

1 June 2017

Dr James Renwick SC
Independent National Security Legislation Monitor
PO Box 6500
Canberra ACT 2600

By email: Mark.Mooney@pmc.gov.au

Dear Dr Renwick

INSLM 2017 Statutory Review

Thank you for the opportunity to provide a submission to and appear before you on Friday 19 May 2017 as part of the Independent National Security Legislation Monitor's (**INSLM**) current statutory review.

As requested at the hearing, please see below for additional observations of the Law Council, should it assist your deliberations.

The Law Council maintains the recommendations of its submission dated 12 May 2017 as the most appropriate way to respond to the challenges presented by the laws under review. However, in light of discussions with you at the public hearing, the following further options were raised to improve certainty and enhance oversight of some of the laws. The adoption of some of these options may allay several of the concerns raised in the Law Council's initial submission.

Stop, search and seizure powers

The Law Council's initial written submission recommended that:

- In the absence of evidence to suggest the necessity of the powers, Division 3A of Part 1AA of the Crimes Act should be repealed or cease when the sunset date (7 September 2018) is reached; and
- If police, stop, search and seizure powers are retained in Part 1AA, Division 3A of the Crimes Act, the Law Council recommends that the reporting and oversight provisions should be strengthened to require annual reporting to the Minister and oversight by the Commonwealth Ombudsman in the same manner as for delayed notification search warrants.

If the powers are to be retained, an appropriate safeguard may be to statutorily require a police officer to provide the reason for the exercise of a power "as soon as is reasonably

practicable after exercising the power". Such a requirement would mean that the failure by police to comply with this requirement would render the exercise of the power unlawful.¹

Further, the Law Council recommends that Part 1AA Division 3A be amended to:

- require the Minister to report annually to the Commonwealth Parliament on the reasons for declaring a prescribed security zone; and
- require the police authorities exercising power under section 3UEA to report annually to the Commonwealth Parliament on the use of this power.

Appointment of special advocates

The Law Council's initial submission recommended that the INSLM appoint special advocates. If this is not to be accepted, then the Law Council acknowledges that there would be merit in utilising the existing framework of legal aid commissions through appointment to a panel.

Government responses to INSLM reports

The Law Council recognises that to date there has been an ad-hoc approach to Government responses to former INSLMs' detailed, well-considered and balanced recommendations. It supports and welcomes the Government responses to some of the former INSLM's reports (for example, on section 35P of the *Australian Security and Intelligence Organisation Act 1979* (Cth)). In some cases, recommendations have also been actioned through legislative enactment. However, many other reports have not received public Government response. Ad-hoc legislative enactment provides no explanation as to the basis for accepting and rejecting INSLM recommendations.

The Law Council submits that the *Independent National Security Legislation Monitor Act 2010* (Cth) should be amended to require the Government to provide a public response to the INSLM's recommendations within three to six months.

Own motion reports

As per the first INSLM's suggestion, there should be an express power for the INSLM to report on a matter or matters within the statutory mandate but more urgently or particularly than by the annual report.²

Issues effecting national security are often deemed time-critical, requiring swift action and response. The ability of the INSLM to issue own motion reports separate from the annual reporting process is critical to ensure that the advice of the INSLM can be provided in a timely way to the Commonwealth Parliament, government agencies and the broader Australian community.

The Law Council would be pleased to elaborate on the above issues, if required.

Thank you for the opportunity to provide these comments.

¹ See special leave application to the High Court *Paul James McCarthy v State of New South Wales* No. S228 of 2015 where the applicant contended that in holding that the lawfulness of the exercise of an enter and search power under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) was not contingent on compliance with subsection 201(1) of the Act the Court of Appeal erred.

² *Independent National Security Legislation Monitor, 2014 Annual Report* (28 March 2014), 2.

Please contact Dr Natasha Molt, Senior Legal Adviser, Policy Division (02 6246 3754 or at Natasha.molt@lawcouncil.asn.au), in the first instance should you require further information or clarification.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Fiona McLeod', written in a cursive style.

Fiona McLeod SC
President