



Law Council
OF AUSTRALIA

Fiji Law Society Annual Convention – Separation of Powers: Preserving Independence and Preventing Overreach

**Speech delivered online by Dr Jacoba Brasch QC, Law Council of
Australia President, at the Fiji Law Society Annual Convention**

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Good afternoon.

Over the past two years, nations around the world have been responding to a major public health threat. These responses have included restricting the movement of people, forcing businesses to close, and even, in some cases, imposing curfews.

In Australia, Federal, State and Territory legislatures expedited legislative processes and reduced Parliamentary sitting days – which limits the time in which bills can be analysed and debated in Parliament.

At the same time, the Executive invoked emergency powers, and increased the use of Ministerial discretion and delegated legislation.

These tools may be justifiable to respond to the challenge at hand, but these practices – and the regulations and decisions made under them – should be subject to appropriate scrutiny and review.

The pandemic – and the responses of governments – have again highlighted that no jurisdiction is immune from the possibility of executive overreach, and the vital and constant role of lawyers to assess the impact of new legislation and monitor the use of emergency powers has perhaps never been more important.

To illustrate this point of the Executive resisting scrutiny – or seeking to act beyond the confines of its powers – I'll share a recent experience in Australia.

In March last year, a National Cabinet was established to coordinate the pandemic response across the country.

The National Cabinet is chaired by the Prime Minister, and is effectively an intergovernmental forum for Premiers and Chief Ministers – the leaders of each State and Territory Government.

The body proved so successful in quickly convening these Government leaders during the initial COVID emergency, that in May last year, it ended up replacing its bureaucratic predecessor, COAG (the Council of Australian Governments), as Australia's primary intergovernmental forum.

The Australian Government has been heavily criticised for seeking to shield National Cabinet from scrutiny, and exempt it from the Freedom of Information laws that facilitate transparency and scrutiny of government documents in our democratic system.

The Government latched onto the word 'Cabinet' – and argued that exemptions which apply to documents of the Commonwealth Cabinet also cover records of this new body's deliberations.

This would have set a very dangerous precedent – enabling the Government to simply put 'Cabinet' in the title of a body in order to render its operations and discussions completely secret.

The Government's argument was rejected by a Federal Court judge, sitting on the Administrative Appeals Tribunal – which recognised that 'Cabinet' has a specific meaning under Australian constitutional law.

The Government then tried to legislate out of the problem – and amend the Freedom of Information Act to make all documents relating to the National Cabinet unconditionally exempt from FOI requests.

The Law Council made a submission in relation to this Bill, arguing that the Government had not justified applying an absolute exemption to documents of National Cabinet, and that there are already adequate, conditional exemptions under the Act to protect documents from disclosure where it can be objectively established that disclosure of the particular document is not in the public interest – and indeed is reasonably likely to cause harm to specified national interests.

In effect, we called for a more nuanced approach where information is kept secret on the basis of its substance, rather than its status – that is, simply relating to the National Cabinet.

In times of crisis and upheaval, when public trust in our institutions is so vital, the scales should be tipped in favour of disclosure rather than secrecy.

Before the pandemic, national security has long been an area in which governments balance individual rights and freedoms on the one hand, and protect the community on the other.

It is for this reason that the Law Council has been especially mindful to monitor for executive overreach in this area, and advocate for appropriate checks and balances.

Our Parliament this year has considered strengthening its control over the exercise of extraordinary powers in a national emergency.

While we understand the need for governments to suspend or modify laws while a national emergency declaration is in force, the broader rights of individuals must not be compromised long-term.

Therefore, we called for emergency declarations, or at least their extension beyond three months, to be subject to Parliamentary disallowance. This reinforces the importance of Parliament as an oversight body and as a vital check on Executive power.

National security in the modern world touches upon national and international economies, human rights, infrastructure, cyber security, climate change, food security, and health systems just to name a few.

Since Australia enacted its first dedicated anti-terrorism laws in 2002, the volume of federal national security legislation has continued to grow.

This will continue. Over the next three years, the Australian Government will implement its response to the 203 recommendations of the Comprehensive Review of National Intelligence Legislation. This is set to include a wholesale rewriting of Commonwealth electronic and surveillance laws.

We remain troubled by the fact that the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020 passed in August without safeguards we believe are essential. Under this legislation, judicial issuing is not required for the new, extraordinary, and we believe, intrusive, warrants.

The legislation confers three extraordinary new powers on the Australian Federal Police and the Australian Criminal Intelligence Commission to tackle serious cyber-enabled crime. This includes powers to disrupt data on computer devices, networks or systems (such as taking down websites or servers), powers to remotely access computers for the purpose of collecting criminal intelligence, and powers to 'lock out' the lawful users of online accounts such as banking, governmental services like Medicare and social security, cloud-based data storage and social media.

The Law Council has also spoken out against plans to significantly expand the compulsory questioning powers of the Australian Security Intelligence Organisation (ASIO) without crucial safeguards. Again, the lack of judicial involvement in the issuing of extraordinary warrants lies at the heart of our concern.

We feel it has never been more important for there to be a voice speaking up to preserve independence and prevent overreach. Therefore, for the first time in its history the Law Council has established a National Security Committee.

The membership of the National Security Committee is still being finalised, but it will start work next month. The National Security Committee will provide advice on the operation, effectiveness and implications of Australia's national security laws while making sure our national security policies and laws contain appropriate safeguards for protecting the rights of individuals and are proportionate to any threat.

That is the first time I have used that word today – proportionate – but that is what we as lawyers must strive for – laws that are proportionate to the harm or risk they seek to address, and which can be reviewed, amended or repealed if a threat does not come to pass.

Thank you.

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