

21 July 2017

Ms T Matulick
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO BOX 6100
Parliament House
CANBERRA ACT 2600

Email: legcon.sen@aph.gov.au.

Dear Toni Matulick,

Re: Senate Legal and Constitutional Affairs Committee's *Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017*

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) welcomes the opportunity to provide a brief submission to the Senate Legal and Constitutional Affairs Committee's *Inquiry into the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017*.

The NATSILS is the peak national body for Aboriginal and Torres Strait Islander Legal Services (ATSILS) in Australia. The NATSILS brings together over 40 years of experience in the provision of legal advice, assistance, representation, community legal education, advocacy, law reform activities and prisoner through-care to Aboriginal and Torres Strait Islander peoples in contact with the justice system. The ATSILS are the experts on the delivery of effective and culturally competent legal assistance services to Aboriginal and Torres Strait Islander peoples. This role provides the NATSILS with a unique insight into access to justice issues effecting Aboriginal and Torres Strait Islander peoples.

The NATSILS represents the following ATSILS:

- Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld);
- Aboriginal Legal Rights Movement Inc. (ALRM);
- Aboriginal Legal Service (NSW/ACT) (ALS NSW/ACT);
- Aboriginal Legal Service of Western Australia (Inc.) (ALSWA);
- Central Australian Aboriginal Legal Aid Service (CAALAS);
- Tasmanian Aboriginal Community Legal Service (TACLS);
- North Australian Aboriginal Justice Agency (NAAJA); and
- Victorian Aboriginal Legal Service Co-operative Limited (VALS).

Scope of Submission:

Our brief submission raises specific concern in relation to Schedule 2 of the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017* and seeks to comment on existing obligations of custody notification under the *Crimes Act 1914* (Cth).

Background:

Section 23H of *Crimes Act 1914* (Cth) currently outlines obligations of investigating officials when an Aboriginal or Torres Strait Islander person is taken into police custody.

A custody notification service is essential to ensuring Aboriginal and Torres Strait Islander people are protected and provided with appropriate support when detained in police custody. Custody notification ensures that an Aboriginal or Torres Strait Islander person receives legal advice and support, delivered in a culturally sensitive manner at the earliest possible opportunity, after contact has been made with the criminal justice system. The importance of mandatory custody notification has been highlighted in numerous reports, including the 1991 Royal Commission into Aboriginal Deaths in Custody.

Recommendation 224 of the 1991 Royal Commission into Aboriginal Deaths in Custody (RCIADIC) states:

“..in jurisdictions where legislation, standing orders or instructions do not already so provide, appropriate steps be taken to make it mandatory for Aboriginal Legal Services to be notified upon the arrest or detention of any Aboriginal person other than such arrests or detentions for which it is agreed between the Aboriginal Legal Services and the Police Services that notification is not required.”

The following submission raises concerns regarding existing custody notification requirements under the *Crimes Act 1914* (Cth) (‘the Crimes Act’) as well as proposed changes to custody notification obligations under the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017* (‘the Bill’).

Section 23H (2) (a):

Section 23H(2)(a) of the Crimes Act, provides that an investigating official need only contact an Aboriginal legal assistance organisation if they have a belief on ‘reasonable grounds’ that the person in question, being detained, is Aboriginal or Torres Strait Islander.

Identification as Aboriginal or Torres Strait Islander should not be determined by an investigating official, but rather an individual who identifies as Aboriginal or Torres Strait Islander. The NATSILS strongly urge against the use of provisions that entitle investigating officials to determine Aboriginality by a belief based on ‘reasonable grounds’. Where a person identifies as Aboriginal or Torres Strait Islander, the custody notification obligation must immediately be evoked.

Section 23H (8):

Section 23H (8) of the Crimes Act provides an exception for custody notification in circumstances where ‘an investigating official believes on reasonable grounds that, having regards to the person’s level of education and understanding, the person is not at a disadvantage in respect of questioning’.

The NATSILS is of the view that section 23H (8) of the Crimes Act should be repealed. This section operates to undermine the purpose of custody notification requirements, making protections under 23H only available to those whom appear, to the subjective mind of an investigating official, to be experiencing disadvantage. This exception severely dilutes the obligation of custody notification, leaving it to be a matter subject to an investigating official’s level of cultural awareness, knowledge and understanding of ‘disadvantage’.

The NATSILS caution against exceptions to custody notification obligations that rely upon a subjective assessment of disadvantage, particularly as Aboriginal and Torres Strait Islander disadvantage is systemic, complex and has historically been misunderstood and penalised by the justice system.

Proposed amendments to section 23 H (1) (a) (b):

The NATSILS further raise concern in relation to proposed amendments to section 23H (1) (a) (b) of the Crimes Act contained in the Bill. Currently under section 23 H (1) (a), an investigating official must immediately inform an Aboriginal legal assistance organisation when an Aboriginal or Torres Strait Islander person is taken into custody. The proposed amendment to section 23H (1) (a) (b) outlined in the Bill, dilutes the current obligation of notification, requiring an investigating official to take ‘reasonable steps’ to notify an Aboriginal legal assistance organisation when an Aboriginal or Torres Strait Islander person is taken into custody.

The NATSILS considers it essential that actual notification of an Aboriginal legal assistance organisation occurs, without exception, when an Aboriginal or Torres Strait Islander person is taken into police custody. Actual notification places a clear and consistent obligation upon investigating officials, leaving no discretion for non-compliance.

The notification of an Aboriginal legal assistance organisation, when an Aboriginal or Torres Strait Islander person is taken into police custody is essential to enabling access to justice. Notification ensures that an Aboriginal or Torres Strait Islander person receives legal advice delivered in a culturally sensitive manner at the earliest possible opportunity, in order to prevent persons being detained from acquiescing to police demands in a manner which could jeopardise subsequent court proceedings. Further, notification requirements provide an opportunity for an Aboriginal or Torres Strait Islander person being detained to receive culturally sensitive support and assurance, that where medical attention may be required, it is provided with immediacy.

The NATSILS warns that custody notification requirements should not be diluted by guaranteeing an exception where an investigating official has taken ‘reasonable steps’ to notify an Aboriginal legal assistance organisation. The NATSILS considers it a matter of priority for custody notification to be mandatory in all circumstances and not dependent upon police discretion and divergent, inconsistent interpretations of what ‘reasonable steps’ may amount to.

In addition to comments made in relation to the Crimes Act, the NATSILS urgently call upon the Commonwealth Government to design, in partnership with the eight ATSILS a legislated custody notification service.

Should you have any further questions or concerns in relation to the information contained within our submission, please contact NATSILS Executive Officer, Karly Warner via email: kwarn@vals.org.au or phone on 0423 610 587.

Yours faithfully,



Mr Wayne Muir
Co-Chair NATSILS