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HOT ISSUES

NATIONAL SECURITY AND CRIMINAL JUSTICE GROUP

DEPUTY SECRETARY – MILES JORDANA

Broadened National Security Definition—All Hazards and Resilience Strategies

Border Protection

- Border Security
- People Smuggling

Criminal Justice

- High profile extraditions
- Royal prerogative of Mercy: Kessing

Emergency Management

- Crisis Management
- Digital Dividend and Public Safety
- Parliament House Briefing Room
- Victorian Bushfire Royal Commission
- Location-based Mobile Telephone Warning Solution
- Safety and security of Australians at Commonwealth Games
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National Security

- Countering violent extremism—community engagement
- Data retention consultation and FOI requests
- Fernandes AAT Appeal
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BROADENED NATIONAL SECURITY DEFINITION—ALL HAZARDS AND RESILIENCE STRATEGIES

Issue

Traditionally, the definition of national security has encompassed defence, foreign and strategic policy matters such as transnational armed conflict, espionage and politically motivated violence. Since the 11 September 2001 terrorist attacks, there has been significant focus on counter-terrorism on both the domestic and international front. These remain key issues for all national governments.

The inaugural National Security Statement to Parliament (December 2008) brought with it a broadening of the national security agenda beyond the traditional environment to an all-hazards approach. This is an acknowledgement that our nation's security can as easily be threatened by events in the natural world as they could be by man-made aggression, and seeks to ensure that our response to current and emerging threats is evolving, flexible and relevant. While the definition is also broad enough to include new and emerging security threats, it is sufficiently confined to those events that have consequences for our institutions of state, our people and our economic assets and technology. This approach has enormous benefit when considering the allocation of finite resources: some of the same intelligence and information sources and many of the same skills and capabilities are used in assessing, mitigating or countering different sources of threat; similar capabilities are called on in responding to the consequences of a diverse range of threats

As a consequence, we have the ability to fully coordinate and utilise our capabilities rather than acquiring or developing discrete capabilities in response to specific threats. Importantly we are well positioned to respond to future threats by developing and continuously improving capabilities with broad applicability.

In this challenging environment, the national security community and policy makers have also recognised the need for a critical shift from response to resilience. In December 2009, COAG endorsed this view and agreed to a new whole-of-nation, 'resilience' based approach to emergency management policy and programs.

The Resilience Paradigm

The increasing complexity and interdependencies of the national security environment has created the impetus to refocus efforts to strengthen the resilience of Australian communities to disasters, both natural and man-made. Our new focus on disaster resilience, calls for an all-hazards, integrated, whole-of-nation effort encompassing enhanced partnerships, shared responsibility, a better understanding of the risk environment, and an adaptive and empowered community.

Underlying this shift to a resilience approach is the important recognition of communities' role in building disaster resilience. A disaster resilient community is one that works together to understand and manage the risks that it confronts. Disaster resilience is the collective responsibility of all sectors of society, including all levels of government, business, the non-government sector, communities and individuals. The Australian Government plays a leadership role in working with all stakeholders to enhance a united focus and a shared sense of responsibility to improve disaster resilience which will ultimately be far more effective than the individual efforts of any one sector.

BORDER PROTECTION: BORDER SECURITY

Issue and timing

Border agencies work together at the border to address risks posed to the Australian community while facilitating legitimate trade and travel. This role is vital to ensure the security of our borders while maintaining Australia's economy. There are a number of key challenges that border agencies face both now and into the future. These include:

- serious and organised crime;
- terrorism;
- proliferation;
- cyber security;
- people smuggling and trafficking; and
- increasing travel and trade volumes.

As outlined in the *Border Management Outlook 2020* (the Outlook), there are a number of global drivers that will impact the future operating environment for border management agencies. External drivers such as globalisation will increase the volume and complexity of people and goods crossing the border. The Outlook highlights the changing nature of security, including the evolution of terrorism, the drivers behind people smuggling and trafficking, and the sophistication of organised criminal networks. The rapid development of technology is enabling advances in border management as well as opportunities for individuals or groups looking to circumvent border management systems. The Outlook also indicates that high levels of variability and uncertainty of the effects of climate change and resource constraints are presenting challenges to border management.

To address these risks and trends, border agencies work together across four environments—overseas, in the maritime zone, at the border and within Australia—that comprise the border continuum. Border agencies manage risks to Australia's border through intelligence-led risk-based interventions that place an increasing emphasis on working ahead of the border as part of a layered approach to border management. Intelligence is used to identify high risk movements and enable targeted intervention, while movements assessed as low risk are facilitated. Campaigns are undertaken to detect, deter and disrupt illicit activity, while a level of broad coverage is maintained to monitor and assess underlying rates of leakage at the border.

A number of initiatives support this intelligence led risk-based approach. In the aviation stream, initiatives such as the Next Generation Border Security (NGBS) and the Enhanced Passenger Assessment and Clearance (EPAC) assist border agencies by increasing intelligence and information sharing. This enhanced fusion of data identifies potential threats ahead of the border and provides opportunities for earlier intervention. The refined intelligence led, risk-based approach is also applied to Customs and Border Protection's cargo intervention. Finally, there is the move towards entity based targeting, which complements the intelligence led, risk-based approach and provides a more holistic view of border movements for targeting purposes. This moves away from the previous commodity based targeting that focussed on individual transactions.

The successful application of these approaches and initiatives requires a coordinated whole of government effort at the border.

[redacted]

Comment [b78]: s47C

[redacted]

Comment [b79]: s47C

BORDER PROTECTION: PEOPLE SMUGGLING

Operational issues

Separate intelligence and operational briefings on the maritime people smuggling situation have been prepared and provided to your Office by the Australian Customs and Border Protection Service.

Crew issues

There are large numbers of people smuggling crew before the courts (83 in Western Australia and 25 in Queensland) and in immigration detention being investigated for prosecution (47 on Christmas Island and 171 in Darwin).

Western Australia, Queensland and New South Wales have agreed a strategy to accept people smuggling cases for prosecution. A Senior Officials Committee including those States and has been established to coordinate arrangements for transfers of crew for prosecution. It is chaired by the Department. Queensland, New South Wales and Western Australia have raised the issue of additional funding for courts and prisons to meet the demands arising from increasing crew prosecutions. Given the growing case load, limiting prosecutions to these three jurisdictions may not be practicable.

[redacted]

Comment [b80]: s33(1)(a)(iii)

[redacted]

Comment [b81]: s33(1)(a)(iii)

Regional legal engagement

The Department is actively engaging with regional countries to develop or strengthen people smuggling laws and maximise opportunities to successfully extradite and prosecute people smugglers and their associates.

The Department's work with regional countries is well advanced. On 3 August 2010, Malaysia passed legislation comprehensively criminalising people smuggling. The Bilateral Technical Legal Working Group with Malaysia on People Smuggling and Trafficking, co-hosted by the Department, has been a valuable forum for sharing information on criminalising people smuggling. The Department also has a program of cooperation with Sri Lanka under the *Australia – Sri Lanka Memorandum of Understanding concerning Legal Cooperation against the Smuggling of Migrants*. On 27 April 2010, Indonesia introduced an Immigration Bill to parliament, containing provisions that seek to criminalise people smuggling. In addition to working with these countries, we are developing options for engaging with emerging priority countries, [redacted]

Comment [b82]: s33(1)(a)(iii)

International law issues

People smuggling may raise a number of international law issues, including consideration of Australia's *non-refoulement* obligations under the 1951 Refugees Convention and international human rights treaties. These include obligations not to return a person to a country where there are substantial grounds for believing there is a real risk that the person would be subjected to the death penalty, arbitrary deprivation of life, cruel, inhuman or degrading treatment or punishment if returned. The Office of International Law can provide advice on these issues as required.

CRIMINAL JUSTICE: HIGH PROFILE EXTRADITION REQUESTS

Issue and timing

Extradition of Mr Zentai to Hungary — Charles Zentai is 88 years old and the subject of an extradition request from Hungary. He is wanted for prosecution for a war crimes offence committed in WWII, namely his alleged involvement in the death of a person in 1944. The matter attracts significant media attention. On 12 November 2009, the Minister for Home Affairs made a determination under the *Extradition Act 1988* that Zentai should be surrendered to Hungary. Zentai challenged the Minister's surrender decision in judicial review proceedings. On 2 July 2010 the Federal Court upheld Mr Zentai's challenge on three grounds and held that the Minister's decision was not lawfully made. The Federal Court will make orders after hearing oral submissions from the parties listed for 8 November 2010. Until then, Zentai remains on conditional bail. [redacted]

Comment [b83]: s42

Extradition of Mr Snedden to Croatia — Daniel Snedden (also known as Dragan Vasiljkovic), a dual citizen of Serbia and Australia, is the subject of an extradition request from Croatia and is wanted to face prosecution for three war crimes offences allegedly committed during the conflict in the former Yugoslavia. This matter attracts significant media attention, both in Australia and overseas. Snedden was first arrested by Australian authorities in January 2006. Following numerous appeals to the extradition process, Snedden was committed to prison on 13 May 2010 to await the Minister for Home Affair's final determination whether to surrender Snedden to Croatia under section 22 of the Extradition Act. [redacted]

Comment [b84]: s33(1)(a)(iii)

Extradition of Mr Ariawan to Indonesia — Adrian Adamas (aka Adrian Ariawan), a dual citizen of Indonesia and Australia, is the subject of an extradition request from Indonesia and is wanted to serve a sentence of life imprisonment for a very serious corruption offence for which he was convicted in his absence in 2002. This matter is [redacted]

Comment [b85]: s33(1)(a)(iii) and s47F

Key messages/Action or decision required

- *Extradition of alleged war criminals* — The Australian Government takes international crime cooperation and allegations of war crimes seriously and is concerned to ensure that Australia does not become a safe haven for alleged criminals.
- *Extradition of Mr Zentai to Hungary* — decision required whether to appeal Federal Court decision
- *Extradition of Mr Snedden to Croatia* — decision required whether to surrender Mr Snedden to Croatia
- *Extradition of Mr Ariawan to Indonesia* — decision required whether to surrender Mr Ariawan to Indonesia

CRIMINAL JUSTICE: ROYAL PREROGATIVE OF MERCY APPLICATION ALLAN KESSING

Issue and timing

In 2007, Allan Kessing was found guilty under subsection 70(2) of the *Crimes Act 1914* for the unauthorised disclosure to the media of classified Customs reports on crime and security at Australia's airports. Mr Kessing has steadfastly maintained that he is innocent of the offence.

Mr Kessing has admitted that, prior to the report being leaked to the media in 2005, he met with and provided a copy of the report to Anthony Albanese's electorate officer. Mr Kessing has also informed the media that he subsequently provided Mr Albanese with information on other Customs matters. On the advice of legal counsel, Mr Kessing did not raise this at trial.

Senator Nick Xenophon wrote to the Minister for Home Affairs in October 2009 about Mr Kessing's case, but this letter was not regarded as a pardon application as it did not contain any indication that Mr Kessing wished to apply for a pardon, or disclose the grounds on which a pardon was sought. The Department commenced processing Mr Kessing's application in February 2010, upon receiving confirmation that Mr Kessing wished to proceed with the application. The grounds, as stated by Senator Xenophon, are that Mr Kessing maintains he is innocent of the offence, though he had revealed the report to his local MP.

In accordance with its usual procedure, the Department sought input from the Commonwealth Director of Public Prosecutions and the Australian Federal Police. On 21 May 2010, the Department wrote to Mr Kessing, advising him of the comments made by the agencies that may be adverse to the pardon application, and providing him with an opportunity to respond to those adverse comments. Mr Kessing has not responded to that letter. When Mr Kessing's response is received, a submission will be drafted for the incoming Minister's consideration.

The Governor-General may grant a pardon to a federal offender under the Royal Prerogative of Mercy (RPM). Section 85ZR of the *Crimes Act 1914* (Cth) provides that where a person has been granted a free and absolute pardon because they were wrongly convicted of a Commonwealth offence, they are taken never to have been convicted of the offence.

While technically the power to grant a pardon is entirely discretionary, a high threshold has been applied in the past to ascertain whether a pardon would be appropriate, given the significant consequence flowing from the grant of a pardon. In most cases, a pardon would not be recommended unless the person was morally and technically innocent of the offence, and there is no remaining avenue of appeal against conviction.

The Minister's decision on whether to recommend a pardon is not subject to judicial review.

This matter is the subject of ongoing reporting in *The Australian*, and the paper has suggested that Mr Albanese's office was the source of the leak to the media.

Action or decision required

When a response to the Department's letter of 21 May 2010 is received from Mr Kessing, a submission will be made to the incoming Minister for Home Affairs on whether to recommend to the Governor-General that she exercise the Royal Prerogative of Mercy.

EMERGENCY MANAGEMENT: CRISIS MANAGEMENT ARRANGEMENTS

Issue and timing

The Australian Government Crisis Management Framework, supporting committee structure and extant national plans reflect an "All Hazards", whole of Government response to crises. The Attorney-General is the "Minister responsible for national security".

In the event of a national security threat (such as terrorist bombing) or a natural disaster (such as cyclone) the 24/7 coordination centre within Emergency Management Australia (EMA), a Division of the Attorney-General's Department, provides immediate reporting and situational awareness of the crisis. The Office of the Attorney-General is one of the priority recipients of information and updates during a crisis.

The Australian Government Crisis Committee, comprised of relevant Australian Government agencies and chaired by the Deputy National Security Advisor is the principal official's level crisis management committee. If State and Territory representatives participate, the meeting becomes a National Crisis Committee. The meeting is normally convened by the Director-General EMA on behalf of National Security Advisor.

The management of crises is guided by extant counter terrorism and national disaster plans.

The officials' committees provide advice to the National Security Committee of Cabinet which determines the whole of government response to the crisis and approves the media strategy and talking points.

State and Territory jurisdictions are responsible for operational response to a crisis. The Commonwealth provides national coordination and support, normally at the request of and by agreement with the jurisdictions.

These arrangements have been activated for various security related incidents, the Victorian bushfires, the H1N1 Pandemic and most recently for the Samoa and Sumatra tsunami and earthquake.

The document *Australian Government Crisis Management Arrangements – A guide for Ministers* provides more detail on the arrangements.

Action or decision required

That you note these arrangements and seek an oral briefing by the Emergency Management Australia Director-General on the national crisis management arrangements soon after assuming office.

EMERGENCY MANAGEMENT: DIGITAL DIVIDEND AND PUBLIC SAFETY

Issue and timing

The Digital Dividend refers to a range within the radio spectrum (694 – 820 MHz) that will no longer be used when analogue television broadcasting ceases on 31 December 2013. It is the Government's intention to sell this spectrum.

Recent experience from other countries has shown that the coincidence of the availability of this spectrum range and technological advances provides public safety agencies with an opportunity to realise a large increase in their radiocommunications capabilities, enabling a significant increase in their operational effectiveness.

[redacted]

Comment [b86]: s47C

[redacted]

Comment [b87]: s47C

Australia's public safety agencies are being represented by the relevant peak national committees: the National Coordinating Committee for Government Radiocommunications (NCCGR) and the Law Enforcement and Security Radio Spectrum Committee (LESRSC).

Key telecommunications companies are also been engaged in relation to emergent technologies.

Action or decision required

[redacted]

Comment [b88]: s34

EMERGENCY MANAGEMENT: PARLIAMENT HOUSE BRIEFING ROOM

Issue and timing

NOTE – This brief should be read in conjunction with Other matters requiring attention brief ***Crisis Coordination Centre****.*

The 2008 Homeland and Border Security Review identified the need to improve Government's crisis management capabilities, including better facilities to support decision making. The Prime Minister's National Security Statement on 4 December 2008 also confirmed Government's intent to move to an all-hazards approach to crisis management.

In line with the recommendations of the Homeland and Border Security Review, the Parliament House Briefing Room and the Australian Government Crisis Coordination Centre will be established through the National Crisis Coordination Capability Program. The objective of the Program is to establish the mechanisms and capabilities to support a consistent whole-of-government approach to crisis management.

The Parliament House Briefing Room will be a 'networked' facility to support executive decision making through the use of information and communication technologies and will be supported by the Crisis Coordination Centre. The facility will be located adjacent to the cabinet suite, within the Ministerial Wing (Area 7 (MG18)).

In the 2008/09 Financial Year, Government approved a New Policy Proposal for the establishment of a Parliament House Briefing Room and 'critical components' of a Crisis Coordination Centre.

Construction of the Parliament House Briefing Room began on 19 April 2010 and is approximately 98 per cent complete. Construction is currently on budget and is scheduled for activation in October 2010.

To support executive decision making the Parliament House Briefing Room will provide:

- a secure meeting room to accommodate National Security Committee or Cabinet meetings, equipped with screens to display media broadcasts, imagery, video, maps and other information;
- an executive communications room that will enable discrete videoconferencing;
- a communications suite that will enable videoconferencing;
- a 'control room' to house the required support staff and information systems; and
- a checkpoint at the entrance of the facility to control entry and exit into the Parliament House Briefing Room suites and meeting room.

The Attorney-General's Department will hand over the facility to the Department of the Prime Minister and Cabinet when it is completed and approved by security accreditation agencies. After handover and approval by security accreditation agencies, the Department of the Prime Minister and Cabinet will be responsible for all Parliament House Briefing Room operations, including activation, access control and general maintenance.

Action or decision required

No action or decision is required.

EMERGENCY MANAGEMENT: RESPONSE TO THE VICTORIAN BUSHFIRES ROYAL COMMISSION FINAL REPORT

Issue and timing

The Victorian Bushfires Royal Commission's (the Commission's) Final Report was released on 31 July 2010. The majority of the recommendations contained in the report are directed at the Victorian Government. Five of the recommendations are directed at the Commonwealth and a further seven are of national interest.

The Victorian Government issued its response to the Commission's Final Report on 27 August 2010. Of particular interest to the Commonwealth is the Victorian Government's desire to retain the support of the Commonwealth and other jurisdictions to implement the next stage of the national telephone emergency warning system (see separate brief) and to work with the Commonwealth to create a new Centre for Fire Excellence to further bushfire research.

Prime Minister Julia Gillard committed to the development of a national bushfire awareness campaign and to provide national leadership on bushfire research in collaboration with other Australian jurisdictions in her election statement "A secure and Fair Australia". These commitments support recommendations 65 and 7 made by the Commission in their final report.

A separate submission including a copy of the draft Commonwealth response to the Commission's Final Report is being prepared and will be supplied on appointment.

The Commission also released two interim reports. The first interim report released 17 August 2009 contained 51 recommendations, five were directed at the Commonwealth. These primarily related to the delivery of emergency warnings and the provision of operational assistance to jurisdictions in the event of a disaster. The Commonwealth provided its response to the first interim report on 31 August 2009.

The Commission's second interim report released on 24 November 2009 focused on building issues in bushfire prone areas. The Commonwealth responded on 25 November 2009.

On 7 April 2010, the Commonwealth provided an update to the Commission on its progress in implementing the recommendations contained in the interim reports.

A National Emergency Management Committee (NEMC) teleconference was held on 6 August 2010 to identify issues of national significance emerging from the Commission's Final Report, on which NEMC could provide strategic national leadership and that could ultimately be included in the NEMC forward work plan.

Timing – The Commonwealth has previously publicly committed to cooperate and assist the Commission with its inquiry. A timely response to the Commission's final report will support this commitment.

Action or decision required

- That you seek agreement from your Ministerial colleagues to release the draft Commonwealth response to the Commission's final report.

EMERGENCY MANAGEMENT: LOCATION-BASED MOBILE TELEPHONE WARNING SOLUTION

Issue and Timing

On 30 April 2009, the Council of Australian Governments (COAG) agreed to develop a telephone-based emergency warning system capable of sending messages to fixed line and mobile telephones based on the customer's registered service address. The Commonwealth provided $15.65M funding to the States and Territories to develop the national system, Emergency Alert, which was operational on 1 December 2009. The Commonwealth owns and maintains the data source for Emergency Alert, and for Western Australia's system StateAlert (at a cost of $9.3M until 2012-13).

The COAG also agreed that research be undertaken into the feasibility of establishing a capability to deliver warnings to mobile telephones based on the location of the mobile telephone handset at the time of an emergency. The Commonwealth provided $1.35M to the States and Territories to undertake the research, which has established that it is technically feasible. On 30 July 2010, the Hon John Brumby, MP, Premier of Victoria, wrote to COAG members, providing the report on feasibility. The report was to be considered by COAG out-of-session, but this has not occurred given that the election was called and COAG could only agree to develop a national capability if a model for funding had been agreed.

The first interim report of the Victorian Bushfires Royal Commission VBRC called for implementation of the capability for the 2009-10 bushfire season, with involvement from the Australian Government, COAG and Victoria. On 27 August 2010, Premier Brumby released his Government's response to the (VBRC) final report. As part of that response, the Victorian Government has called for urgent action, including funding from the Commonwealth Government, to enable the development of the capability for deployment during the upcoming 2010-11 disaster season. Contract negotiations with the mobile telecommunications carriers need to commence as soon as possible, [redacted]

Comment [b89]: s45 and s47G

There are sound arguments for Commonwealth intervention including ensuring that the capability is developed nationally, to achieve consistency, equity for the smaller states and surety for the public that warnings can be provided to them, regardless of which state or territory they live in, are travelling through. [redacted]

Comment [b90]: s47C

Action or decision required

- That you urgently seek a decision from the Prime Minister as to Commonwealth support, and ensure the decision is urgently conveyed to COAG members.
- If the Commonwealth commits to providing funding for the establishment costs, then you will need to bring forward a submission to the Cabinet Expenditure Review Committee.

EMERGENCY MANAGEMENT: SAFETY AND SECURITY OF AUSTRALIANS AT THE COMMONWEALTH GAMES

Issue and timing

[redacted]

Comment [b91]: s33(1)(a)(iii)

Australian Government agencies, led by Department of Foreign Affairs and Trade (DFAT), are putting in place arrangements to monitor and promote the safety and security of Australians attending the Games. These will also enable the Australian Government to respond as effectively as possible in the event of an emergency.

The Attorney-General's portfolio is contributing personnel (from Emergency Management Australia's Security Coordination Branch, the Australian Federal Police and ASIO) to both the DFAT Canberra-based Commonwealth Games Task Force and to the whole-of-government deployment to Delhi for the Games.

Security or safety incidents in India in the lead-up to the Commonwealth Games are likely to generate a high level of media attention. The DFAT Travel Advice for India remains the primary source for Government communication with Australians attending the Games, including athletes and Games officials, and the basis for whole-of-government Talking Points.

Action or decision required

A more comprehensive submission will be provided at the first available opportunity.

EMERGENCY MANAGEMENT: WIRELESS PRIORITY SERVICE SYSTEM

Issue and timing

There is a public expectation that the current Wireless Priority Service System (WPSS) will be will be upgraded onto the Telstra 3G mobile network over a two year period by June 2011. This cannot be achieved by this time because of technical issues. [redacted]

Comment [b92]: s45 and s47C

The WPSS facilitates nationwide end-to-end priority mobile phone connectivity to authorised users on the Telstra 2G mobile phone network. It is currently available for up to 1000 authorised users nationwide, including the Prime Minister, Cabinet Ministers, and key decision-makers and emergency responders at both Commonwealth and State/Territory level.

Additional funding of $6.8 million was announced in the 2009-10 Budget to replace the existing 2G capability with a technically superior 3G mobile network that would enable more users and enhanced functionality. This was reiterated in the October 2009 Ministerial Statement on Commonwealth preparation for the bushfire season.

[redacted]

Comment [b93]: s45 and s47C

The Department will submit, as a matter of priority, options to you about the future of this system.

Action or decision required

Brief provided for noting.

NATIONAL SECURITY: COUNTERING VIOLENT EXTREMISM – COMMUNITY ENGAGEMENT

Issue and timing

On 8 July Attorney-General McClelland met with representatives from communities in Western Sydney (primarily representatives from the Muslim community) to discuss the Government's countering violent extremism strategy. The Attorney-General indicated that a series of community engagement meetings would be conducted to ensure that community representatives had input into the development of the strategy.

Further meetings were deferred until after the 2010 election.

There is an expectation among Sydney's Muslim community, in particular, that the Attorney-General will continue to hold community engagement forums after the outcome of the 2010 election.

There is also an expectation that the Attorney-General will release the findings of the Lexicon project which collected and assessed community views about the use of language in terrorism discourse. The findings have formed the basis for a language guidance note designed to inform government officials about the impact of language when discussing terrorism. There is strong support among Australia's multicultural community, and particular the Muslim community, for this work. Media commentary at the time of the project's launch was critical of any work designed to impose any limitations on the use of language. The language guidance note has been crafted to be informative rather than prescriptive.

The research report and language guidance note have been finalised and the content approved by the Attorney-General. Any public release of the research report or guidance note will need to be coordinated with the Victorian Premier as this project was the result of collaboration between the Victorian Government and the Attorney-General's Department.

Countering violent extremism is ALP policy. As part of the 2010 Budget announcements, $9.7 million was allocated to a countering violent extremism program. The Budget allocation was in response to the Counter-Terrorism White Paper released in February 2010 that identified home grown terrorism as a significant risk to Australia's national security.

Action or decision required

- A decision as to whether to continue to hold community engagement forums and the timing for future forums will need to be made soon after the appointment of an Attorney-General. Community expectations have been raised and ongoing dialogue with community representatives indicates that they will be watching the Attorney-General very carefully to ensure that he delivers on his commitment to consult with communities on the Government's countering violent extremism strategy. It was made clear to the Attorney-General that community engagement needs to be sincere and ongoing in order for it to be effective. To that end, a decision made soon after the appointment of an Attorney-General will be an important signal to communities.
- A public release of the Lexicon research report and language guidance note was delayed because of the election. There is an expectation on the part of Victoria and the communities that were involved in the project that the public release will occur soon.

NATIONAL SECURITY: DATA RETENTION CONSULTATION AND FOI REQUESTS

Issue and timing

Telecommunications data is information about a communication, but does not include the content of the communication. Examples include subscriber information and call charge records.

Access to telecommunications data for national security and law enforcement purposes is regulated by the *Telecommunications (Interception and Access) Act 1979*, which permits agencies to authorise the disclosure of telecommunications data where it is reasonably necessary for the enforcement of the criminal law, a law imposing a pecuniary penalty, or the protection of the public revenue. There is no obligation for carriers/carriage service providers (C/CSPs) to retain this information.

The Department has been consulting with industry and the Office of the Privacy Commissioner on the proposed elements of a mandatory data retention regime since August 2009. In June 2010, consultation documentation was leaked to the media resulting in FOI requests from journalists for the documentation and an Inquiry by the Senate Standing Committee on Environment, Communications and the Arts into the adequacy of protections for the privacy of Australians online. The Inquiry has a reporting date of 20 October 2010, with submissions closing on 23 July 2010. This issue will need to be referred to Senate Committee following the commencement of the new Parliament.

The majority of information requested under the FOI requests was not released as it was created for the purposes of the deliberative processes of the Department and the Government. As the matters were not settled, the release of the information may lead to unnecessary concern and disclosure of the methods and procedures used by law enforcement agencies for investigating breaches of the law.

[redacted]

Comment [b94]: s47C

Media articles have indicated that Senator Ludlam will be seeking the "censored" documents, and all related documentation to be released publicly in an unchanged form as part of the Senate Inquiry.

[redacted]

Comment [b95]: s47C

This issue has attracted considerable online media interest and is likely to gain further attention as a result of the Senate Inquiry.

Action or decision required

Note the information provided.

NATIONAL SECURITY: FERNANDES AAT APPEAL

Issue and timing

Dr Fernandes has sought review in the AAT of a decision by the National Archives of Australia not to release certain documents on the basis that their disclosure could damage Australia's security, defence or international relations.

[redacted]

Comment [b96]: s42 and s47F

[redacted]

Comment [b97]: s42

[redacted]

Comment [b98]: s42 and s47F

Action or decision required

[redacted]

Comment [b99]: s42 and s47F

NATIONAL SECURITY: HABIB CASE

Issue and timing

Litigation involving Mr Habib and the Commonwealth has been ongoing since 16 December 2005. Mr Habib's claim involves the following three allegations:

1. Commonwealth officers committed the tort of *misfeasance* in public office by aiding and abetting a breach of Australian criminal law, namely the Crimes (Torture) Act, the Criminal Code or the Geneva Conventions Act, by the Pakistan, Egyptian and US Governments (i.e. an action against the holder of a public office, alleging in essence that the office-holder has misused or abused his or her power). Mr Habib alleges that, for example, an Australian officer was present when he was forcibly removed to Egypt, and that Australian officials provided information to Egyptian officials, which they knew, or should have known, would be used by Egyptian officials in the course of interrogating him in a way involving maltreatment and torture.
2. These same acts were calculated to cause Mr Habib psychiatric or physical injury and therefore constituted the tort of *harassment* (the intentional but indirect infliction of harm).
3. Mr Habib was *defamed* by Commonwealth officers in Pakistan, Egypt and Guantanamo Bay, by speaking or publishing words to the effect that he was a terrorist, among other things, which has injured his character credit and brought his reputation into disrepute.

The Commonwealth denies Mr Habib's claims.

On 1 July 2010 the Commonwealth filed its defence to Mr Habib's claim in accordance with court orders. The defence was settled by the Solicitor-General.

At the Directions Hearing in the Federal Court on 21 July 2010, Justice Perram asked the parties to indicate whether they consented to a mediation occurring on 4 and 5 November 2010 before the next Directions Hearing. The next directions hearing is on 23 September 2010. Agreeing to mediation would not admit any liability on the part of the Commonwealth.

[redacted] Mr Habib's civil matter is expected to take place in the Federal Court in 2011.

Comment [b100]: s42

Separately, Mr Habib also has proceedings underway in relation to his applications for an Australian passport. In 2007 Mr Habib commenced action seeking a review of the Foreign Minister's refusal to issue him with a passport. The matter was remitted by consent back to the AAT from the High Court and has been listed before the AAT on 15 September 2010. In 2009, Mr Habib lodged a new application for an Australian passport. The Minister for Foreign Affairs made a decision in respect of this new application on 25 August 2010 refusing Mr Habib's passport application based on an adverse security assessment from ASIO.

Mr Habib's claims attract significant media attention.

Action or decision required

- Authority to continue with next steps, including Commonwealth participation in mediation on 4 and 5 November 2010.
- The key message for responding to any media queries is:
  - Mr Habib's claims are ongoing and the Government is defending these claims.
  - As the claims are before the Court, it would not be appropriate to comment further.

NATIONAL SECURITY: HANEEF CASE

Issue and timing

Dr Haneef's lawyers, Maurice Blackburn, have filed the following claims for compensation, for the purpose of entering into negotiations on a without prejudice basis with the Commonwealth.

1. *Defamation*. This claim is against Kevin Andrews as former Minister for Immigration and Citizenship, for statements he made about Dr Haneef.
2. *Wrongful arrest, false imprisonment and malicious prosecution*. This claim is against the Commonwealth. Dr Haneef claims his initial arrest (and his detention that followed) was unlawful as the arresting officer suspected but did not believe, as required by law, that Dr Haneef had committed an offence. Dr Haneef also claims he was charged without any reasonable basis, thereby setting in train the prosecution process.

However, Maurice Blackburn has not formally served the claims on the Commonwealth or Mr Andrews. This means the usual court processes that follow the filing of a claim have not commenced.

[redacted]

Comment [b101]: s47F

The Commonwealth has instructed the Australian Government Solicitor (AGS) to act for the Commonwealth [redacted]

Comment [b102]: s42

The claim against Mr Andrews

On 15 June 2010, Mr Andrews wrote the Attorney-General seeking legal assistance under Part 3 of the Parliamentary Entitlements Regulations. [redacted] The grant of legal assistance to Mr Andrews was approved on 27 July 2010. A letter was sent to the shadow Attorney-General notifying him of the decision.

Comment [b103]: s47F

Next Steps

[redacted]

Comment [b104]: s42 and s47C

[redacted]

Comment [b105]: s42 and s47C

HOT ISSUES

CIVIL JUSTICE AND LEGAL SERVICES GROUP

DEPUTY SECRETARY – ELIZABETH KELLY

Access to Justice

- Access to Justice Agenda

International Law

- Afghanistan: Detainee Management Arrangements
- Case Against Japan over Whaling

Legal Services

- Response to Blunn/Krieger and AGS Reform

Legislation and litigation

- Legislation establishing military court/restructure Family Court
- Native title litigation
- Native Title – Kimberley Gas Hub
- Salo litigation

ACCESS TO JUSTICE: ACCESS TO JUSTICE AGENDA

Issue and timing

In January 2009, Attorney-General McClelland established a Departmental Access to Justice Taskforce to examine the federal civil justice system and develop a strategic approach to access to justice issues. The Taskforce released its report on 23 September 2009. Implementation is ongoing, with the majority of the recommendations already progressed. The Government adopted the Strategic Framework for Access to Justice, and in November 2009, the Standing Committee of Attorneys-General (SCAG) Ministers endorsed the Framework's principles. Key measures include a launch of the Access to Justice website, establishment of the Human Rights and National Indigenous Law and Justice Frameworks and references to the National Alternative Dispute Resolution Advisory Council.

[redacted]

Comment [b106]: s47C

[redacted]

Comment [b107]: s47C

[redacted]

Comment [b108]: s47C

INTERNATIONAL LAW: AFGHANISTAN: DETAINEE MANAGEMENT ARRANGEMENTS

Issue and timing

Australian forces operate in Oruzgan Province in Afghanistan. Until 1 August 2010, the Dutch were the lead nation in Oruzgan Province. Australia's previous practice was to transfer detainees captured by the ADF in Afghanistan to the Dutch, who took full responsibility for the detainees.

However, on 1 August 2010 the Dutch commenced withdrawing their military forces from Afghanistan and ceased accepting the transfer of ADF-apprehended detainees.

Since that time Australia has operated under interim detainee management arrangements approved by the Minister for Defence in consultation with the Minister for Foreign Affairs and Trade and Attorney-General. The then Shadow Minister for Defence, Senator Johnston, was also consulted and agreed with the proposed approach. The interim arrangements were intended to apply until the incoming Government can consider ongoing arrangements.

The interim detainee management arrangement involves the transfer of most detainees to Afghanistan. Australia has concluded a bilateral arrangement with Afghanistan concerning the treatment of transferred detainees, including assurances provided by Afghan authorities in respect of the humane treatment of detainees and a right of access for Australian officials and humanitarian organisations such as the International Committee of the Red Cross. Interim guidelines on monitoring of detainees transferred by the ADF have also been established.

Further details of these arrangements cannot be provided in this unclassified brief. A separate classified briefing can be provided if required.

On 1 September 2010, the Australian Greens and the Australian Labor Party agreed to a full parliamentary debate on the war in Afghanistan. Public statements by the Greens suggest that such a debate would focus on the reasons for Australia's involvement in Afghanistan rather than specifically on detainee issues. The Australian Greens policy calls for immediate withdrawal of Australian forces from Afghanistan.

Action or decision required

No decisions are immediately required. However, ongoing detainee management arrangements to replace the interim arrangements should be considered by the new Government. The Office of International Law will shortly provide more detailed briefing on this.

INTERNATIONAL LAW: CASE AGAINST JAPAN OVER WHALING

Issue and timing

On 31 May 2010 the Australian Government initiated legal proceedings in the International Court of Justice (ICJ) against Japan challenging Japan's whaling program in the Southern Ocean.

The primary remedy sought is a cessation of the 'Second Phase of Japanese Whales Research Program under Special Permit in the Antarctic' (JARPA II) – that is, Japanese so-called 'scientific' whaling in the Southern Ocean. The causes of action upon which Australia relies are breaches by Japan of the moratorium on commercial whaling established under the International Convention for the Regulation of Whaling, the Convention on the International Trade in Endangered Species of Wild Fauna and Flora, the Convention on Biological Diversity and customary international law.

By an Order of 13 July 2010, the ICJ fixed 9 May 2011 as the time-limit for the filing of a Memorial (written pleadings) by Australia, and 9 March 2012 as the time-limit for the filing of a Counter-Memorial by Japan. After all written pleadings are received by the ICJ, an oral hearing of the merits of the case will take place in The Hague. [redacted]

Comment [b109]: s42 and s47C

In addition to the Solicitor-General and General Counsel (International Law), Australia has engaged three eminent international lawyers to act as counsel in the case – [redacted] Bill Campbell QC, General Counsel (International Law) of the Office of International Law in the Attorney-General's Department, and HE Lydia Morton, Ambassador of Australia to the Kingdom of the Netherlands, were appointed to act as Australia's Agent and Co-Agent in the case.

Comment [b110]: s47F

There has been extensive media coverage of the Government's decision, and some countries have expressed some concern about Australia seeking to resolve this matter through the ICJ, rather than through diplomatic means, [redacted] Nevertheless, this course of action has been supported by a number of countries and has been welcomed by the NGO community. [redacted]

Comment [b111]: s42 and s47C

Comment [b112]: s33(1)(a)(iii)

Action or decision required

There are no actions or decisions requiring immediate attention.

LEGAL SERVICES: RESPONSE TO BLUNN/KRIEGER AND AGS REFORM

Issue and timing

The Labor Government has been criticised for failing to deliver on a 2007 election promise to cut legal expenditure by over $15m per year.

In March 2009, the then Attorney-General commissioned a review of Commonwealth legal services procurement. The *Report of the Review of Commonwealth legal services procurement* (the Blunn Krieger report) was publicly released on 8 January 2010. No Government response has yet been made to the Report. The key recommendations are:

- That a more coordinated approach be taken to the procurement of legal services;
- That action be taken to better support agency in-house practices in the delivery of legal services and the management of external providers; and
- That a more coordinated and strategic approach be taken to the management of legal risk and legal issues across the Commonwealth.

Both the Blunn Krieger report and the 2008 organisational audit of the Department (the Beale review) comment on the position of the Australian Government Solicitor and the difficulties arising from its separation from the Department in 1999, particularly the diminution of a whole-of-government and coordinated approach to the delivery of legal services and the management of legal issues and risk. These issues have been discussed in the media (AFR, *Future role of AGS under consideration*, 5 February 2010; The Australian, *A-G Office Virtually Powerless*, 1 March 2010 and *'A-G to overhaul Department'*, 2 March 2010, The Australian, *Canberra plans new rules on buying legal services*, 4 June 2010).

A working group of Commonwealth agency General Counsel has been established to take forward consideration of the bulk of the Report's recommendations, including options for more coordinated procurement. Its first meeting was on 10 August 2010.

Legal services expenditure in 2008-09 was $555 million, a comparative increase of 1.3% on the previous financial year. Reform initiatives introduced in the past 18 months have focussed on improving efficiency and value for money including: greater transparency through a mandatory reporting format for agency legal expenditure; common tender documentation for agencies seeking to purchase legal services; and encouraging the use of alternative dispute resolution.

Key message

[redacted]

Comment [b113]: s47C

LEGISLATION AND LITIGATION: MILITARY/FAMILY COURT RESTRUCTURE

Issue and timing

After a public announcement by the Attorney-General and Defence Minister on 24 May 2010, Bills to restructure the Family Court of Australia and to create the new Military Court of Australia were introduced into Parliament on 24 June 2010, and referred to the Senate Legal and Constitutional Affairs Legislation Committee. Only one submission was received on the Military Court Bill before Parliament was prorogued, the Bills lapsed and the Committee decided not to continue inquiries into these Bills. If re-introduced the Bills may again be referred to the Senate Committee for consideration.

If re-introduced, the Access to Justice (Family Court Restructure and Other Measures) Bill 2010 will implement the restructure of the Family Court to make the Family Court the single court dealing with family law matters. Federal Magistrates (FMs) currently exercising family law jurisdiction will be offered commissions to the new General Division of the Family Court. The Federal Magistrates Court will be retained to hear general federal law matters. FMs with the requisite experience may also be offered dual commissions to the Military Court.

Comment [b114]: s47C

[redacted]

Comment [b115]: s47C

The 2009-10 Budget reflected the $6 million savings to be achieved over four years by combining the administrative functions of the family courts. Of this, $1.5 million over the four years is to be reinvested into family consultant services.

If re-introduced, the Military Court of Australia Bill 2010 will establish the Military Court as a Chapter III court and provide a permanent solution for the handling of service offences. The Bill provides for the structure, jurisdiction, practice and procedure of the Military Court, which will try serious service offences. Judicial officers of the Court will be required to have experience or knowledge of the nature of service in the Australian Defence Force and will usually hold a dual commission to another federal court. Consequential amendments and transitional provisions have been drafted during the caretaker period and will also be introduced with this Bill. The FMC and the Military Court will be separate financial and reporting agencies assisted in their administration by the Federal Court under a shared services model.

The Opposition has indicated that it does not support the Family Court restructure.

Action or decision required

- Whether to reintroduce the Access to Justice (Family Court Restructure and Other Measures) Bill 2010 and the Military Court of Australia Bill 2010 and request that the Senate Legal and Constitutional Affairs Legislation Committee consider these Bills again. Further information on Bills can be found in the **Priority/Time Critical Legislation** brief.

[redacted]

Comment [b116]: s47C

LEGISLATION AND LITIGATION: NATIVE TITLE LITIGATION

Issue and timing

A number of native title matters to which the Commonwealth is a party require urgent attention. Full briefing on possible actions will be provided shortly in relation to each of these matters.

Gunai/Kurnai Peoples – Victoria has agreed to settle the claim by way of payment of financial benefits and a consent determination recognising native title over part of the claim area. The Commonwealth has contributed towards the financial benefit component as part of its agreement to provide funding towards Victoria's Native Title Settlement Framework. Victoria is seeking for the Commonwealth to enter into a consent determination prior to the Victorian Government entering Caretaker mode in late September.

Bardi Jawi Appeal – The Full Federal Court handed down its decision in the Bardi Jawi native title claim on 18 March 2010. The Commonwealth was unsuccessful in the arguments it put before the Court and the Full Court overturned the first instance judge's decision. Final orders were made on 18 August 2010. Parties have 28 days in which to file a Special Leave application to the High Court.

Torres Strait Regional Sea Claim – The Federal Court (Finn J) handed down its decision in the Torres Strait Regional Sea native title claim on 2 July 2010. The Court found that non-exclusive native title rights existed, including a right to take marine resources for commercial purposes, subject to compliance with the law. Final orders were made on 23 August 2010. Parties have 21 days from the making of those orders to appeal to the Full Federal Court.

Antakirinja Matu Yankunytjatjara – The Federal Court (Mansfield J) made an interlocutory decision to remove two deceased named applicants from a native title determination application without a corresponding application under s 66B of the *Native Title Act 1993*. The Commonwealth has filed a notice of motion seeking leave to appeal that decision, and the matter has been listed for directions on 29 September 2010.

Action or decision required

[redacted]

Comment [b117]: s47C

Comment [b118]: s47C

Comment [b119]: s47C

Comment [b120]: s47C

LEGISLATION AND LITIGATION: NATIVE TITLE—KIMBERLEY GAS HUB

Issue and timing

On 2 September 2010, WA Premier Mr Colin Barnett announced the State would begin a formal compulsory acquisition process for land in James Price Point, near Broome, for a multi-user liquefied natural gas precinct. The project is expected to generate significant revenues for the Commonwealth.

Mr Barnett said WA would prefer an Indigenous Land Use Agreement (ILUA) with native title claimants, but if that was not possible, would like a negotiated outcome consistent with its April 2009 Heads of Agreement with the Kimberley Land Council (KLC) and Woodside. This $1 billion deal, to be formalised in an ILUA, includes housing, health, employment, training and education opportunities for Indigenous people in the Kimberley.

[redacted] Mr Barnett estimated the entire process could take up to 18 months. In this time, it is also possible for an ILUA to be concluded, and Mr Barnett has stated that this option remains his preference.

Comment [b121]: s47C

[redacted]

Comment [b122]: s47C

[redacted]

Comment [b123]: s47C

Woodside has confirmed that it remains ready to deliver on its commitment to Indigenous people in the Kimberley as outlined in the April 2009 Heads of Agreement and will continue to work towards making a final investment decision on the site by mid 2012.

While not a party to the ILUA negotiations, the Commonwealth Government has engaged in separate discussions with the KLC about future prioritisation, design and delivery of programs in the Kimberley. It has also committed in excess of $340 million to be spent over four years addressing Indigenous disadvantage in the Kimberley region. The Commonwealth and WA governments are currently working together on a strategic assessment under the EPBC Act, as well as a formal assessment of the National Heritage values to identify areas which may warrant recognition and protection. The final assessment is expected to be provided by 30 June 2011.

Action or decision required

The Department is consulting with other Commonwealth departments (Resources, Energy and Tourism, FaHCSIA) and the WA Government to assess what further steps can be taken to promote a timely, negotiated outcome. [redacted]

Comment [b124]: s47B and s47C

LEGISLATION AND LITIGATION: SALO LITIGATION

Issue and timing

In April 2010 the film *Salo* was classified R18+ by the Classification Board, allowing its release in Australia. That classification was upheld by the Classification Review Board following a request for review by the Minister for Home Affairs. The film had previously been Refused Classification from 1975 until 1993 and again from 1998 until this decision. The decision received strong criticism from FamilyVoice Australia, the Australian Christian Lobby and Senators Julian McGauran and Guy Barnett. FamilyVoice Australia has appealed the Review Board's decision in the Federal Court under the *Administrative Decisions Judicial Review (ADJR) Act 1975*.

A First Directions hearing was held on 29 July 2010. AGS appeared for the members of the Classification Review Board. AGS advised the Federal Court that there were no instructions from the Commonwealth as to whether the Commonwealth or a relevant Minister would be minded to intervene, because the Government was in caretaker mode. By agreement, the matter was stood over until 9 September 2010.

[redacted]

Comment [b125]: s42

[redacted]

Comment [b126]: s42

[redacted]

Comment [b127]: s42

Action or decision required

[redacted]

Comment [b128]: s42

HOT ISSUES

PRIORITIES AND COORDINATION GROUP

DEPUTY SECRETARY – RENEE LEON

Constitutional Policy

- Constitutional Litigation

CONSITUTIONAL POLICY: CONSTITUTIONAL LITIGATION

Issue and timing

The Attorney-General typically receives notices daily of cases in Australian courts raising constitutional issues. The question whether the Attorney should intervene in a particular case, on behalf of the Commonwealth, may require a decision as a matter of some urgency.

[redacted]

Comment [b129]: s47C

Under arrangements approved by consecutive Attorneys-General, the Australian Government Solicitor (AGS) will assess constitutional issues raised by a notice under section 78B and make a recommendation on intervention. A decision against intervention currently requires the agreement of the Solicitor-General, AGS and the Constitutional Policy Unit in the Department. In contrast, a recommendation for intervention is put to the Attorney-General. In each case, other Commonwealth agencies with a particular policy interest in the matter are consulted.

Where the Attorney-General has intervened or is a party, but the Commonwealth's submissions have not already been filed, it is proposed they be settled and filed consistently with the approach approved by the previous Attorney-General and in consultation with the Department. More detailed briefing will shortly be provided about these general arrangements.

On 24 and 25 August, the High Court heard the challenge to the non-statutory scheme used to assess whether 'offshore entry persons' (people who land on Christmas Island or other areas excised from the migration zone) are refugees. These people are not permitted to apply for visas under the *Migration Act* unless the Immigration Minister 'lifts the bar' to such applications in their favour on public interests grounds under s 46A of the Act. The Minister does so if a DIAC officer determines that an 'offshore entry person' meets the definition of a refugee under the international *Refugee Convention*. DIAC officers' assessments are made in accordance with departmental guidelines and subject to independent merits review by contract reviewers with relevant expertise. Further briefing in relation to this particular matter will be provided as required.

The previous Attorney-General also intervened in the High Court challenge to the validity of theft and conspiracy provisions of the Victorian *Crimes Act* as they apply to property which Customs has seized and which has been forfeited to the Commonwealth. The challenge is based on an argument that the Victorian offences are inconsistent, under s 109 Constitution, with parallel 'theft of Commonwealth property' provisions of the Commonwealth *Criminal Code*. The High Court heard this case on 31 August. Separate briefing will be provided if further decisions in relation to a matter are required.

Action or decision required

Your agreement is sought to continue the general arrangements outlined above pending more detailed briefing.

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