Australian Government

Attorney-General's Department

Security and Critical Infrastructure Division

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Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005 – Attorney-General's Department Submission No. 1

Officers from the Attorney-General's Department appeared before the Committee on Monday 14 November 2005. During the course of questioning, Senators asked officers about the application of the Commonwealth *Evidence Act 1995* (Evidence Act) to the processes for obtaining preventative detention orders and control orders, and the differences between the proposed new sedition offence and the application of the incitement provision under the *Criminal Code Act 1995* (Criminal Code) to existing terrorism offences.

To assist the Committee in its inquiry into the Bill, the Attorney-General's Department provides the following information in relation to those two issues. in view of the time limitations, I thought it would be more helpful if we provided our additional comments progressively.

Evidence and hearsay

Subsection 4(1) of the Evidence Act provides that the Act "applies in relation to all proceedings in a federal court ... including proceedings that ... are interlocutory proceedings or proceedings of a similar kind".

Whether the proceedings are to be characterised as "interlocutory proceedings" is to be determined not by their form, but by reference to the kind of relief sought. For example, in *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 3) (1996) 63 FCR 55 at 58; 142 ALR 450*, Lindgren J. noted that while there is no definition of "interlocutory proceeding" in the Evidence Act, the expression appears in the Law Reform Commission's Report No 38 *Evidence* (ALRC 38), which described them as "proceedings that are not final, usually dealing with procedural problems that arise in preparing a case for trial, but including proceedings for injunctions pending the trial of an action". In that case, it was held that a proceeding for a permanent injunction should not be regarded as an interlocutory proceeding for the purposes of the Evidence Act.

Control Orders

Control orders are issued by federal courts: the Federal Court of Australia, the Family Court of Australia, and the Federal Magistrates Courts (see item 11, page 15 of the Bill).

An ex parte application for an interim control order would be regarded as an interlocutory proceeding for the purposes of the Evidence Act. Confirmation hearings would be regarded as "proceedings in a federal court" for the purposes of the Evidence Act. Accordingly, subsection 4(1) of the Evidence Act means the provisions of that Act would apply to both applications for interim control orders and confirmation hearings.

Section 59 of the Evidence Act provides that hearsay is generally not admissible to prove the existence of the fact asserted. However, the Evidence Act also contains a large number of exceptions to the hearsay rule that apply both in civil and criminal proceedings. The application of those exceptions means hearsay could be accepted in an application for an interim control order and a confirmation hearing.

For example, section 75 of the Evidence Act provides that the hearsay rule does not apply to "interlocutory proceedings" if the party adducing it also adduces evidence of its source. Accordingly, provided information about the source of the information is adduced in an application for an interim control order, it is likely that hearsay evidence could be included in the application.

A proceeding for the confirmation of such an order would not be regarded as an interlocutory proceeding. However, there are a number of exceptions to the hearsay rule in Divisions 1 to 3 of Part 3.2 of the Evidence Act that could apply, and could resulting in hearsay being accepted in such a proceeding. The exceptions in Division 1 relate to evidence relevant for a non-hearsay purpose, the exceptions in Division 2 relate to "first hand" hearsay, and the exceptions in Division 3 relate to other matters, including business records and telecommunications.

Preventative Detention Orders

Applications for continued preventative detention orders are made to issuing authorities. An issuing authority can be a judge or former judge, a Federal Magistrate, or a President or Deputy President of the Administrative Appeals Tribunal (see proposed section 105.2 of the Bill). Under the Bill, the issuing authority exercises the function to make decisions in a personal capacity, and not as a member of the court or tribunal to which the person is or was attached (see proposed section 105.18 of the Bill).

Accordingly, applications for preventative detention orders, including applications for extensions as well as applications for prohibited contact orders, are not proceedings before a court. Therefore, the provisions of the Evidence Act will not apply to the material that is included in an application.

There are other application processes under Commonwealth law that have similar characteristics to applications for preventative detention orders. For example, applications for extensions to detention for questioning under Part IC of the *Crimes Act 1914* (Crimes Act), search warrants under various pieces of Commonwealth legislation (including the Crimes Act) and forensic procedures under Part ID of the Crimes Act all have similar characteristics. The courts have considered the issue of the nature of information that is provided to decision makers in those application processes. Some of the similarities include that:

- applications are made by AFP members,

- applications are made to issuing authorities (including magistrates, justices of the peace, and senior officers within the relevant agency),
- issuing authorities act in a personal capacity when making decisions, and
- the application is required to be supported by information on oath or information that is sworn or affirmed.

Applications for extensions to detention for questioning, search warrants and forensic procedures are not criminal proceedings. Accordingly, the courts have held that the material placed before the issuing authority need not be based on evidence that is in an admissible form. That is, the courts have held that all the material that supports the application can properly be placed before the issuing authority – not just the material that would be admissible under the Evidence Act (see *L v Lyons (2002) 137 ACrimR 93*). That is because to require that only admissible material be placed before the issuing authority would serve no purpose, as the result would be that an application could only be made if the applicant already had evidence to support a conviction.

The courts have also held that the relevant test in determining whether or not to issue the warrant or order sought is whether a reasonable person would place sufficient weight on the information provided to form the suspicion or belief necessary to ground the search warrant (see *Malayta (1996) ACrimR 492).* It is likely that such an approach will also be accepted by reviewing courts when considering applications for preventative detention orders.

The Bill makes provision for a person who is or has been the subject of a preventative detention order to seek a remedy from the Federal Court in relation to the order or the person's treatment under the order (see proposed section 105.51 of the Bill). The Evidence Act would apply to such proceedings.

Incitement and Sedition

Incitement to commit an offence is an offence in its own right under section 11.4 of the Criminal Code. In order to prove an offence of incitement the prosecution will need to prove:

1. that the offender intended to urge another person to commit an offence; and
2. that the offender intended that the crime incited be committed.

This second limb requires the prosecution to prove the fault elements of the offence incited.

The urging is intentional because "urging" is a conduct element of the offence. Subsection 5.6 of the Criminal Code provides that if the law creating the offence does not specify a fault element, for a physical element that consists only of conduct, intention is the fault element for that physical element.

For example the offence of harming a Commonwealth public official (section 147.1 of the Criminal Code) provides that a person (the ***first person***) is guilty of an offence if:

(a) the first person engages in conduct; and

(b) the first person's conduct causes harm to a public official; and

(c) the first person intends that his or her conduct cause harm to the official; and

(d) the harm is caused without the consent of the official; and

(e) the first person engages in his or her conduct because of:

(i) the official's status as a public official; or

(ii) any conduct engaged in by the official in the official's capacity as a public official; and

(ea) the public official is a Commonwealth public official;

Therefore the prosecution would need to prove the fault elements of the above offence; that is that the offender intended that other person engage in conduct and intended that the conduct cause harm to the official.

In the context of terrorism, proving that a person who urges or encourages the commission of a terrorism offence is guilty of the offence of 'incitement' under the Criminal Code would require proof that the person intended that the offence incited be committed. That would require proof of a connection to a 'terrorist act'.

A significant difference of the proposed new sedition offence, as opposed to relying on incitement under s11.4 of the Criminal Code, is that the requirement to prove a connection to a terrorist act or a particular terrorist organisation is removed. The rationale is that while it may not be possible to show that a person intends that the relevant offence be committed, to communicate such ideas is dangerous as it can be taken up by the naïve and impressionable to cause harm to the community.

The existing sedition offence

A person who engages in a 'seditious enterprise' with the intention of causing violence, or creating public disorder or a public disturbance, or who writes, prints, utters or publishes any seditious words with the intention of causing violence or creating public disorder or a public disturbance, is guilty of the offence of sedition under the Crimes Act.

However, the existing offences contain complicated fault elements and defences, that the Gibbs Committee recommended should be simplified. Further they do not focus on key terrorism themes such as urging violence by one racial group against another. The existing law focuses on the language of class.

Urging

It is important to note that the incitement offence in section 11.4 of the Criminal Code uses the word "urge". This language was recommended as a plain English way of capturing the essence of the offence, by the Commonwealth, State and Territory officers on the Model Criminal Code Officers Committee (page 93, Chapter 2, December 1992).

The use of the word urge modifies the common law which traditionally imposed liability for incitement where a person "counsel, commands or advises" the commission of an offence. Some courts have interpreted "incites" as only requiring that a person causes rather than advocates the offence. The use of the word "urge" is designed to avoid this ambiguity.

Proposed sedition offence

For similar reasons and for internal consistency, sedition refers to "urging" rather than inciting. The sedition offences are concerned with urging:

1. overthrow of the Government by violence;
2. violent interference with elections;

3. violence against other groups in the community threatening the peace and good Government of Australia;
4. the assistance of an enemy engaged in armed hostilities with the Australian Defence Force.

Like the incitement offences the prosecution must prove that the person intended to urge the conduct. As mentioned above, "urging" is intentional because it is a conduct element of the offence.

However, unlike the incitement offences sedition does not require the prosecution to prove that the person intended the crime urged be committed.

The prosecution must prove that the person was reckless as to whether the thing against which the person urged the use of force or violence against was, for example, a group distinguished by race, religion, nationality or political opinion. Proof of recklessness requires the prosecution to prove beyond reasonable doubt that the person was aware of a substantial risk that the circumstance exists (that the group against which the person urged the use of force or violence was a group so distinguished), and that having regard to that circumstance, it was unjustifiable for the person to take the risk.

General

The action officers for this matter are Karen Bishop who can be contacted on 02 6250 6926 and Kirsten Kobus who can be contacted on 02 6250 5433.

Yours sincerely

Geoff McDonald
Assistant Secretary
Security Law Branch

Telephone: 02 6250 5430
Facsimile: 02 6250 5985
E-mail: geoff.a.mcdonald@ag.gov.au