

5 March 2014



Mr Bret Walker SC
Independent National Security Legislation Monitor
PO Box 6500
Canberra ACT 2600

By email: INSLM.submissions@pmc.gov.au

Dear Mr Walker SC

Independent National Security Legislation Monitor's February 2014 Inquiry

Attached is the Law Council of Australia's supplementary submission responding to your inquiry into the *Crimes (Foreign Incursions and Recruitment) Act 1978*, Part 5.3 of the *Criminal Code Act 1995*, Part IIIAAA of the *Defence Act 1903* (the Defence Act), the *Australian Passports Act 2005*, and sections 15AA, 19AG and Division 3A of Part IAA and Part IC of the *Crimes Act 1914*.

The Law Council is grateful for the opportunity to make this supplementary submission regarding Part IIIAAA of the Defence Act.

Yours sincerely

A handwritten signature in black ink, appearing to read "M Hagan".

**MARTYN HAGAN
SECRETARY-GENERAL**

Part IIIAAA of the *Defence
Force Act 1903* (Cth)
Supplementary Submission

**Independent National Security Legislation
Monitor**

28 February 2014

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Introduction

1. On 10 February 2014, the Law Council of Australia made a submission regarding the public consultation by the Independent National Security Legislation Monitor ('the Monitor') in relation to the Monitor's review of the *Crimes (Foreign Incursions and Recruitment) Act 1978*, Part 5.3 of the *Criminal Code Act 1995*, Part IIIAAA of the *Defence Act 1903* ('the Defence Act'), the *Australian Passports Act 2005*, and sections 15AA, 19AG and Division 3A of Part IAA and Part IC of the *Crimes Act 1914* ('the Crimes Act'). The Law Council's submission focused primarily the Monitor's Issues for Consideration regarding the Part 5.3 Criminal Code terrorism offences, sections 15AA and 19AG of Division 3A of Part IAA and Part1C of the Crimes Act.
2. The Law Council now wishes to provide the following comments in relation to Part IIIAAA of the Defence Act.
3. The Law Council notes that it has previously provided a submission to the Senate Legal and Constitutional Legislation Committee ('the Committee') on the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005 ('the Bill') highlighting the substantial cause for concern that proposed provisions to amend Part IIIAAA of the Defence Act granted extensive powers to the Government and Defence Forces and failed to include the types of safeguards necessary to ensure that clear limits were placed on the use of these powers and to ensure that they were only used when necessary and proportionate to achieving a legitimate end.¹ The following short submission draws upon the 2006 submission which remains relevant as no substantial amendments to Part IIIA have occurred since 2006.

Law Council's Concerns

4. The Law Council remains concerned that Part IIIAAA grants broad and extensive powers to the Government and Defence Forces which are broadly defined and fail to provide appropriate limits on the use of these powers, which in turn make it difficult to assess whether these powers are necessary and proportionate to the legitimate end at which they are directed. For example, subsection 51SF(2) that the authorising Ministers may declare an area is an 'offshore general security area' and that the area:
 - (a) 'may be specified by reference to an area surrounding one or more vessels or aircraft, or surrounding a class of vessels or aircraft, being an area the boundaries of which change as the location of the vessels or aircraft changes; and
 - (b) may include areas within the internal waters of a State or Territory if the order under section 51AA includes the internal waters of a State or Territory.'
5. Under section 51AA, where the Ministers are satisfied that there is a 'threat in the Australian offshore area to Commonwealth interests', the Minister may make an order that the Defence Forces be called out. The section further provides that:
 - where the threat relates to the internal waters of a State or Territory, the Governor-General may make an order directing the Chief of the Defence

¹ See Law Council of Australia's *Submission to the Senate Legal and Constitutional Legislation Committee on the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005*. A copy of this submission has been provided to the Monitor's office.

Forces to utilize the Defence Forces in the internal waters of that State or Territory;

- the Governor-General may make such an order, notwithstanding that the State or Territory does not request the making of the order; and
 - where the Ministers are satisfied that there is sufficient urgency, there will be no requirement to consult the Government prior to making such an order.
6. Finally, while subsection 51SF(3) requires that the details of any such order be notified to the person in the designated 'offshore general security area', published in the *Gazette* and forwarded to the presiding officer in each house of Parliament within 24 hours, subsection 51SF(4) allows the Minister to dispense with this requirement if he or she is of the view that other Defence Force operations might be compromised.
 7. In addition, the Law Council notes that several of the key terms contained in the Part IIIAAA are overly broad. For example 'member' is defined in subsection 4(1) of the Defence Act as including 'any officer, sailor, soldier and airman'. This means that lower ranking members of the ADF can exercise the extraordinary powers under Part IIIAAA without Ministerial authorisation if they 'believe on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists' (subsection 51I(3)).
 8. Further some key terms are not defined, including 'Commonwealth interests', 'invasion' and 'domestic violence'. Subsection 51(1) of the Defence Act defines 'domestic violence' as having 'the same meaning given in section 119 of the Constitution'. However, section 119 of the Constitution only refers to 'domestic violence' without a definition. The effect of this is that 'domestic violence' in the Defence Act is for all substantive purposes undefined.
 9. The cumulative effect of these provisions is to vest extraordinary powers in the Minister for Defence. In effect, it would seem that the Minister, in certain circumstances, can be empowered to act independently, without any requirement to inform the Parliament, the State or Territory Government concerned, or persons affected by the actions of Defence personnel.
 10. The Law Council does not suggest the Defence Forces should not be used in circumstances of a legitimate threat to domestic security. However, there must be clear legislative or regulatory limits on what action the Defence Forces may take in response to a particular threat. For example, clear guidance should be provided as to when the most severe action, such as destroying aircraft or firing upon persons suspected of engaging in terrorist acts, becomes necessary. Imposing clear limitations on the exercise of executive power, particularly when that power can have pronounced impacts on the rights and liberties of individuals, is a key component of the rule of law and reflected in the Law Council's Rule of Law Principles.²
 11. In the 2006 submission, it was noted that as an absolute minimum, the Law Council would expect Ministers to outline the situations that have led the Government to include the measures contained in the Act, for the future reference of the Parliament and the Courts. It was noted that there is no reference in Part IIIAAA of the Defence Act, or in the Explanatory Memorandum accompanying the Bill, to the reasons for

² Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011. A copy of this statement is available at <http://www.lawcouncil.asn.au/lawcouncil/index.php/divisions/criminal-law-and-human-rights/general-rule-of-law-issues>

granting power to the Commonwealth over the internal waters of a State – that would normally be within the jurisdiction of the state government authorities. Nor is there reference to the circumstances in which it is anticipated that the Government may make the extraordinary decision to authorise action without consulting any of those affected.

12. The Law Council is also concerned that there are insufficient mechanisms to ensure that these powers are being used in accordance with law, and only when necessary and proportionate. This is exacerbated by uncertainty around existing mechanisms for review and whether review is entirely Parliamentary based, or whether judicial review is also available. While the Law Council has not in the time available had the opportunity to explore these issues in depth, it notes that such questions have also been raised by academics in the field.³
13. The Law Council notes that when the 2005 Bill was considered by the Senate Legal and Constitutional Affairs Committee, a number of key stakeholders raised concerns about the Bill, and made suggestions for additional safeguards to be placed upon the new powers afforded under the Bill, in order to ensure that Australia better complied with its international human rights obligations.⁴

Recommendations

14. Accordingly, the Law Council recommends that:

- legislative provisions or regulations be introduced in relation to Part IIIAAA of the Defence Act that specify the action ADF personnel may take or when the most severe action, becomes necessary. Further, the legislative provisions or regulations should specify what constitutes ‘reasonable grounds’ under subsection 51(3). If these recommendations are not pursued, guidelines that seek to achieve the same purpose should be developed and made publicly available;
- the Government outline the situations that have led the Government to include the measures contained in Part IIIAAA for the future reference of the Parliament and the Courts, including the reasons for granting power to the Commonwealth over the internal waters of a State, and a reference to the circumstances in which it is which it is anticipated that the Government may make the extraordinary decision to authorise action without consulting any of those affected;
- a review be conducted to ensure that appropriate safeguards and limitations apply to the powers contained in of Part IIIAAA to ensure that they are only used when shown to be necessary and proportionate; and
- Part IIIAAA be amended to clearly specify the mechanisms for judicial review and Parliamentary review that apply.

³ See for instance Michael Head, *Calling Out the Troops – The Australian Military and Civil Unrest: The Legal and Constitutional Issues*, Sydney, Federation Press, 2009, pp 177-84.

⁴ See for instance the Human Rights and Equal Opportunity Commission, *Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005*, January 2006; see also Gilbert + Tobin Centre of Public Law, *Submission to the Senate Legal and Constitutional Legislation Committee Inquiry into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2005*, 16 January 2006

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the Constituent Bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12-month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.