

Chapter 4

Changes to the Committee's oversight of the AFP

4.1 As noted in Chapter 1, the Parliamentary Joint Committee on Law Enforcement (PJCLE) is established under the *Parliamentary Joint Committee on Law Enforcement Act 2010* (the PJCLE Act).

4.2 The PJCLE is responsible for the oversight of two important Commonwealth law enforcement agencies—the Australian Federal Police (AFP) and the Australian Crime Commission (ACC). It is required to report to both houses of Parliament on certain matters related to those agencies' performance, including their annual reports.

4.3 In 2014, the government introduced a bill to amend Australia's national security arrangements, the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the bill). Following the bill's introduction in the Senate¹ it was referred to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) on 24 September 2014 by the Attorney-General.²

4.4 In its inquiry into the bill, the PJCIS recommended that oversight functions of the PJCIS be extended to include the counter-terrorism functions of the AFP:

[PJCIS] recommends that the functions of the Parliamentary Joint Committee on Intelligence and Security be extended to encompass the counter-terrorism activities of the Australian Federal Police, including, but not limited to, anything involving classified material.³

4.5 The PJCIS's recommended extension of its oversight powers was clearly intended to be additional to, rather than as a substitute for existing oversight mechanisms, including those of the PJCLE:

While not wanting to impinge on these oversight mechanisms including the important role played by the Parliamentary Joint Committee on Law Enforcement, the Committee considers its oversight powers should be extended to include the counter-terrorism activities of the AFP. The Committee can provide a useful *additional* oversight function, particularly in relation to classified material that is not able to be considered by other parliamentary committees.⁴

4.6 The government subsequently accepted the recommendation of the PJCIS. In doing so, the revised explanatory memorandum noted the bill would now also

1 *Journals of the Senate*, No. 55—24 September 2014, p. 1487.

2 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. vix.

3 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. xv.

4 Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, October 2014, p. 80 (emphasis added).

amend the PJCLE Act to remove oversight of counter-terrorism functions of the PJCLE. The removed oversight relates specifically to the functions of the AFP under Part 5.3 of the Criminal Code, which relates to counter-terrorism functions:

The amendment to subsection 7(2) removes the oversight function with respect to the monitoring, reviewing or reporting on the performance by the AFP of its functions under Part 5.3 of the Criminal Code from the Parliamentary Joint Committee on Law Enforcement. The amendments will confer that authority on the Parliamentary Joint Committee on Intelligence and Security.⁵

4.7 The PJCLE notes that this amendment went one step further than the recommendation of the PJCIS, by expressly excluding the PJCLE from monitoring, reviewing or reporting on the performance by the AFP of its functions under Part 5.3 of the *Criminal Code Act 1995* (Cth) (Criminal Code).⁶

Counter-terrorism functions of the AFP

4.8 Part 5.3 of the Criminal Code represents legislative implementation of the Agreement on Counter-terrorism Laws (the agreement), made by the Council of Australian Governments (CoAG) on 25 June 2004. The agreement notes:

The Prime Minister, Premiers and Chief Ministers agreed on 5 April 2002 to take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power so that the Commonwealth may enact specific, jointly-agreed legislation...

The Commonwealth subsequently enacted legislation designed to enhance Australia's capacity to deal with terrorists, including certain Federal offences contained in Part 5.3 of the Commonwealth Criminal Code.⁷

4.9 At first glance the transfer of oversight responsibilities of the counter-terrorism activities of the AFP may seem logical. The PJCIS, which is responsible for reviewing certain matters relating to Australia's intelligence and security agencies, clearly has a legitimate interest in the counter-terrorism activities of the AFP.

4.10 However, because the AFP's counter-terrorism activities will often overlap with its important law enforcement functions, the change potentially creates uncertainty and may lead to unintended gaps in parliamentary oversight. The PJCLE is concerned that the transfer may affect the work of this committee and its future ability to effectively oversee the work of the AFP.

4.11 The PJCLE's current examination of the AFP's annual report is one clear example where the new arrangement may create uncertainty. As is stated elsewhere in

5 Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, *Revised explanatory memorandum*, p. 180.

6 *Parliamentary Joint Committee on Law Enforcement Act 2010*, ss. 7(2).

7 Council of Australian Governments (CoAG), *Agreement on Counter-terrorism Laws*, 25 June 2004, <https://www.coag.gov.au/sites/default/files/IGA%20on%20Counter-Terrorism%20Laws.pdf> (accessed 11 September 2015) p. 2.

this report, it is a legislative requirement for the PJCLE to examine each annual report of the AFP.⁸ The AFP's annual report provides details about its counter-terrorism activities. In this instance, the PJCLE has decided to examine the entire AFP annual report, as a gap in parliamentary oversight would otherwise emerge were the committee not to examine the counter-terrorism aspects of the report.

4.12 The overlap is acknowledged in the AFP's submission to the PJCLE's recent inquiry into financial related crime. That submission clearly shows how terrorism and non-terrorism issues can be intertwined:

The AFP also has strong relationships with state and territory jurisdictions and Australia's industry sector as well as 48 cooperation agreements with foreign law enforcement agencies. The majority of these agreements relate to combating transnational crime, including people smuggling and terrorism.⁹

4.13 The ACC's recent report *Organised Crime in Australia 2015* confirms the growing interconnections between organised crime and terrorism:

As counter-terrorism efforts throughout Australia are enhanced, the linkages between terrorism and the broader organised crime and volume crime environments are being identified. These linkages include, but are not limited to, Australians who finance terrorist activities, Australians who leave Australia to support terrorist causes, and who may return to Australia with the intent of inflicting harm on the Australian community, or may be recruited by organised crime groups seeking the specialist skill sets they developed in foreign conflicts.¹⁰

4.14 The ACC's report concludes that 'Australian law enforcement will increasingly look at the evolving challenges posed by the nexus between organised crime and terrorism over the next two years'.¹¹

4.15 These examples from Australia's peak law enforcement agencies highlight the interconnectedness of transnational crime and terrorist group activities. This inherent complexity creates potential uncertainty for both committees in determining how to proceed with inquiries where there is crossover between the AFP's counter-terrorism functions and its other law enforcement roles.

Committee view

4.16 The PJCLE is concerned that the new arrangements could create uncertainty for the future work of both the PJCIS and the PJCLE.

8 *Parliamentary Joint Committee on Law Enforcement Act 2010*, para. 7(1)(f).

9 *Parliamentary Joint Committee on Law Enforcement, Inquiry into financial related crime, AFP, Submission 6*, p. 9.

10 *ACC, Organised Crime in Australia 2015*, May 2015, p. 7.

11 *ACC, Organised Crime in Australia 2015*, May 2015, p. 83.

4.17 The PJCLE notes the bill was considered in the Senate under a limitation of debate.¹² Limitations of debate can prevent senators from fully discussing the amendments and, in this case, the proposed oversight arrangements.

4.18 The PJCLE understands the significance of maintaining appropriate oversight of Commonwealth law enforcement agencies in an increasingly high-risk security environment. However, the PJCLE questions how desirable or sustainable it is for two statutory parliamentary committees to have separate oversight responsibilities over separate but often interacting responsibilities of the AFP. The PJCLE is concerned that this situation may lead to gaps in future parliamentary scrutiny of the AFP's functions.

4.19 The PJCLE supports the original recommendation of the PJCIS which was to extend the oversight functions of that committee, without impinging on the oversight responsibilities of the PJCLE. The PJCLE is of the view that the amendments contained in the Foreign Fighters bill did not effectively implement the recommendations of the PJCIS. This has resulted in uncertainty surrounding the oversight functions of the PJCLE and the potential for gaps in future parliamentary scrutiny of the AFP's functions.

4.20 Therefore the committee recommends that the government introduce amendments to re-establish the PJCLE's oversight of the AFP's counter-terrorism functions.

Recommendation 2

4.21 The committee recommends that the government introduce legislation to re-establish the Parliamentary Joint Committee on Law Enforcement's oversight function with respect to the monitoring, reviewing or reporting on the performance by the Australian Federal Police of its functions under Part 5.3 of the Criminal Code.

Mr Craig Kelly MP

Chair

12 *Journals of the Senate*, No. 61—28 October 2014, p. 1631.