

CHAPTER 4

Key issues – Parliamentary Joint Committee on Law Enforcement Bill 2010

4.1 Submissions and evidence regarding the LE Bill were generally supportive.

4.2 The Law Council, for example, welcomed the introduction of the LE Bill with its expanded oversight of both the ACC and the AFP. The Law Council noted:

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. To the extent that the Bill seeks to address this gap, the Law Council supports its enactment.¹

4.3 In comparison to the NS Bill, the committee received fewer submissions and less evidence with regard to specific provisions of the LE Bill. The main issues discussed in this chapter are the functions of the PJC-LE and the ability of the PJC-LE to effectively fulfil these functions.

Functions of the PJC-LE

4.4 Proposed subsection 7(1) of the LE Bill sets out the functions of the PJC-LE, which will include:

- monitoring, reviewing and reporting to Parliament on the performance by the ACC and the AFP of their functions;
- examining and reporting to Parliament on each annual report of the ACC and the AFP; and
- examining trends and changes in criminal activities, practices and methods, and reporting to Parliament on any desirable changes to the functions, structure, powers and procedures of the ACC or the AFP.

4.5 Proposed subclause 7(2) clarifies that the functions of the PJC-LE exclude:

- undertaking an intelligence operation or investigating a matter relating to a relevant criminal activity;
- reconsidering the findings of the ACC in relation to a particular ACC operation or investigation (concluded or ongoing);

1 *Submission 22*, p. 30. Also see Police Federation of Australian, *Submission 3*, p. 1; Liberty Victoria, *Submission 8*, p. 4; Australian Human Rights Commission, *Submission 18*, p. 50; and Australian Crime Commission, *Submission 21*, p. 3.

- reviewing sensitive operational information or operational methods;
- reviewing particular operations or investigations that have been, are being or are proposed to be undertaken;
- reviewing information proved by, or by an agency of, a foreign government where that government does not consent to the disclosure of the information; or
- conducting inquiries into individual complaints about the activities of the ACC or the AFP.

4.6 In essence, the functions of the PJC-LE will relate to the broad operation and effectiveness of the ACC and the AFP rather than individual operations, investigations or complaints.² However, the PJC-LE may still consider information about particular operations or investigations if this is relevant to its functions.³

4.7 The Police Federation of Australia (PFA) submitted that proposed section 7: ...strikes an appropriate balance between the scrutiny we think is warranted and the safeguards for sensitive information held by law enforcement bodies, operational matters that should not be interfered with, and exceptional circumstances where inquiries might be prejudiced or where private hearings might be more appropriate.⁴

4.8 However, not all submissions held this view. Liberty Victoria, for example, favoured extending the PJC-LE's functions to include all matters it considers necessary:

Openness, transparency and accountability will not be maximised if the committee is restricted in reviewing sensitive matters. It is in the interest of Australian democracy for the committee to monitor and report on the most important of matters. Courts and Royal Commissions have demonstrated that processes are available for considering sensitive matters, whilst meeting national security requirements. It is common for reports to be produced that balance the requirement to maintain confidentiality with openness.⁵

4.9 Other submissions also suggested the incorporation of additional functions which, in their view, would improve parliamentary oversight by the PJC-LE.⁶ Some submissions, commenting more generally on the value of parliamentary oversight, questioned whether proposed subsection 7(2) actually undermines the functions set

2 Australian Crime Commission, *Submission 21*, p. 3.

3 Attorney-General's Department, *Submission 12*, p. 4.

4 *Submission 3*, p. 1.

5 *Submission 8*, p. 4.

6 For example, Australian Federal Police Association, *Supplementary Submission 16*, p. 3; and Australian Human Rights Commission, *Submission 18*, pp 32 and 51.

out in proposed subsection 7(1).⁷ More specifically, some submitters and witnesses questioned whether proposed sections 8 and 9 hinder or obstruct the ability of the PJC-LE to fulfil its statutory functions.⁸

Ability of the PJC-LE to fulfil its functions

4.10 Proposed subsection 8(1) creates an obligation for the CEO of the ACC to comply with requests from the PJC-LE to provide information in relation to an ACC operation or investigation (concluded or ongoing), as well as the general performance of the ACC's functions. A similar obligation is created in proposed subsection 9(1) in relation to the Commissioner of the AFP and the AFP's operations, investigations and functions.

4.11 However, proposed subsections 8(2) and 9(2) provide the CEO and the Commissioner of the AFP with a discretion not to comply with the request if satisfied that:

- the information is 'sensitive information'; and
- the public interest that would be served by giving the information to the [PJC-LE] is outweighed by the prejudicial consequences that might result from giving the information to the [PJC-LE].

4.12 Proposed subsections 8(3)-(4) and 9(3)-(4) set out a process by which the PJC-LE may refer its request to the relevant minister, if the request is declined by the CEO or the Commissioner of the AFP. The relevant minister is then required to make a determination and provide a copy of the determination to the agency head and the PJC-LE. The minister is not required to disclose his or her reasons for making the determination.⁹

4.13 A few submissions disagreed with the proposed disclosure provisions. Some of the opposition focused on the potential of the provisions to inhibit the effectiveness of the PJC-LE. The Law Council, for example, argued:

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.¹⁰

4.14 In particular, the ground of 'sensitive information' as a potential reason for withholding information requested by the PJC-LE drew some comment. The Law Council submitted:

7 For example, Dr Fergal Davis, *Submission 1*, p. 1; and Civil Liberties Australia, *Submission 14*, p. 3.

8 For example, Law Council of Australia, *Submission 22*, p. 30.

9 Proposed subsections 8(5) and 9(5) of the LE Bill.

10 *Submission 22*, p. 30.

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.¹¹

4.15 The AHRC likewise commented:

The government has not justified why provisions preventing the PJC Committee from disclosing any information obtained through the performance of its functions would not adequately deal with the Government's legitimate concern to protect sensitive information.¹²

4.16 In addition, the Law Council identified other concerns with the proposed disclosure provisions, for example:

- the failure to address the concerns expressed by the (current) PJC-ACC 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 PJC-LE;
- 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 PJC-LE; and
- the inclusion of information that 'could prejudice a person's reputation' in the definition of sensitive information.¹³

4.17 At the public hearing in Melbourne, the Law Council acknowledged that the PJC-LE model proposed in the LE Bill is an improvement on the *Australian Crime Commission Act 2002* (ACC Act) as it will require agency heads to balance competing interests in the disclosure of information to the PJC-LE. However:

We are of the view that the balance is not yet struck properly. We think that the bill does not offer enough guidance about what information agency heads should be providing to the committee...What is more there should be some time frame involved. It is one thing to require information but another thing for the agency to say, 'We will give it to you when we are ready.' It is also, we think, preferable that the minister be the person who deals with the issue of refusing to provide the information in the first place rather than the minister be the point of review.¹⁴

11 *Submission 22*, p. 36.

12 *Submission 18*, p. 51.

13 *Submission 22*, pp 30-36.

14 Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 21 May 2010, p. 4.

4.18 In response to committee questions, a representative from the Law Council also suggested that the minister be required to provide skeleton reasons as to why information is not provided to the PJC-LE when requested:

The default position should be revelation of information. If the chief executive of an organisation decides not to reveal information to a parliamentary oversight committee, that should be a very, very rare and major event, and that sort of thing should be approved by a minister, not by the chief executive, who has an interest, some might think, in protecting the organisation against the sort of scrutiny that these committees are set up to achieve.¹⁵

4.19 An officer from the Department told the committee that the LE Bill improves the current provisions of the ACC Act in so far as ministerial reasons are concerned because, at present, the minister must not provide reasons for the content of a determination.¹⁶ In addition:

[The Department considers] that Agency Heads will be in a good position to assess whether the public interest in providing sensitive information to the Committee is outweighed by the prejudicial consequences that might result. The suggestion that such a decision only be made by the responsible Minister would be less flexible and efficient, and could result in more matters being referred to the Minister, impeding the Committee's ability to obtain information.

The decision not to provide information to the Committee has a high threshold. Furthermore, consistent with powers and procedures of Parliamentary committees, it would be open to agencies to negotiate alternative arrangements with the Committee, such as providing sensitive information in private hearings or in a confidential submission. In the rare event where an agency may contemplate not disclosing information due to the prejudicial consequences, it will likely be more expedient for the decision to be referred to the Agency Head (who may indeed be present at the hearing) rather than the Minister in the first instance.¹⁷

4.20 Further:

If the decision were a matter for the Minister only, this could potentially result in the unintentional consequence of the Committee being provided with less information at hearings, as officers may be inclined to take a more cautious approach and refer requests for sensitive information to the Minister for decision. The means to protect sensitive information should involve as minimal as possible disruption to normal Committee practice and procedure, and should, as far as possible, facilitate the Committee being

15 Mr Phillip Boulten SC, Law Council of Australia, *Committee Hansard*, 21 May 2010, p. 8 and p. 9.

16 Ms Laura Munsie, Attorney-General's Department, *Committee Hansard*, 21 May 2010, p. 51.

17 Answer to question on notice, received 3 June 2010, pp 7-8.

provided with the information it needs to perform its functions in an efficient manner.¹⁸

4.21 Finally, the Department noted that the amendments proposed in the LE Bill are consistent with those provisions they are replacing in subsection 59(6B) of the ACC Act, which, in the Department's view, have worked well to date.¹⁹

Committee view

4.22 The committee acknowledges that the reform of Australia's counter-terrorism and national security legislation is an ongoing process requiring the full cooperation of federal, state and territory governments. It is important that the reform process not be rushed and is conducted in a comprehensive manner which strives to achieve the appropriate balance between individual rights, as enshrined in national and international law, and the need to protect national security. It is equally important that measures proposed in the reform process are constitutionally supported and capable of withstanding judicial scrutiny.

4.23 Consistent with its earlier views,²⁰ the committee is not entirely convinced of the need for urging violence offences within Division 80 of the Criminal Code. Evidence to the committee reiterated concerns that existing law covers the targeted behaviour and the proposed provisions have been poorly drafted, including so as to restrict freedom of speech as protected by Article 19 of the ICCPR and other international covenants. The committee understands that the proposed amendments arise from recommendations made after extensive review by the ALRC and on that basis accepts the placement of the proposed urging violence offences within Division 80 of the Criminal Code.

4.24 One particular query raised in evidence was the placement of proposed sections 80.2A and 80.2B (Urging violence against groups and members of groups) in Chapter 5 of the Criminal Code (Security of the Commonwealth). The committee heard that this placement will compromise the effectiveness and utility of the proposed offence provisions, which many submitters and witnesses stated are more appropriately classified as discrimination and anti-vilification offences.

4.25 While an argument exists for the placement of these provisions in Chapter 9 of the Criminal Code (Dangers to the community) or Part IIA of the *Racial Discrimination Act 1975*, the committee accepts the Department's evidence that proposed sections 80.2A and 80.2B are appropriately located due to their potential to impact on the security of the Commonwealth. The committee suggests however that the Department revise and reissue the Explanatory Memorandum to the NS Bill to

18 Answer to question on notice, received 3 June 2010, p. 8.

19 Answer to question on notice, received 3 June 2010, p. 8.

20 Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No. 2) 2005*, paras 5.167-5.171.

clarify the reasons for including proposed sections 80.2A and 80.2B in Chapter 5 of the Criminal Code.

4.26 In its inquiry into the *Provisions of the Anti-Terrorism Bill (No. 2) 2005*, the committee recommended that proposed subsection 80.3(3) of the Criminal Code be amended to remove the element of 'good faith'.²¹ Clearly, that recommendation was not adopted. In the context of this inquiry, the committee heard that the proposed defence is illogical in its application to the proposed urging violence offences. The committee agrees and recommends that proposed subsection 80.3(3) be amended to remove the element of 'good faith'.

4.27 Perhaps not surprisingly, the proposed pre-charge detention provisions drew considerable comment, particularly with respect to terrorism offences. Evidence to the committee argued that the extension application procedures, particularly the withholding of certain information, might unfairly prejudice an accused. In this regard, the committee is reassured that the judicial officer determining the application will factor safeguards into consideration of the application. However, the committee especially notes concerns expressed with respect to provisions regarding investigation time and so-called 'dead time' (investigation time that can be disregarded from calculation of the investigation time).

4.28 Some evidence queried the maximum time permitted under the investigation time (24 hours) and, in discussing the maximum time permitted to be disregarded under the disregarded time mechanisms, it was sometimes difficult to ascertain which of the three time components was currently being discussed. In short, the overwhelming message to the committee was that the current legislative regime for pre-charge detention is complex and could be simplified to facilitate its better understanding and practical implementation.

4.29 The AHRC proposed that there be a maximum investigation period with only one disregarded time mechanism (relating to the particular needs of an accused). The committee considers that there is merit in this proposal. The committee notes however that there is considerable disagreement regarding the length of a maximum investigation period – ranging from 24 hours to four days and to arguments that setting a cap might impede or frustrate the investigation of terrorism offences. In addition, the committee notes that there are various views regarding the retention of 'dead time' and, if retained, the maximum period of disregarded time – whether that be unlimited, or in the range of 24 hours to 48 hours, or even seven days.

4.30 The committee heard evidence that the length of pre-charge detention must be proportionate to its need to avoid violation of Article 9 of the ICCPR, which prohibits

21 Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No. 2) 2005*, Recommendation 28. The committee also recommended extending the defence to include statements for journalistic, education, artistic, scientific, religious or public interest purposes which are largely reflected in the defence proposed in the NS Bill, except for a religious defence.

arbitrary detention. The committee agrees that it is highly inappropriate to detain persons for longer than is reasonably necessary and the Criminal Code should, whether the AHRC's recommendation is ultimately adopted or not, set an appropriate cap. Considering the snapshot of views heard throughout the inquiry, the committee suggests that the ALRC conduct a public inquiry into the pre-charge detention regime with a view to determining what period of pre-charge detention is 'reasonably necessary' to balance the competing interests of criminal investigations and individuals' right to liberty, as well as a straightforward legislative framework. The committee encourages the Australian Government to give proper consideration to the findings of that review. In the interim, the committee recommends that proposed subsection 23DB(11) be amended to reduce the cap on investigative 'dead time' from seven days to three days.

4.31 In relation to proposed section 3UEA, the committee agrees with the numerous submitters and witnesses who described warrantless entry to premises in emergency situations as a necessary invasion of privacy which must contain adequate safeguards to avoid potential abuse. The committee accepts evidence from the Department that existing and proposed safeguards are adequate.

4.32 Proposed subsections 15AA(3C) and 15AA(3D) concerned some submitters and witnesses. The Law Council, for example, submitted that if an accused satisfies existing and strict bail criteria, and is granted a bail order, the prosecution should not have an effective veto over the court's decision. However, the committee notes that the proposed provisions are modelled on existing state law in, for example, NSW and South Australia. Accordingly, the committee is not persuaded that the proposed provisions are inappropriate and should be removed from the NS Bill.

4.33 In relation to the proposed amendments in the LE Bill, the committee considers that the ability of the PJC-LE to fulfil its functions will not be hampered by the proposed non-disclosure provisions. However, the committee notes the concerns relating to the current PJC-ACC,²² as detailed in the evidence from the Law Council. To alleviate these concerns, the committee calls on the Attorney-General to provide a ministerial direction or additional materials to explain the circumstances in which the Chief Executive Officer of the Australian Crime Commission and the Commissioner of the Australian Federal Police ought to proactively report to the PJC-LE.

4.34 In view of the above comments, the committee makes the following recommendations.

22 Parliamentary Joint Committee on the Australian Crime Commission, *Inquiry into the Australian Crime Commission Amendment Act 2007*, September 2008, Chapter 4 where the PJC-ACC expressed concern with its ability to access information relevant to its oversight function.

Recommendation 1

4.35 The committee recommends that the Attorney-General's Department revise and reissue the Explanatory Memorandum to the National Security Legislation Amendment Bill 2010 to clarify the reasons for including proposed sections 80.2A and 80.2B in Chapter 5 (Security of the Commonwealth) of the *Criminal Code Act 1995*.

Recommendation 2

4.36 The committee recommends that proposed subsection 80.3(3) of the National Security Legislation Amendment Bill 2010 be amended to remove the element of 'good faith' from the proposed defence.

Recommendation 3

4.37 The committee recommends that the Australian Law Reform Commission conduct a public inquiry into the pre-charge detention regime. This review should examine, among other things, what period of pre-charge detention is 'reasonably necessary' to balance the competing interests of criminal investigations and individuals' right to liberty, as well as a straightforward legislative framework for a pre-charge detention regime.

Recommendation 4

4.38 In addition to Recommendation 3, the committee recommends that the pre-charge detention regime set out in the National Security Legislation Amendment Bill 2010 be amended to limit the amount of time that a person can be held in pre-charge detention by:

- retaining the investigation period as set out in proposed subsection 23DB(5) and proposed section 23DB(F) (a total of 24 hours);
- retaining the investigative dead time provisions as set out in proposed section 23DB but amending proposed subsection 23DB(11) to reflect a 3 day time limit; and
- retaining the down time provisions relevant to the particular needs of an accused as set out in proposed subsection 23DB(9).

Recommendation 5

4.39 In relation to the Parliamentary Joint Committee on Law Enforcement Bill 2010, the committee calls on the Attorney-General to provide a ministerial direction or additional materials to explain the circumstances in which the Chief Executive Officer of the Australian Crime Commission and the Commissioner of the Australian Federal Police ought to proactively report matters to the Parliamentary Joint Committee on Law Enforcement.

Recommendation 6

4.40 Subject to the above recommendations, the committee recommends that the Senate pass the National Security Legislation Amendment Bill 2010 and the Parliamentary Joint Committee on Law Enforcement Bill 2010.

Senator Trish Crossin

Chair