Law Council
OF AUSTRALIA

Attorney-General's Portfolio Miscellaneous Measures Bill 2023

Senate Legal and Constitutional Affairs Legislation Committee

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Telephone **+61 2 6246 3788**
Email **mail@lawcouncil.au**
PO Box 5350, Braddon ACT 2612
Level 1, MODE3, 24 Lonsdale Street,
Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.au

Table of contents

About the Law Council of Australia **3**
Acknowledgements **4**
Introduction **5**
Schedule 1—Federal Court criminal jurisdiction **7**
Part 1—Conferral of criminal jurisdiction 7
The rationale for change 7
Existing constraints on the criminal jurisdiction of the Federal Court 9
Expertise 9
Docket system 10
Appeals 11
Definition of 'related summary offence' 11
Part 2—Criminal procedure 12
The transfer of proceedings 12
Schedule 2—Federal Court juries **14**
Schedule 3—Amendments to the Marriage Act 1961 ..... **15**
Schedule 4—Other amendments **16**
Part 1—Arbitration 16
Part 2—Assistance under the Native Title Act 17
Part 3—Corrections 19

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice and general improvement of the law.

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
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2024 are:

- Mr Greg McIntyre SC, President
- Ms Juliana Warner, President-elect
- Ms Tania Wolff, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Mr Lachlan Molesworth, Executive Member

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.au.

Acknowledgements

The Law Council acknowledges the contributions of the Bar Association of New South Wales and the Law Society of New South Wales in the preparation of this submission, in addition to the Law Council's Indigenous Legal Issues Committee and National Criminal Law Committee.

Introduction

1. The Law Council of Australia welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation **Committee** to assist in its inquiry into the provisions of the Attorney-General's Portfolio Miscellaneous Measures **Bill** 2023.

2. The omnibus Bill, introduced in the House of Representatives on 15 November 2023 and referred to the Committee on 30 November 2023, would:[1]

    - confer jurisdiction on the **Federal Court** of Australia to hear and determine a range of summary and indictable offences relating to conduct within the regulatory remit of the Australian Securities and Investments Commission (**ASIC**) (**Schedule 1**);
    - enable the Sheriff of the Federal Court to request a State or Territory jury official to prepare and provide a jury panel for use by the Federal Court (**Schedule 2**);
    - make amendments to the *Marriage Act 1961* (Cth) to clarify and improve the operation of the Commonwealth Marriage Celebrants Program and provide greater accessibility for marrying couples (**Schedule 3**); and
    - make minor and technical amendments to update, clarify and improve the intended operation of other legislation administered within the Attorney-General's portfolio (**Schedule 4**), including:
        - changes to the *Family Law Act 1975* (Cth) about arbitration (**Part 1**);
        - the abolition of the Native Title Respondents Scheme under the *Native Title Act 1993* (Cth) (**Part 2**); and
        - typographical corrections to the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (**FCFCOA Act**) and the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) (**Part 3**).

3. Schedules 1 and 2 to the Bill replicate, to a large extent, provisions of an exposure draft of the Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill (**Exposure Draft Bill**).[2] The Exposure Draft Bill was released for public consultation by the Attorney-General's Department (**AGD**) in October 2022, and the Law Council provided a submission on the Exposure Draft Bill to the AGD in November 2022.[3]

4. The Law Council understands that it was one of eight submitters to the AGD on the Exposure Draft Bill.[4] The AGD website states that 'feedback from this consultation informed revisions to the Bill to clarify its operation'.[5] However, as at 5 January 2024, no submissions have been published on the AGD website. It is also unclear whether the AGD has provided a submission to the Committee in response to its inquiry into the Bill, as no submissions have been published at the time of writing. As such, the

[1] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth), 3 [1].
[2] Attorney-General's Department, Consultation on the Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill (Web Page, 2023) <https://consultations.ag.gov.au/legal-system/federal-court-of-australia-amendment/>.
[3] Law Council of Australia, Exposure Draft Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022 (Submission to the Attorney-General's Department, 1 November 2022) <https://lawcouncil.au/resources/submissions/federal-court-of-australia-amendment-extending-criminal-jurisdiction-and-other-measures-bill>.
[4] Attorney-General's Department, Consultation on the Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill (Web Page, 2023) <https://consultations.ag.gov.au/legal-system/federal-court-of-australia-amendment/>.
[5] Ibid.

extent to which Schedules 1 and 2 to the Bill attempt to address feedback received on the Exposure Draft Bill is not clear. The Law Council suggests that the Committee seek advice from the AGD on this matter.

5. In its submission to the AGD in response to the Exposure Draft Bill, the Law Council expressed the view that, given the complexity of issues arising, a longer period of consultation and expanded reasoning for the approach taken was warranted, such as by way of an issues paper that sets out, in detail, the rationale for changes.[6] It is unfortunate that such a process has not occurred prior to the introduction of the Bill, particularly with regard to Schedules 1 and 2. Further, the nondescript title of the Bill, which does not make reference to the Federal Court, may mean that interested stakeholders are unaware of the Bill's potential implications.

6. In addition, the Law Council's Constituent Bodies, Sections and Advisory Committees have had limited opportunity to consider and provide feedback on the Bill. There were only 18 business days in December 2023 during which submissions could be prepared and provided to the Committee.[7] This has impeded the Law Council's ability to engage meaningfully with its membership about the Bill.

7. Nonetheless, the Law Council has conducted a preliminary analysis of the proposed reforms, and makes the following recommendations:

    - In relation to Schedule 1, that:
        - the Committee seek clarification from the AGD on the rationale underpinning the amendments in Schedule 1 to the Bill, given that delays in prosecuting criminal corporate crime are not dependent on jurisdiction;
        - the Committee seek clarification from the AGD as to how the Bill proposes to manage the existing constraints on the Federal Court's exercise of criminal jurisdiction;
        - the offence categories in proposed subsection 67G(4) be reconsidered and, if retained, their inclusion be clearly justified in the Bill's Explanatory Memorandum;
        - the Bill and/or its explanatory materials include further matters that could guide the court's consideration of whether a transfer of proceedings would be in the interests of justice;
        - the accused be provided the right to make an application to transfer proceedings—alternatively, justification should be included in the Bill's Explanatory Memorandum for the accused not being provided this right;
        - prosecutors only be permitted to apply for a transfer of proceedings prior to committal for trial or sentence; and
        - guidance material be developed by relevant federal agencies, and made publicly available, about when a prosecutor should apply to transfer proceedings.

[6] Law Council of Australia, Exposure Draft Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022 (Submission to the Attorney-General's Department, 1 November 2022) <https://lawcouncil.au/resources/submissions/federal-court-of-australia-amendment-extending-criminal-jurisdiction-and-other-measures-bill> 6.

[7] The Bill was referred to the Committee on 30 November 2023, with submissions due on 28 December 2023.

- In relation to Schedule 2, that:
  - the differences between the current jury preparation process in Subdivision D of Part III of the Federal Court Act, and jury selection rules in each State and Territory, be examined in greater detail by the AGD and canvassed in the Bill's Explanatory Memorandum; and
  - the Bill and/or its explanatory materials provide more detailed specification of the criteria to be applied by the Sherriff in utilising the discretionary, hybrid jury preparation procedure proposed in Schedule 2.
- In relation to Schedule 3, that:
  - updated guidance material be provided to authorised marriage celebrants to assist them to comply with their new obligations under the Marriage Act.
- In relation to Schedule 4, that:
  - there be a sustained increase in resourcing for the Federal Circuit and Family Court of Australia (**FCFCOA**) to assist it to meet its substantial ongoing demands; and
  - the Government take proactive steps, in consultation with relevant stakeholders, to reduce the impact of the abolition of the Native Title Respondents Scheme on Aboriginal Land Councils, particularly in New South Wales.

Schedule 1—Federal Court criminal jurisdiction

Part 1—Conferral of criminal jurisdiction

The rationale for change

8. Part 1 of Schedule 1 confers jurisdiction on the Federal Court to hear and determine a range of indictable and summary corporate crime offences within the regulatory remit of ASIC.

9. In his second reading speech on the Bill, the Commonwealth Attorney-General, the Hon Mark Dreyfus KC MP, stated that the amendments in Schedule 1 will enhance the capacity of the Australian court system to deal with corporate criminal offences, and will support the ASIC to prosecute corporate criminal conduct more efficiently.[8]

10. The Law Council appreciates the Government's objective of ensuring greater resourcing for Commonwealth criminal trials, particularly in the context of corporate crime. However, while efforts to increase resourcing are welcomed, Schedule 1 to the Bill represents a substantial change to the federal, state and territory court systems. Any such changes necessitate detailed justification, which the Law Council is concerned has not sufficiently occurred to date, especially without visibility of the AGD's submission to the Committee.

[8] Commonwealth, *Parliamentary Debates,* House of Representatives, 15 November 2023, 13 (Mark Dreyfus, Attorney-General).

11. The Law Council acknowledges that, in the Government's response to the **Royal Commission** into Misconduct in the Banking, Superannuation and Financial Services Industry, a commitment was made to expand the Federal Court's jurisdiction in relation to criminal corporate crime:[9]

> *Extending the Federal Court's jurisdiction will boost the overall capacity within the Australian court system to ensure the prosecution of financial crimes does not face delays as a result of heavy caseloads in the Courts.*

12. The Government simultaneously noted that it had already provided an additional $70.1 million to boost ASIC's increased enforcement activity, and $41.6 million to the Commonwealth Director of Public Prosecutions (**CDPP**) to prosecute an increased number of briefs from ASIC.[10]

13. The Explanatory Memorandum to the Bill states that the amendments in Part 1 of Schedule 1 would 'support the efficient resolution of criminal proceedings by enabling the Federal Court to determine both indictable and related summary offences where appropriate'.[11] The Law Council appreciates this reasoning and acknowledges that, as noted in the Explanatory Memorandum, the proposed provisions are modelled on, or are consistent with, legislation at the State, Territory and Commonwealth levels.[12] However, there appears to be no basis for suggesting that delays in the prosecution of Commonwealth corporate crime briefs are attributable to the jurisdiction in which they are being tried.[13] The Law Council's concerns regarding this unfounded inference were previously canvassed in its submission to the AGD in response to the Exposure Draft Bill,[14] and are set out below.

14. The Law Council understands from some of its Constituent Bodies that delays in the prosecution of Commonwealth matters may arise because extensive documentary evidence is generally involved in matters relating to corporate and/or 'white collar' offending. These matters are of a high complexity, meaning there are typically ongoing investigations at the point of charge, leading to multiple tranches of brief service. Moreover, it is not unusual for there to be a reformulation of the prosecution's case over time by the CDPP, including proximate to trial in some cases.[15]

15. As the Law Council noted in its submission to the AGD on the Exposure Draft Bill, these delays are not dependent on jurisdiction.[16] Rather, delays typically arise for a variety of reasons, including:

    - limited resourcing of the federal agencies involved in investigating and prosecuting Commonwealth crime; and
    - issues concerning eligibility for legal assistance for accused persons in large Commonwealth prosecutions.

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[9] Australian Government, Restoring trust in Australia's financial system (Government response to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, February 2019) <https://treasury.gov.au/sites/default/files/2019-03/FSRC-Government-Response-1.pdf> 39.
[10] Ibid.
[11] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) 23 [35].
[12] Ibid 23 [38]; 30 [81].
[13] Law Council of Australia, Exposure Draft Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022 (Submission to the Attorney-General's Department, 1 November 2022) <https://lawcouncil.au/resources/submissions/federal-court-of-australia-amendment-extending-criminal-jurisdiction-and-other-measures-bill> 2.
[14] Ibid 2-3.
[15] Ibid 3.
[16] Ibid.

The Law Council understands that these challenges have similarly arisen in prosecutions in the Federal Court.[17]

16. Consequently, the Law Council suggests that the Committee seek clarification from the AGD on the rationale underpinning the amendments in Schedule 1 to the Bill, given that delays in prosecuting criminal corporate crime are not dependent on jurisdiction.

17. Specific matters that would benefit from detailed consideration for reasons given in the Law Council's submission on the Exposure Draft Bill—and that have not been canvassed in the Second Reading Speech or Explanatory Memorandum to the Bill—include:

    - the relative costs of conducting criminal proceedings in the Federal Court, compared to State and Territory courts; and
    - the identification of existing procedural rules in State and Territory courts that will require revision to reduce delays.[18]

Recommendation

- **That the Committee seek clarification from the AGD on the rationale underpinning the amendments in Schedule 1 to the Bill, given that delays in prosecuting criminal corporate crime are not dependent on jurisdiction.**

Existing constraints on the criminal jurisdiction of the Federal Court

18. Schedule 1 to the Bill also does not sufficiently address the current constraints on the exercise of criminal jurisdiction by the Federal Court. The Law Council drew the AGD's attention to these constraints in its submission on the Exposure Draft Bill,[19] and its concerns persist in relation to this Bill.

Expertise

19. The Explanatory Memorandum to the Bill states that:[20]

> *The Federal Court has considerable expertise in civil, commercial and corporate matters and is well positioned to deal with matters under this corporate criminal jurisdiction. The Federal Court has existing criminal jurisdiction for cartel offences against the Competition and Consumer Act 2010. In addition to the Federal Court's existing criminal jurisdiction, it already has jurisdiction to deal with a number of civil penalty provisions under the Acts being amended which share the same or similar elements to related criminal offences.*

20. The Law Council acknowledges that some Federal Court judges will have significant experience in the field of federal criminal law and related proceedings. However, the reality is that a significant portion of Federal Court judges will have limited experience in this practice area, given that the Federal Court focuses on federal legislation and commercial matters. This contrasts with State superior courts, where there is generally a greater proportion of judges with criminal law experience.

[17] Ibid.
[18] Ibid 1.
[19] Ibid 3.
[20] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) 4 [5].

Docket system

21. The Federal Court operates on an individualised docket system. This system is a component of the National Court **Framework**,[21] with each prosecution supervised by the same judge from beginning to end. The Law Council understands that State and Territory criminal courts do not employ an equivalent approach.

22. The Federal Court's website describes the function of the individualised docket system, under the Framework, in the following terms:[22]

> *A key component of the National Court Framework is the national allocation system for judicial matters. This national system ensures the consistent and appropriate allocation of judge-related matters and the effective management of the Court's judicial workload.*
>
> *Under the national allocation system, the work of the judges has been aligned to hear cases based on the individual docket system, taking into account workload management, National Practice Area expertise and the character of matters filed.*
>
> *… The general principle underlying the individual docket system is that a case is allocated to the docket of a particular judge at or about the time of filing with the intention that, subject to any necessary relocation, it will remain with that judge for case management and disposition.*

23. One of the National Practice Areas established by the Framework is 'Federal Crime and Related Proceedings'.[23] According to the Federal Court's website, there are currently 14 judges in this National Practice Area (inclusive of two 'National Coordinating Judges'), plus one 'additional judge' (15 listed judges in total).[24]

24. Of the 15 listed judges:

- seven are located in the Sydney registry;
- three are located in the Melbourne registry;
- two are located in the Adelaide registry;
- two are located in the Brisbane registry; and
- one is located in the Perth registry.

25. The Law Council is concerned that there may be insufficient numbers of Federal Court judges with experience running complex criminal jury trials in every superior court registry, particularly in Adelaide, Brisbane and Perth. This challenge may be amplified in the context of Federal Court appeals, as outlined below.

[21] Federal Court of Australia, The National Court Framework (Web Page, 2023) <https://www.fedcourt.gov.au/about/national-court-framework>.
[22] Federal Court of Australia, Allocation of Judicial Matters under the NCF (Web Page, 2023) <https://www.fedcourt.gov.au/about/national-court-framework/allocations>.
[23] Federal Court of Australia, National Practice Area: Federal Crime & Related Proceedings (Web Page, 2023) <https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/crime>.
[24] Federal Court of Australia, Judges: Federal Crime & Related Proceedings (Web Page, 2023) <https://www.fedcourt.gov.au/law-and-practice/national-practice-areas/crime/judges>.

Appeals

26. In the absence of an appellate tier of the Federal Court, determining criminal appeals in the existing Full Federal Court system is undesirable because of the limited number of judges with sufficient criminal law experience.

27. If the Government intends for criminal appeals to only be determined by judges with criminal law experience in the Full Federal Court, then this would lead to a very small number of trial judges sitting in judgment of each other's rulings and directions.[25] The Law Council recommends that the Committee seek clarification from the AGD as to whether this is the intention, and, if so, how this limitation will be managed in practice.

Recommendation

- **That the Committee seek clarification from the AGD as to how the Bill proposes to manage the existing constraints on the Federal Court's exercise of criminal jurisdiction.**

Definition of 'related summary offence'

28. The Bill would insert a definition into section 2 of the *Judiciary Act 1903* (Cth) to provide that 'related summary offence' has the meaning given by new subsection 67G(3), which would confer jurisdiction on the Federal Court to hear and determine defined offences.

29. New subsection 67G(3) would define a 'related summary offence' as a summary offence against a law of the Commonwealth, arising from substantially the same facts and circumstances as those from which an indictable offence, which is within the jurisdiction of the Federal Court, has arisen.[26]

30. New subsection 67G(4) would confer jurisdiction on the Federal Court to hear and determine prosecutions of indictable offences against the *Criminal Code Act 1995* (Cth) (**Criminal Code**) that are likely to be relied on in prosecutions arising from investigations undertaken by the ASIC. The offences under the Criminal Code include:

    - bribery of foreign public officials;
    - forgery and related offences;
    - identity crime;
    - money laundering;
    - computer offences;
    - financial information offences; and
    - offences relating to accounting records.[27]

31. These provisions enable the Federal Court to hear and determine both indictable and related summary offences where appropriate.[28] The Explanatory Memorandum notes that, without jurisdiction for related summary offences, the alternative would likely be

[25] Law Council of Australia, Exposure Draft Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022 (Submission to the Attorney-General's Department, 1 November 2022) <https://lawcouncil.au/resources/submissions/federal-court-of-australia-amendment-extending-criminal-jurisdiction-and-other-measures-bill>.
[26] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) 23 [34].
[27] Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth), sch 1, item 8 (s 67G(3)).
[28] Ibid item 8 (s 67G(1)-(2)).

for prosecutors to commence new proceedings in a State or Territory court, which would require duplicate evidence disclosure and admission processes.[29]

32. The Law Council considers that several of the offence categories in proposed subsection 67G(4) are not necessarily associated with corporate criminal conduct, in particular, forgery and related offences, identity crime, money laundering, and computer offences.[30] These offence categories be should be reconsidered and, if retained, the inclusion of each category should be clearly justified in the Bill's Explanatory Memorandum.

Recommendation

- **That the offence categories in proposed subsection 67G(4) be reconsidered and, if retained, their inclusion be clearly justified in the Bill's Explanatory Memorandum.**

Part 2—Criminal procedure

33. Part 2 of Schedule 1 would make technical and procedural amendments to several Acts to support the exercise of jurisdiction within the scope of Part 1, by the Federal Court and State and Territory courts.

The transfer of proceedings

34. The Bill would insert new section 32AE into the FCA Act, to provide for proceedings (or parts of proceedings) relating to corporate crime offences to be transferred between courts.[31]

35. According to the Explanatory Memorandum, the purpose of this provision is to:[32]

> *… enable proceedings to be moved across the Australian court system to the most appropriate forum and venue, having regard to the interests of justice, to support the effective and efficient administration of justice.*

36. The Law Council is pleased that the Bill expressly requires the first court to have regard to the interests of justice in considering whether to make an order to transfer the proceedings.[33] The first court must also have regard to any laws of the State or Territory in which it is located that provide for certain courts to hear and determine the proceedings.[34]

37. However, the Explanatory Memorandum provides that:[35]

> *… there is no defined set of criteria for assessing the interests of justice. Rather, the court should assess the interests of justice on a case-by-case basis, having regard to all relevant circumstances*.

[29] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) 23 [35].
[30] Law Council of Australia, Exposure Draft Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022 (Submission to the Attorney-General's Department, 1 November 2022) <https://lawcouncil.au/resources/submissions/federal-court-of-australia-amendment-extending-criminal-jurisdiction-and-other-measures-bill> 4.
[31] Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) sch 1, item 19 (s 32AE).
[32] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) 29-30 [80].
[33] Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) sch 1, item 19 (s 32AE(3)(a)).
[34] Ibid item 19 (s 32AE(3)(b)).
[35] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) 30 [84].

38. The Law Council acknowledges that it may be difficult to define criteria for assessing what is in the interests of justice. However, the Bill (or, at a minimum, the Explanatory Memorandum) could include additional guidance in this respect, by reference to (for example):

    - the nature of the offence;
    - the location of the alleged offending conduct;
    - the location of the witnesses; and
    - the costs and expense to the parties of the trial being conducted in a particular jurisdiction or location.[36]

39. The Bill provides that the court may transfer a proceeding on application by the prosecutor, or on its own initiative.[37] However, the Explanatory Memorandum does not appear to include a justification for why the defendant cannot apply to transfer the proceedings. The Law Council notes that, according to the Explanatory Memorandum, 'the principles of procedural fairness will require the court to provide the defendant an opportunity to be heard before any decision to transfer or not to transfer is made.'[38] While providing the defendant with an opportunity to be heard addresses the principles of procedural fairness to some extent, the Law Council recommends that the Bill should provide the accused with the right to make an application to transfer the proceedings.[39]

40. The Law Council considers that, if a prosecutor is to be permitted to apply to transfer proceedings, then that prosecutor should be required to do so prior to committal for trial or sentence. In addition, any decision as to whether to seek committal of an accused to a State, Territory or Federal Court should be communicated to the accused, prior to the committal date, to afford them the opportunity to make representations as to the appropriate jurisdiction.[40] This measure would mitigate the risk of 'forum shopping', noting that the rule of law requires that, where the law distinguishes between different classes of persons, there should be a rational basis for that differentiation.[41]

41. Furthermore, it is a fundamental principle of the criminal justice system that like cases be treated alike.[42] It is, therefore, undesirable that the Bill will enable the same criminal proceedings to be brought in either the Federal Court or a State/Territory court, with different procedures, merely based on the choice by a prosecutor as to where a defendant will be indicted. This could give rise to the problematic perception

[36] Law Council of Australia, Exposure Draft Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022 (Submission to the Attorney-General's Department, 1 November 2022) <https://lawcouncil.au/resources/submissions/federal-court-of-australia-amendment-extending-criminal-jurisdiction-and-other-measures-bill> 4.
[37] Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) sch 1, item 19 (s 32AE(4)).
[38] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) 30 [87].
[39] Law Council of Australia, Exposure Draft Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022 (Submission to the Attorney-General's Department, 1 November 2022) <https://lawcouncil.au/resources/submissions/federal-court-of-australia-amendment-extending-criminal-jurisdiction-and-other-measures-bill> 4.
[40] Ibid.
[41] Law Council of Australia, Rule of Law Principles (Policy Statement, 19 March 2011) <https://lawcouncil.au/resources/policies-and-guidelines/rule-of-law-principles>.
[42] Australian Law Reform Commission, Same Crime, Same Time: Sentencing of Federal Offenders (Report 103, 2006) <https://www.alrc.gov.au/publication/same-crime-same-time-sentencing-of-federal-offenders-alrc-report-103/> 14.

that a prosecutor is electing a certain jurisdiction, based on the court in which they prefer to lay an indictment.[43]

42. In this context, to ensure public confidence in the justice system is maintained, it will be essential for there to be clear and publicly available policy guidelines by the CDPP, ASIC and other relevant federal agencies as to the relevant considerations which will apply to such an election.[44]

Recommendations

- **That the Bill and/or its explanatory materials include further matters that could guide the court's consideration about whether a transfer of proceedings would be in the interests of justice.**
- **That the accused be provided the right to make an application to transfer proceedings. Alternatively, justification should be included in the Bill's Explanatory Memorandum for the accused not being provided this right.**
- **That prosecutors only be permitted to apply for a transfer of proceedings prior to committal for trial or sentence.**
- **That guidance material be developed by relevant federal agencies, and made publicly available, about when a prosecutor should apply to transfer proceedings.**

Schedule 2—Federal Court juries

43. Schedule 2 to the Bill would amend the FCA Act by enabling the Sheriff of the Federal Court to request a State or Territory jury official, with the consent of the relevant State or Territory, to prepare and provide a jury panel to the Sheriff. Relevant State and Territory laws will generally apply in relation to the preparation of the jury panel for provision to the Court and juror qualification.

44. According to the Explanatory Memorandum, the purpose of Schedule 2 is to 'improve the efficiency of jury preparation processes for primary indictable proceedings in the Federal Court'.[45] However, in its submission to the AGD on the Exposure Draft Bill, the Law Council raised concerns regarding the implications of having two different methods for the empanelment of jurors under the FCA Act.[46] These concerns remain, particularly with regard to proposed Subdivision DB of Division 1A of Part III of the FCA Act.

[43] Law Council of Australia, Exposure Draft Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022 (Submission to the Attorney-General's Department, 1 November 2022) <https://lawcouncil.au/resources/submissions/federal-court-of-australia-amendment-extending-criminal-jurisdiction-and-other-measures-bill> 3.
[44] Ibid 4.
[45] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) 34 [118].
[46] Law Council of Australia, Exposure Draft Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022 (Submission to the Attorney-General's Department, 1 November 2022) <https://lawcouncil.au/resources/submissions/federal-court-of-australia-amendment-extending-criminal-jurisdiction-and-other-measures-bill> 5.

45. On the webpage summarising its consultation on the Exposure Draft Bill, the AGD states:[47]

> *[Schedule 2] will not replace the Federal Court's ability to recruit a jury panel under the Federal Court of Australia Act 1976. Rather, it will provide an additional option for preparing a jury panel. The additional option for preparing a jury panel would help make recruiting jury panels more effective and help prevent delays in indictable proceedings.*

46. The Explanatory Memorandum to the Bill similarly provides that the Sheriff will maintain their existing power to directly prepare a jury panel, and determine which approach for preparing a jury panel is adopted on a case-by-case basis.[48]

47. The Law Council is of the view that this proposed discretionary, hybrid jury preparation mechanism is problematic. These concerns have arisen in light of the important differences between existing State and Territory jury selection provisions and Subdivision D of Division 1A of Part III of the FCA Act, which currently provides for preparation of a jury roll and list by the Sheriff for the purposes of the Federal Court.[49]

48. Should the hybrid approach to jury preparation be retained in the Bill, the differences between the process in Subdivision D of Part III of the FCA Act and State and Territory jury selection rules should be examined in greater detail by the AGD and canvassed in the Bill's Explanatory Memorandum. Further, the Bill and/or its explanatory materials should provide more detailed specification of the criteria to be applied by the Sherriff in utilising the hybrid procedure to be given effect by Schedule 2.[50]

Recommendations

- **That the differences between the current jury preparation process in Subdivision D of Part III of the Federal Court Act, and jury selection rules in each State and Territory, be examined in greater detail by the AGD and canvassed in the Bill's Explanatory Memorandum.**
- **That the Bill and/or its explanatory materials provide more detailed specification of the criteria to be applied by the Sherriff in utilising the discretionary, hybrid jury preparation procedure proposed in Schedule 2.**

Schedule 3—Amendments to the Marriage Act 1961

49. Schedule 3 to the Bill would:

- expand the ways that a Notice of Intended Marriage (**NOIM**) can be witnessed under Commonwealth law;[51]

[47] Attorney-General's Department, Consultation on the Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill (Web Page, 2023) <https://consultations.ag.gov.au/legal-system/federal-court-of-australia-amendment/>.
[48] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) 34 [119].
[49] Law Council of Australia, Exposure Draft Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022 (Submission to the Attorney-General's Department, 1 November 2022) <https://lawcouncil.au/resources/submissions/federal-court-of-australia-amendment-extending-criminal-jurisdiction-and-other-measures-bill> 5.
[50] Law Council of Australia, Exposure Draft Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill 2022 (Submission to the Attorney-General's Department, 1 November 2022) <https://lawcouncil.au/resources/submissions/federal-court-of-australia-amendment-extending-criminal-jurisdiction-and-other-measures-bill> 5.
[51] Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth) sch 3, part 6.

- require the authorised marriage **celebrant** to meet separately, and in person, with the parties to the marriage, prior to solemnisation, to ensure they fully and freely consent to marry;[52]
- clarify certain requirements in the Marriage Act, including that a marriage must be solemnised in the 'physical' presence of a celebrant;[53] and
- make several operational changes to assist the efficiency of the administration of the Commonwealth Marriage Celebrants Program.[54]

50. The Law Council considers that the changes proposed in Schedule 3 to the Bill are likely to provide greater accessibility for marrying couples, while enhancing safeguards to ensure the free consent of both parties.

51. The Law Council is particularly supportive of the proposed continuation of the temporary measure, introduced in response to the COVID-19 pandemic, to enable a party to sign a NOIM under the observation of an authorised witness, via a video link or audio-visual link. This measure—in Part 6 of Schedule 3—will particularly assist parties in rural, regional and remote (**RRR**) areas, and other individuals who face barriers engaging with paper-based processes.

52. The Law Council also welcomes proposed new section 42B of the Marriage Act, requiring celebrants to meet independently, and in person, with each party to a marriage, prior to solemnisation. The Law Council is supportive of Governmental efforts to ensure that individuals are freely and voluntarily entering marriages, noting—with concern—that forced marriages continue to occur in Australia.[55]

53. Nonetheless, should these amendments to the Marriage Act proceed, appropriate guidance for celebrants must be developed and provided to inform them of their new obligations, for example, by way of update to the AGD's 'Guidelines on the *Marriage Act 1961* for authorised celebrants'.[56] In particular, clear guidance will be required to assist celebrants to understand, and comply with, the new requirement to meet independently with each party to a marriage.

Recommendation

- **That updated guidance material be provided to authorised marriage celebrants to assist them to comply with their new obligations under the Marriage Act.**

Schedule 4—Other amendments

Part 1—Arbitration

54. Part 1 of Schedule 4 makes technical amendments to the arbitration framework in the Family Law Act, to allow parties and arbitrators to make applications for review of an arbitral award, or to determine a question of law, to both divisions of the FCFCOA.

[52] Ibid sch 3, item 44.
[53] Ibid sch 3, part 4.
[54] Ibid sch 3, parts 1-3 and part 7.
[55] See, eg., Carla Hildebrandt, Federal police fear hike in child forced marriage cases as overseas travel restrictions list (ABC News Online, 4 September 2022) <https://www.abc.net.au/news/2022-09-04/nsw-forced-marriage-police-fear-spike-as-travel-resumes-/101317834>.
[56] Attorney-General's Department, Guidelines on the *Marriage Act 1961* for authorised celebrants (September 2021) <https://www.ag.gov.au/sites/default/files/2021-08/guidelines-marriage-act-1961-for-authorised-celebrants.PDF>.

55. The Law Council welcomes the intent of this amendment to remove the existing administrative burden on the FCFCOA, arising from the need to transfer these applications from Division 2 to Division 1 for determination.

56. While the Law Council is supportive of the amendments in Part 1, the urgent need remains for increased and sustained resourcing of both divisions of the FCFCOA so that it can meet its substantial ongoing demands.[57]

Recommendation

- **That there be a sustained increase in resourcing for the FCFCOA to assist it to meet its substantial ongoing demands.**

Part 2—Assistance under the Native Title Act

57. Part 2 of Schedule 4 will repeal sections 94P(1) and 213A of the Native Title Act. These amendments will have the effect of abolishing the Native Title Respondents **Scheme** by removing the ability for the Attorney-General to grant assistance to a respondent party to an inquiry, mediation or proceeding related to native title.

58. The Bill's Explanatory Memorandum states that the primary recipients of the funding provided for in the Scheme were pastoralists, commercial fishers, miners, and local government councils.[58] The majority of Scheme funds have therefore been granted to support non-First Nations parties to native title matters.[59]

59. The Attorney-General provided the following rationale for the abolition of the Scheme in his second reading speech on the Bill:[60]

> *Many significant questions of native title law have now been settled and the government considers that many current native title respondents, which are generally commercially viable or sound entities, would have the capacity to deal with native title matters as part of their ordinary business costs*.

60. The Law Council understands that, in some circumstances, the Scheme supported Aboriginal and Torres Strait Islander people and entities to participate as respondents to native title claims.[61] However, the Explanatory Memorandum to the Bill states that:

- Aboriginal and Torres Strait Islander parties to native title matters (who are not native title holders, applicants or claim groups) may seek funding under the Special Circumstances Scheme, administered by the AGD;[62] and
- applicants for Native Title determinations, common law holders of native title, and Registered Native Title Bodies Corporate will continue to receive legal assistance provided through Native Title Representative Bodies and Native

[57] See, eg., Law Council of Australia, 2023-24 Pre-Budget Submission (Submission to the Treasury, 3 February 2023) <https://lawcouncil.au/resources/submissions/2023-24-pre-budget-submissions> 10-11.
[58] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth), 15 [18].
[59] Ibid 16 [20].
[60] Commonwealth, *Parliamentary Debates,* House of Representatives, 15 November 2023, 14 (Mark Dreyfus, Attorney-General).
[61] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth), 15 [18].
[62] Attorney-General's Department, Special circumstances scheme (Web Page, 2023) <https://www.ag.gov.au/legal-system/legal-assistance-services/commonwealth-legal-financial-assistance/special-circumstances-scheme>.

Title Service Providers, and other programs administered by the National Indigenous Australians Agency.[63]

61. Noting the rationale provided by the Attorney-General, and the assurances in the Explanatory Memorandum that Aboriginal and Torres Strait Islander people and entities will still be able to seek funding and receive legal assistance through existing Commonwealth programs, the Law Council does not object to the abolition of the Scheme. The Law Council further notes that the abolition of the Scheme was an election commitment of the Australian Labor Party in both 2019 and 2022,[64] and that the Government committed to abolish funding for the Scheme from 2022–23 in the October 2022 Federal Budget.[65]

62. Nonetheless, the Law Council considers that the abolition of the Scheme may have an adverse impact on the New South Wales Aboriginal Land Council (**NSWALC**) and Local Aboriginal Land Councils in New South Wales (**Local Aboriginal Land Councils**—together, the **NSW Local Aboriginal Land Councils**).

63. The NSW Aboriginal Land Councils are, by virtue of the complex interaction between the *Aboriginal Land Rights Act 1983* (NSW) (**NSW Land Rights Act**) and the Native Title Act, effectively obliged to respond to native title applications made in relation to land under their management if they wish to deal in the land.

64. The Law Council has been made aware by the Law Society of New South Wales that the abolition of the Scheme may result in NSW Aboriginal Land Councils being faced with a significant financial impost, as they cannot access funding otherwise available to claimants in native title cases. As such, the abolition of the Scheme may negatively impact the ability of these entities to participate in, and settle, complex native title claims in a coordinated and efficient manner.

65. In circumstances where NSW Aboriginal Land Councils will, for the reasons above, continue to be required to be respondents to native title claims in NSW, the abolition of the funding provided by the Scheme will be keenly felt, given that:

- the Local Aboriginal Land Councils do not receive annual grants from the NSW Government to fund their general operations; and
- many Local Aboriginal Land Councils are small community organisations, operating in RRR areas, with limited financial resources, few staff, and a board principally comprised of volunteers.

66. In addition, when NSW Aboriginal Land Councils are represented as respondent parties, they are better able to understand the complex interaction between the NSW Land Rights Act and the Native Title Act, and work with First Nations stakeholders to achieve pragmatic outcomes in the context of the two legislative regimes.

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[63] Explanatory Memorandum, Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (Cth), 16 [22].
[64] See Parliamentary Budget Office, Abolishing the Native Title Respondents Scheme (Policy Costing, 2019) <https://www.pbo.gov.au/sites/default/files/2023-03/PER445%20-%20ALP%20-%20Abolishing%20the%20Native%20Title%20Respondents%20Scheme.PDF>; Attorney-General's Department, Native title respondent funding scheme (Web Page, 2023) <https://www.ag.gov.au/legal-system/legal-assistance-services/commonwealth-legal-financial-assistance/native-title-respondent-funding-scheme>.
[65] Commonwealth of Australia, Budget October 2022-23 (Budget Measures Paper No. 2) <https://parlinfo.aph.gov.au/parlInfo/download/library/budget/2022O_02/upload_binary/bp2_2022-23.pdf;fileType=application%2Fpdf#search=%22library/budget/2022O_02%22> 48.

67. The Law Council understands, from its Indigenous Legal Issues Committee, that Aboriginal Land Councils in jurisdictions outside of NSW are unlikely to encounter similar challenges. This is because:

    - these Land Councils are adequately funded to deal with such issues; and/or
    - the issues may not arise, because the same Land Councils deal with statutory land rights schemes and perform the role of a Native Title Representative Body under the Native Title Act.

68. Nonetheless, it will be important for the Government to take proactive steps, in consultation with relevant stakeholders, to reduce any impact of the abolition of the Scheme on Aboriginal Land Councils, no matter the jurisdiction.

Recommendation

- **That the Government take proactive steps, in consultation with relevant stakeholders, to reduce the impact of the abolition of the Native Title Respondents Scheme on Aboriginal Land Councils, particularly in New South Wales.**

Part 3—Corrections

69. Part 3 of Schedule 4 makes typographical corrections to the FCFCOA Act and the Federal Court Act. The Law Council is supportive of these corrections.