

LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

Members present:

Mr PS Russo MP (Chair)
Mr JP Lister MP
Mr SSJ Andrew MP
Mr JJ McDonald MP
Mrs MF McMahon MP
Ms CP McMillan MP

Staff present:

Ms R Easten (Committee Secretary)
Ms E Jameson (Inquiry Secretary)

PUBLIC BRIEFING—INQUIRY INTO THE JUSTICE LEGISLATION (LINKS TO TERRORIST ACTIVITY) AMENDMENT BILL 2018

TRANSCRIPT OF PROCEEDINGS

MONDAY, 3 DECEMBER 2018
Brisbane

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The committee met at 2.46 pm.

CHAIR: Good afternoon. I declare open this public briefing for the committee's inquiry into the Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018. My name is Peter Russo, the member for Toohey and chair of the committee. Other committee members here today are James Lister MP, member for Southern Downs and deputy chair; Stephen Andrew MP, member for Mirani; Jim McDonald MP, member for Lockyer; Melissa McMahon MP, member for Macalister; and Corrine McMillan MP, member for Mansfield.

On 13 November 2018 the Attorney-General and Minister for Justice, the Hon. Yvette D'Ath MP, introduced the Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018 into the parliament. The parliament has referred the bill to the Legal Affairs and Community Safety Committee for examination, with a reporting date of 7 March 2019. The purpose of today is to hear evidence from stakeholders as part of the committee's inquiry. Only the committee and invited witnesses may participate in the proceedings. Witnesses are not required to give evidence under oath, but I remind witnesses that intentionally misleading the committee is a serious offence.

These proceedings are similar to parliament and are subject to the Legislative Assembly's standing rules and orders. In this regard, I remind members of the public that under the standing orders the public may be admitted to, or excluded from, the hearing at the discretion of the committee. The proceedings are being recorded by Hansard and broadcast live on the parliament's website. Media may be present and will be subject to the chair's direction at all times. The media rules endorsed by the committee are available from committee staff if required. All those present today should note that it is possible you might be filmed or photographed during the proceedings by the media and images may also appear on the parliament's website or social media pages.

I remind committee members that witnesses are here to provide factual or technical information. Any questions seeking an opinion about policy should be directed to the minister or left to debate on the floor of the House. The program for today has been published on the committee's web page and there are hard copies available from committee staff.

DEVESON, Ms Kristina, Principal Legal Officer, Strategic Policy and Legal Services, Department of Justice and Attorney-General

GILES, Ms Megan, Executive Director, Strategic Policy and Legislation, Strategy, Department of Child Safety, Youth and Women

PETRIE, Ms Kate, Director, Policy and Legislation, Strategy and Governance, Queensland Corrective Services

ROBERTSON, Mrs Leanne, Assistant Director-General, Strategic Policy and Legal Services, Department of Justice and Attorney-General

CHAIR: I welcome representatives from the Queensland government who have been invited to brief the committee on the bill. Good afternoon. I invite you to make an opening statement, after which committee members may have questions for you.

Mrs Robertson: Thank you, Chair. Thank you for the opportunity to brief the committee regarding the Justice Legislation (Links to Terrorist Activity) Amendment Bill 2018. I will not repeat any introductions, but I would just note that colleagues from the Queensland Police Service are also present here this afternoon should there be specific questions about the Queensland Police Service's role in the implementation of the amendments in the bill.

The bill amends the Bail Act 1980, the Corrective Services Act 2006, the Penalties and Sentences Act 1992 and the Youth Justice Act 1992 to implement the 9 June 2017 Council of Australian Governments, COAG, agreement that first ministers would ensure that there will be a presumption that neither bail nor parole will be granted to those persons who have demonstrated support for, or who have links to, terrorist activity—in other words, the COAG commitment.

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National consistency in counterterrorism legislation is desirable to avoid creating safe havens for terrorists and to ensure interoperability given the cross-jurisdictional nature of terrorism. Implementation of the COAG commitment is guided by agreed nationally consistent principles outlined in the briefing materials that the department has previously provided to the committee. The agreed national principles provide flexibility to accommodate well-established jurisdictional differences in practice and procedure during implementation. The approach of other jurisdictions that have implemented the COAG commitment was considered in the drafting of the bill. However, each jurisdiction has implemented the national principles slightly differently. While broadly consistent with other jurisdictions, the bill implements the COAG commitment to best fit Queensland's legislative framework.

Turning now to the key amendments in the bill, there are three main elements of the bill: reversing the statutory presumption in favour of bail for both adults and children with links to terrorist activity; reversing the presumption in favour of parole for adults with links to terrorist activity; and removing the discretion of a sentencing court to order a release date any earlier than after 70 per cent of a period of detention for a child with links to terrorist activity.

The amendments throughout the bill are centred on key definitions of 'terrorist act', 'terrorism offence', 'Commonwealth control order' and 'promoting terrorism'. 'Terrorist act' is defined by reference to the Police Powers and Responsibilities Act 2000 and in consistent terms to the Commonwealth Criminal Code and laws around the country. The definition of 'terrorism offence' in the bill includes offences under Commonwealth and state legislation and provides the opportunity for additional offences to be prescribed by regulation. 'Commonwealth control order' is defined by reference to the Commonwealth Criminal Code.

A control order allows obligations or prohibitions to be placed on a person such as a curfew, reporting to a police station or wearing a tracking device. Control orders are not reliant on the commission of a criminal offence and can be imposed if a court is satisfied on the balance of probabilities that the order would substantially assist in preventing a terrorist act or the provision of support for a terrorist act, or that the person has previously been involved in one of a number of specified terrorist related activities and each of the conditions on the order is necessary to protect the public from a terrorist act, or to prevent support for a facilitation of a terrorist act or hostile activity in a foreign country.

The concept of promoting terrorism is used throughout the bill and is modelled on comparable Tasmanian provisions. A person has promoted terrorism if the person has carried out an activity to support the carrying out of a terrorist act, or made a statement in support of the carrying out of a terrorist act, or carried out an activity or made a statement to advocate the carrying out of a terrorist act or support for the carrying out of a terrorist act. The bill makes it clear that for the purposes of the provisions related to promoting terrorism a terrorist act includes a terrorist act that has not happened and is not limited to a specific terrorist act.

Turning to those aspects of the bill dealing with bail, clauses 9 and 27 amend the Bail Act and the Youth Justice Act respectively to reverse the statutory presumption in favour of bail for any adult or child who has previously been convicted of a terrorism offence or who is, or has previously been, subject to a control order, regardless of the offence they are charged with. This will reverse the presumption in favour of release for children under the Youth Justice Act for the first time. Clause 5 limits the power to grant bail to a person subject of the reverse presumption to a court. This means a police officer will not be able to grant bail. The bill introduces a higher threshold of exceptional circumstances to justify granting bail for any adult or child subject of the reverse presumption into bail legislation for the very first time. The term 'exceptional circumstances' is not defined, and what satisfies this threshold will be determined by the court on a case-by-case basis.

Clauses 8 and 26 insert new terrorism related circumstances into the existing lists of matters to be considered by a court or police officer when determining if any offender poses an unacceptable risk if released on bail. These circumstances include promotion of terrorism or associations with terrorist organisations or other people who have promoted terrorism. For children, only associations that are for the purpose of supporting a purpose or organisation in carrying out a terrorist act or to promote terrorism are relevant matters for consideration. This recognises the vulnerability and lack of autonomy of children and makes a distinction between the associations an adult chooses to have and those a child may have. For example, a child may have contact with someone incidental to their parent associating with them outside of the child's control.

Turning now to the adult parole provisions, clause 13 of the bill amends the Corrective Services Act to create a presumption against parole for adult prisoners who fall into one of two categories. The first category includes a prisoner who has been convicted of a terrorism offence who is the subject of Brisbane

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a control order or who has promoted terrorism. The second category includes a prisoner who has previously been charged with, but not convicted of, a terrorism offence or who has previously been the subject of a control order or who is or has been associated with a terrorist organisation or with a person who has promoted terrorism and the Commissioner of Police has provided a report stating there is a reasonable likelihood the prisoner may carry out a terrorist act. In these circumstances parole must be refused unless the Parole Board is satisfied exceptional circumstances exist to justify granting parole. Again, exceptional circumstances are not defined.

The Parole Board may have regard to any relevant matter when determining if exceptional circumstances exist to justify granting parole. If the Parole Board decides that exceptional circumstances exist and grants parole, the board must give the prisoner written reasons for the decision. The Parole Board may requires a report from the Commissioner of Police to provide information that the board may require for use under the new provisions. The Commissioner of Police must comply with a request to provide such a report. However, to ensure that sensitive police or intelligence information is protected while allowing the Parole Board access to the information, the bill limits the circumstances in which the Commissioner of Police must comply with such a request. In brief, the Commissioner of Police is not required to disclose requested information to the Parole Board if the information is not in the Police Commissioner's possession or the information was accessed through an arrangement with a law enforcement agency, the Australian Security Intelligence Organisation or an immigration and border protection department and the arrangement prevents the disclosure, or if the information is of a type listed in section 803 of the Police Powers and Responsibilities Act 2000 and the Police Commissioner is satisfied that withholding the information will not adversely affect public safety.

The bill provides additional powers to the Parole Board Queensland to support the new presumption against parole. Clause 17 of the bill requires that an application for parole by a prisoner who has links to terrorist activity must be considered by the board sitting as five members. Clause 13 provides that the board can defer its decision in order to obtain further information by no more than 50 days. Read alongside existing section 193(3), the effect is that the board must decide the application within 200 days after its receipt.

Clauses 14 to 16 provide the board with the power to suspend or cancel parole if the board becomes aware that the prisoner poses a risk of carrying out a terrorist act. Currently, if a court is sentencing a person to a period of imprisonment of three years or less and the offence is not a serious violent offence or a sexual offence, the court must fix a date for the offender to be released from their imprisonment on parole.

A parole release date is different from a parole eligibility date, which is a date on which an offender can apply to the Parole Board to make a decision about whether they should be released from imprisonment on parole. Clause 23 amends the Penalties and Sentences Act 1992 to allow a court the discretion to fix a parole eligibility date for an offender previously convicted of a terrorism offence, subject to a control order or if the court is satisfied that the offender has promoted terrorism. If the offence is a serious violent offence or a sexual offence, the current requirement on the sentencing court to fix a parole eligibility date remains.

I turn now to those provisions dealing with the supervised release of children. As there is no system for parole for children in Queensland, the bill amends the existing system of supervised release to reflect the underlying intent of the COAG commitment. Clause 30 of the bill removes the discretion of a sentencing court to order a release date any earlier than after serving 70 per cent of a period of detention. This will apply to a child who has previously been found guilty of a terrorism offence, who is the subject of a control order or when the sentencing court is satisfied that the child has promoted terrorism and applies regardless of the offence before the court.

Clause 32 requires conditions that are reasonably necessary to reduce the risk of a child carrying out a terrorist act or promoting terrorism to be imposed on the supervised release order of any child who has previously been found guilty of a terrorism offence, who is the subject of a control order or when the chief executive is satisfied that the child has promoted terrorism. Examples of conditions that could be imposed are prohibiting a child from being at a stated place or communicating with a stated person, or imposing a curfew on the child.

Other minor amendments in the bill provide for consistency between the amendments reversing the statutory presumption in favour of the accused and other existing release mechanisms under the Bail Act and Youth Justice Act. Thank you for the opportunity to address the committee about the bill. We are happy to take questions from the committee.

CHAIR: Thank you.

Mr LISTER: Thanks again, Mrs Robertson, for appearing before us. I would like to ask about the ability to prescribe terrorist offences under regulation. I see the rationale for that—being able to respond quickly to emerging events and so forth. Could there potentially be any threats to that? A defendant might be able to argue that it is not fair; it is not the way things should be done. Are there any potential risks associated with that? Can you envisage any offences emerging in other jurisdictions that might come into play in the event that the executive needed to prescribe some offences?

Ms Deveson: Perhaps I could answer the second part of your question first, which is predicting whether there might be additional offences in other states or territories that could arise that may be open to prescription. Because the national framework of counterterrorism legislation is built upon a referral of power, all states have referred power to the Commonwealth for matters related to terrorist acts, which means that the overwhelming majority of terrorism related offences are under Commonwealth legislation, in particular in part 5.3 of the Commonwealth Criminal Code. The majority of future offences are likely to fall within part 5.3 of the Commonwealth Criminal Code and will, as a result, be captured by the definition in the bill, which picks up all offences within that part.

There are a small number—three—of terrorism related offences designated in the bill that have been introduced in other states or territories. The reason the power to prescribe is there is in the event that other states or territories introduce similar or corresponding offences. Looking at the numbers, when there are to date only three across the country, I would anticipate that the majority of future amendments would be picked up as part of part 5.3 of the Commonwealth reforms.

Speaking to the first part of your question about whether there is any potential impact on fairness or unfairness—

Mr LISTER: I wanted more to know if there are any risks from that approach—not so much to do with fairness but risks that it could be declared invalid or attacked through legal mechanisms?

Ms Deveson: I could draw the committee's attention to similar provisions in other jurisdictions—the definition of 'terrorism offence' in implementing the COAG commitment. I can point to South Australia, which similarly included an offence of a kind prescribed by regulation in their legislation. Similarly, Tasmania has included a power to prescribe additional Commonwealth, state or territory legislation. Victoria allows for corresponding laws to be picked up. I understand that recently introduced amendments in Western Australia, if passed, would also pick up corresponding laws as opposed to prescribed by regulation, so there is a level of consistency in the implementation across—

Mr LISTER: Does that consistency add weight and credence to that approach? Obviously I want to see it succeed as a means to prevent terrorist acts or to allow law enforcement to act. Queensland is not just a rogue state; we are all doing it.

Mrs Robertson: I do not think that gives us an absolute guarantee. Realistically, the only other device is to go in every time some new offence is created and legislatively amend the act. It is not unusual for these sorts of provisions to be used. I understand, in the context of the subject matter, there are issues, but it is not unusual for that sort of device. Without being able to give an absolute guarantee, the fact that there is a consistency of approach, the fact that these sorts of regulation-making power provisions are used, would help that argument. Obviously, we cannot foreshadow what might happen.

Ms Deveson: I also note that the regulation-making power that is attached to each of the definitions of a 'terrorist act' is quite limited. It specifies that the offence cannot just be any other offence; it has to be an offence in relation to an activity that involves a terrorist act or is preparatory to the carrying out of an activity that involves a terrorist act. There is quite a limitation placed on that regulation-making power.

Mr LISTER: Have other jurisdictions proceeded to adopt under statute law these offences that have been introduced through regulation? Is there an expectation that that is the way things would go or is it purely a temporary thing that might fall off once that particular threat has passed?

Ms Deveson: I am not sure that I can answer that question. The amendments introduced in the COAG commitment are all quite new, the COAG commitment being fairly recent. I am not sure that we could speak to the legislative actions of other jurisdictions or predict at this time.

Mr LISTER: Yes, that is fair enough. Thank you.

CHAIR: Ms Petrie, how many children currently in the system have been charged?

Ms Petrie: Are you looking at adult offenders?

CHAIR: No, juveniles.

Ms Petrie: I will direct that question to my colleague.

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CHAIR: In custody.

Ms Giles: I am not aware of any children who have been charged with terrorism related offences in Queensland. We have been provided with information from the police about national data, so I can give you that, if that is helpful.

CHAIR: No, I am not too concerned about national data; I was mainly interested in what is happening in Queensland.

Ms Giles: Yes.
CHAIR: Thank you,

Mr ANDREW: What are some examples of exceptional circumstances that might justify the granting of bail or parole for someone charged or convicted with a terrorism offence?

Ms Deveson: Exceptional circumstances, as Mrs Robertson explained in her introduction, are not defined in the bill. What satisfies the threshold is going to be a matter for the court or the Parole Board to determine on a case-by-case basis.

With respect to bail for children and adults, the bill specifically provides that the courts can have regard to any relevant matter when they are determining whether they are satisfied that the threshold has been met. In general, when determining the threshold of 'exceptional circumstances' the courts consider it as its general ordinary meaning as an adjective—that it has to be something that forms an exception from the ordinary. It is unusual, special or uncommon but it does not have to be unprecedented or unique.

Mrs McMAHON: In relation to the introduced aspect of promoting terrorism, I note that making a statement in support of carrying out a terrorist act is in new subsection 2B. Would that mean potentially that a 14-year-old who makes a Facebook post or comment in support of activities happening, say, on the Gaza Strip may find themselves having made a comment promoting terrorism and find themselves subject to being denied bail?

Ms Deveson: Perhaps I could answer this broadly as it might relate to adults and children. We are not able to give legal advice on a specific or hypothetical example because, like exceptional circumstances, whether a court is satisfied that a person has promoted terrorism is going to depend very much on the facts of each circumstance.

The way the provision is drafted, it will require more than incidental support. The terminology used in the bill is that a person has promoted terrorism if the person has carried out an activity to support the carrying out of a terrorist act or made a statement in support of the carrying out of a terrorist act, or they have carried out an activity or made a statement to advocate the carrying out of a terrorist act or support for the carrying out of a terrorist act. With that drafting, it is intended that it will require more than an incidental support and instead something really would need to be directed towards, or for the purpose of, supporting or advocating support for terrorism.

An example that was raised during consultation during the drafting of the bill by the Aboriginal and Torres Strait Islander Legal Service was if a person liked a post on social media in favour, for example, of an independent Palestinian state but that was more of a political statement than support for the person who had posted it when that person may, in fact, be involved in terrorist activity. As drafted, the bill requires the activity or the statement of the person to be the support for the carrying out of the terrorist act or advocating support for the terrorist act rather than possibly incidental to supporting the person's actions.

Mrs McMAHON: However, the provisions of 2C indicate that it is not limited to a specific terrorist act.

Ms Deveson: Not limited to a specific terrorist act but to the carrying out of a terrorist act.

Mrs McMAHON: And the fact that the terrorist act need not have even occurred at this point.

Ms Deveson: That is correct, it does not have to relate to a terrorist act that has occurred, because the provision is targeted towards the support for a person carrying out a terrorist act regardless of whether the terrorist act has occurred or comes to fruition.

Mrs McMAHON: A Facebook like is probably not at the threshold but an actual comment in support, as in, 'Yeah, that's the way to go' or 'I support this action'?

Ms Deveson: Ultimately it will be a matter for the court or the Parole Board to determine on a case-by-case basis.

Mrs McMAHON: But the person, whether adult or juvenile, would be denied bail until such time as that was considered?

Ms Deveson: The presumption of bail is only reversed if a person has been convicted of a terrorism offence or subject of a control order. This would only apply as a consideration at the time of a court considering bail for anyone or for the exercise of sentencing discretion or for questions of parole.

Mr ANDREW: If a person has been not so much groomed but approached by an organisation or a budding organisation that are terrorist wannabes, so basically want to maybe perform an act of terror, and they are continually going to this person either trying to recruit or trying to get her to spread the word through maybe some sort of institution or this person, male or female, and because this person does not want to go forward and speak about it because they are worried about their own safety and there is something that transpires out of that or there is something that comes of that, would that person then come under this act because they did not come forward? I am just trying to work that out.

Ms Deveson: The provisions in the bill are limited to a person who has been charged with an offence and someone is considering bail, they are being sentenced for an offence and someone is considering the sentence to be imposed, or they have already been convicted of an offence and a decision is being made related to their parole. The amendments in the bill do not apply to considerations of terrorism offending, deradicalisation or efforts towards social cohesion outside of the scope of the COAG commitment, which is to reverse the presumption for bail or parole.

CHAIR: Am I correct that if you are charged under the Commonwealth legislation you cannot get bail unless you show exceptional circumstances now? Is this act different?

Ms Deveson: A person charged with a Commonwealth offence is subject to a requirement of showing exceptional circumstances because of the Crimes Act. The provisions in this bill will apply to a person charged with a Queensland offence when they are linked to terrorist activities based on a previous conviction for a Commonwealth terrorism offence or because they are or have been subject to a control order.

CHAIR: Isn't it the case that most people in Queensland charged with terrorism offences are charged under Commonwealth legislation?

Ms Deveson: Yes. The COAG commitment is targeted at people outside of prosecution for terrorism offences and instead people who have demonstrated support for or links to terrorist activity.

CHAIR: But there is Commonwealth legislation to cover the offences that you are talking about in this legislation?

Ms Deveson: The Commonwealth legislation only applies to prosecutions for Commonwealth criminal offences. The amendments in the bill will apply to bail proceedings for Queensland offences.

CHAIR: What I am saying is: the Commonwealth legislation covers these types of offences that are being referred to in this piece of legislation.

Ms Deveson: Yes. Sorry, Chair; I misunderstood your question. The Commonwealth legislation, the Crimes Act provision requiring exceptional circumstances, would pick up the prosecutions for terrorism offences as they are defined under the bill.

CHAIR: As well as these offences that are defined by this piece of legislation?

Ms Deveson: The Crimes Act provisions will only apply to prosecutions for Commonwealth offences. It will not apply, for example, to a person who is charged with a common assault under the Queensland Criminal Code. But if that person charged with common assault under the Queensland Criminal Code had previously been convicted of a Commonwealth terrorism offence, the effect of the bill will introduce a new reverse presumption of bail requiring exceptional circumstances for that person.

Mr McDONALD: In regard to the court and Parole Board granting bail, what sort of additional onus do you see being placed on them? Police can make a very simple decision and object to bail. Why would that not be the case here? We are actually putting more work on the courts.

Ms Deveson: The implementation has been guided with national consistency in mind. All jurisdictions that have implemented the COAG commitment other than New South Wales have limited the ability to grant bail to offenders subject to these reforms to a court.

Mr McDONALD: That does not mean that the others have got it right or wrong. New South Wales might have it right.

Ms Deveson: I think with respect to the opening part of your query about additional resourcing impacts, it is my understanding that nationally there are 56 offenders who have been convicted of terrorism related offences and there have only ever been six control orders. It is a very small potential cohort that would be captured by these reforms. If there was a resourcing impost on the courts, that would be minimal.

Mr McDONALD: Ms Giles, you were going to talk about the national youth. Given we have heard that there are 56 offenders, are they adult offenders?

Ms Giles: Thank you for the question. The data that we have been provided with by police is that nationally since 2001 56 people have been convicted of terrorism related offences, as Ms Deveson, my colleague, has already outlined, five of whom were children. That is nine per cent of the 56.

Ms Deveson: I might just note for the committee, just for completeness, that the data Ms Giles and I have given is based on terrorism related offences. That might not align exactly with the definition of a terrorism offence under the bill but it is provided to give the committee a general idea of the numbers.

Ms McMILLAN: What might be an example of an incidental affiliation?

Ms Deveson: Is your query with respect to the specific exception regarding associations for children?

Ms McMILLAN: Yes.

Ms Deveson: I will let Ms Giles answer, but the example that Mrs Robertson gave during her opening is probably the first one that comes to mind, which is an association as a result of a child being in the company of their parent while their parent is associating.

Ms Giles: The additional requirement for children is: not only is there any association the child has had with a terrorist organisation or with a person who has promoted terrorism but also the court is satisfied that the purpose of that association was in relation to carrying out a terrorist act or promoting terrorism. That is to reflect the fact, as Mrs Robertson outlined in her opening address, that children do not have autonomy in terms of who they associate with. There might be people, for example, coming into their household. They have no say over what other adults or indeed young people are coming into their contact in their household. It could be associates of their other family members or parents, for example. I think that is probably the most obvious example of those kinds of relationships or associations that we are trying to pick up by that additional text.

Mr McDONALD: Coming back to the granting of bail, I know the numbers are only fairly small, but that would say to me that perhaps we should still alleviate the courts from that process and allow police officers to grant bail. We are talking about potential serious offences. I am not convinced that giving decisions to the court is the best way.

Mrs Robertson: Chair, I am not sure that we can take that much further. As I articulated, it is consistent with the approach of a number of other jurisdictions and it is a policy.

CHAIR: Yes. Any more questions?

Mr McDONALD: I note in the explanatory notes that the decision was actually in 2017. Is there any reason there was such a delay in getting this bill to the parliament?

CHAIR: I do not think that is a question that could be answered.

Mr McDONALD: Unless there was a delay in the department.

CHAIR: I rule that question out of order. There being no further questions, that concludes this briefing. I would like to thank the departmental officers for appearing today. Thank you to our Parliamentary Service staff and our Hansard reporters. The transcript of these proceedings will be available on the committee's parliamentary web page in due course. I declare this public briefing for the committee's inquiry into the Justice Legislation (Links to Terrorist Activity) Amendment Bill closed.

The committee adjourned at 3.26 pm.