
# National Security Legislation Amendment Bill 2010

# & Parliamentary Joint Committee on Law Enforcement Bill 2010

## Senate Legal and Constitutional Affairs Committee

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GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

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# Introduction

The Law Council welcomes the opportunity to provide the following submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the following Bills:

- *National Security Legislation Amendment Bill 2010*
- *Parliamentary Joint Committee on Law Enforcement Bill 2010* ('the PJC on Law Enforcement Bill').

This submission closely reflects the comments made by the Law Council in response to an exposure draft of the legislation which was released for community consultation in August 2009.

At that time, the Law Council made the two following observations which remain relevant to the current Inquiry:

- The Bills are by no means the product of a comprehensive review of Australia's anti-terror laws. The amendments proposed certainly do not equate to the complete overhaul of those laws, which the Law Council has long advocated is required.

  For example, the amendments proposed do not address in any way some of the most controversial and concerning aspects of Australia's anti-terror regime such as:

  - the terrorist organisation proscription process;
  - the majority of the terrorist organisation offences;
  - the preparatory terrorism offences;
  - the preventative detention regime;
  - the control orders regime;
  - ASIO's questioning and detention powers, and
  - telecommunication interception powers, such as B-Party warrants.

  For those reasons, the Law Council is hopeful that these Bills represents the first step in a more extensive review and reform process, one which considers both the ongoing necessity and effectiveness of existing measures and their compliance with Australia's international human rights obligations.

  The Law Council looks forward, for example, to the appointment of the Independent National Security Legislation Monitor who will be able to provide impartial and robust advice to government on an ongoing basis. The Law Council also looks forward to the Council of Australian Governments' review of certain key provisions of the anti-terror laws and expects that this process too will provide the opportunity for further discussion and for meaningful reform.

- Many of the reforms proposed in the Bills reflect the recommendations of earlier reviews and inquiries to which the Law Council made submissions, including:

  - Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (November 2008);
  - Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code by the PJCIS (September 2007);
  - Review of Security and Counter-Terrorism Legislation by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (December 2006); and

- Review of Sedition Laws in Australia by the Australian Law Reform Commission (July 2006).

It is positive that the work of these earlier reviews has not, despite in some cases the passage of several years, been completely ignored and overlooked. However, the Law Council is disappointed by:

- the selective, and often unexplained, adoption of some earlier recommendations and not others; and

- the minimalist approach which has been taken, in general, to the implementation of earlier review recommendations.

This disappointment has been compounded by the introduction of the current Bills, which address an even narrower range of issues than the exposure draft legislation released last year. This concern is addressed in further detail in the body of the submission below.

The Law Council's detailed response to the specific amendments proposed in both Bills is set out below. The submission is divided into two parts – the first part addresses the National Security Legislation Amendment Bill, the second part addresses the PJC on Law Enforcement Bill.

# Part One: National Security Legislation Amendment Bill

## Proposed Amendments to the Criminal Code

### Amendments to Treason Offences (section 80.1 and proposed section 80.1AA)

Schedule 1, Items 8 to 15 of the Bill seek to narrow and clarify the scope of the treason offences. The Law Council supports the following proposed amendments:

- The repeal of the offences currently set out in paragraphs 80.1(1)(e) and (f) of the Criminal Code, in favour of the insertion of two new offence provisions in proposed section 80.1AA. In particular, the Law Council supports:
  - The insertion of a new requirement that the assistance provided to an enemy at war with the Commonwealth or to a country or organisation engaged in armed hostilities with Commonwealth must be *material* assistance.
  - The insertion of a new requirement that the assistance provided must both be intended to assist the enemy to engage in war or hostilities with Australia and must in fact assist the enemy to engage in war or hostilities with Australia.
  - The insertion of a new requirement that the person charged with the offence must owe an allegiance to the Commonwealth – that is that he or she must be a citizen, resident or have voluntarily put him or herself under the protection of the Commonwealth.
  - The insertion of an express prohibition on the retrospective proclamation of an "enemy at war with the Commonwealth" or the retrospective proclamation of a country /organisation engaged in armed hostilities with the Commonwealth for the purposes of the section.
- The repeal of the offence currently set out in paragraph 80.1(1)(h) of the Criminal Code. This paragraph makes it an offence to "*form an intention to [commit treason] and to manifest that intention by an overt act."* The Australian Law Reform Commission (ALRC) found that this provision "*appears redundant and should have been deleted*" when the treason offences were transferred from the *Crimes Act 1914*.[1] The earlier Gibbs Committee review of the relevant provisions concluded likewise.[2]
- The repeal of section 80.5 which provides that a prosecution cannot be commenced without the consent of the Attorney-General.

The Law Council has the following concerns with the proposed amendments to the treason offences:

- The Law Council submits that current sub-section 80.1(2) should be repealed. This section makes it an offence to allow another person who has committed treason '*to escape punishment or apprehension'* or to fail to prevent the

[1] "*Fighting Words – A Review of Sedition Law in Australia*", ALRC 104 (2006) at 11.40
[2] *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), H Gibbs, R Watson and A Menzies, [31.38].

commission of an offence of treason by informing a constable or by using other reasonable endeavours. The offence carries a maximum penalty of life imprisonment.

The Law Council submits that this type of ancillary conduct should not be dealt with in specific offence provisions but rather ought to be left to:

- Part 2.4, Division 11 of the Criminal Code which covers ancillary offences under the Code more generally; and
- Section 6 of the *Crimes Act 1914* ("the Crimes Act") which makes it an offence to be an accessory after the fact to any Commonwealth offence and which carries the significantly lower maximum penalty of two years imprisonment, as is appropriate.

## Amendments to Sedition Offence (section 80.2 and proposed section 80.2A and 80.2B)

Schedule 1, Items 18 to 24 of the Bill seek to narrow and clarify the scope of the sedition offences in subsections 80.2(1) and (3) of the Criminal Code.

The Law Council submits that the sedition offences in subsection 80.2(1) and (3) of the Criminal Code are unnecessary and should be repealed rather than reformed. The type of conduct sought to be targeted is already adequately covered by the ancillary offences set out in Part 2.4, Division 11 of the Criminal Code which deals with inciting, conspiring, aiding, abetting, counselling and procuring an offence.

To date no one has been prosecuted for a sedition offence under Division 80 of the Criminal Code. This supports the assertion that the offence provisions serve no useful purpose.

The Law Council is also concerned that, in addition to being unnecessary, the sedition offences, by their very nature, have the potential to unduly burden freedom of expression and may have the effect of chilling legitimate political debate.

However, if the provisions are to remain in the Criminal Code, the Law Council supports the following proposed amendments to subsection 80.2(1) and (3):

- The insertion of a new requirement that in order to trigger the offence provision a person must have *intentionally* urged the relevant conduct – e.g. the overthrow of the Government by force/violence; the interference with elections by force/violence; or the use of force/violence against a targeted group or member of that group.
- The insertion of a new requirement that the person *must have intended that force or violence would occur*.

The Law Council also supports:

- The proposed repeal of subsections 80.2(7) and 80.2(8) which make it an offence to urge a person to engage in conduct which would assist an enemy at war with Australia or a country or organisation engaged in hostilities with Australia. The

Law Council submits that these provisions lack appropriate precision and are redundant in view of the treason provisions.

- The proposed repeal of section 80.5 which provides that a prosecution cannot be commenced without the consent of the Attorney-General.

Schedule 1, Item 33 of the Bill seeks to repeal current subsection 80.2(5) of the Criminal Code which makes it an offence to urge a group or groups distinguished by race, religion, nationality or political opinion to use force or violence against another group or groups distinguished by race, religion, nationality or political opinion in circumstances, where the use of force or violence would threaten the peace, order and good government of the Commonwealth.

Schedule 1, Item 35 seeks to replace this offence with four new offences as follows:

- New subsection 80.2A(1) would make it an offence to intentionally urge a person or group to use force or violence *against another group*, which is distinguished by race, religion, nationality, national or ethnic origin or political opinion, with the intention that force or violence will occur and in circumstances where the use of force or violence would threaten the peace, order and good government of the Commonwealth.

- New subsection 80.2A(2) would mirror section 80.2A(1) but without the requirement that the use of force or violence would threaten the peace, order and good government of the Commonwealth.

- New subsection 80.2B(1) would make it an offence to intentionally urge a person or group to use force or violence *against another person* , because of a belief that he or she is a member of a group distinguished by race, religion, nationality, national or ethnic origin or political opinion, with the intention that force or violence will occur and in circumstances where the use of force or violence would threaten the peace, order and good government of the Commonwealth.

- New subsection 80.2B(2) would mirror section 80.2B(1) but without the requirement that the force or violence would threaten the peace, order and good government of the Commonwealth.

The Law Council has the following concerns with these proposed new offences:

- The Law Council submits that these offences should not be co-located in the Criminal Code with the treason and sedition offences.

  These offences are of a different character and do not relate to political dissent or acts of violence directed towards the government and its institutions. Unlike the offence they replace, the new offences are not even focused on intergroup violence but may involve the urging of violence by one individual against another. Further, two of the new offences do not require that "the use of force or violence would threaten the peace, order and good government of the Commonwealth". In those respects, the new offences are even harder to categorise as "public order offences" than the offences they replace.

On that basis, the Law Council submits that if these offences are to be included in the Criminal Code they should be in a separate Division dealing with anti-vilification laws.

- The Law Council further submits that a separate and more detailed review of these proposed provisions is required outside of the national security legislation framework. The proper content and scope of federal anti-vilification laws, particularly in light of Australia's international obligations under the International Convention on the Elimination of all forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR), is not a matter which can be properly addressed as a side issue to the broader anti-terror law debate.

  To date, because these offences have not been directly formulated as anti-vilification laws and have instead been designed to fit, however unsuccessfully, in Division 80, they contain a strange mix of elements, some of which are inappropriate for anti-vilification offences.

  For example, the Law Council submits that the requirement that "the use of force or violence would threaten the peace, order and good government of the Commonwealth" should not be an element of an anti-vilification offence and would create an unnecessary additional hurdle to successful prosecution.

  Further, the Law Council questions whether it is appropriate that the offences should cover the targeting of a group or a member of a group that is distinguished by political opinion. Protection of groups defined by political opinion is beyond the scope of traditional anti-vilification laws.

- Finally, the Law Council questions whether it is appropriate that a good faith defence should be available for these offences. It is difficult to envisage what type of good faith justification could legitimately exist for conduct undertaken with the *specific intent* of urging a person to use force or violence against another person with the further intention that such force or violence will occur.

## Amendment to the definition of the phrase "advocates the doing of a terrorist act" (s102.1(1A))

Subsection 102.1(2)(b) of the Criminal Code permits the Attorney-General to list an organisation as a terrorist organisation if he or she is satisfied that the organisation "*advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur*)."

Section 102.1(1A) explains that an organisation 'advocates' the doing of a terrorist act if:

a) The organisation directly or indirectly counsels or urges the doing of a terrorist act; or

b) The organisation directly or indirectly provides instructions on the doing of a terrorist act; or

c) The organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of s 7.3) that the person might suffer) to engage in a terrorist act).

Schedule 2, Item 2 of the Bill seeks to amend section 102.1(1A) to clarify that an organisation may only be listed as a terrorist organisation if it directly praises the doing of a terrorist act in circumstances where there is a *substantial* risk that it might have the effect of leading a person (regardless of his or her age or any mental impairment that he or she might suffer) to engage in a terrorist act.

The Law Council supports the proposed amendment.

However, the Law Council submits that this very minor amendment does not address in any meaningful way the significant problems with section 102.1(1A).

The Law Council submits that the power to proscribe an organisation on the basis of advocacy alone is unjustified and unnecessary and that section 102.1(2)(b) and 102.1(1A) should be repealed rather than amended.

The Law Council is not opposed to laws which criminalise incitement to violence or other criminal acts. However, the Law Council submits that s102.1(2)(b) and s102.1(1A) extend well beyond criminalising incitement.

Without s 102.1(2)(b), the Executive is already empowered to proscribe any organisation which is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

If it can not be demonstrated that an organisation's activities fall under this very broad umbrella then the organisation should not be outlawed as a terrorist organisation and its members exposed to serious criminal penalties.

The Government has agued that the provision allowing advocacy as a basis for proscription is aimed at "early intervention and prevention of terrorism."[3]

The Law Council submits that disproportionate restraints on freedom of association and speech will not achieve this aim and, in fact, are likely to prove counter-productive. The members of any organisation are rarely a homogenous group who think and talk as one. On the contrary, although formed around a common interest or cause, organisations are often a battleground for opposing ideas, and may represent a forum in which some members' tendencies towards violent ideology can be effectively confronted and opposed by other members.

A further problem with subsection 102.1(1A) is that it does not specify when the 'advocacy' of an individual member of a group will be attributable to the organisation as a whole. According to the explanatory memorandum 'advocacy' may include "all types of communications, commentary and conduct'. The Law Council is concerned that the listing provisions fail to precisely identify:

- The form in which the 'advocacy' must be published;

[3] Australian Government submission to the Parliamentary Joint Committee on Intelligence and Security review of security and counter-terrorism legislation, Dec 2006, p.6

- The extent to which the 'advocacy' must be publicly distributed;
- Whether or not an individual who 'advocates' must be specifically identified as a member of the organisation; or
- Whether or not the relevant individual must be the group's leader.

If the provision is to remain, the Law Council submits that the uncertainty over when responsibility for 'advocacy' is transferred from an individual to an organisation for the purposes of listing must be clarified.

However, as noted above the Law Council submits that the provision should be repealed.

## Amendments to the Criminal Code proposed in the exposure draft legislation but not pursued in the Bill

The exposure draft legislation released for comment in 2009 proposed a series of amendments in relation to:

- The definition of "terrorist act" in s 100.1 of the Criminal Code;
- The terrorist organisation offences in Division 102 of the Criminal Code – in particular, the offence of providing support to a terrorist organisation in s 102.7 and the offence of providing training to/receiving training from a terrorist organisation in s 102.5; and
- The introduction of a new hoax offence in proposed section 101.7.

With the exception of the proposed amendments to the training offence, which the Government has abandoned following feedback received during the consultation process, the Attorney-General explained in his second reading speech that the other amendments are on hold because they will "*require the states to amend their legislation which referred power to the Commonwealth."* The Government has committed to "*continue to work closely with the states to progress these measures."*[4]

There is considerable doubt about whether the proposed amendments do, in fact, require the prior amendment of the state referral legislation.

The Law Council understands that this issue will be explored in greater detail in the submission of the Gilbert + Tobin Centre of Public Law. The Law Council has had the benefit of reading a preliminary opinion on the matter from the Centre Director, Associate Professor Andrew Lynch. Amongst other things, Profession Lynch points out that:

- Prior to the enactment of the *Anti-Terrorism Act (No 2) 2005* the States were not required to amend their referral legislation so as to allow the Commonwealth to insert Division 104 (which establishes the control orders regime) into the Criminal Code;
- Section 100.8 of the Criminal Code establishes a mechanism for State approval of 'express amendments' to the anti-terror provisions of the Code which does not involve legislative action by the States but merely Executive assent;
- The relevant State referral legislation recognises that the Commonwealth may make amendments to the initial text using those legislative powers it holds aside from the State references.

[4] Second Reading Speech, House of Representatives, 18 March 2010 (the Hon Robert McClelland MP)

- The decision of the High Court in *Thomas v Mowbray*[5] has confirmed that the Commonwealth possesses substantial power under s 51(vi) of the Constitution (the defence power) to legislate with respect to terrorism and there is every reason to suspect that the proposed amendments to the anti-terror provisions of the Criminal Code would fall within the scope of this power, rendering resort to the referrals power unnecessary in any case.

The Law Council is not disappointed that a number of the amendments to the Criminal Code which were foreshadowed in the exposure draft legislation are not included in the current Bill *in the form originally proposed*. However, the Law Council is concerned that, as a result of the purported need to await the prior amendment of the state referral legislation, the provisions of the Criminal Code covered by these deferred amendments will now not be discussed or reformed in any way in the context of the current Bill.

The result is that Bill leaves outstanding any form of legislative response to a number of the key recommendations of the inquiries and reviews it purports to respond to. This is despite the fact that most of those recommendations are now several years old.

For example:

- The Law Council did not support the amendments to the definition of "terrorist act" which were proposed in the exposure draft legislation and which did not reflect the recommendations of earlier reviews. However, the Law Council does agree that the definition of terrorist act in section 100.1 of the Criminal Code is in urgent need of reform.

  In 2006, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) conducted a Review of Security and Counter Terrorism Legislation. In its bi-partisan report, the Committee recommended that:

  - the 'threat' of terrorist acts be removed from the definition of terrorism and be dealt with as a separate offence.
  - to remove doubt the definition of terrorism be amended to include a provision or a note that expressly excludes conduct regulated by the law of armed conflict.

  The Bill purports to respond to the PJCIS report – but these key recommendations are not reflected in the Bill and the definition will remain unchanged.

- The Law Council did not support the introduction of the hoax offence as proposed in the exposure draft legislation, without further refinement to ensure that the offence provision was exclusively targeted at conduct undertaken with the intention of inducing fear in another person or with the intention of inducing a response from police or emergency services.

  In its 2006 bi-partisan report, the PJCIS recommended that a separate terrorism hoax offence be included in the Criminal Code but that the penalties reflect the less serious nature of a hoax as compared to a threat of terrorism.

  Again, the Bill purports to respond to the PJCIS report – but this key recommendation is also not reflected in the Bill

[5] (2007) 233 CLR 307

- The Law Council did not object *per se* to the proposed amendments in the exposure draft legislation which related to the training offence provisions but submitted that those amendments did not address the fundamental flaw in the offence provision – that is, that it makes no distinction between training which may assist an organisation in preparing for and carrying out a terrorist act and training which is otherwise benign.

  In its 2006 bi-partisan report, the PJCIS recommended that the training offence be redrafted to define more carefully the type of training targeted by the offence or, alternatively, that the offence be amended to require that the training could reasonably prepare the individual or the organisation to engage in, or assist with, a terrorist act.

  Again, the Bill purports to respond to the PJCIS report – but this key recommendation is not reflected in the Bill.

- The Law Council supported the proposal in the exposure draft legislation to narrow and clarify the scope of the offence of providing support to a terrorist organisation by:

  - inserting a new requirement that the support provided must be *material* support;

  - inserting a new requirement that a person must provide the resources or support with the express intention of helping the organisation to directly or indirectly engage in, prepare for, plan, assist in or foster the doing of a terrorist act.

  In its 2006 bi-partisan report, the PJCIS recommended that the offence of providing support to a terrorist organisation be amended to 'material support' to remove ambiguity.

  In 2008, the Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (Clarke Inquiry) recommended that consideration be given to amending the offence of providing support to a terrorist organisation to remove the uncertainties surrounding the physical and fault elements of the offence.[6]

  Although the Bill purports to respond to both the PJCIS report and the Clarke Inquiry – these key recommendation concerning 102.7 of the Criminal Code are not reflected in the Bill.

In the second reading speech, the Attorney-General claimed that:

*"The proposed amendments included in this package of reforms are designed to give the Australian community confidence that our counterterrorism laws are precise, appropriately tailored and that our law enforcement and security agencies have the investigative tools they need to counter terrorism."*[7]

The Law Council submits that, without addressing the outstanding recommendations of the PJCIS and the Clarke Inquiry listed above, the Bill falls far short of its aim.

[6] It is worth noting that Clarke specifically commented at page 260 of his Report that this recommendation would not appear to be inhibited by the states' and territories' referral of counter-terrorism laws to the Commonwealth.

[7] Second Reading Speech, House of Representatives, 18 March 2010 (the Hon Robert McClelland MP)

# Proposed Amendments to the Crimes Act

## Unlawful association provisions

The Law Council strongly supports Schedule 1, Item 3 of the Bill - the proposed repeal of the unlawful association provisions of the Crimes Act and the offence under section 30C of "advocating or inciting to crime".

## Amendments to the police arrest, questioning and investigation powers in Part 1C

Clarification of the relationship between section 3W and sections 23C and proposed section 23DB (current 23CA)

Under subsection 3W(1) of the Crimes Act, a person may only be arrested for an offence, if the arresting officer *believes on reasonable grounds* that the person has committed the offence. The arresting officer must also *believe on reasonable grounds* that arresting the person is necessary because proceeding by way of summons would not achieve one or more of the following purposes:

(i) ensuring the appearance of the person before a court in respect of the offence;

(ii) preventing a repetition or continuation of the offence or the commission of another offence;

(iii) preventing the concealment, loss or destruction of evidence relating to the offence;

(iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;

(v) preventing the fabrication of evidence in respect of the offence;

(vi) preserving the safety or welfare of the person.

Under subsection 3W(2), if at any time after a person is arrested but before they are charged, the officer in charge of the investigation ceases to believe on reasonable grounds that the person has committed the offence or that holding the person is necessary to achieve one of the purposes listed in (i) to (vi) above – then the person must be released.

This same provision, and therefore these same statutory tests, apply for all offences. There is no special arrest provision and test relating to terrorist offences.

Section 23C of the Crimes Act sets out the purposes for which a person arrested for Commonwealth offence (other than a terrorism offence) may be detained. Section 23CA sets out the purposes for which a person arrested for a terrorism offence may be detained.

Both sections provide that a person arrested for an offence may be detained for the purpose of investigating (a) whether the person committed the offence for which he or she was arrested and/or (b) whether the person committed another offence (in the case of

section 23CA another terrorism offence) that an investigating official reasonably suspects the person to have committed.

The terms “arrested” and “under arrest” are defined in section 23B.

The Dr Haneef case drew attention to uncertainty about the relationship between sections 3W(2) and 23C/23CA. Specifically, questions were raised about whether sections 23C and 23CA permitted a person to be detained for the purposes of investigating a second and different offence, even where the officer in charge of the investigation had ceased to believe on reasonable grounds that the person had committed the offence for which he or she was arrested.

In order to clarify that the effect of section 3W(2) is not displaced by these later sections, the Bill seeks to:

- amend the definition of “arrested” and “under arrest” in section 23B (see Schedule 3, Items 1 and 6 of the Bill);

- amend subsections 23C(2) and proposed subsection 23DB(2) (current subsection23CA(2)) to insert the words “*while arrested for the Commonwealth offence*”; (see Schedule 3, items 10 and 16 of the Bill); and

- insert a note in section 23C and proposed section 23DB (current 23CA) (see Schedule 3, Items 9 and 16 of the Bill)

The proposed changes would make clear that the release requirement in section 3W(2) is unaffected by section 23C and proposed section 23DB, because these later sections merely set out the purposes for which a person may be detained if he or she is validly under arrest. A person is not “arrested” or “under arrest” if police are required to release him or her pursuant to section 3W(2).

The Law Council supports these proposed changes.

<u>Proposed amendments to the “dead-time” provisions</u>

The Bill seeks to amend the provisions in Part 1C of the Crimes Act which govern how and when an application may be made to both extend the allowable investigation period and to have a period of time disregarded from the calculation of that period. In particular, the Bill seeks to amend the current provisions so that:

- a police officer will only be able to make an application to extend the investigation period or an application to exclude certain time from the calculation of the investigation period (i.e. a dead time application) if he or she has the prior approval of a senior officer (Commissioner, Deputy Commissioner or Superintendant);
- an application to have certain time excluded as dead time may only be made to a magistrate, and not to a justice of the peace or a bail justice;
- a maximum cap of seven days is placed on the period of dead time that may be authorised by a magistrate;
- it is specifically provided that an application for an extension of the investigation period or a dead time application is not required to include information which, if disclosed, is likely to prejudice national security; to be protected by public interest immunity; to put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community;

- It is specifically provided that, if an application for an extension of the investigation period or a dead time application does contain information which, if disclosed, is likely to prejudice national security; to be protected by public interest immunity; to put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community, this information may be removed from the copy of the application that is given to the arrested person or his or her legal representative; and
- It is specifically provided that the instrument which sets out a magistrate's reasons for granting an extension of the investigation period or for allowing a period of dead time need not include information relied upon which if disclosed, is likely to prejudice national security; to be protected by public interest immunity; to put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community.

The Law Council supports the following proposals to amend the questioning and detention powers in Part IC:

- The insertion of a new requirement that a police officer can only make a dead time application with the prior approval of a senior officer (Commissioner, Deputy Commissioner or Superintendant). The Law Council agrees that this proposal will deliver a greater degree of oversight and accountability within law enforcement agencies about how and when an extension of the investigation period and/or maximum period of detention is sought.
- The introduction of a cap on the maximum period of dead-time which may be allowed under proposed section 23DB(9)(m) (current section 23CA(8)(m)). Although with respect to the length of cap (that is, seven days) please see Law Council concerns below.

However, the Law Council has the following concerns with the proposed amendments:

- The Law Council submits that the proposal to allow for up to seven days dead time to be excluded from the calculation of the investigation period in terrorism cases is unjustified. The proposal could result in a possible period of detention without charge of up to eight days, possibly more.[8] This is considerably longer than the period of pre-charge detention permitted under the Crimes Act in non-terrorism cases.

  The Law Council submits that, even if it is accepted that terrorism cases because of their nature and complexity may require the investigation period to be suspended (and thereby extended) for certain periods, no considered justification has been provided for why a period of seven days is reasonable.

  The Discussion Paper which accompanied the exposure draft legislation essentially suggested that a seven day cap is reasonable because it is less than allowed in some overseas jurisdictions and more than in others and because it lies in the middle of the spectrum of time periods suggested in submissions to the Clarke Inquiry.[9] The Discussion Paper also noted that the Clarke Inquiry suggested that a cap of *no more than* seven days might be appropriate.

[8] This would allow for a maximum investigation period of 24 hours plus seven days dead-time under proposed section 23DB(9)(m). In fact, the length of permissible detention could be longer if additional periods of dead time are taken into account under other sub-paragraphs of 23DB(9) before a successful application is made under section 23DC or after a period of dead time allowed under s23DB(9)(m) has expired.
[9] National Security Legislation: Discussion Paper on Proposed Amendments, July 2009, p127

The Law Council submits that before an extended period of detention without charge is allowed for in terrorism investigations, evidence justifying the operational need for such an extraordinary measure must be presented.

It is not enough to assert that terrorism investigations are more time consuming because they may involve police from several countries. There are many offences, such as people smuggling and the production and distribution of child pornography, which also involve investigations which range across countries and police forces.

Likewise, it is not enough to assert that terrorism investigations are more time consuming because they are inherently complex. There are other offences, such as fraud, which may be equally complex and difficult to unravel.

The Law Council does not oppose *per se* provision for a judicially supervised and capped period of extended pre-charge detention in terrorism cases, if it can be demonstrated that it is required by the unique and challenging circumstances of terrorism investigations. However, the Law Council submits that no attempt has been made to demonstrate such a need in any detail and thus attempting to determine an appropriate dead time cap at this point is an arbitrary exercise.

In the circumstances, the Law Council submits that a cautious approach is warranted and that the dead time cap should be no more than 48 hours unless sufficient justification can be provided by relevant agencies for the cap to be longer. The Law Council further submits that it is preferable that the cap be set low and then reviewed by the Independent National Security Legislation Monitor, rather than being initially set at seven days.

- The Law Council submits that the proposed amendments which allow a suspect and his or her legal representative to be denied access to information on which an application for dead time or an extended investigation period is based are too broadly drafted and may render meaningless the right to be heard and make submissions in opposition to the application (see sub-sections 23D(6); 23DC(7) and 23DE(6)).

  The Law Council accepts that in the context of a sensitive, ongoing investigation, an application for dead time or an extended investigation period may require the presiding judicial officer to consider classified information in the absence of the person under arrest and/or his/her legal representative.

  However, as presently drafted the proposed provisions appear to give the investigating official and not the judicial officer the complete discretion to determine what, if any, information contained in the application is disclosed to the arrested person and his or her legal representative.

  No provision is made for the judicial officer to order that a summary or redacted version of classified information be disclosed to the arrested person and his or her legal representative.

  No provision is made for the judicial officer to order that the relevant information be disclosed to the arrested person's legal representative on the basis of an undertaking that it will not be further disclosed – either to the arrested person or any other third party.

The Law Council accepts that it is a matter for the investigating official to determine what information he or she chooses to rely on in the application for dead time or an extended investigation period. However, the Law Council submits that once a decision is taken to include certain information in the application and to seek to rely on it to the detriment of the arrested person, it should not remain the exclusive prerogative of the investigating official to determine that the information cannot be disclosed because it is likely to be protected by public interest immunity or if disclosed, is likely to prejudice national security, to put at risk ongoing operations or put at risk the safety of the community.

The Law Council submits that the relevant provisions should be redrafted to give the judicial officer the discretion to determine what information should be disclosed, to whom and in what form.

Consistent with its submission to the Clarke Inquiry into the case of Dr Mohamed Haneef,[10] the Law Council also submits that the following amendments to the questioning and detention powers in Part IC are required:

- Amendment to proposed section 23DD to preclude a judicial officer from adjourning an application made under proposed section 23DC (current section 23CB) for more than a specified number of hours, or alternatively, amendment to proposed sub-paragraph 23DB(9)(h) (current sub-paragraph 23CA(8)(h)) to provide that any period of adjournment in excess of a certain number of hours is not dead time and therefore must be included in the calculation of the investigation period;

- Amendment to proposed sections 23DC and 23DE (current sections 23CB and 23DA) to require that if a suspect is not legally represented when an application is made under proposed sections 23DC and 23DE the police should be required to produce the suspect in person so that the judicial officer determining the application can satisfy him or herself that that the suspect understands the nature of the application and has been given his or her opportunity to be heard on the application;

- Amendment to proposed sections 23DC (current section 23CB) to require that applications must be made to a Supreme Court Judge, or at the very least a District Court judge.

<u>Amendment to Part 1C proposed in the Discussion Paper but not pursued in the Bill: Reasonably suspects v reasonably believes in section 23C and proposed section 23DB</u>

The Discussion Paper released in August 2009 invited comment on whether section 23C and proposed section 23DB (current section 23CA) should be amended to provide that a person, arrested for a Commonwealth offence, may only be detained for the purpose of investigating whether he or she:

- committed the offence for which he or she was arrested; or
- committed another offence that an investigating official reasonably *believes* (rather than reasonably *suspects*) the person to have committed.

The Law Council supported this proposal.

[10] The Law Council' s submission is available on line at: http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=6A0BC784-1C23-CACD-227C-88939D926B22&siteName=lca

Section 23C and proposed section 23DB (current section 23CA) determine the purposes for which an arrested person may be detained and the amount of time available to police to pursue those purposes before the person must be either released or brought before a judicial officer. The allowed time period can be significant. For example, in the Dr Haneef case it extended to 12 days, and even under proposed section 23DB it could extend to up to eight days.

As currently drafted sections 23C and 23CA do not only permit police to use the time that a person is already being detained for the purpose of investigating the offence for which he or she was arrested, but to also investigate a second offence that they reasonably suspect the person has committed. Those sections in fact allow a person to be detained solely for the purpose of investigating the suspected secondary offence, even when police do not require and are not using the detention period to investigate the offence for which the person was arrested.

The Law Council submits that an arrested person's release or appearance before a judicial officer should not be able to be delayed in order to facilitate the investigation of an offence that police merely suspect the person has committed.

A person's detention, particularly for a period of days, should not be founded on a mere suspicion.

It is immaterial that police must have, and maintain throughout, a reasonable belief that the person committed the offence for which he or she was arrested, if ultimately the reason for a person's ongoing detention without charge is not the investigation of that offence but another offence in relation to which the police have no such belief.

Amending these sections to require that a person may only be detained for the purposes of investigating a secondary offence, that police reasonably believe the person to have committed, would address this problem.

The Law Council is disappointed that this amendment has not been pursued in the current Bill. No explanation has been provided for this decision.

## Introduction of an emergency search power

Schedule 4, item 4 of the Bill seeks to introduce a new section (s 3UEA) into the Crimes Act which would allow a member of the AFP to enter premises without a warrant where he or she reasonably suspects that:

(a) a thing is on the premises

(b) it is necessary to search the premises for the thing and seize it in order to prevent the thing from being used in connection with a terrorism offence; and

(c) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

If the member of the AFP finds any other thing relevant to an indictable or summary offence, he or she must secure the premises and then obtain a search warrant.

The Law Council has the following concerns with the proposed amendments:

The power to enter and search premises, and seize property without the occupier's consent, is a breach of privacy. For that reason such a power should be carefully confined and subject to strictly enforced conditions. The warrant system ensures that police search and seizure powers are subject to independent and external supervision and may only be exercised where prescribed statutory criteria are satisfied. Allowing police to enter and search premises without a warrant and under their own authority increases the risk that such powers will be misused. Moreover, it increases the risk that an individual's privacy rights will be breached in circumstances not justified by the necessary pursuit of a legitimate law enforcement imperative.

Accordingly, the Law Council submits that the onus is on the government to demonstrate why the introduction of this extraordinary power is required. The Law Council further submits that the Government has not discharged that onus and that the necessity for this power has not been demonstrated, particularly given the ability to obtain a warrant by telephone or fax in exigent circumstances.[11] If these existing measures do not operate effectively in emergency situations, the Law Council submits that consideration should first be given to improving the logistics of how and to whom a warrant application can be made in an emergency before introducing a warrantless entry power.

If, notwithstanding the ability to obtain a warrant by fax or phone, the need for a narrowly drafted emergency entry power for the AFP can be demonstrated, the Law Council would not oppose it *per se,* provided appropriate safeguards were in place.

In that respect, the Law Council acknowledges that "*the common law has long recognised that any person may justify what would otherwise constitute a trespass to land in cases of necessity to preserve life or property*".[12] However, the proposed provisions currently go beyond a codification of this position, which is already reflected in section 10.3 of the Criminal Code.

In that respect also, the Law Council acknowledges that there is precedent for the proposition that under the common law police are able to enter premises without a warrant in order to prevent (but not investigate) a breach of the peace.[13] However, once again, the proposed provisions go beyond a codification of this position.

If the power is to be introduced in its current form, the Law Council submits that a member of the AFP who conducts a search under this provision should be required to go before a magistrate or judge after the search has been conducted to obtain an ex post facto search warrant.

The Law Council submits that if an ex post facto search warrant is not granted, it should be explicitly provided that any evidence identified by the member of the AFP during the course of the search may be ruled inadmissible in future court proceedings.

The exercise of this power by the AFP should also be reported on annually to the Commonwealth Parliament. In particular, reports should be made of any instances in which an ex post facto search warrant has not been granted.

[11] Crimes Act 1914 s3R
[12] Kuru v State of New South Wales [2008] HCA 26 (12 June 2008) at [40]
[13] Kuru v State of New South Wales [2008] HCA 26 (12 June 2008) at [40] – [53].

## Amendments to the bail provisions (section 15AA)

Section 15AA of the *Crimes Act* provides that a bail authority must not grant bail to a person charged with or convicted of a terrorism offence[14] unless the bail authority is satisfied that exceptional circumstances exist to justify bail.

The Bill proposes to amend this section in order to provide for a specific appeal right for both the prosecution and defendants.

It is also proposed to insert new subsections (s15AA(3C) and (3D)) which will provide that where a bail authority decides to grant bail to a person charged with a terrorism offence and immediately after the decision is made the prosecution indicates an intention to appeal, the grant of bail will be stayed until:

- a decision is made on appeal; or
- the prosecution notifies the court that it does not intend to proceed with the appeal; or
- 72 hours has passed since the stay came into effect.

The Law Council submits that section 15AA should not be amended to provide that a grant of bail may be stayed for up to three days pending appeal.

The Law Council does not support the insertion of subsection 15AA(3C) and (3D). These proposed amendments do not approach the denial of a person's liberty with the requisite degree of seriousness. The Law Council submits that detention should never be the default position.

If a person has successfully satisfied the bail authority that there are exceptional circumstances which warrant his or her release, he or she should not be denied the benefit of that decision, even for a period of three days.

The Law Council submits that if the Government has concerns about the capacity of bail authorities at certain levels to hear and determine bail applications in terrorism cases, the appropriate response would be to amend the legislation to be more prescriptive about the level of judicial officer to whom a bail application may be made. The Government should not confer authority on an officer to make a bail decision, but then reserve the right to itself not only to appeal that decision but to have it set aside while it does so.

More generally, the Law Council submits that the presumption against bail in section 15AA should be repealed.

The Law Council objected when section 15AA was inserted into the Crimes Act on the basis that the Government had failed to demonstrate why the reversal of the long held presumption in favour of bail was necessary to aid in the investigation or prosecution of terrorist related offences.

No evidence was advanced to suggest that people charged with terrorism offences, which range from the offence of merely being a member of terrorist organisation to actually committing a terrorist act, are more likely to abscond while on bail, re-offend, threaten or intimidate witnesses or otherwise interfere with the investigation.

Prior to the introduction of s15AA, existing bail provisions already provided the court with the discretion to refuse bail on a range of grounds, and to take into account the

[14] Other than an offence against 102.8 of the Criminal Code.

seriousness of the offence in considering whether those grounds were made out. No reason was given as to why these existing provisions were inadequate to guard against any perceived risk to the community in terrorism cases.

The use of section 15AA to date illustrates the high hurdle applicants must overcome before bail is granted and the manner in which the reversal of the presumption in favour of bail can jeopardise the fair trial rights of the accused, including the right to be tried without undue delay.

The issue of whether lengthy delay between arrest and trial can amount to exceptional circumstance has attracted judicial consideration. For example, in *R v Vinayagamoorthy & Yathavan*[15] Bongiorno J found that the considerable delay experienced by the accused as a result of the lengthy investigation period, coupled with a number of other factors, can amount to exceptional circumstances. His Honour observed:

*The investigation process has taken almost two years to date. Neither of the accused have done anything to hinder that process of that investigation. Indeed, the material before the Court would suggest that they have co-operated.*

*Taking these considerations together with the evidentiary and other difficulties which the Crown must face in proving some at least of the allegations against them, the inevitable delay which will be incurred in finalising this matter, the ties to the jurisdiction which these men have, the lack of any evidence to support any allegation that they may commit offences or interfere with witnesses (whoever those witnesses might be) and their previous good character, there are exceptional circumstances in this case which justify the making of an order admitting each of them to bail.*[16]

Similarly, in the case of *R v Kent*[17]*,* it was argued that the time Mr Kent had already spent in custody and the delay he faced before re-trial was so considerable that it amounted to exceptional circumstances. Bongiorno J accepted this submission and granted bail.

However, in the case of *Ezzit Raad,* Bongiorno J was not convinced that considerable delay amounted to exceptional circumstances:

*It has been a long time since Raad was arrested and may still be many months before the case against him is concluded. But having regard to the complexities of it as they have now emerged it cannot be said that that circumstance is, in this case, exceptional. Terrorism cases are going to be, of their nature, long and involved. So much has become clear, even from the relatively little experience of such cases in this country to date. Nor does Mr Raad's health combined with the circumstances of his detention and the delay to which I have referred together make up the exceptional circumstances necessary to overcome the statutory presumption against bail.*[18]

This was the case despite the evidence before the court that the accused (and his co-accused) were being held in particularly harsh conditions of detention. Bongiorno J observed:

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[15] [3]Aruran Vinayagamoorthy and Sivarajah Yathavan were charged with three terrorist organisation offences under the *Criminal Code*. They were granted bail on the grounds that exceptional circumstances were shown. See *Vinayagamoorthy & Yathavan v Commonwealth Director of Public Prosecutions* (2007) 212 FLR 326 at [19]-[20].

[16] *Vinayagamoorthy & Yathavan v Commonwealth Director of Public Prosecutions* (2007) 212 FLR 326 at [19]-[20].

[17] *Application for Bail by Shane Kent* [2008] VSC 431 at [13]

[18] *Application for Bail by Ezzit Raad* [2007] VSC 330 at [6]

*The court has heard and accepted evidence in other cases that the conditions in the Acacia Unit in Barwon Prison are such as to pose a risk to the psychiatric health of even the most psychologically robust individual. Close confinement, shackling, strip searching and other privations to which the inmates at Acacia Unit are subject all add to the psychological stress of being on remand, particularly as some of them seem to lack any rational justification. This is especially so in the case of remand prisoners who are, of course, innocent of any wrongdoing.*[19]

A similar result followed an application for bail by co-accused Shoue Hammoud[20] and Amer Haddara.[21]

These cases suggest that significant delays between arrest and trial, even when coupled with particularly harsh conditions of detention, may not be enough to give rise to exceptional circumstances and justify a grant of bail pursuant to section 15AA.

The Law Council's concerns with section 15AA have been shared by the United Nations Human Rights Committee (UNHRC) in its recent Concluding Observations on Australia's human rights performance. The UNHRC expressed concern that section 15AA operates to reverse the burden of proof contrary to the right to be presumed innocent and fails to define the "exceptional circumstances", required to rebut the presumption against bail. The UNHRC recommended that Australia ensure that its counter-terrorism legislation and practices are in full conformity with the ICCPR and ensure that the notion of 'exceptional circumstances' does not create an automatic obstacle to release on bail.[22]

# Proposed Amendments to the National Security Information (Criminal and Civil Proceedings) Act

## Extension of Notice Provisions to Cover the Issue of Subpoenas (sections 24)

Under section 24(1) of the *National Security Information (Criminal and Civil Proceedings) Act* ("the NSI Act"), if a prosecutor or defendant knows or believes that:

- he or she will disclose, in a federal criminal proceeding, information that relates to or may effect national security; or
- a person whom he or she intends to call as a witness in a federal criminal proceeding will disclose information in giving evidence or by his or her mere presence that relates to or may affect national security

the prosecutor or defendant must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.

Failure to give notice is an offence under section 42 which carries a maximum term of imprisonment of two years.

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19 *Application for bail by Ezzit Raad* [2007] VSC 330 at [6].

20 *Hammoud v DPP* [2006] VSC 516

21 *Application for Bail by Amer Haddara* [2006] VSC 8.

22 UN Human Rights Committee (HRC), *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights : 5th periodic report of States parties : Australia*, 19 February 2008, CCPR/C/AUS/5, [11].

It is proposed to amend section 24(1)[23] so that this notice requirement is also enlivened when the prosecutor or defendant (or the defendant's legal representative) knows or believes that "*on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in a federal court proceeding."*

The Law Council does not support the proposal to extend the notice provisions to cover the issue of subpoenas.

The Law Council submits that this extension places a heavy burden on lawyers engaged in federal criminal proceedings for no obvious purpose.

The production of information on subpoena is already covered by the NSI Act and the Law Council submits that this is sufficient.

The issue of a subpoena, in and of itself, will not result in the disclosure of information prejudicial to national security. The only third parties who are privy to the contents of the subpoena are the court officials who facilitate its issue and the party to whom it is directed. It can be assumed that this receiving party already has knowledge of any information sought to be captured by the subpoena.

Given the broad definition of "national security" (discussed in further detail below) and the lack of precision with which subpoenas are often drafted, it is likely to be very difficult for lawyers to determine in advance whether national security information will be captured by a particular subpoena.

Nonetheless, if a lawyer drafts a subpoena too widely, without due consideration for the type of information it might yield, he or she faces prosecution and imprisonment of up to two years.

For these reasons the Law Council submits that notice provisions in subsection 24(1) should not be extended to cover the issue of subpoenas.

## Definition of National Security Information (Section 7)

It is proposed to amend section 7 of the *NSI Act* by inserting a definition of national security information as follows:

*"national security information means information:*

- *that relates to national security; or*
- *the disclosure of which may affect national security."*

It is proposed to redraft the notice provisions contained in the *NSI Act*[24] with reference to this new definition.

The Law Council acknowledges that this will merely tighten and clarify the drafting of the notice provisions, without narrowing or broadening their scope.

[23] It is also proposed to amend in the same way section 38D which sets out the notice requirements in civil proceedings. The Law Council's objections to the proposed amendment of section 24 apply equally to section 38D.

[24] Sections 24, 25, 38D and 38E

In that respect the Law Council does not object to the insertion of the definition in and of itself.

However, the Law Council submits that the insertion of the definition serves to highlight that the notice provisions set out in the *NSI Act* are impractically wide and onerous.

In effect, the *NSI Act* requires the parties in civil and criminal proceedings to notify the Commonwealth Attorney-General and/or the court if they know or believe that any information that either relates to or may affect national security may be disclosed in the proceedings.

Having received such notice, the Attorney-General must then determine whether the information falls within a much narrower category of information, that is, information which if disclosed would be likely to prejudice national security. If the information falls within this narrower category the Attorney-General may issue a non-disclosure certificate or a witness exclusion certificate.

The rationale behind the *NSI Act* is to ensure that the Attorney-General is put on notice of any possible disclosure of information which may be prejudicial to national security, by ensuring that he or she has notice of any disclosure at all that relates to or may effect, however remotely, national security.

The problem with this approach is that national security is very broadly defined in section 8 of the Act as follows:

*"In this Act, national security means Australia's defence, security, international relations or law enforcement interests."*

Security is defined in section 9 of the Act as follows:

"*In this Act, security has the same meaning as in the Australian Security Intelligence Organisation Act 1979"*

Security is defined in section 4 of the ASIO Act as follows:

> *(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:*
> *i. espionage;*
> *ii. sabotage;*
> *iii. politically motivated violence;*
> *iv. promotion of communal violence;*
> *v. attacks on Australia's defence system; or*
> *vi. acts of foreign interference;*
>
> *whether directed from, or committed within, Australia or not; and*
>
> *(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).*

International relations is defined in section 10 of the Act as follows:

*"In this Act, international relations means political, military and economic relations with foreign governments and international organisations."*

Law enforcement interests is defined in section 12 of the Act as follows:

*"In this Act, law enforcement interests includes interests in the following:*

*(a) avoiding disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation, foreign intelligence and security intelligence;*
*(b) protecting the technologies and methods used to collect, analyse, secure or otherwise deal with, criminal intelligence, foreign intelligence or security intelligence;*
*(c) the protection and safety of informants and of persons associated with informants;*
*(d) ensuring that intelligence and law enforcement agencies are not discouraged from giving information to a nation's government and government agencies."*

Read together, these provisions would mean that lawyers representing a defendant in a terrorism prosecution may well be required and would be wise to put the Attorney-General on notice that their entire case may relate to or affect national security.

Given that a failure to comply with the notice provisions is an offence which carries a maximum penalty of two years, such a cautious approach is advisable.

However, if, in view of the broad definition of national security, parties were to adopt this approach, the regime set out in the *NSI Act* would be unworkable.

It would not be possible for the Attorney-General to personally consider, as is required under sections 26 and 38F, the volume of material referred to him or her for determination.

Thus at present, the workability of the regime is contingent on lawyers exercising their own discretion even though it may expose them to prosecution.

For that reason, the Law Council submits that the notice provisions should be redrafted so that they only relate to a narrower and more directly relevant class of information.

## Other Matters Not Addressed by the Discussion Paper

The Law Council has two further concerns with the current *NSI Act*, which are not addressed by the amendments proposed in the Bill. These concerns are discussed below.

Security Clearances for lawyers (section 39)

The *NSI Act* currently provides that, during a federal criminal proceeding, a legal representative of a defendant may receive written notice from the Secretary of the Attorney General's Department that an issue is likely to arise in the proceedings relating to the disclosure of information that is likely to prejudice national security.[25] A person who receives such a notice must apply to the Secretary for a security clearance.[26] They must do so within 14 days of receiving a notice. If they do not apply for such a clearance, or if they are unsuccessful in obtaining such a clearance, then it is possible that they will not be able to view all the relevant evidence in the case and thus they will not be able to

25 s39(1).
26 s39(2)

continue to effectively represent their client.[27] In the circumstances the Court may recommend that the defendant retain a different legal representative.[28]

In the view of the Law Council, the security clearance system for lawyers which is prescribed in the Act threatens the right to a fair trial in two ways.

First, it potentially restricts a person's right to a legal representative of his or her choosing by limiting the pool of lawyers who are permitted to act in cases involving classified or security sensitive information. For example, pursuant to the *Commonwealth Legal Aid Guidelines* (March 2008), a legal representative acting for a legally aided person cannot maintain carriage of a matter (where the Attorney-General has issued a relevant security notification) unless they already have or can quickly apply for a security clearance.[29] If the legal representative does not have or cannot obtain a security clearance, then a Legal Aid Commission can only continue to pay the legal representative for 14 days from the date a security notification was issued or while the security clearance application is being determined. This detracts significantly from the guarantee in article 14(3) of the ICCPR that all persons have access to a legal representative of their choosing, and that such representation be provided by the State in cases where the person does not have sufficient means to pay for it.

Secondly, the security clearance scheme threatens the independence of the legal profession by potentially allowing the executive arm of government to effectively 'vet' and limit the class of lawyers who are able to act in matters which involve, or which might involve, classified or security sensitive information. By undermining the independence of the legal profession in this way, the right to an impartial and independent trial with legal representation of one's choosing is undermined.

Criminal defence lawyers were well used to dealing with confidential information in a variety of circumstances prior to the emergence of the *NSI Act*. No evidence was provided by the Government to indicate that, in the experience of courts or disciplinary tribunals, lawyers frequently or even infrequently breached requirements of confidentiality imposed either by agreement or by the Courts.

In the absence of a plausible justification for the security clearance system, the perception arises that the primary purpose of the system is to provide the executive arm of government with the ability to select the legal representatives permitted to appear in matters involving classified or security sensitive information.

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[27] If the person does not obtain the security clearance, anyone who discloses relevant information to the person will, except in limited circumstances, commit an offence. s39(3).

[28] s39(5)(b)(ii).

[29] *Commonwealth Legal Aid Guidelines* (March 2008) available at http://www.nationalsecurity.gov.au/www/agd/rwpattach.nsf (accessed on 6 May 2010). Guideline No 7 provides:

*(2) In a matter relating to Australia's national security, payment in respect of assistance, under or in accordance with a Grant of Legal Assistance, after the date on which national security notification is given in the matter may only be made in respect of assistance provided by a legal representative if the assistance was provided at a time:*

*(a) no later than 14 days after national security notification was given in the matter; or*

*(b) when the representative had lodged, and was awaiting the determination of, an application for a security clearance mentioned in:*

*(i) if the matter is a criminal proceeding — subsection 39 (2) of the NSI Act; or*

*(ii) if the matter is a civil proceeding — subsection 39A (2) of the NSI Act; or*

*(c) when the representative had been given a security clearance mentioned in subparagraph (b) (i) or (ii) as the case may be.*

The Law Council understands that, notwithstanding the *NSI Act*, to date terrorism prosecutions have, as a result of the use of undertakings, proceeded without the need for defendants' legal representatives to seek security clearances.

Nonetheless, until the security clearance provisions are repealed or amended, defence counsel continue to operate under their shadow, uncertain of when and if they might be invoked.

For that reason, the Law Council recommends the following amendments to the Act:

1. The repeal of the security clearance process contained in section 39 of the Act.

2. If this recommendation is not adopted, the Law Council recommends that section 39 be amended so as to give the Court a greater role in both determining whether a notice should be issued and in reviewing a decision to refuse a legal representative a security clearance.

   One way in which the Law Council has proposed this could be achieved is:

   (a) the Secretary should be obliged to apply to a court for leave to give a notice to a legal representative under s.39 of the Act;

   (b) the application should be supported by affidavit setting out the basis for the Secretary's contention that before or during a proceeding an issue is likely to arise relating to a disclosure of information in the proceeding that is likely to prejudice national security;

   (c) the application by the Secretary should be made *ex parte* and *in camera.* This would allow the court to assess properly the nature of the information which was said to prejudice national security, without that information otherwise being disclosed;

   (d) the court should give leave to the Secretary to issue the notice if the Secretary established a *prima facie* case that an issue was likely to arise relating to a disclosure of information in the proceeding that was likely to prejudice national security.

   (e) a legal representative who receives an adverse decision with respect to his or her application for a security clearance should have a right of appeal against that adverse decision;

   (f) the right of appeal should be expressly set out in the Act and should be distinct from the appeal rights available under the *Administrative Decisions (Judicial Review) Act 1977;*

   (g) in the appeal the Attorney-General should have the burden of establishing on the balance of probabilities that disclosure of the information concerned to the legal representative/appellant would be likely to prejudice national security;

   (h) the appeal should be held *in camera*;

   (i) the appeal should be conducted, if possible, so as to ensure that, during the hearing, the information concerned is not disclosed;

   (j) if it is not possible to conduct the appeal without the information concerned being disclosed, then the court should have the power to make appropriate orders for the conduct of the appeal in order to protect that information;

(k) in the event that the Attorney-General failed to establish that disclosure of the information concerned to the legal representative/appellant would be likely to prejudice national security, the appeal should be allowed and the legal representative should be entitled to have the information concerned disclosed to him or her in the course of acting for the defendant/client.

Court's discretion to maintain, modify or remove restrictions on disclosure of information (section 31(7) and (8))

As discussed above, under the *NSI Act*, prosecutors and defendants in criminal proceedings must notify the Attorney-General if they know or believe that they will disclose or a witness they intend to call will disclose national security information in the course of the proceedings.[30] Depending on the nature of the information, this may result in the Attorney-General issuing a certificate of non-disclosure, or a witness exclusion certificate preventing, for example, a particular witness from giving evidence on the grounds that it would be prejudicial to national security.[31]

Where a certificate has been issued, the court must hold a closed hearing to determine whether it will maintain, modify or remove the ban on disclosure or the calling of witnesses.

The matters which must be considered by the Court in making this determination are set out in section 31, which relevantly provides as follows:

> *"31(7) The Court must, in deciding what order to make under this section, consider the following matters:*
>
> *(a) whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if:*
>
> *(i) where the certificate was given under subsection 26(2) or (3)—the information were disclosed in contravention of the certificate; or*
>
> *(ii) where the certificate was given under subsection 28(2)—the witness were called;*
>
> *(b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence;*
>
> *(c) any other matter the court considers relevant.*
>
> *(8) In making its decision, the Court must give greatest weight to the matter mentioned in paragraph (7)(a).*

The Law Council is concerned that subsection 31(8) of the *NSI Act* unduly restricts the court's discretion to determine how and when certain information may be disclosed in federal criminal proceedings.

The Law Council submits that the *NSI Act* tilts the balance too far in favour of the interests of protecting national security at the expense of the rights of the accused. While this has been found not to be in breach of Chapter III of the *Constitution*,[32] the Law Council

[30] ss24-25.
[31] s26(2) and s 28(2).
[32] In *Lodhi v R* [2007] NSWCCA 360 the constitutionality of Part 3 of the *National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)* (the NSI Act) was challenged on the grounds that by requiring

maintains that it is not a proportionate response to addressing the risk that information prejudicial to national security may be released.

For that reason, the Law Council submits that sub-section 31(8) should be repealed.

the Court to give "greatest" weight to the risk of prejudice to national security (pursuant to section 31(8)) the Parliament had usurped the judicial function by directing the judge hearing the case how the case must effectively be decided. The Court of Appeal held that subsection 31(8) was constitutionally valid. The Court found that while the word 'greatest' meant that greater weight must be given to the risk of prejudice to national security than to any other of the circumstances weighed, the subsection did not usurp judicial power because it did not require that the balance must always come down in favour of the risk of prejudice to national security. *Lodhi v R* [2007] NSWCCA 360 at [41]-[49], per Spigelman CJ with whom Barr and Price JJ agreed.

# Part Two: Parliamentary Joint Committee on Law Enforcement Bill 2010

The Law Council welcomes the introduction of the PJC on Law Enforcement Bill which seeks to replace the existing Parliamentary Joint Committee on the Australian Crime Commission (PJCACC) with a new oversight committee, the Parliamentary Joint Committee on Law Enforcement (PJCLE). The new Committee will have responsibility for monitoring the activities of both the Australian Crime Commission (ACC) and the Australian Federal Police (AFP).

In contrast to Australian intelligence agencies and the ACC, it is anomalous that the AFP is not currently subject to oversight by a dedicated parliamentary committee.[33] To the extent that the Bill seeks to address this gap, the Law Council supports its enactment.

However, the Law Council is concerned that the effectiveness of the new Committee may be undermined by certain provisions in the Bill which potentially inhibit the Committee's ability to access important information from the agencies it is tasked with overseeing.

## Information Gathering Powers of the Committee

The new Committee's effectiveness as an accountability body will ultimately depend on its ability to obtain and review accurate and comprehensive information about the AFP's and ACC's performance of their functions.

To that end, the Law Council has the following concerns with the Bill:

- the failure to address the concerns expressed by the PJCACC about its inability to provide meaningful oversight of the ACC in the absence of more comprehensive information gathering powers;
- the appropriateness of the heads of the agencies under review determining what information should be disclosed to the Committee;
- the absence of any requirement for the Minister to provide reasons for his or her determination to uphold an agency's decision to withhold information from the Committee; and
- the inclusion of information that '*could prejudice a person's reputation'* in the definition of sensitive information.

### Shortcomings of the PJCACC have not been addressed

The PJCACC, which is currently tasked with oversight of the ACC, has, at times, struggled to fulfill its mandate precisely because it has not always been given timely access to information about the ACC's activities.

In 2007, urgent legislation was introduced and passed by parliament which made retrospective changes to the Australian Crime Commission Act in order to overcome problems arising from a systemic failure on the part of ACC examiners to comply with the

[33] See Commonwealth Ombudsman's submission to Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, July 2008, p. 3, at http://www.aph.gov.au/senate/Committee/aclei_ctte/lawenfmod/submissions/sub003.pdf

procedures set out in the ACC Act for issuing a summons.[34] The first time the PJCACC became aware of this failure and the ramifications it may have, both for the validity of summonses issued by the ACC and the admissibility of evidence obtained pursuant to those summonses, was when the Bill was introduced to parliament. The PJCACC did not have the opportunity to review the provisions of the amending Act (some of which it later recommended be repealed) or the circumstances which purportedly necessitated its urgent passage, until after the Bill was passed.

When the PJCACC did finally review and report on the amending Act, it took the opportunity to make a number of observations about its oversight role and the extent to which it is able to adequately fulfill that role, given the limitations of its statutory powers to access information.[35]
Sub-sections 59(6A) – (6D) of the ACC Act set out the powers of the PJCACC to request and receive information from the ACC and relevantly provide as follows:

> *(6A) Subject to subsection (6B), the Chair of the Board:*
>
> > *(a) must comply with a request by the Parliamentary Joint Committee on the Australian Crime Commission for the time being constituted under Part III (the PJC) to give the PJC information relating to an ACC operation/investigation that the ACC has conducted or is conducting; and*
> >
> > *(b) must when requested by the PJC, and may at such other times as the Chair of the Board thinks appropriate, inform the PJC concerning the general conduct of the operations of the ACC.*
>
> *(6B) If the Chair of the Board considers that disclosure of information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the Chair must not give the PJC the information.*
>
> *(6C) If the Chair of the Board does not give the PJC information on the ground that the Chair considers that disclosure of the information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the PJC may refer the request to the Minister.*
>
> *(6D) If the PJC refers the request to the Minister, the Minister:*
>
> > *(a) must determine in writing whether disclosure of the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies; and*
> >
> > *(b) must provide copies of that determination to the Chair of the Board and the PJC; and*
> >
> > *(c) must not disclose his or her reasons for determining the question of whether the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies in the way stated in the determination.*

The PJCACC expressed concern with the "limitations in the Act" and observed that:

> *'the PJC's power to access information assumes that the committee is informed about matters within the ACC, and that this knowledge allows the PJC to request*

[34] Australian Crime Commission Amendment Act 2007
[35] See: PJCACC's report of its inquiry into the Australian Crime Commission Amendment Act 2007, dated 4 September 2008 at http://www.aph.gov.au/Senate/committee/acc_ctte/acc_amend_act07/index.htm

*and receive information from the Chair of the ACC Board. This is not always the case, and in such circumstances, the PJC is left with no mechanism to seek information from the ACC.*

*Further, subsection 59(6A) does not stipulate when the Chair of the ACC Board must comply with the committee's request, and subsection 59(6B) allows the Chair of the Board a means by which the PJC's request for information can be denied, although there is a means for appeal to the Minister.*

*The totality of the provisions does not suggest that the PJC has any special ability to meaningfully oversee the ACC.'*[36]

The PJCACC noted that the need for the Committee to have this meaningful oversight ability was demonstrated by the fact that, in absence of effective Committee oversight, failures on the part of the ACC to comply with the law may only be revealed, if at all, in the course of litigation.

The disclosure provisions in the current Bill are set out in proposed section 8 and 9. In short, those provisions provide as follows:

- the new Committee may request information from the CEO of the ACC or the Commissioner of the AFP about the ongoing or completed operations and investigations of either agency;
- the new Committee may request from the CEO or Commissioner, or the CEO or Commissioner may volunteer as and when they consider appropriate, information about the general performance of the ACC or AFP of its functions;
- the CEO or Commissioner must comply with such a request unless he or she decides that:

  (a) the information is sensitive information; and

  (b) the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee.

- If the CEO or Commissioner decides not to provide information to the Committee as requested, the request may be referred to the Minister who must determine in writing whether:

  (a) the information is sensitive information; and

  (b) the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee.

- The Minister is not required to provide reasons for his or her determination.

These provisions are not modelled on section 59 of the ACC Act. Instead, they closely replicate those provisions of the *Law Enforcement Integrity Commissioner Act 2006* which govern the powers of the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (PJCLEI) to request and receive information from the Integrity Commissioner.

[36] Paragraphs 4.12 to 4.14, at http://www.aph.gov.au/Senate/committee/acc_ctte/acc_amend_act07/report/c04.htm

The disclosure provisions in the Bill are an improvement on the disclosure provisions in the ACC Act because they recognise that, even where the disclosure of certain information may have prejudicial consequences, this may be outweighed by the public interest in the information being disclosed to the Committee. (The current provisions in the ACC Act provide simply that the Chair of the ACC board *must not* disclose information to the PJCACC if the disclosure of the information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies. There is no requirement that this be weighed against the public interest in the Committee having access to the information.)

Nonetheless, the disclosure provisions in the Bill still suffer from many of the same shortcomings as those identified with section 59 of the ACC Act by the PJCACC. For example:

- they offer very little guidance about what information agency heads should be required to proactively volunteer to the Committee and when, and instead assume that Committee members will be in a position to identify and request any pertinent information;

- they do not provide any timeframe within which agency heads must respond to a request for information;

- they allow agency heads wide latitude to refuse a request for information, in relation to which the only remedy is appeal to the Minister; and

- the Minister is not required to provide any reasons for his or her determination.

The Explanatory Memorandum states that the provisions allowing an agency to refuse a Committee request for information '*should be relied upon only in exceptional circumstances'*, and that other options, such as the Committee receiving information at a private hearing and committing to not publishing sensitive information, should be pursued as an alternative to refusal to provide information. However, this sentiment is not reflected in the text of the Bill itself, and in particular is not captured in the test to be applied by agency heads or the Minister in determining whether information should be disclosed.

In the circumstances, the Law Council is concerned that the provisions of the Bill may not sufficiently compel the AFP and the ACC to furnish the Committee with the information it requires to fulfill its functions, such that the new Committee, like the PJCACC which preceded it, will not have "*any special ability to meaningfully oversee*" the ACC and AFP.

## Agency heads decide what information is provided to or withheld from the Committee

The purpose of the new Committee is to provide a vehicle via which parliament can provide oversight of the AFP and ACC and, in particular, monitor whether those agencies exercise the extraordinary powers which are available to them according to law and proper process. It is intended that the new Committee will help deliver greater transparency and accountability to the overall operation of both agencies.

In this regard, there is an inherent conflict between the purpose of the new Committee and the provisions of the Bill which, at first instance, give the heads of the very agencies under review the power to determine what information the Committee should have access to.

The Law Council accepts that in certain exceptional circumstances, and notwithstanding the Committee's ability to hear evidence in camera, some sensitive information may need to be withheld from the Committee. However, as the Bill acknowledges in proposed sub-sections 8(2) and 9(2), determining what information may fall within this category requires the potentially prejudicial effect of the release of the information to be weighed against the more general public interest in the Committee, as the oversight body, having access to that information.

The Law Council submits that this balancing exercise is not one which can be undertaken by the agency heads from whom information is requested. Agency heads can not and should not be expected to evaluate the 'public interest' other than through the lens of their role, which will inevitably entail the prioritisation of the needs and best interests of their agencies above other considerations.

Even if the agency heads could undertake the task with the requisite degree of objectivity, the perception of bias, that is that they will err on the side of shielding their agencies from criticism, will remain and undermine the public's confidence in the oversight process.

For that reason, the Law Council submits that only the Minister should be able to direct that information requested by the Committee be withheld. This would more closely reflect the position set out in the Explanatory Memorandum that the Committee should only be denied access to requested information in exceptional circumstances.

It is understood that this would also more closely reflect the procedures which govern when and how requested information may be withheld from the Parliamentary Joint Committee on Intelligence and Security.[37]

The Law Council submits that there is no value in an intermediate step which gives the agency heads the power, at first instance, to make their own determinations about disclosure. On the contrary, there is danger in such a provision in that it may create a dynamic whereby the Committee, although supposedly operating as a watchdog, is rendered subordinate to the agencies under its review, or, at the very least, is forced to negotiate and compromise simply in order to obtain their cooperation.

To some extent, this was the experience of the Clarke Inquiry into the Case of Dr Mohamed Haneef. Mr Clarke was not given any power to compel the production of information from the law enforcement agencies involved in that case, notwithstanding the fact that information held by those agencies was clearly critical to the effectiveness and credibility of his review. Although all agencies pledged cooperation with the Inquiry, Mr Clarke encountered difficulties in accessing the information he required to thoroughly review the circumstances of the case. In a statement released on 25 July 2008, Mr Clarke advised that 'gaining access to the documents has involved a protracted period of negotiation' with government agencies'.[38] Even after these protracted negotiations, Mr Clarke indicated that documents '*in the main*' were provided. This statement indicates that at least some information requested by the Inquiry was not provided.

[37] The PJCIS is able to access information from the agencies it oversights subject to only one limitation. That limitation arises if the responsible Minister is of the opinion that 'operationally sensitive information' may be disclosed. In that circumstance, the Minister may prevent disclosure by giving the Committee's presiding member a certificate setting out that opinion. The certificate must also specify the material and evidence that should not provided to the committee – see: *Intelligence Services Act 2001*, Schedule 1, Clauses 3 and 4

[38] Clarke Inquiry into the Case of Dr Mohamed Haneef, Statement of 25 July 2008 - M J Clarke QC , p.1 at http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~230708+Statement+4.doc.pdf/$file/230708+Statement+4.doc.pdf

Mr Clarke also stated that some documents that were received were provided on a confidential basis, notwithstanding assurances at the commencement of the Inquiry that as much material of the Inquiry's proceedings as possible would be made publicly available.[39]

In short, decisions about disclosure were made by individual agencies and imposed upon the Inquiry as a condition of cooperation by the agencies.

The Clarke Inquiry demonstrates that it is unrealistic to expect that agencies will willingly submit to extensive review of their operations or that their assessments of what information should be disclosed and under what terms will necessarily accord with those of the body tasked with reviewing their conduct or of the public more generally.

## Minister is not required to provide reasons

Where either the AFP Commissioner or the ACC CEO decides that requested information should not be disclosed to the new Committee, the Committee has the option of referring the request to the Minister. The Minister must then determine for him or herself whether the information is 'sensitive information' and, if so, whether the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee.

The Minister is not required to provide any reasons for his or her determination.

The Law Council recognises that the Minister's ability to provide reasons may be constrained by the need not to reveal the very information sought to be protected.

However, the Law Council submits that the Bill should at least require the Minister to provide reasons for his or her determination to the extent that he or she is able to without compromising the confidentiality of the information to be withheld from the Committee.

Such a provision would:

- bring greater transparency to the process;
- reinforce the importance of the Committee and its role; and
- provide the foundation for a more robust disclosure regime based on the following principles:
  - that there is a presumption in favour of disclosure to the Committee;
  - that the Committee is entitled, as the parliament's designated oversight body, to expect full disclosure; and
  - that information should only be withheld from the Committee in exceptional circumstances.

## Definition of 'sensitive information'

As noted above, the CEO of the ACC or the Commissioner of the AFP must comply with a request for information from the Committee unless he or she decides that:

(a) the information is sensitive information; and

[39] Clarke Inquiry into the Case of Dr Mohamed Haneef, Opening Statement of 30 April 2008 - M J Clarke QC, p.3 at http://www.haneefcaseinquiry.gov.au/www/inquiry/rwpattach.nsf/VAP/%28CFD7369FCAE9B8F32F341DBE097801FF%29~Opening+Statement.pdf/$file/Opening+Statement.pdf

(b) the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee.

The definition of 'sensitive information' contained in the Bill closely mirrors the definition of sensitive information' in the *Law Enforcement Integrity Commissioner Act 2006*. However, the definition in the Bill is slightly more expansive in that it also includes information that '*could prejudice a person's reputation'* (see proposed sub-section 3(h)).

This addition to the definition is perhaps a consequence of the current provisions of the ACC Act which provide that the Chair of the Board must refuse a request for information from the PJCACC if he or she considers that disclosure of information to the public could, amongst other things, prejudice the reputation of persons.

The Law Council is of the view that it is unnecessarily restrictive to include information that '*could prejudice a person's reputation'* in the category of information that might be withheld from the Committee.

Parliamentary Committees of all types frequently receive evidence of this nature and have procedures for handling such information, including receiving such information in private session, expunging such material from the transcript of evidence and forbidding publication of that evidence (see Senate Standing Orders 35 to 37,[40] Senate Procedures to be observed by the Senate Committees for the protection of witnesses,[41] Senate Brief No 13 – October 2009 Rights and Responsibilities of Witnesses before Senate Committees[42] and Odgers' Australian Senate Practice Chapter 17 on Witnesses[43]).

The Committee's inquiries and reports may from time to time legitimately reveal information which reflects poorly on a person's actions, judgments or associations. That is the nature of a body tasked with oversight and accountability of another agency. It should be a matter for the Committee and its judgment to ensure that its processes are not misused as a vehicle for an *unwarranted* attack on a person's reputation.

The Law Council recommends that section 3(h) be deleted from the Bill.

[40] At http://www.aph.gov.au/Senate/pubs/standing_orders/b00.htm

[41] At http://www.aph.gov.au/Senate/committee/wit_sub/bro_thr.htm

[42] At http://www.aph.gov.au/SENATE/pubs/briefs/brief13.htm

[43] At http://www.aph.gov.au/senate/pubs/odgers/chap17toc.htm

## Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.