

Legal & Constitutional Affairs Committee

Senate Inquiry – National Security Legislation Amendment Bill 2010 & Parliamentary Joint Committee on Law Enforcement Bill 2010.

Introduction

The members of the Committee will undoubtedly be aware of clause 7(2) of the Parliamentary Joint Committee on Law Enforcement Bill 2010 which places a series of restrictions upon the ability of the proposed PJC-LE to effectively carry out its functions. While the Attorney-General, the Honourable Robert McClelland MP has reassured us, in the Explanatory Memorandum to the Bill, that the

Individual operations and investigations are subject to oversight through the process of ministerial responsibility. (p.3)

I would contend that strengthening Parliamentary oversight is crucial and ministerial responsibility should not be solely relied upon.

Contention

In the field of counterterrorism and emergency executive powers there is a strong incentive for executive over-reaction because

the political costs of underreaction are always going to be higher than the costs of overreaction....Since no one can know in advance what strategy is best calibrated to deter an attack, the political leader who hits hard—with security roundups and preventive detentions—is making a safer bet, in relation to his own political future, than one who adopts the precautionary strategy of ‘first do no harm’.¹

Law enforcement agencies and the executive are likely to share similar risk assessments and as a result executive review of Law Enforcement Agencies may be ineffective. While ministerial responsibility may function well – Parliament as an institution may effectively restrain executive power – it would be better to strengthen the institutions of Parliament in order to ensure effective control. The PJC-LE offers an exciting opportunity to enable a specialist committee of parliament strengthen the democratic control of executive power. Clause 7(1) of the Bill grants wide powers of supervision to the proposed committee which could create a Parliamentary institution capable of true democratic oversight of Law Enforcement Agencies. Subsection 2, however, undermines much of that good work.

I suggest that the exclusionary clause in subsection 2 is too widely drawn. It could be replaced by a positive statement along the lines anticipated by the AG in the Explanatory Memorandum:

The PJC-LE may ... consider information about particular operations or investigations if this is relevant to the Committee’s functions. For example, the PJC-LE may consider

¹ Ignatieff, *The Lesser Evil: Political Ethics in an Age of Terror* (Edinburgh UP, Edinburgh 2005) 58.

an operation or investigation in the course of considering trends and changes in crime, or in considering the AFP or ACC's performance of their functions. (p. 3)

This would have a less restrictive impact on the operations of the PJC-LE.

Conclusion

It is entirely possible that future members of PJC-LE may well interpret their role broadly and restrict the operation of Clause 7(2), however, in the interests of strengthening Parliamentary control of executive power an amendment to the Bill might best be inserted.

I wish the Senate Committee all the best with its future deliberations.

Yours sincerely,

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