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27 APR 2004
Law Council
of Australia



27 April 2004

Ms Louise Gell
Secretary
Senate Legal and Constitutional Committee
Parliament house
CANBERRA ACT 2600

Dear Ms Gell

I refer to your correspondence to the Secretary General of 02 April in which you invite comment from the Law Council in relation to the *Anti-Terrorism Bill 2004* ("The Bill").

The Law Council of Australia is the peak national representative body of the Australian legal profession. It is the federal organisation representing approximately 40,000 Australian lawyers, through their representative Bar Associations and Law Societies (the "constituent bodies" of the Law Council).

The Law Council notes that in relation to this matter separate submissions may be lodged by some of these bodies.

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council recognises the difficulties faced by Governments in responding to the increased threats posed by global terrorism. However, we believe strongly that any legislative amendments in response to this new threat should not undermine the democratic values which underpin Australian society.

The Law Council notes that the Bill in this case seeks to amend multiple Acts which are dealt with separately below.

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AMENDMENTS TO PART 1C OF THE CRIMES ACT

The Bill will amend Part 1C of the *Crimes Act 1914* (the Crimes Act) to permit the fixed investigation period applying to the investigation of federal terrorism offences to be extended by a maximum of 20 hours if judicially authorised and subject to all the existing procedural safeguards enshrined in Part 1C. The amendment does not propose to alter the existing power to hold a suspect for a period of four hours without charge. Rather the amendments will provide authorities with the power to apply to a court for any number of extensions not totaling more than 20 hours, bringing the maximum period without charge to 24 hours. Previously, authorities could only apply for one extension of a maximum of eight hours, meaning the total period for detention without charge could not exceed 12 hours.

The Law Council is not opposed to this provision. However, it wishes to place on record its strong view that this measure should remain balanced by proper court supervision, as is proposed by the Bill. The Law Council also strongly supports the retention of the existing investigatory safeguards in Part 1C of the *Crimes Act 1914* for the purposes of the amended provision, such as the right to communicate with a legal practitioner, friend, relative, interpreter and a consular office, the right to remain silent, the requirement for any admissions or confessions made during questioning to be tape recorded in order to establish admissibility, and the right to a copy of recorded interviews.

The Bill also proposes amending Part 1C of the Crimes Act to permit authorities to reasonably suspend or delay questioning of a person arrested for a terrorism offence to make inquiries (in relation to the terrorism investigation) in overseas locations that are in different time zones. Effectively this measure would render the time in which it took police to make overseas inquiries as 'dead time' in relation to the holding period.

The Law Council is not opposed to this provision provided the intended safeguards remain in place. These include (i) providing that the decision to halt questioning and utilise the 'dead time' mechanism must be reasonable and (ii) requiring the period for which questioning is suspended or delayed to be reasonable, with the maximum allowable 'dead time' capped by the amount of the time zone difference between the place of investigation and the relevant overseas location.

FOREIGN INCURSIONS ACT AMENDMENTS

The Law Council notes the proposed amendments to the *Crimes (Foreign Incursions and Recruitment) Act 1978* ("the Foreign Incursions Act") has two facets. The first relates to amendments which aim to alter foreign incursions offences, to account for situations where terrorist organizations are operating as part of the armed forces of a state. The provision is subject to the current defence contained in section 6(4)(a) of the Foreign Incursions Act which provides that a person who commits a hostile act in the course of, and as part

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of, his or her service in any capacity in or with the armed forces of a government of a foreign state does not commit a hostile activity for the purposes of section 6. This defence provides that where a terrorist organisation is part of the armed forces of a government, a person engaged in such an organisation will not be liable for an offence under the Act. However, the Bill provides that this defence will not apply where the said terrorist organization is proscribed under regulation in accordance with Australian law.

Pursuant to section 3 of the Foreign Incursions Act for the purposes of subsection (1), engaging in a hostile activity in a foreign State consists of doing an act with the intention of achieving any one or more of the following objectives (whether or not such an objective is achieved):

- (a) the overthrow by force or violence of the government of the foreign State or of a part of the foreign State;
- (aa) engaging in armed hostilities in the foreign State;
- (b) causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury;
- (c) causing the death of, or bodily injury to, a person who:
 - (i) is the head of state of the foreign State; or
 - (ii) holds, or performs any of the duties of, a public office of the foreign State or of a part of the foreign State; or
- (d) unlawfully destroying or damaging any real or personal property belonging to the government of the foreign State or of a part of the foreign State

The Law Council's only comment in regard to this aspect of the amendments is to seek confirmation from the Government that the provision will not apply to Australian people who work in communities in which terrorist organizations operate to provide medical or community aid assistance (but not armed assistance) in the field of battle.

The second facet of the amendments relating to the Foreign Incursions Act concerns the three types of ministerial certificates which can be made under this Act, two of which serve as prima facie evidence of the facts recognised in the certificates and one serving as conclusive evidence of recognised facts. In his second reading speech in relation to the Bill the Attorney-General described these provisions as follows:

"The three types of certificates relate to facts that are difficult to prove or that may have implications for Australia's international relations because of the political nature of the facts (for example, whether a place or an area is or is in an independent sovereign state, whether a person was acting in the course of his duty to the Commonwealth and whether an

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authority was in effective governmental control of a state or part of a state).

Proving whether a group or organisation is part of the armed forces of a state is similarly difficult to prove and may also have implications for Australia's international relations.

Recognising this fact, the bill contains an amendment enabling a minister to issue a certificate attesting to the fact that a group was not part of the armed forces of a state at any one time. Such a certificate would be prima facie evidence of the fact stated therein".¹

The Law Council is opposed in principle to the use of conclusive ministerial certificates. It believes that wherever possible and lawful, the crown should ensure it presents all available evidence in relation to the alleged activities of terrorist groups to a court to allow it to make considered determinations. We believe sufficient measures exist (such as the criminalisation of unlawful disclosure, rules of evidence and procedure allowing for restrictive orders including *in camera* hearings in special circumstances, and the well established common law and statutory rules relating to public interest immunity) to protect classified and sensitive information. Moreover, the gravity of the penalty for the offence, which is to be increased to 20 years imprisonment under this Bill, provides further reason for careful court scrutiny of such matters.

CRIMINAL CODE AMENDMENTS

The Bill proposes to amend the Criminal Code Act 1995 to change the counter-terrorism legislation relating to membership of terrorist organisations and the offence of providing training to or receiving training from a terrorist organisation. This will enable a court to make a determination that a person is a member of a terrorist organisation on the basis of facts presented in the course of a trial, notwithstanding that organisation is not listed in regulations as a terrorist organisation.

The Law Council is not opposed to this amendment but wishes to once again place on record its opposition to the recent legislative provisions which provide the Federal Government with a largely unfettered executive power to proscribe terrorist organizations (as contained in the *Criminal Code Amendment (Terrorist Organisation) Bill* passed by the parliament on 03 March 2004). The Law Council believes that there should be some front-end supervision of these powers by the court system.

¹ Attorney-General, Second Reading Speech, *Anti-Terrorism Bill 2004*, Hansard, House of Representatives, Wednesday 31 March 2004, at p 27660.

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AMENDMENTS TO THE PROCEEDS OF CRIME ACT

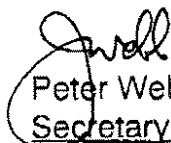
Finally the Bill also proposes to amend the *Proceeds of Crime Act 2002* to restrict the commercial gain by a person who has committed foreign indictable offences, whether or not they have been convicted of that offence. For the purposes of the definition of foreign indictable offence, an offence against a law of a foreign country includes offences triable by a military commission established under a specified order of the President of the United States of America.

The Law Council's has two comments on this draft provision. Firstly it believes the provision should only apply to people actually convicted of a terrorism offence. While we accept the Government's intention is to ensure those who involve themselves in terrorist activity do not benefit commercially from any notoriety, we believe it would be unjust to extend the provision to those who were not convicted of an offence in a properly constituted criminal trial setting.

Secondly it wishes to place on record its disappointment at the recognition of the United States military commission process in Australian law. The Law Council has been a stern critic of the military commission process because it does not afford suspects the procedural fairness which exists in Australia's criminal trial system. It is disappointing to see such a system recognized in Australian law and we wish to express our ongoing concern at the Australian Government's tacit support for the approach of the United States with respect to this issue.

Thank you for providing the Law Council with the opportunity to comment on this important piece of legislation.

Yours Sincerely


Peter Webb
Secretary-General