



Australian Government
Attorney-General's Department

**National Security
Law and Policy Division**

10/925

28 April 2010

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

**Inquiry into the National Security Legislation Amendment Bill 2010 (NSLA Bill) and
the Parliamentary Joint Committee on Law Enforcement Bill 2010 (PJC-LE Bill)**

I refer to your letter of 1 April 2010 inviting a submission from the Attorney-General's Department to the Inquiry by the Standing Committee on Legal and Constitutional Affairs into the NSLA Bill and PJC-LE Bill. I am pleased to enclose a submission prepared by the Department in relation to this inquiry.

The Department looks forward to providing the Committee with further information and assistance throughout the course of the inquiry. If you wish to discuss any aspect of the Department's submission, please do not hesitate to contact myself or

Yours sincerely

Geoff McDonald
First Assistant Secretary
National Security Law and Policy Division

Background to and purpose of the Bills

In December 2008, the Government announced its response to the following independent and bipartisan reviews of national security and counter-terrorism legislation:

- Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (November 2008)
- Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code by the Parliamentary Joint Committee on Intelligence and Security (September 2007)
- Review of Security and Counter-Terrorism Legislation by the Parliamentary Joint Committee on Intelligence and Security (December 2006), and
- Review of Sedition Laws in Australia by the Australian Law Reform Commission (July 2006).

The National Security Legislation Amendment Bill (NSLA Bill) implements the Government's responses to these reviews. In implementing the reviews, the Government has taken the opportunity to re-examine key aspects of the legal framework to promote greater clarity, bolster existing safeguards and ensure the laws are appropriately accountable in their operation.

Broadly, the legislative amendments contained in the NSLA Bill are designed to:

- clarify and improve the operation of the treason and sedition offences in the Criminal Code
- enhance and clarify law enforcement powers to investigate terrorism under the *Crimes Act 1914*
- improve the terrorist organisation listing regimes in both the Criminal Code and the Charter of the United Nations Act 1945
- improve the processes for protecting national security information in court proceedings under the *National Security Information (Criminal and Civil Proceedings) Act 2004*, and
- extend the role of the Inspector-General of Intelligence and Security to inquire into an intelligence or security matter relating to any Commonwealth Department or agency.

The Parliamentary Joint Committee on Law Enforcement Bill (PJC-LE Bill) will improve oversight of the Australian Federal Police (AFP) by establishing the Parliamentary Joint Committee on Law Enforcement (PJC-LE) which will replace and extend the functions of the current Parliamentary Joint Committee on the Australian Crime Commission. The PJC-LE will be responsible for providing broad Parliamentary oversight of the AFP and the Australian Crime Commission (ACC).

Public consultation process

On 12 August 2009, the Attorney-General released a Discussion Paper containing an exposure draft of the Bills. The Discussion Paper was made available on the Attorney-General's Department website and was sent directly to a number of individuals. In addition, officers of the Department presented and received feedback on the Discussion Paper at a

public forum in Sydney on 22 February 2009 (hosted by the NSW Bar Association and Law Council of Australia) and a public forum in Melbourne on 8 October 2009 (hosted by the Victorian Bar Association). The National Counter-Terrorism Committee Legal Issues Sub-Committee, which comprises Commonwealth and State and Territory representatives were also consulted on the proposed amendments.

The final closing date for submissions was 9 October 2009. Fifty submissions were received from interested individuals and organisations listed at **Attachment A**.

The amendments to the Inspector-General of Intelligence and Security Act (IGIS Act) in the NSLA Bill were not canvassed in the Discussion Paper. These amendments were announced by the Government in December 2008. The amendments broaden the mandate of the Inspector-General of Intelligence and Security (IGIS) to enable (at the direction of the Prime Minister) IGIS inquiries to be extended to Commonwealth agencies that are not members of the Australian Intelligence Community (AIC). This recognises that in order for the IGIS to inquire fully into a security or intelligence matter, it may sometimes be desirable for the IGIS to be able to extend an inquiry outside the Australian Intelligence Community. The extension will be subject to referral by the Prime Minister, which is intended to ensure that the extended mandate does not detract from the IGIS' core role of providing oversight of the Australian Intelligence Community.

The proposal to extend the IGIS' mandate was announced by the Government in December 2008 as part of the response to the Clarke Inquiry recommendation that the Government consider incorporating in legislation the special arrangements and powers that would apply to inquiries and other independent reviews and investigations involving matters of national security. The amendments were initially intended to be taken forward separately from the NSLA Bill, but as the measures had not yet been introduced, the Government decided that it would be appropriate to include the amendments in the NSLA Bill as part of the broad package of national security amendments.

Changes made to the NSLA Bill following the public consultation process

Following the public consultation process, certain proposed measures which were to be included in the NSLA Bill were deferred and others were modified.

Deferred amendments to Part 5.3 of the Criminal Code

There were two key reasons for deferring some of the amendments to Part 5.3 of the Criminal Code.

First, in light of the feedback received from the public consultation process, some of the measures required further consideration in consultation with the States and Territories. For example, some issues were raised about the practical implications of the proposed humanitarian aid exemption to the training offence in section 102.7 of the Criminal Code. This measure was not included in the NSLA Bill to enable further consultation with non-government organisations and aid organisations to occur. This process will ensure a workable solution is developed that is properly responsive to aid delivery needs. The proposed amendments to the offence of providing support to a terrorist organisation in section 102.7 of the Criminal Code were also not progressed as part of the NSLA Bill. Some States requested further time to consider the amendments. The Government agreed to delay these amendments

to ensure all States were given the opportunity to comprehensively consider the proposed amendments.

Second, some of the proposed amendments will require the States and Territories to amend their reference legislation for the measures to be constitutionally supported. These include the proposed amendments to the definition of ‘terrorist act’ and the proposed terrorism hoax offence. Additional time is required to facilitate this process. The substantive issues raised about these measures during the public consultation process will be examined as the measures are progressed in consultation with the States and Territories.

Modified amendments

Urging violence offences

In line with the recommendations of the ALRC, the NSLA Bill expanded the urging violence offences in Division 80 of the Criminal Code to cover urging force or violence on the basis of ‘national origin’. Some commentators, including the Australian Human Rights Commission suggested that the list of distinguishing features which applies to the offence should be expanded to also include ‘ethnic origin’ because cultural/ethnic groups who may not be classified as a national or racial group (e.g. persons of the Jewish faith) may inadvertently not be covered by the offence. To ensure the offence appropriately covers ethnic as well as racial and national origin demographic categories, the proposed offence was modified to include ‘ethnic origin’ as an additional category in the list of distinguishing features of a group for the purposes of the offence.

Entry without warrant in emergency circumstances

Some concerns were raised in the public consultation process about the breadth of the proposed new power to allow police to enter a premises without a warrant in emergency circumstances where an officer suspects on reasonable grounds that material relevant to a terrorism offence is on the premises and there is a risk to a person’s life, health or safety.

To address these issues, the Bill was modified to clarify that this power is not for the general purpose of evidence collection. Further, the power is also now accompanied by a specific requirement that the occupier is notified of the entry to the premises if the occupier is not at the premises at the time the police enter the premises. This will alleviate any concerns that these new entry powers could be exercised covertly.

Other amendments

The public consultation process also identified ways in which provisions could be improved by, for instance, more precisely defining the scope of their application. For example, a concern was expressed about the breadth of proposed section 45A in the *National Security Information (Criminal and Civil Proceedings) Act 2004* which will make it an offence to contravene the *National Security Information (Criminal and Civil Proceedings) Regulations 2005*. In response to this concern, the proposed offence was confined so as only to apply if the contravention is ‘likely to prejudice national security’. This will ensure consistency with existing offence provisions in the NSI Act which apply to failure to notify the Attorney-General of an expected disclosure of information relating to or affecting national security.

Changes made to the PJC-LE Bill following the public consultation process

There were very minimal comments on the PJC-LE Bill, and those submissions that did comment on the Bill were generally supportive of the proposals to enhance oversight of law enforcement agencies. The Bill has not changed much following the public consultation process, with only a few minor procedural issues being addressed.

A few submissions questioned why the Bill places limitations on the PJC-LE's functions in subclause 7(2) of the Bill. The limitations are modelled on similar provisions that currently apply to the Parliamentary Joint Committee on the Australian Crime Commission, which will become the PJC-LE. The purpose of these limitations is to clarify that the role of the PJC-LE is to focus broadly on the performance by the AFP and ACC of their functions. It is not intended that the PJC-LE be concerned with reviewing individual operations and investigations. Individual operations and investigations are already subject to adequate scrutiny, including, in particular, scrutiny by the courts in the course of prosecutions and related criminal justice proceedings. Particular care needs to be taken in this area to avoid any possible prejudice to ongoing or future criminal proceedings. However, it is also important to note that subclause 7(2) does not prevent the PJC-LE from considering information about particular operations or investigations if relevant to the Committee's functions. For example, the PJC-LE may consider information about 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, but the PJC-LE's function is not to review or reconsider the findings of that particular investigation or operation.

Senator Ludlam's Anti-Terrorism Laws Reform Bill (ATLR Bill)

On 28 October 2009, the Senate Committee tabled its report on Senator Ludlam's Anti-Terrorism Laws Reform Bill 2009 (ATLR Bill) and recommended that it be used as a mechanism to further the public discussion on the NSLA Bill. Some of the measures in the ATLR Bill are consistent with or relate to the proposed amendments to Part 5.3 of the Criminal Code that have been deferred. For example, the ATLR Bill proposes to clarify that the level of support required to commit the offence of providing support to a terrorist organisation in section 102.7 is 'material support' and also proposes amendments to the definition of 'terrorist act'. The ATLR Bill proposals will be considered during the course of progressing these measures in consultation with the States and Territories.

Other measures contained in the ATLR Bill are inconsistent with the Government's policy and recommendations of various reviews of national security legislation. For example, the ATLR Bill proposes to repeal the sedition offences and the *National Security Information (Civil and Criminal Proceedings) Act* (NSI Act). The repeal of the sedition offences is inconsistent with recommendations of the ALRC which concluded that the offences should be retained. Similarly, the wholesale repeal of the NSI Act would be impractical. The NSI Act was introduced in accordance with the recommendations of a 2004 ALRC report. The recommendations in that report were aimed at reconciling the tension between non-disclosure of information to protect national security and disclosure of information in the interests of fair and effective legal proceedings. The NSI Act is an important tool in ensuring the protection of the rights of the accused while also protecting national security information. The proposed amendments in the NSLA Bill are designed to improve the practical application of the Act.

Other initiatives to bolster Australia's national security framework

The Counter-Terrorism White Paper released on 23 February 2010 identified violent extremism and terrorism on the home front as a significant threat to Australia's national security.

The Government is working with States and Territories to develop and implement a more sophisticated and coordinated national approach to countering violent extremism in Australia. An effective counter-terrorism strategy requires a combination of an effective legal framework, appropriate security and law enforcement responses, and broader strategies to enhance social cohesion and lessen the appeal of the extremist ideologies that fuel terrorism.

Many Commonwealth and State and Territory agencies already conduct activities that help to prevent extremism by enhancing social cohesion and community resilience. The Government's strategy will draw together and build on these activities to address the long term causes of violent extremism.

Strong partnerships between all levels of government and communities are critical to success, as solutions must be appropriate to local circumstances. The Government will actively engage with communities to develop specific measures to maintain social cohesion and support community resilience.

The Commonwealth and States and Territories will continue to work cooperatively to develop a national approach to countering violent extremism which will form an integral part of Australia's national counter-terrorism strategy.

ATTACHMENT A - National Security Legislation Discussion Paper – List of individuals and organisations who provided submissions during the public consultation period

1. Australian Lawyers for Human Rights
2. Australian Muslim Civil Rights Advocacy Network
3. Amnesty and Human Rights Law Resource Centre
4. Australia's Right To Know
5. Asem Judeh
6. Australian Human Rights Commission
7. Australian Press Council
8. Carl Ellis
9. Civil Liberties Australia
10. Civil Rights Defence
11. Centre for Policy and Development Systems
12. Daniel Black
13. David Phillips
14. David Reisenbigler
15. David Smallbone
16. Council of Australian Jewry Inc
17. Gilbert + Tobin Centre for Public Law
18. Humanist Society of Victoria Inc
19. International Commission of Jurists Victoria
20. Islamic Council of Victoria
21. Jacqui Ewart
22. James Sinnamon
23. John Park
24. Katherine Gelber

25. Law Council of Australia
26. Law Institute of Victoria
27. Law Society of NSW
28. Lawrence McNamara
29. Media, Entertainment & Arts Alliance
30. Miriam Gani / Mark Nolan
31. National Association of Community Legal Centres
32. National Legal Aid
33. National Association for the Visual Arts Ltd
34. Norman Pentzien
35. National Tertiary Education Union
36. Office of the Privacy Commissioner
37. Patrick Emerton
38. Philip Van Gaalen-Prentice
39. Prue Moodie
40. Public Interest Advocacy Centre
41. Queensland Council for Civil Liberties
42. Quaker Peace and Legislation Committee
43. Simon Corbell MLA (ACT)
44. Social Justice Network
45. Stephen Keim
46. Suzanne Harrison
47. Sydney Centre for International Law
48. Sydney Centre for International Law (2) - Ben Saul
49. Sydney PEN
50. Victorian Council for Civil Liberties