SUPPLEMENTARY SUBMISSION OF THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC.) INC

TO THE PARLIAMENTARY JOINT COMMITTEE ON ASIO, ASIS AND DSD

REVIEW OF ASIO'S SPECIAL POWERS RELATING TO TERRORISM OFFENCES AS CONTAINED IN DIVISION 3 PART III OF THE AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION ACT 1979

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This submission was prepared by Marika Dias, Dan Nicholson and other members of the Anti-Terrorism Laws Task Group, on behalf of the Federation of Community Legal Centres (Vic).

Contents

The Federation of Community Legal Centres

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for forty-nine Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres provide free legal advice, information, assistance, representation and community legal education to more than 60,000 Victorians each year. We also work on strategic research, casework, policy development and social and law reform activities.

Community Legal Centres have expertise in working with excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds. We operate within a community development framework. We provide a bridge between disadvantaged and marginalised communities and the justice system. We work with the communities of which we are a part. We listen, we learn, and we provide the infrastructure necessary for our communities' knowledge and experiences to be heard.

The Federation, as a peak body, facilitates collaboration across a diverse membership. Workers and volunteers throughout Victoria come together through working groups and other formal and informal networks to exchange ideas and strategise for change.

The day-to-day work of Community Legal Centres reflects a 30-year commitment to social justice, human rights, equity, democracy and community participation.

Failure to give information or produce a record or thing

Section 34G of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('the Act') creates two offences relating to failure to give information or to produce a record or thing:

> Section 34G(3):
> A person who is before a prescribed authority for questioning under a warrant must not fail to give any information requested in accordance with the warrant.
> Penalty: Imprisonment for 5 years.
>
> Section 34G(6):
> A person who is before a prescribed authority for questioning under a warrant must not fail to produce any record or thing that the person is requested in accordance with the warrant to produce.
> Penalty: Imprisonment for 5 years.

The above provisions do not apply where the person does not have the information or does not have possession or control of the record or thing. With respect to both offences, however, the Act expressly shifts the evidentiary burden to the defendant. This exact nature of this shift is clarified in section 13.3 of the *Criminal Code Act 1995* (Cth). Where a defendant is charged with one of the above offences, it is incumbent on the defendant to adduce sufficient evidence to demonstrate the reasonable possibility that they did not have the information, record or thing.

In their submission to this Committee, Amnesty International submit that this reversal of evidentiary burden abrogates a subject's right to be presumed innocent, as required by Article 14 of the International Covenant on Civil and Political Rights.

The Federation is further concerned that these provisions represent a significant departure from fundamental legal principles.

This shift in evidentiary burden effectively removes the defendant's right to silence in the course of prosecution of these offences. A defendant will be compelled to testify in order to discharge the evidentiary requirement. In order to avoid a finding of guilt, the defendant must necessarily waive the right not to have to testify in his or her own defence.

The corollary of these provisions is also that the prosecution's task is made considerably easier than it is in other criminal matters. The prosecution is not required to prove beyond reasonable doubt that the defendant knew the information or had possession/control of the record or thing. The prosecution is

simply required to prove that the defendant did not supply the information, record or thing as requested.

These provisions also give rise to practical difficulties for the defendant. It is difficult to envisage what kind of evidence a defendant would lead to demonstrate that he or she did not possess information or a record or thing. It seems more likely that a defendant will only be able to testify that he or she did not have the information, record or thing. In turn, it seems unlikely that this would be sufficient to discharge the defendant's evidentiary burden.

For example, a defendant is accused of failing to provide information regarding the location of a thing to be used in connection with a terrorist act. Where the defendant genuinely never had this information, they will only be able to testify that they did not have the information. The defendant may even have been in a position to have access to this information but in actual fact did not have the information. In such a scenario the odds would be unfairly stacked against the defendant. The defendant's testimony would in all likelihood fail to discharge the evidentiary burden and yet the defendant may have no concrete evidence to show that he or she did not have the information, record or thing.

In light of these issues, where Division 3 is to be renewed for a further term, the Federation recommends that the provisions creating these offences be removed from the Act. Alternatively, if these provisions are to remain, we recommend that the prosecution be required to prove the elements of these offences beyond reasonable doubt.

Immunity from Prosecution

Section 34G(9) of the Act provides that any information, records or things provided by a subject while the subject is before a prescribed authority for questioning under a warrant cannot be used as evidence against the subject in criminal proceedings. This does not include criminal proceedings for a section 34G offence. The Act does not, however, provide the subject with immunity from the derivative use of that evidence. That is, where the information, record or thing provided in accordance with a warrant is used to obtain further evidence, this further evidence may subsequently be admissible as evidence in prosecuting the subject of some criminal offence.

In this regard, the Australian legislation differs from corresponding legislation in some other jurisdictions.

For example, Section 83.28(10) of the Canadian Anti-Terrorism Act provides that 'no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person' other than in prosecution of offences under that Act.

In their submission to this Committee, the Human Rights and Equal Opportunity Commission (HREOC) suggests that this failure to protect against derivative use may be at odds with Article 14(3) of the International Covenant on Civil and Political Rights. Their submission particularly refers to sub-clause 14(3)(g), which provides that in criminal prosecution, a subject should 'not be compelled to testify against himself [sic] or to confess guilt'. HREOC refer to a General Comment issued by the Human Rights Committee on Article 14. This states that 'The law should require that evidence provided by … any other form of compulsion is wholly unacceptable'. HREOC conclude that this statement would in all likelihood encompass derivative use of information, records or things obtained under questioning warrants.

Questioning warrants are designed to elicit intelligence in relation to terrorism offences. The warrants are not intended as a tool of criminal investigation or prosecution. Hence, the Act expressly denies subjects any right to silence. Where there is no right to silence, it is not appropriate that evidence derived in any manner through the warrant process, be it directly or indirectly, be used in criminal prosecution of the subject.

Section 34G of the Act compels a subject to provide information sought under the warrant. It is a fundamental principle of criminal law that one should not be compelled to incriminate oneself. Where there is no derivative use immunity, this principle is entirely abrogated.

The Federation believes that police investigators are already vested with sufficient investigative powers. Where an individual is suspected of committing a

criminal offence, the appropriate police powers should be used to investigate and obtain evidence with respect to that offence. In that way defendants are guaranteed what have long been held as essential safeguards, for example, the right to silence. In our submission, where evidence is derived in any manner absent of these safeguards, that evidence should not be able to be used against a defendant in criminal prosecution.

Where Division 3 of the Act is renewed, the Federation recommends that a provision be inserted providing that no evidence derived from evidence obtained under a warrant shall be used in criminal proceedings against the subject of the warrant.

Other Matters

Since our initial written and oral submissions to this Committee, two events have occurred that may affect this Committee's deliberations and merit comment.

In late June, a number of houses in Melbourne were raided by ASIO. It has been confirmed that ASIO executed search warrants with the support of State and Federal police. It is not clear one way or another whether questioning and/or detention warrants were executed by ASIO, as the secrecy provisions in the Act prevent disclosure of the existence of such warrants.

We are concerned about the justification for these raids. Unnamed senior Federal Officials were quoted in the media saying that the raids aimed to deter the subjects of the raids from 'taking the next step' and to 'rattle the cages', despite the fact that there is apparently no evidence that any offences had been committed. This would appear to stray far from ASIO's role of gathering intelligence. It raises the prospects of ASIO using its coercive powers under the Act as a tool of intimidation and to silence dissent, a concern we have previously raised about these powers.

We are also concerned about the media management of this issue by ASIO and the AFP - notably the widespread leaking of information relating to the raids and their subjects – and its relation to the secrecy provisions of the Act. Firstly, given that the raids were very public, if ASIO's powers to question and/or detain were used, in our view there is no security or public interest justification for keeping the use of these powers secret. This demonstrates that a blanket non-disclosure provision, as currently exists in the act, is excessive.

Secondly, a large amount of prejudicial information appears to have been anonymously leaked about the subjects of the raids to the media by someone involved in security or law enforcement agencies. The secrecy provisions associated with the questioning and detention powers would prevent the subjects of warrants from defending themselves publicly. This would appear to make very real our concerns about the secrecy provisions being used as a means of political control of information. We are aware that a complaint has been lodged with the office of the Inspector General of Intelligence and Security concerning this issue.

The second event that warrants comment is the recent bombings in London. We agree that these bombings are tragic. However, it is our submission that these bombings should not directly affect your consideration of ASIO's special powers. They do not affect the degree of threat present in Australia. Nor should they affect your consideration of a proportionate legislative response to that threat. The subsequent shooting of an innocent person in London by law enforcement authorities using a "Shoot to Kill" policy further highlights the need for adequate safeguards to be built into anti-terrorism legislation to protect fundamental human rights and freedoms.