



Department of the Premier and Cabinet
Government of Western Australia

Office of the Director General

Our Ref: 200607926

Ms Jane Hearn
Inquiry Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

Dear Ms Hearn

Security Legislation Review

Thank you for your letter dated 16 June 2006 to the Premier Hon Alan Carpenter, MLA and invitation to make a submission to the Parliamentary Joint Committee on Intelligence and Security commenting on the recommendations of the Security Legislation Review.

I submit for your consideration some comments and observations prepared by the Department of the Premier and Cabinet in consultation with the State Solicitor's Office and the Western Australia Police (Attachment A).

If you have any questions in relation to these comments please contact Ms Tania Lawrence, Principal Policy Officer, Department of the Premier and Cabinet on (08) 9222 9704 or tlawrence@dpc.wa.gov.au.

Yours sincerely



M C Wauchope
DIRECTOR GENERAL

Att.

Submission to the Parliamentary Joint Committee on Intelligence and Security regarding the Report of the Security Legislation Review Committee

Prepared by the Western Australian Department of the Premier and Cabinet in consultation with the State Solicitor's Office and the Western Australia Police

Introduction

This submission has been prepared at the invitation of the Parliamentary Joint Committee on Intelligence and Security. As there are no draft legislative amendments to consider, it is provided as a general commentary on the recommendations in the Security Legislation Review Committee's Report as to the operation, effectiveness and implications of the definition of a "terrorist act" as contained in section 100.1 of Schedule 1 to the *Criminal Code Act 1995* (Cth) (as amended by the *Criminal Code Amendment (Terrorism) Act 2003* and the *Anti-Terrorism Act 2005*).

It is noted that the Parliamentary Joint Committee on Intelligence and Security will not be reviewing the operation of section 102.1 of the *Criminal Code Act 1995* (Cth) until early 2007. However for the Committee's information, comments are provided in relation to the recommendations affecting this section.

Recommendation 1: Further Review

A legislative-based timetable for a continuing review of the security legislation would be consistent with the Council of Australian Governments (COAG) agreement to a 5 year legislative review of the *Anti-Terrorism Act 2005* (Cth).

As an alternative approach the Committee might consider the mechanisms in Western Australia's *Terrorism (Extraordinary Powers) Act 2005* and *Terrorism (Preventative Detention) Bill 2005* for review 12 months after enactment and 3 yearly thereafter. The review must review the operation and effectiveness of the Act, whether its provisions are appropriate having regard to its object, and whether it should continue in operation. A report based on the review must also be tabled before each House of Parliament.

Recommendation 2: Community Education

The Western Australian Government developed its legislation through public Parliamentary inquiries, and seeking and receiving submissions from the public. Western Australia will cooperate with the Commonwealth by continuing to develop strategies that address community needs.

Recommendation 3, 4, 5: Reform of the process of proscription

A transparent process for proscribing a terrorist organisation is desirable. Under the current arrangement there is an opportunity for representations to be made by the organisation and by members of the public, as regulations are tabled in Parliament.

The SLRC recommendation 4(i) would appear to be an appropriate avenue for achieving greater transparency.

Recommendation 6: Definition of terrorist act – ‘harm that is physical’

This recommendation will expand the scope of the Act and its offences because it will encompass actions causing or intending to cause not only physical, but also mental, harm. As harm to a person's mental health is more difficult than physical harm to identify objectively, such an expansion of the *Criminal Code* may need to be balanced by strengthening existing safeguards.

In any event this recommendation ought properly be considered in the context of what, if any, other amendments are made to the definition of ‘terrorist act’, and whether distinctions are to be drawn between the actual consequences of actions and the contemplated consequences of actions which have not occurred but which are, say, planned or threatened.

Recommendation 7 and 8: Definition of a terrorist act – ‘threat of action’

Any changes to the definition of ‘terrorist act’ which remove the ambiguity and uncertainty resulting from ‘action’ and ‘threat of action’ being combined in the definition, are supported.

Recommendation 9: Definition of ‘advocates’

The effect of implementation of the recommendation that section 102.1(1A) be deleted would be to narrow the circumstances in which an offence can be committed. To the extent that requiring, for the commission of an offence, that there to be a “substantial risk” that praising a terrorist act may lead a person to engage in a terrorist act, does not impede enforcement, security or prosecution authorities in carrying out their functions, it would appear to appropriately balance competing concerns.

An amendment however, which merely substitutes "substantial risk" for "risk" in the section may simply ensure that the word "risk" is interpreted in the manner in which the courts are likely currently to interpret the provision.

Recommendation 10: Definition of a ‘terrorist organisation’

It would appear desirable to retain the means given by paragraph (a) of the definition of ‘terrorist organisation’ in section 102.1(1) to characterise an organisation as a ‘terrorist organisation’, notwithstanding that it has not been so proscribed, by the leading of evidence as to the organisation's activities.

Such a provision may be required where the organisation had not come to the attention of authorities or where the process of in paragraph (b) of designation by Commonwealth regulation an organisation to be a ‘terrorist organisation’ has not been completed.

Recommendation 11: Section 102.3(2) – burden of proof

As the steps which a person has taken upon learning that an organisation was a 'terrorist organisation' would usually be within the knowledge, and frequently the sole knowledge, of the defendant, it would appear that a defendant ought continue to bear the legal burden of proof (as distinct from merely an evidential burden) and that accordingly, section 102.3(2) should be retained.

Recommendation 12: Section 102.5 – training a terrorist organisation or receiving training from a terrorist organisation

It would appear that the proposed redrafting of the offence to expressly relate the proscribed training to a terrorist act or to preparation for engaging in or assisting with a terrorist act, would reflect the intention of section 102.5, and to that extent the recommendation could be supported. Care should be taken, however, to ensure that the offence will not require proof that a specific terrorist act was in contemplation when the training was provided or received.

Recommendations 13 – 17

Amendments that achieve greater clarity and certainty would be supported.

Recommendation 18 and 19

Implementation of these recommendations would not rest on State referred powers and therefore would not require agreement of the States under section 100.2 of the *Criminal Code*.

Recommendation 20: Hoax offence

The Western Australian *Criminal Code* contains hoax offences. For example, section 171 creates an offence of creating a false belief of a threat to life or property or that an offence has been or will be committed. Section 338C creates offences of making statements or committing acts creating a false apprehension as to the existence of threats or danger.

Any extension to Part 5.3 to provide for a hoax offence in the Commonwealth's legislation would rely on State referred powers. Therefore the circumstances proposed to be covered would need to be clear and for the purpose of addressing a critical gap in State law.