

**STANDING COMMITTEE ON UNIFORM LEGISLATION  
AND STATUTES REVIEW**

**INQUIRY INTO THE COUNCIL OF AUSTRALIAN GOVERNMENTS  
AGREEMENT OF SEPTEMBER 27 2005  
RELATING TO STRENGTHENING COUNTER-TERRORISM LAWS**

**TRANSCRIPT OF EVIDENCE TAKEN  
AT PERTH  
WEDNESDAY, 16 NOVEMBER 2005**

**Members**

**Hon Simon O'Brien (Chairman)  
Hon Matthew Benson-Lidholm  
Hon Sheila Mills  
Hon Donna Taylor**

**Hearing commenced at 10.00 am****HAY, MR GEOFFREY****Assistant Director General, Department of the Premier and Cabinet, examined:****THOMSON, MR JAMES****Legal Officer, State Solicitor's Office, examined:**

**The CHAIRMAN:** Welcome to the hearing. We appreciate your assistance with our inquiries. Both of you will have completed a document entitled "Information for Witnesses". Have you read and understood that document?

**Mr Hay:** Yes, I have.

**Mr Thomson:** Yes, I have.

**The CHAIRMAN:** Today's hearing is public and is being recorded by Hansard. A copy of the transcript will be provided to you. Please note that until such time as the transcript of the public evidence is finalised, the transcript should not be made public. I advise you that premature publication of the transcript or inaccurate disclosure of public evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. If you want to make a confidential statement, you can ask that the committee consider taking the statement in private. If the committee agrees, the public will be asked to leave the room before we continue. This hearing has not been advertised and no members of the public are present, and I think it is unlikely that they will join us. However, that opportunity is there if you want to take advantage of it. To assist Hansard in reporting the proceedings accurately, it is desirable that you identify any document to which you refer by its title or other means of identifying it. It would be appreciated if you could talk into the microphones and avoid covering them with papers.

We have provided you with some indicative questions. I know that you have done some preliminary work on them. Mr Hay, would you like to make an opening statement to the committee?

**Mr Hay:** The fairly recent meeting of the Council of Australian Governments on counter-terrorism has attracted a fair bit of attention. It has had a fair bit of coverage in the media. We are happy to help the committee understand the background of some of the issues that have been the subject of that discussion. From our reading of the indicative questions, I think we can help you greatly this morning in that regard.

**The CHAIRMAN:** That will be great. Let us use that in the first instance. Can you please outline the areas in which the commonwealth may lack the necessary legislative power to implement the COAG agreement relating to strengthening counter-terrorism laws?

**Mr Thomson:** Mr Chairman, as you will appreciate, there are always differing views about constitutional powers and the extent of commonwealth constitutional powers. Those views often differ between the commonwealth and the states. In this area of antiterrorism legislation, that situation prevails. Differing views have been expressed about the extent of commonwealth legislative powers, and also about the application of any constitutional prohibitions that may arise in relation to those legislative powers. As I am sure the committee knows, at least two sets of legislation are involved. There is commonwealth legislation, which has been introduced into the commonwealth Parliament, and one act has been passed by that Parliament. There is also a bill, which has passed the House of Representatives and is in the Senate. A Senate committee is looking

at that bill. There is also proposed state legislation, as indicated by the 27 September COAG press release, which is a fairly detailed document that is publicly available. Again, there are differing views about the constitutionality of the commonwealth legislation. I understand that the commonwealth considers that its laws are constitutional. I have seen no opinion to that effect, but the Prime Minister has indicated that, in his view and in the view of his office, the commonwealth legislation is constitutional. That view is not shared by a number of state Solicitors General. There has been some comment in the press about state Solicitors General indicating that the commonwealth legislation, or some parts of it, may not be constitutional, either because it contravenes prohibitions arising from the separation of powers, which is embodied in the structure of the commonwealth Constitution, or because - there are some views about this - the commonwealth legislation may not come within the scope of the referred powers. Again, that is a matter that is subject to differing views. There has been some comment in the press about these issues and about the Solicitors General providing that advice.

The second area is state legislation. In this state, no legislation has been introduced into Parliament as yet. I will leave it there at this stage. However, the government takes its own legal advice and I understand that that legal advice is confidential to the government.

**The CHAIRMAN:** We will probably need to come back to a number of other questions to tease out some of those threads, but some of them have already been foreshadowed, so I will return to our prepared questions. Can you please advise whether Western Australia has or has announced stop, question and search powers; and if so, can you identify the relevant legislation or proposed legislation?

**Mr Hay:** The Western Australian stop, question and search powers in relation to terrorism are in the Terrorism (Extraordinary Powers) Bill 2005, which is currently in the Parliament.

**The CHAIRMAN:** Apart from those stop, question and search powers, what types of legislative provisions will the state be required to enact as a result of the COAG agreement announced on 27 September?

**Mr Hay:** The provisions relating to preventive detention orders, including the basis for applying for such orders and for the making of the orders, and also relating to the review of those orders and the rights of people subject to orders would be required to be in state legislation.

**The CHAIRMAN:** We have given you some advance notice of this question. Can you provide a list of the current Western Australian legislation that deals with terrorist threats and advise how the proposed legislation will complement that?

**Mr Hay:** The two acts and the bill I have referred to cover that field. The Terrorism (Extraordinary Powers) Bill 2005, the WA Criminal Code and the Terrorism (Commonwealth Powers) Act 2002 are the relevant pieces of legislation. The proposed state legislation will enable Western Australian police to detain persons who are going to engage in a terrorist act, who possess a thing connected with the preparation of or engagement in a terrorist act, or who have done an act in preparation for a terrorist act. The preventive detention would substantially assist in preventing the act or preserve evidence of or relating to a terrorist act. That really just reflects the commonwealth legislation. It simply relates to preventive detention orders. The commonwealth legislation covers detention for a period of up to 48 hours. As indicated in the COAG communiqué, the state legislation would take the preventive detention beyond that 48-hour period to 14 days.

**The CHAIRMAN:** Why is it necessary for the state to legislate to take it from 48 hours to 14 days? Is that beyond the power of the commonwealth?

**Mr Thomson:** Again, there are differing views on that, but I think that is the reason. It is thought that the commonwealth Parliament's powers do not extend that far, including the powers that have been referred to it. It is a constitutional reason. It is thought that the commonwealth powers would

---

not extend that far. Again, this is an area of constitutional law for which differing views are expressed by various High Court judges basically for the reasons the chairman has identified.

[10.15 am]

**The CHAIRMAN:** Has an agreement been reached about the nature of the legislation that the states and territories will be required to pass? I refer, for example, to a template bill, the referral of powers or something else.

**Mr Hay:** There is no template scheme. The agreement reached at COAG was that consideration would be given to options for harmonising state legislation. There is no model bill for all the states. Each jurisdiction is developing its own legislation. Consultation is occurring between parliamentary counsels' offices.

**The CHAIRMAN:** I thank you for that clarification. I will try to summarise in layman's terms the points that have been made so far. The various participants at COAG have agreed on a final outcome that they want to institute and it is now a matter of putting in place the various parts of the legislative machinery in the various jurisdictions to achieve that outcome.

**Mr Hay:** That is right.

**The CHAIRMAN:** The states each have slightly different Criminal Codes and other laws on the statute books and will each strive to achieve a common outcome by topping up those laws. Is that a fair way to characterise it?

**Mr Hay:** That is fair. There was one significant difference among the states and territories regarding the COAG agreement, which was that the Queensland Premier wanted it put on the record that its legislation would include a reference to the state's Public Interest Monitor. That body already exists in Queensland. It was recognised that some differences exist between each state and territory's jurisdiction.

**The CHAIRMAN:** Is it possible that other states are considering the establishment of a public interest monitor along the lines of the Queensland model?

**Mr Hay:** They may be, but I am not aware of it.

**The CHAIRMAN:** When is it anticipated that the Western Australian legislation resulting from the COAG agreement will be introduced into the state Parliament?

**Mr Hay:** As I mentioned earlier, the Terrorism (Extraordinary Powers) Bill is already before the Legislative Council. We cannot say when the preventive detention legislation will be introduced into the Parliament.

**The CHAIRMAN:** I have a further question following on from that. If you feel that it touches on government policy and you are not free to answer it, you can, of course, decline to answer it. Is it the government's intention at this time to have these further laws passed through the Parliament by a particular date or even before the end of this year?

**Mr Hay:** That is a policy matter that is with the government. I am not aware of what its intentions are.

**Hon DONNA TAYLOR:** Was there anything in the COAG agreement about when bills across the country needed to be implemented by? Was a deadline set by which the states had to follow through on?

**Mr Hay:** No, there was not.

**The CHAIRMAN:** What is the progress of proposed legislation in the other states and territories? How are they all going?

---

**Mr Hay:** We checked the other states' legislation this morning. As far as we know, the only state to have introduced a COAG-related bill is South Australia, which introduced it in the past week or so.

**The CHAIRMAN:** Is anything else known about the other states, or are you just waiting to see what will happen?

**Mr Hay:** We are waiting to see.

**The CHAIRMAN:** The committee has noted that after the 27 September 2005 meeting of COAG, a conference was called between the Prime Minister and the state Premiers on 2 November 2005. The media reported that the Prime Minister required the support of four state and territory leaders to introduce the proposed antiterrorism laws into federal Parliament. Is that correct? If it is, what was the reason for that requirement?

**Mr Hay:** A confidential telephone conversation that I was not privy to was held between the Prime Minister and a number of Premiers. Mr Thomson might be able to explain the requirement for the support of the four states.

**Mr Thomson:** The requirement flows from section 100.8 in part 5.3 of the commonwealth Criminal Code. That provision is in the Terrorism (Commonwealth Powers) Act 2003, which indicates that an express amendment of this provision applies to part 5.3. Part 5.3 is based upon the state's referred powers. Part 100.8 of the commonwealth Criminal Code states in part -

An express amendment to which this section applies -

It applies to parts 5.3 -

is not to be made unless the amendment is approved by:

- (a) a majority of the group consisting of the states, the Australian Capital Territory and the Northern Territory; and,
- (b) at least 4 states.

It is a requirement in the commonwealth legislation that when an amendment is made to part 5.3, as contained in the Terrorism (Commonwealth Powers) Act 2002, the agreement from at least four states must be obtained. That is where that figure comes from.

**The CHAIRMAN:** Did that conference call between the Prime Minister and the Premiers alter the part of the COAG agreement relating to the strengthening of antiterrorism laws; and if so, how?

**Mr Hay:** It did not alter the agreement at all.

**The CHAIRMAN:** A media report indicated that the Premier, Hon Geoff Gallop, MLA, lodged a dissenting opinion on the issue of these so-called shoot-to-kill provisions. Is that correct? Were there any other aspects with which the Premier did not concur?

**Mr Hay:** It is correct that the Premier dissented on the use-of-force provisions contained in the commonwealth legislation. However, throughout the process of the development of the commonwealth legislation the Premier pushed for the inclusion of appropriate safeguards, many of which were picked up by the commonwealth. As a result, the use-of-force provisions were the only provisions from which the Premier dissented.

**The CHAIRMAN:** Are the so-called shoot-to-kill provisions - I am sure that is a term devised by the media and other observers rather than by COAG or heads of government - to be in the commonwealth Criminal Code, or are they to be part of the legislation that is likely to be introduced into Western Australia?

**Mr Hay:** The provisions are included in the commonwealth Anti-Terrorism Bill (No. 2) 2005 which is currently before the Senate.

---

**The CHAIRMAN:** Comments made by Western Australia's Premier and others were reported in the media. Were they commenting in the context of agreeing to parts of part 5.3 of the commonwealth Criminal Code and were they not further canvassing the state's agreement to draft their own legislation?

**Mr Hay:** That is correct.

**The CHAIRMAN:** I am glad we have clarified that. Therefore, is it unlikely that those provisions would be considered by the state Parliament in future?

**Mr Thomson:** I remind the committee - I am sure it does not need reminding - that we are dealing with two sets of legislation: commonwealth and state legislation. The so-called shoot-to-kill provisions will be included in part 5.3 of the legislation if it is passed by the commonwealth Parliament. Therefore, the provisions rely on the state-referred power. During the process of developing a commonwealth bill, the issues on the use of force with regard to preventive detention orders were given careful consideration and some changes were made to the proposed legislation because of the 5.3 provision. The bill now contains a provision that indicates that Australian Federal Police officers who are serving, detaining or stopping a person with regard to an apprehension under a preventive detention order will have certain powers. Those powers will flow from part 5.3 of the commonwealth Criminal Code, which itself flows from the referred power. The commonwealth bill now indicates that the AFP officers who exercise that power will have the powers that are given to them from the Crimes Act. The Crimes Act provisions will operate for AFP officers, but the commonwealth bill indicates that when state police officers are serving a commonwealth PDO, their powers will flow from state legislation. Therefore, whatever the state legislation provides will apply to the state police. Presumably, if and when state legislation is introduced, the question of what force can be used for state police with regard to state preventive detention orders also must be addressed. The committee must recall that preventive detention orders operate when a person has not committed a criminal offence. Therefore, it is a different situation from the usual situation under which police officers operate whereby they either know that a criminal offence has been committed or reasonably suspect that a criminal offence has been committed. The commonwealth legislation is not premised on that; it is a preventive order. That is why the Premier was very keen to examine the so-called shoot-to-kill provisions. If a state bill is introduced and it contains state preventive detention orders and the police will be authorised to use some type of force, whatever that might be in relation to those orders, that will be a matter that comes before the state Parliament.

**The CHAIRMAN:** Thank you for that. Was a further agreement drawn up to reflect the matters that were either discussed or agreed upon on 2 November 2005?

**Mr Hay:** No, there was not.

**The CHAIRMAN:** Were those matters recorded in any other form?

**Mr Hay:** From the -

**The CHAIRMAN:** From the discussions on 2 November.

**Mr Hay:** No.

**Hon SHEILA MILLS:** Currently complaints made against the Police Service can be referred to the Ombudsman for independent investigation. If somebody is aggrieved by the proposed terms of this legislation, will they have access to the Ombudsman's office to lodge a complaint?

[10.30 am]

**Mr Hay:** Are you talking about commonwealth legislation?

**Hon SHEILA MILLS:** No, state legislation. Currently, if a person feels aggrieved by police action, that person can refer it to the Ombudsman's office to investigate the complaint.

---

**Mr Hay:** Are you referring to the bill currently before the Parliament?

**Hon SHEILA MILLS:** Yes, I am.

**Mr Hay:** I am not familiar with that bill. I do not know whether Mr Thomson is.

**Mr Thomson:** No, I am not familiar with that bill either. We can take that question on notice and get an answer for you. Whether the Ombudsman is able to investigate would be in the bill. To the extent that your question is directed to any other legislation that might be introduced that might involve police and activities, again, that is a matter of government policy.

**Hon SHEILA MILLS:** Would a proposed bill have to exclude a complaint to the Ombudsman's office if somebody felt aggrieved by police actions in exercising any proposed powers that they will have under future legislation?

**Mr Thomson:** That would depend on the terms of the Ombudsman's legislation. Remember, these proposals flowing out of COAG are somewhat new creatures. To the extent that the Ombudsman's legislation does not cover it, it would not have to be excluded. If the Premier and the government wanted to extend the Ombudsman's jurisdiction, perhaps it would have to be included in any new legislation brought before the Parliament.

**Hon MATTHEW BENSON-LIDHOLM:** I have a question that relates to the eighth question that the Chairman posed to you. This is not a particularly significant issue in the overall scheme of things. I was interested to hear that the Prime Minister required the support of four state and territory leaders to introduce the proposed laws into federal Parliament. Is that just a politically expedient number, because obviously it is half of eight, or is there some substance to that requirement that you know of?

**Mr Thomson:** The requirement arises out of the negotiations a few years ago that centred around the question of the state Parliaments referring to the commonwealth Parliament powers over terrorism. As I am sure the Chairman remembers, that referral was done as a textual referral. It was not simply the state Parliaments referring to the commonwealth Parliament powers over terrorism; it was a referral of a specific bill. Attached to the state bill were specific terms, and the commonwealth Parliament enacted those terms. However, there was also power for the commonwealth Parliament to make some amendments to that textual referral so that it did not freeze the legislation in time. However, as an additional safeguard, the states, to ensure that they were consulted and agreed to those amendments, gave the referral on the condition that at least four of them agreed. It flows from those earlier negotiations. A matter that was pointed out to me that I had not realised is that section 100.8 of the commonwealth Criminal Code Act states that an amendment is not to be made unless the four agree. The bill could have been introduced as a technical matter and the agreements obtained at the very end.

**Hon MATTHEW BENSON-LIDHOLM:** That has answered my question beautifully.

**The CHAIRMAN:** Earlier we discussed the current Western Australian legislation dealing with terrorist threats. You mentioned the WA Criminal Code. Can you identify the provisions in the Criminal Code that deal with terrorism?

**Mr Thomson:** My colleague's reference to that was that, as you know, the Criminal Code contains a number of criminal offences. I think he addressed the question of how the COAG proposals complement existing laws by including the Criminal Code, because terrorism offences are murder, damage to property etc. In that sense, terrorist acts are caught by the Criminal Code if there is murder, grievous bodily harm etc in that sense. There is no technical difference. If it is a murder, it is a murder. Only to that extent can we say that terrorist acts are caught by the Criminal Code. To my memory - I am not an expert on the Criminal Code - there is no criminal terrorism offence under the code, but there is under part 5.3; there are commonwealth terrorism offences. Those terrorism offences are based on the state-referred power. That is the legislation that the commonwealth

---

Parliament has passed. Specific terrorism offences are in the commonwealth Criminal Code Act. The more general consequences of murder, damage to property etc are in the state's Criminal Code.

**The CHAIRMAN:** Thank you for clarifying that matter. Do you have any final points or observations that you want to offer?

**Mr Hay:** No.

**The CHAIRMAN:** Thank you for assisting us with our inquiry. There are some uncertainties about the future timetable for the matters that we have discussed. It will be helpful if we are in a position to respond if our house requires us to progress these matters, particularly if there is a very short time frame. We do not know. You have assisted us in positioning ourselves to be able to respond in the best way we can. I thank you very much for that.

**Hearing concluded at 10.36 am**

---