National Association of Community Legal Centres (NACLC)
Tel: 61 2 9264 9595
Fax: 61 2 9264 9594
Email: naclc@clc.net.au
Mail: PO Box A2245 Sydney South NSW 1235 Australia

Submission

To the Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the National Security Legislation Amendment Bill 2010

30 April 2010

Acknowledgements

This submission has been prepared for the National Associations of Community Legal Centres by the Federation of Community Legal Centres (Victoria) using previously material prepared by the Federation of Community Legal Centres (Victoria) and Community Legal Centres NSW and member Community Legal Centres.

This submission is made on behalf of the National Association of Community Legal Centres.

Contents

Acknowledgements 2

Contents 3

About Community Legal Centres - Community, Compassion, Justice 4

About the National Association of Community Legal Centres 4

Executive Summary 5

Schedule 1 - Treason and urging violence 7

Schedule 2 - Terrorism 8

Schedule 3 – Investigation of Commonwealth offences 9

Schedule 4 – Powers to search premises in relation to terrorism offences 10

Schedule 5 - Re-entry of premises in emergency situation 10

Schedule 6 – Amendments relating to bail 10

Schedule 7 - Listings under Charter of United Nations Act 1945 10

Schedule 8 – Amendments relating to the disclosure of national security information in criminal and civil proceedings 11

About Community Legal Centres - Community, Compassion, Justice

Community Legal Centres are independent, community organisations that provide free legal services to the public.

Community Legal Centres are located throughout Australia in urban, regional and remote locations. They are part of their communities and they respond to their communities.

Community Legal Centres are able to offer effective and creative solutions to legal problems based on their experience within their community. It is the community relationship that makes Community Legal Centres vital organisations able to respond to the needs of their community as these needs arise and change. It is the relationship with their community that distinguishes Community Legal Centres from other legal services.

While providing legal services to individuals, Community Legal Centres also work beyond the individual. Community Legal Centres undertake community development, community legal education and law reform projects that are based on client need, that are preventative in outcome and that strengthen the community they serve.

The clients of Community Legal Centres are those who face economic, social or cultural disadvantage and whose life circumstances are often affected entirely by their legal problem.

Community Legal Centres harness the energy and expertise of thousands of volunteers across the country. Community Legal Centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for their clients and the system of justice in Australia.

Community Legal Centres are about Justice and not simply the law.

About the National Association of Community Legal Centres

The National Association of Community Legal Centres is the peak body for Community Legal Centres in Australia and the association of state community legal centre organisations in Australia. Its members are:

- Australian Capital Territory Association of Community Legal Centres
- Community Legal Centres NSW
- Northern Territory Association of Community Legal Centres
- Queensland Association of Independent Legal Services
- South Australian Council of Community Legal Services
- Tasmanian Association of Community Legal Centres
- Federation of Community Legal Centres (Victoria)
- Community Legal Centres Association (Western Australia)

Together, these organisations represent around 200 Community Legal Centres nationally.

Executive Summary

We appreciate the opportunity provided by the Senate Standing Committee on Legal and Constitutional Affairs to comment on the *National Security Legislation Amendment Bill 2010* (hereafter "the Bill").

Our organisations provided a joint and detailed submission to the Attorney-General's Department in response to the Discussion Paper, National Security Legislation. The Federation also provided a detailed submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Anti-Terrorism Laws Reform Bill 2009 which was referred by that Committee to the Attorney-General's consultation process. Whilst we seek to provide the committee with an outline of our concerns about the Bill in this letter, we refer the committee to both of these submissions for the detailed arguments contained therein.

In our response to the *National Security Legislation, Discussion Paper on Proposed Amendments* we commended the government for providing the public with a detailed discussion paper and an opportunity to provide input. Whilst significant issues were raised by the vast majority of submissions to that consultation process, it appears that few changes were made to the draft *National Security Legislation Amendment Bill 2009*, before it was as tabled in Parliament in March 2010 as the *National Security Legislation Amendment Bill 2010*. As a consequence, we do not believe that our views and those of others with similar concerns have been understood and given due consideration as part of the consultation process undertaken by the Attorney-General's Department.

In particular, our submission raised concerns about the failure of governments and policy makers to understand and address the negative impact of Australia's counter-terrorism laws, policies and practises upon communities who are directly or indirectly affected by counter-terrorism laws. The Attorney-General's second reading speech for the *National Security Legislation Amendment Bill 2010* provides that, "The proposed amendments included in this package are designed to give the Australian community confidence that our counterterrorism laws are precise, appropriately tailored and that our law enforcement and security agencies have the investigative tools they need to counter terrorism." This statement provides no indication of any understanding or consideration of the unintended and negative consequences of the current laws upon particular communities.

A recently published report of a forum convened in 2008 by the Federation and others *Is Community a Crime?* highlights some of the concerns raised by representatives from the Muslim, Kurdish, Tamil and Somali communities about the anti-terror laws at that time, including:

- Communities felt concerned about the breadth of the investigative and policing powers provided to authorities such as the Australian Federal Police (AFP);
- Communities felt targeted by Australian Security Intelligence Organisation (ASIO) and/or the AFP and that there had been a misuse of power by these authorities;
- Communities felt that the Australian government acted in the interests of other foreign governments in its application of the legislation. For example, the Turkish and Sri Lankan governments pushed Australia strongly to treat the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) respectively as 'terrorist organisations';
- Communities felt afraid to provide assistance to family and friends in their countries of origin for fear of being accused of providing assistance to alleged 'terrorist organisations'. This fear was more prominent in relation to conflicts where a group such as the PKK or the LTTE were fighting for a separate state; and
- Communities felt intimidated when attending community events for fear that the authorities were incorrectly characterising such events as 'terrorist organisation' events.

We provide this report to the committee and trust that it will be given due consideration as part of this inquiry.

Furthermore, the *National Security Legislation Amendment Bill 2010* does not address other significant concerns raised in our previous submissions about Australia's counter-terrorism response including:

- the breadth of laws;
- the proportionality of the restrictions on rights and freedoms when compared to publicly available information about the threat posed;
- the lack of evidence to suggest that ordinary criminal laws are insufficient to respond to the threat posed;
- a lack of consistency with general legislative and international law and human rights principles; and
- a lack of consistency with the government's commitment to "evidence-based policy" and transparency in government.

Nor does the Bill appear to concord with the government's stated objectives of "preserving the values and freedoms that are part of the Australian way of life" or "ensuring the laws and powers are balanced by appropriate safeguards", as is the government's stated objective.[1]

We note the Attorney-General's comments in April 2010 as part of Australia's Human Rights Framework that, "The Government is committed to ensuring that its national security laws and powers contain appropriate safeguards and are accountable in their operation. … Human rights obligations will also be taken into account as a part of a further review of counter-terrorism laws, which is expected to commence in December 2010." We are concerned that the Bill does not take into account Australia's human rights obligations. We urge the committee to ensure that aspects of this Bill are not enacted where appropriate safeguards are not in place or where human rights obligations are clearly abrogated.

[1] Comprehensive Response to National Security Legislation Reviews, News Release, Attorney-General The Hon Robert McClelland MP, 23 December 2008.

Schedule 1 - Treason and urging violence

Community Legal Centres maintain that the treason and sedition offences should be repealed in their entirety. It is our view that these offences are not appropriate in a modern, democratic and culturally diverse society that values freedom of speech and freedom of association. These offences fail to recognise that we live in highly pluralistic society which includes an immense variety of divergent political opinions and allegiances. It is for these reasons that we support paragraphs 3, 9 and 11 and consequential amendments.

We do not support paragraphs 15 and 35 which propose to create new offences. We are particularly concerned about the inclusion of paragraph 35 which seeks to provide a legislative response to the problem of racism in the community, and in particular racially motivated violence, in a Bill about counter-terrorism. It is especially concerning that these offences will have extended geographical jurisdiction as a consequence of their inclusion in this section of the *Criminal Code*.

In our experience the communities who are affected by investigations for terrorism offences are the same communities that are also the victims of racial taunts and in some cases racially motivated violence. In some cases the racism is motivated by a perception that particular communities are harbouring terrorists. The merits or otherwise of these proposed offences should be the subject of broader public debate and consultation outside of the context of debate about counter-terrorism measures. This discussion should include addressing racism and related violence through leadership and a broad range of education and social cohesion programs.

If the offences are to be retained or new offences enacted we would support paragraph 30 repealing section 80.5 which requires the Attorney-General's consent before proceedings for a treason offence may commence. This addresses to some extent the serious concern that criminal prosecution may be influenced by political motivations. We would also support paragraph 18, amending subsection 80.2(1), that seeks to strengthen the connection between the offending conduct and violence.

We would also urge that further amendments be made to paragraph 15 to reduce the penalties for the offences where a person simply engages in conduct that will materially assist an enemy to engage in war or armed hostilities. In our view imprisonment for life is disproportionately severe.

We would also urge further amendments to paragraph 28 which proposes a new subsection 80.3(3). In our view this good faith defence, is unnecessarily complicated and we remain confused as to why the acts in the proposed subsection 80.3(3) are not complete defences, as are industrial disputes and industrial matters contained in subsection 80.3(1)(e). To simplify the defence, we would support the inclusion of artistic work, public debate and news, as provided for in subsection 80.3(3), in section 80.3(1)(e).

Schedule 2 - Terrorism

Community Legal Centres maintain that the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Bill 2007* was unnecessary as the Classification Scheme in place at that time had sufficient scope to be able to deal with material inciting or promoting terrorist acts. Furthermore the Bill represented an undue incursion into freedom of political expression that is not appropriate in a modern, liberal democracy. The proposal in paragraph 1 is somewhat of an improvement on the existing section. However there remains potential for excessive censorship of political, religious and ideological material.

Community Legal Centres continue to advocate for repeal of the listing provisions contained in Division 102 of the Criminal Code in their entirety. In our view they are fundamentally inconsistent with the aspirations of a democratic society and they compromise fundamental human rights and principles of the criminal law by the automatic criminalisation of political affiliations, associations and convictions by executive discretion.

On the assumption that section 102.1(2)(b) is to be retained, the insertion of the word "substantial" as proposed in paragraph 2 is an improvement, albeit an inadequate one, as it creates a greater nexus between the organisation to be listed and actual terrorist activity. The proposed amendment, however, will not address our major criticisms that the statutory criteria are too general and discriminatory in their application. Moreover, given that section 102.1(2)(b) appears not to have been relied upon to list an organisation, changes to the definition of 'advocates' are unlikely to have a substantial impact upon the listing powers.

Paragraph 3 seeks to extend the period for which organizations remain on the list of terrorist organisations from 2 years to three years. We do not have any particular view on this proposal. It is our view that the proscription criteria and guidelines, the process of proscription without the need for community consultation prior to a listing, and the lack of merits review for proscription decisions are of far greater concern.

Schedule 3 – Investigation of Commonwealth offences

Community Legal Centres maintain that existing criminal laws with respect to investigation powers are adequate to deal with the threat of terrorism. In a just and democratic society, there is limited place for abrogation of fundamental rights and freedoms. The provisions relating to investigative dead time should be repealed in their entirety.

Community Legal Centres maintain that there should not be two separate categories of offences, with different powers and safeguards. There should be one law for the investigation of offences under the Crimes Act. The same safeguards and limits upon detention without charge should apply for terrorism related offences. Why should a person suspected of a minor terrorism offence motivated by political or religious beliefs be afforded less protection from prolonged incommunicado detention without charge, than a person suspected of serial killings motivated by financial interests or jealousy? The provisions allowing for special treatment of people under investigation for terrorism offences should be repealed.

On the assumption that the current regime of investigative powers for terrorism offences remain, we support a cap on investigate deadtime. In our view the 7 day cap proposed in paragraph 16 is too generous and arguably not a real improvement on the current legislation. Whilst it would have assisted Mr Haneef, it does not represent an adequate safeguard and may result in 7 days becoming regarded as a "reasonable" period. In our view, there has been no serious case presented that clearly articulates a need for more than 24 hours of investigative deadtime.

We do not support the proposals in paragraphs 10 and 16 that lower the threshold for arrest from "reasonable belief" to "reasonable suspicion". This creates a situation in which the long-accepted purpose of arrest – established in Commonwealth law by Section 3W of the Crimes Act – is flouted. That is, the operation of those provisions can give rise to a situation in which the AFP can continue to detain a person in order to investigate that person rather than because they have some basis on which to bring charges against that person ie they can conduct a 'fishing expedition'. Section 3W(2) of the Crimes Act makes such 'fishing expeditions' unlawful, by requiring the release of any arrested person if a constable ceases to believe on reasonable grounds that that person committed the offence for which s/he was arrested.

We remain concerned about the proposals in paragraph 15 (sections 23D and DA(4)) and paragraph 16 (sections 23DC(5), DD(4), DE(4) and DF(4)) that permit information to be withheld from a Magistrate in an application for a specified period, and/or can be removed from the copy of an instrument made by a Magistrate given to the person or their representative (For security reasons, e.g. where disclosure is likely "to put at risk ongoing operations by law enforcement agencies or intelligence agencies"). In our view the reasons expressed in these exceptions are too broad. If these exclusions are to be retained, we are particularly concerned that in the interests of justice and to enable a proper assessment of the application to be made, that a court be provided with all relevant information. Given that the Bill allows for information to be provided to the Magistrate but removed from the application given to the person (or their representative), we do not believe that sections 23D(4), 23DC(5) and DE(4) are necessary.

Schedule 4 – Powers to search premises in relation to terrorism offences

We do not support the proposal for new powers to enter premises and conduct limited searches without warrant in emergency situations when investigating terrorism. We do not believe that adequate justification has been provided for expanded entry and search powers that will unduly infringe civil liberties. We urge the committee to reject this proposal. Given that this proposal has not come from one of the many reviews of this legislation and that the Independent National Security Legislation Monitor is soon to be established with a broad mandate to review laws relating to terrorism against certain criteria, we do not believe it is appropriate to provide new powers at this time.

Schedule 5 - Re-entry of premises in emergency situation

We do not support the proposed amendments to the search warrant provisions that seek to provide more time for re-entry under a search warrant in an emergency situation ie expansion from within 1 hour to within 12 hours as per paragraph 3. We support the proposal that a relevant officer may apply to an issuing officer for an extension of time to enter premises in emergency situations as provided in paragraph 4. If an application for an extension of time can easily be made by telephone as per existing procedure, in circumstances where such an extension of time is required, in our view it should be made after 1 hour, rather than 12 hours.

Schedule 6 – Amendments relating to bail

The proposed amendments do not address our significant concerns with the bail provisions in respect of terrorism offences. In our view, there is no justification for the continued presumption against bail for terrorism offences in section 15AA given that the vast majority of terrorism related offences that have been prosecuted to date have not related to homicides or actual violence. This is of particular importance given the conditions that remandees have been subjected to whilst on remand for lengthy periods.

Schedule 7 - Listings under Charter of United Nations Act 1945

Community Legal Centres support proposals to improve the standard for listing under the Charter Act and to provide for regular review of listings. Recommendation 22(a) of the PJCIS Report Review of Security and counter-Terrorism Legislation provides that "external merit review of a decision to list a person, entity or asset under section 15 of the COUNA should be made available in the Administrative Appeals Tribunal". Without full implementation of recommendation 22(a), in our view, the asset freezing regime remains problematic and disproportionate.

The periodic review mechanism proposed in the Bill is clearly an improvement on the existing regime but does not adequately respond to recommendation 22(a) of the PJCIS Report or our significant concerns about the lack of procedural fairness with the listing system under the Charter Act.

A listed entity or individual is currently not given an opportunity to be heard before a decision is made about listing, nor are there requirements for the Minister to provide reasons. Furthermore, there is no capacity for subsequent scrutiny of a Minister's decision by a parliamentary committee, as is provided for listings under Division 102 of the Criminal Code. This clearly

breaches fundamental principles of natural justice and procedural fairness and in our view does not provide for sufficient safeguards for rights and freedoms.

Schedule 8 – Amendments relating to the disclosure of national security information in criminal and civil proceedings

Community Legal Centres maintain that the *National Security Information (Criminal and Civil Proceedings) Act* 2004 should be repealed in its entirety. We do not believe that the proposals in the Bill respond to our concerns about this Act.