New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

to

The Senate Legal and Constitutional Affairs Legislation Committee

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

23 June 2017

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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Introduction:

The New South Wales Council for Civil Liberties (NSWCCL) welcomes the Committee's decision to review proposed changes to a range of federal criminal laws, pursuant to the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017.

These submissions convey mixed support for the proposed changes to improve and clarify Commonwealth criminal justice arrangements. The NSWCCL expresses deep concern in respect to one particular proposed change to Federal criminal legislation, involving custody notification obligations of investigating officials before questioning an Aboriginal or Torres Strait Islander person.

Proposed Amendment to Custody Notification Laws (Schedule 2, Item 5):

It is acknowledged that the proposed changes to custody notification laws at a federal level will predominantly affect the policing practices of the Australian Federal Police (AFP). Given the limited field operation of the AFP, our concern is not that this legislation will immediately affect a great number of Aboriginal people at the coalface of arrest and custody procedure, but that these proposed laws will serve as a new 'best practice' model for the States and Territories to follow.

The CCL acknowledges that these laws are well intentioned. They are designed to give effect to existing custody protections for indigenous people, particularly in the Australian Capital Territory where the Supreme Court of the ACT recently found that these protections (specifically, s. 23H(1) of the *Crimes Act 1914 (Cth)*) do not require an investigating official to notify an Aboriginal legal assistance organisation that an Aboriginal person has been detained in police custody, prior to commencing questioning: *R v CK* [2013] ACTSC 251. Accordingly, Schedule 2 of the Bill seeks to alter s. 23H(1) to require police to notify an Aboriginal legal assistance organisation prior to commencing questioning – a commendable intervention, in accordance with recommendations 108, 223 and 224 of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC). In doing so, however, the Bill provides that police may interview an Aboriginal person in custody who has not received legal advice from the organisation, provided that they have taken 'reasonable steps' to

contact an Aboriginal legal assistance organisation, simply by leaving a message on the organisation's answering service and waiting two hours (Schedule 2, Item 5, (1AB)(b); and Explanatory Memorandum at p. 28).

The NSWCCL submits that this proposal constitutes an unacceptable interference with the procedural and fair trial rights of some of the most vulnerable people within the criminal justice system – Aboriginal people. In practice, police are sometimes unable to contact an Aboriginal legal assistance organisation within 2 hours of detaining an Aboriginal person in custody, for instance, when arrest occurs outside of working hours and a lawyer is not available via the custody notification service. This is often due to a missed phone call or poor phone reception, particularly in rural and regional areas, or simply as a result of an on-call lawyer sleeping through a late-night phone call. Custody notification services are not funded in the same on-call manner as the emergency services.

Accordingly, a consequence of the proposed legislation is that Aboriginal people will forego access to legal advice and/or a prisoner's friend in custody. Access to fair trial rights such as the right to silence and the privilege against self-incrimination will be severely restricted, with the effect of unfairly incriminating Aboriginal people. Such a law will almost certainly increase the over-representation of Aboriginal people in prison.

The NSWCCL submits that the proposed amendment to the *Crimes Act 1914*, pursuant to Schedule 2, Item 5 1(AB) of the Bill, should be deleted and replaced by a provision that codifies NSW procedure in respect to the custody notification service (discussed below).

<u>NSW Custody Notification Service:</u>

The New South Wales Custody Notification Service (NSWCNS) provides a preferable model for custody notification. The NSW scheme is partly legislative (embedded within the *Law Enforcement Powers and Responsibilities Regulations 2016 (NSW),* s. 37, (LEPRR); previously, *LEPRR 2002,* s. 33) and partly through common law. The NSW legislation is silent in respect to the time period that must elapse before police can interview an Aboriginal person in custody after attempting to contact an Aboriginal legal assistance organisation. Rather, this

aspect of the NSWCNS is prescribed by common law. In *Campbell and 4 Ors v Director of Public Prosecutions (NSW)* [2008] NSWSC 1284, Justice Hidden of the NSW Supreme Court found that if police cannot comply with custody notification provisions, *police must defer any interview until such time as a lawyer from an Aboriginal legal assistance organisation can be contacted.* In this case, confessional evidence was rendered inadmissible by a failure of police to do comply with this requirement. And, in the intervening period between being arrested, charged and interviewed, the Court recommended that the appellants in this case should not have been taken into custody (even when faced with multiple serious offences). Rather, it was incumbent upon police to either grant bail or, depending on the seriousness of the offence, detain the person in custody (at [18]-[20]).

These laws have been overwhelmingly successful in achieving the objective of reducing Aboriginal deaths in police custody. While NSW has had one of the highest per capita rates of Aboriginal people in police custody (compared with other Australian States and Territories), it has one of the lowest rates of Aboriginal deaths in custody (Schofield-Georgeson, *The Conversation,* 'NSW Ditches Another Protection for Indigenous People in Custody', 10 June 2015; see also, Schofield-Georgeson, 'Over-Incarceration'*, JustJustice,* 2016).

It should be noted, however, that neither the proposed federal scheme, nor the existing NSW model, currently require police to notify an Aboriginal legal organisation when an Aboriginal person is taken into protective police custody (usually for an alcohol or mental health related reason). Both CNS schemes could be improved by extending legislative provisions to ensure that Aboriginal legal organisations are informed whenever an Aboriginal person is taken into protective custody.

Perspectives from the Aboriginal Legal Service (NSW/ACT):

We have contacted the NSW/ACT Aboriginal Legal Service (NSW/ACT ALS) in respect to this Bill as well as our submissions. We understand that during initial consultations relating to this Bill that the ALS opposed the requirement of 'reasonable steps' outlined in Schedule 2, Item 5, (1AB)(b). The ALS have also suggested that where Police are unable to contact a representative of a local Aboriginal legal assistance organisation, they must attempt to

contact such an organisation within another locality or jurisdiction. This is a sound proposal, wholly supported by the NSWCCL.

We also understand that the ALS maintain a longstanding objection to existing s. 23H(8) of the Act. This section excuses Police from contacting an Aboriginal legal assistance organisation if they form the opinion that the Aboriginal person is 'not at a disadvantage' during the interview process due to their 'level of education and understanding' compared 'with members of the Australian community generally'. Such a scheme is inherently subjective and dependent upon an assessment by individual officers. Criteria used to assess whether or not to notify the relevant organisation is likely to vary greatly between officers. This presents practical difficulties and may render the assessment of individual officers the subject of legal challenge. Such a provision does not exist under NSW procedural law. **Accordingly, the NSWCCL recommends further amendment of the *Crimes Act 1914,* to delete existing section 23H(8).**

A Proposed Reformulation of Schedule 2, Item 5, s. 1(AB):

A preferable formulation of the proposed amendments would be to codify existing NSW common law procedural requirements in the following way:

a) As soon as an Aboriginal person is taken into police custody (including protective custody), police must notify an Aboriginal legal assistance organisation that the person has been taken into custody.

b) Police must not interview an Aboriginal person in custody until such time as a legal practitioner or representative of a local Aboriginal legal assistance organisation can be contacted and has spoken to the person in custody, unless the person in custody waives their right to legal representation.

c) Where Police are unable to contact a representative of a local Aboriginal legal assistance organisation, they must attempt to contact an Aboriginal legal assistance organisation within another locality or jurisdiction.

d) A waiver of the right to legal representation does not interfere with the obligation of Police to notify an Aboriginal legal assistance organisation, in accordance with 'a)'.

Summary of NSWCCL position and recommendations:

The NSWCCL submits that:

1. **The proposed amendment outlined in Schedule 2, Item 5 1(AB) (which provides that police may interview an Aboriginal person in custody who has not received legal advice from the organisation, provided that they have taken 'reasonable steps' to contact an Aboriginal legal assistance organisation, simply by leaving a message on the organisation's answering service and waiting two hours) will disadvantage Aboriginal people in three significant ways by:**
    - **(i) compromising access to legal advice;**
    - **(ii) curtailing the right to silence and privilege against self-incrimination; and**
    - **(iii) adding to the overrepresentation of Aboriginal people in prison;**

2. **Schedule 2, Item 5 1(AB), should be deleted;**

3. **Schedule 2, Item 5 1(AB) should be replaced by provisions that codify NSW procedure in respect to the custody notification service;**

4. **The codification of NSW CNS procedure should be modified to include:**
    - **(i) compulsory notification of Aboriginal legal assistance organisations in the event of protective custody matters;**

(ii) **a requirement for police to contact another Aboriginal legal assistance organisation in a different locality or jurisdiction in the event that they are unable to contact a local Aboriginal legal assistance organisation; and**

(iii) **deletion of s. 23H(8) under the existing *Crimes Act 1914.***

Concluding comments

We thank you for your consideration of our submissions. In making these submissions, the NSWCCL would not wish to exclude consideration of submissions from other organisations such as the North Australian Aboriginal Justice Agency (NAAJA) that may provide for a legislative scheme that is more favourable to Aboriginal people in custody, than the terms contemplated here.

This submission was written by Eugene Schofield-Georgeson (NSWCCL Committee Member) on behalf of the NSWCCL. Mr Schofield-Georgeson is available to elaborate on these submissions at any public hearing of this Bill.

Yours sincerely,

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