article 7 of the International Covenant on Civil and Political Rights (**ICCPR**)[42] and the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**) require that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. These rights are absolute and non-derogable.[43] Article 3 of the CAT establishes non-refoulement obligations prohibiting states from returning a person to a country where there are substantial grounds for believing that the person would be in danger of being subjected to torture.

59. The Explanatory Memorandum notes that the effect of Schedule 7 of the Bill is to expand the current scope of the grounds on which the Attorney-General must refuse mutual assistance on torture grounds to encompass situations where:

> *… there are substantial grounds to believe that providing the evidence requested will result in a third person located in the foreign country being investigated and subjected to torture.*[44]

[39] Ibid, [3.1].
[40] Ibid, [5.30].
[41] Ibid, [5.31].
[42] *International Covenant on Civil and Political Rights* opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[43] See, for example, ICCPR, Art. 4, para. 2 and Art. 7.
[44] Explanatory Memorandum, 16 [84]. See also 58 [229].

60. The Law Council welcomes Schedule 7 of the Bill. It considers that Schedule 7 will enhance Australia's compliance with its obligations under international law and ensure the Attorney-General's vital discretion to refuse mutual assistance where there are torture concerns expressed appropriately.[45]

Schedule 8 – Public interest monitors

61. Schedule 8 of the Bill proposes amendments to the *Telecommunications (Interception and Access) Act 1979* (Cth) (**TIA Act**) directed to expanding the scope for jurisdictional[46] Public Interest Monitors (**PIMs**) to make submissions in relation to warrant applications for coercive powers and applications for International Production Orders.

62. The Law Council considers that these ad hoc amendments, which are directed to strengthening the role of jurisdictional Public Interest Monitors in Victoria and Queensland, highlight the need to expand the role of the independent contradictor established by the TIA Act, the Public Interest Advocate. The role should go beyond applications for journalist information warrants to other applications for intrusive powers under the TIA Act. Consideration of the latter alternative will improve the oversight of intrusive powers across the board under the TIA Act.

63. The Law Council has long advocated for expanded use of public interest advocates to provide greater independent contestation in the authorisation process.[47] In general, an issuing authority should have the discretion to consider whether they would be assisted by an independent contradictor in relation to a particular warrant or authorisation request.[48] The Law Council acknowledges that this issue may be considered further in the context of ongoing consideration of Electronic Surveillance Reform.

64. The Law Council maintains its long-standing support for the recommendations endorsed by the Parliamentary Joint Committee on Intelligence and Security's Press Freedom Report which are directed to strengthening the role of the Public Interest Advocate under the TIA Act by:

- **Setting out qualifications in primary legislation**—setting out minimum qualifications for Public Interest Advocates in primary legislation;[49]
- **Power to request information**—authorising the Public Interest Advocate to clarify elements of the warrant application provided by a law enforcement agency to enable the case to be built in their submission;[50]
- **Additional recordkeeping and reporting requirements**—requiring additional information to be collected and included in the Minister's annual report on the use of the TIA Act including, for example, the number of cases where a Public Interest Advocate contested a warrant application, the number of cases where

[45] See Parliamentary Joint Committee on Human Rights, Human rights scrutiny report, Report 5 of 2023 (9 May 2023) 10 [1.28] and 15 [1.41].
[46] Public Interest Monitors currently operate in Victoria and Queensland. They were established under the *Public Interest Monitor Act 2011* (Vic), the *Police Powers and Responsibilities Act 2000* (Qld), and the *Crime and Corruption Act 2001* (Qld).
[47] Law Council of Australia, Submission to Department of Home Affairs, Reform of Australia's Electronic Surveillance Framework: Discussion Paper (18 February 2022) 47 [233].
[48] Ibid.
[49] Parliamentary Joint Committee on Intelligence and Security, Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press (August 2020), 78-83. ('***PJCIS Press Freedom Report***')
[50] Ibid.

a Public Interest Advocate attended the hearing of a verbal application for a warrant, and the number of cases where a warrant was not issued after being contested by a Public Interest Advocate.[51]

Recommendation

- The Law Council supports consideration of expanding the role of the independent contradictor established by the TIA Act, the Public Interest Advocate, beyond applications for journalist information warrants to other applications for intrusive powers under the TIA Act.

[51] PJCIS Press Freedom Report, 83-85.