



Law Council
OF AUSTRALIA

Office of the President

13 March 2018

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

By email: pjicis@aph.gov.au

Dear Mr Hastie

Proposed amendments to the Home Affairs and Integrity Agencies Legislation Amendment Bill 2017 (the Bill)

1. Thank you for the opportunity for the Law Council to provide an additional written submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) review of the Bill.
2. The Law Council is grateful for the assistance of its National Criminal Law Committee in the preparation of this submission.
3. The initial Bill presented to the Committee for Parliamentary scrutiny amended four pieces of legislation. The proposed legislative amendments would amend a further 33 Acts to transfer Ministerial responsibility as part of the establishment of the Home Affairs portfolio.
4. The Law Council considers it unfortunate that only 4.5 business days has been provided to comment on these newly proposed amendments (noting the public holiday in Canberra on 12 March 2018). In the timeframe available for response, the Law Council has not been in a position to comprehensively examine all of the possible implications of the Bill. The Law Council strongly recommends that substantially more time is given to enable organisations and the Committee to gain a full appreciation of the impact of the Bill prior to enactment.
5. Further, on the Government sheet of amendments, several amendments appear to be missing, namely, amendments 50-71 inclusive and 224-239 inclusive. It is unclear why these amendments have not been included for public comment, and again, this has the potential to impact on the effective Parliamentary scrutiny of these proposed amendments. This is particularly important if the amendments are those which transfer responsibility of the Australian Security and Intelligence Organisation and telecommunications interception to the Minister for Home Affairs.
6. The Law Council notes that the proposed amendments would transfer responsibility from the Attorney-General to a range of Ministers within the Home Affairs portfolio, including for example matters which have the potential to restrict a person's liberty:

without being found guilty of a criminal offence (i.e. control order applications under Part 5.3 of the *Criminal Code Act 1995* (Cth)); or subjecting individuals to continuing post-sentence detention in certain terrorism cases.

7. Given the extraordinary nature of these powers and the potential for restrictions on liberty involved, the Attorney-General should retain responsibility for their exercise. As the First Law Officer with broader policy responsibility for the administration of the criminal justice system and integrity functions, the Law Council considers it appropriate for the Attorney-General to continue to exercise powers and functions relating to potential restrictions on liberty. This approach would also be consistent with the proposed amendments for the Attorney-General to retain responsibility for powers and functions that have the potential to restrict liberty under the *Australian Security and Intelligence Organisation Act 1979* (Cth) (e.g. questioning, and questioning and detention warrants). As a minimum, the agreement (i.e. not simply a consultation) of the Attorney-General should be obtained prior to the bringing of such applications and for matters subsequently arising out of proceedings.
8. The Law Council also considers that where there is the intention that the Attorney-General retain specific functions there should not be a possibility to refer these powers as a matter of course to the broad range of Ministers including more junior ministers in the Home Affairs portfolio (as section 19 of the *Acts Interpretation Act 1901* (Cth) would permit). This is because the exercise of the powers would have been determined by the Parliament to be crucially performed by the Attorney-General as First Law Officer with integrity and oversight functions.
9. In addition, the creation of the Home Affairs portfolio has the potential to impact on the way in which personal information is shared by various agencies. The Law Council reiterates the importance of adequate safeguards around the secondary use and disclosure of personal information held to ensure that the purpose of access to personal information is always to enable the exercise of one of the functions only for which access was granted. The Law Council recommends that any sharing of information be done in accordance with the Australian Privacy Principles, and that legislation and protocols be developed in consultation with the Australian Privacy Commissioner.

Thank you for the opportunity to provide a supplementary submission on these matters.

Please contact Dr Natasha Molt, Deputy Director of Policy, Policy Division
or in the first instance, if you require further
information or clarification.

Yours sincerely

Morry Bailes
President