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Submission

To the Attorney-General's Department

Discussion Paper on Proposed Amendments – National Security Legislation

9 October 2009

Acknowledgements

This submission has been prepared for the National Associations of Community Legal Centres by the Federation of Community Legal Centres (Victoria) and Community Legal Centres NSW. Substantial contributions were made by the following member Community Legal Centres:

- Public Interest Advocacy Centre, NSW
- Western Suburbs Legal Service, Vic
- Fitzroy Legal Service, Vic
- Moreland Legal Service, Vic

Input was also provided by Dr Victoria Sentas and Dr Patrick Emerton.

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

Contents

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

Community Legal Centres welcome the opportunity to provide feedback on the *National Security Legislation – Discussion Paper on Proposed Amendments* (hereafter referred to as the "Discussion Paper"). It is commendable that the public has been provided with a detailed discussion paper and an opportunity to provide input. This is in stark contrast to the previous government's processes of policy development around national security.

Community Legal Centres have actively participated in the debate about Australia's counter-terrorism response since the events of September 2001. We have written submissions and letters, given evidence to reviews and inquiries and participated in the public debate. Our advocacy responds to the needs of communities who are affected by Australia's counter-terrorism laws, policies and practises, both directly and indirectly. On the most part our concerns, and those of the communities we work with, appear to have been given scant regard as the counter-terrorism laws and policy have developed. We trust that our views will be understood and given due consideration by the incumbent government.

Community Legal Centres work with a broad range of individuals and communities who are affected by counter-terrorism laws. We work with individuals and communities who may have been spoken to by investigating authorities, who suspect that they are the subject of covert surveillance, who have family in their country of origin who may have links to a "terrorist organisation" or who are the subject of racial or religious taunts because of their assumed links to terrorism. We work to provide legal information to communities about the counter-terrorism laws and individual legal advice, representation and advocacy for people dealing with investigating agencies, courts and relevant complaint bodies.

In much of the debate the voices of affected communities are not heard and the impact of Australia's counter-terrorism response upon these communities does not appear to have been understood. Our experience is that many people are fearful of active participation in public debate because of the potential legal and social consequences for themselves, their families in Australia and their extended families and networks in their country of origin. In this case, given that only 8 weeks and then a further 2 weeks, have been provided for input and that the Discussion Paper is largely inaccessible for communities due to its size and the complexity of the laws, we have been unable to directly obtain input from communities we work with on the proposed amendments. This submission draws upon the detailed arguments that have previously been put by Community Legal Centres to various reviews. We go through each proposal in the Discussion Paper providing feedback through the lens of the communities we work with.

On the whole, we are concerned that the proposals do not achieve 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".[1] Nor do the proposed amendments address our significant concerns 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

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

- a lack of consistency with the government's commitment to "evidence-based policy" and transparency in government.

We welcome the government's response to longstanding calls for an Independent Reviewer of terrorism law and the recent tabling in parliament of the *National Security Legislation Monitor Bill 2009*. Assuming that all of the recommendations of the Senate's Finance and Public Administration Committee's Report on this Bill will be accepted, and that an Independent National Security Legislation Monitor will be established, we suggest that much of the subject matter of the proposals in this Discussion Paper be referred to the Independent Monitor for review so as to ensure that Australia's counter-terror laws address the significant concerns outlined above.

We note that the government's Comprehensive Response to National Security Legislation Reviews, released on 23rd December 2008 refers significant sections of legislation for further review in particular to the 2010 Review by the Council of Australian Governments (COAG Review). For example, the proscription regime and Division 102 terrorist organisation offences. We urge that these further reviews be consultative and publicly accessible to allow for community input and public debate.

We note the government's commitment "to engaging the community on a range of national security matters" as outlined in the Comprehensive Response to National Security Legislation Reviews. We would warmly welcome the opportunity to work further with the government and the Independent National Security Monitor, once established, to assist with engaging diverse cultural communities and understanding the significant impact of Australia's counter-terrorism legislation upon them.

Chapter 1 - Amendments to the *Criminal Code Act 1995*

Part 1 Amendments to the treason offences in Division 80 of the Criminal Code

Community Legal Centres maintain that the treason offences should be repealed in their entirety. On the assumption that a treason offence is to be retained, we support the proposals to repeal both the offences contained in sections 80.1(1)(e) and (f) and the requirement for the Attorney-General's consent in section 80.5.

It is our view that the treason offences are not appropriate in a modern, democratic and culturally diverse society. These offences fail to recognise that we live in highly pluralistic society which includes an immense variety of divergent political opinions and allegiances. These opinions and allegiances may include support for countries that at times will contradict Australian government policy. It is for these reasons that we support repeal of sections 80.1(1)(e) and (f).

In our view, it is also unclear why separate offences might be required for murder or threats to kill where committed against the Prime Minister or the Governor-General, for example. This would suggest that the murder of these officials is necessarily more serious than or diverse from the murder of or threats to kill any other person. The social purpose of punishing these offences separately to the equivalent crimes under ordinary criminal law is unclear in a contemporary setting.

We support the proposed amendment seeking to repeal 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 do not support the proposed new treason offences contained in s.80.1AA. These offences relate to materially assisting an enemy of the Commonwealth or the ADF. We are particularly concerned that these offences restrict freedom of political association and are prone to being used to suppress dissent and opponents of government policy, particularly with respect to the activities of the ADF.

For example, there are a great many people in Australia who opposed the occupation of Iraq and supported the Iraqi people's right to take up arms against what was widely regarded at the time as an illegal invasion. This support may translate to providing financial or other material support to Iraqi organisations involved in resisting Western forces. We do not believe that this type of activity should attract prosecution and we are particularly concerned about the suppression of political dissent and freedom of association as a consequence of these offences.

We remain concerned about the inclusion of these offences in counter-terrorism legislation. This could lead to inconsistent application of the treason provisions, given the widespread political, legislative and public association of Muslim groups with terrorism.

If the treason offences are to be retained, we urge that further amendments be made 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.

Part 2 Amendments to the urging violence offences in Division 80 of the Criminal Code

Community Legal Centres maintain that all of the sedition offences should be repealed. On the assumption that a sedition offence is to be retained, we welcome the repeals proposed in the Discussion Paper. The proposed new offences of urging violence should not be inserted in Division 80 of the Criminal Code and their merits or otherwise should be the subject of further public debate and consultation outside of the context of public debate about counter-terrorism measures.

Amendments to the sedition offences

Community Legal Centres strongly support repeal of the sedition offences in their entirety. We have long been fundamentally opposed to the criminalisation of so-called seditious acts that serve to restrict free speech and freedom of association and are duplicitous of existing laws. In a truly democratic society, diversity of political views is imperative and a multitude of political opinions and philosophies should be accommodated and allowed free expression.

Given the historical purpose of sedition laws and their links to feudalism and monarchic rule and that their enactment coincided with the establishment of the Communist Party of Australia, it is our view that they are not transferable into the context of modern democracy. They serve to inordinately restrict the forms of political organisation and activism that citizens may be involved in or advocate for. It is fundamental to true democracy that citizens are able to challenge governmental structures and processes and this should not be impeded via legislation.

The sedition provisions are also unnecessary given that there are a number of other existing laws that may be used to prosecute the same type of conduct. There is an extremely wide range of terrorism offences and offences relating to terrorist organisations, all of which are very broadly framed. There are offences in the Commonwealth Electoral Act 1918 (Cth) relating to the disruption of elections and offences in state racial and religious vilification laws, which may cover the urging of inter-communal violence. While these offences remain part of our legislative framework, we do not see justification for the sedition offences.

On the assumption that sedition offences are to be retained, we recognise the reasoning behind extending subsection 80.2(3) to referenda. We would also support the amendments in section 80.2 (with the exception of 80.2(4)) that seek to strengthen the connection between the offending conduct and violence. The incursions on the right of citizens to freely criticise and oppose government and government policies are currently completely unjustified in light of the tenuous connection between the so-called seditious conduct and violence. We do not support section 80.2(4) as we believe that the inclusion of the fault element of recklessness makes the subsection broad and convoluted.

Community Legal Centres do not support the inclusion of the proposed new sections 80.2A, urging violence against groups, and 80.2B, urging violence against individual members of groups in Division 80 of the Criminal Code. The merits or otherwise of these proposed offences should be the subject of broader public debate and consultation outside of the context of public debate about counter-terrorism measures. This discussion should include addressing racism and related violence through leadership and a broad range education and social cohesion programs.

We are particularly concerned that the government's legislative response to the problem of racism in the community and in particular racially motivated violence is presented in a discussion paper about counter-terrorism. 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. That the Discussion Paper suggests the government may give priority to the introduction of these new offences ahead of the larger package of counter-terrorism reforms suggests that the impact of counter-terrorism laws upon the culturally diverse communities is not properly understood.

In our view the proposed new subsection 80.3(3), the good faith defence, is unnecessarily complicated. 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).

As with the treason offences we support repeal of section 80.5 which requires the Attorney-General's consent for prosecution of sedition and treason offences. The existing requirement politicises the terrorism related offences and provides inappropriate interference with prosecutorial discretion.

Repealing outdate offences in Part IIA of the *Crimes Act 1914*

Community Legal Centres strongly support repeal of the outdated offences in Part IIA of the Crimes Act 1914. As outlined above we believe that sedition offences are not relevant in a modern, democratic and culturally diverse society.

Part 3 Amendments to the 'terrorist act' definition and offences in Division 100 and 101 of the Criminal Code

Community Legal Centres maintain that the definition of 'terrorist act' is overly broad and as a result has significant negative unintended consequences for communities in Australia, in particular for communities with cultural and familial links to countries experiencing internal conflict. Whilst we support the proposal to include the United Nations in the definition of 'terrorist act', we do not believe that the other proposed amendments seeking to expand the definition and create further offences are justifiable or worthy of support.

Amendments to the definition of a 'terrorist act' in the Criminal Code

Community Legal Centres have long argued that the definition of 'terrorist act' is overly broad and consequently may be applied to an inordinately wide array of acts and threats of acts. This is of particular concern given that all terrorism offences, the criteria for identifying and specifying organisations as terrorist organisations, the criteria for classification of publications, films and computer games and the regimes for control orders and preventative detention orders derive from this key definition.

Clarifying that the United Nations may be the target of terrorist violence

Notwithstanding our significant concerns with the already expansive definition of a 'terrorist act', we support the proposal seeking to clarify that the United Nations may be the target of terrorist violence.

Psychological harm in the definition of harm

Community Legal Centres do not support the proposals that would expand the definition of 'terrorist act' to include actions or threats intended to cause non-physical harm. Expanding the definition of a 'terrorist act' to include non-physical harm may mean that more people are exposed to prosecution for terrorism offences, more organisations are liable to proscription and more control orders and preventative detention orders are made. This is of grave concern given the extraordinary nature of these other legislative mechanisms.

In our view, extending the definition of 'terrorist act' to include acts and threats of non-physical harm goes beyond commonly accepted notions of what constitutes an act of terrorism. Although it may be argued that community fears of terrorist activity give the government a mandate to legislate in relation to such acts, the current legislative definition of 'terrorist act' goes far beyond that mandate in exceeding the range of 'terrorist' activity that the public is concerned about (such as bombings and hijackings, for example). In our view, the definition of 'terrorist act' should be made significantly more specific and should more closely resemble acts of terrorism which are actual community concerns.

The removal of the 'physical harm' requirement also has implications for the exceptions relating to advocacy, protest, dissent and industrial action. If this proposal were to be enacted, protest or industrial action aimed at causing some mental distress may be prosecuted as a terrorist act. As outlined below, we do not wish to see advocacy, protest, dissent or industrial action conflated with terrorism, even where physical harm results. Extending the definition of a 'terrorist act' to include non-physical harm will increase the likelihood that protestors, advocates, dissenters and industrial activists may find themselves subject to prosecution as terrorists. In our opinion this is entirely undesirable and inappropriate, not to mention unnecessary.

Clarifying the harm that arises from a 'threat of action'

Community Legal Centres do not support the proposal to retain the 'threat of action' in the definition of a 'terrorist act'. Nor do we support the proposed additions "or is likely to cause" after "causes" in the subsections of section 101.1(2). We support the Sheller Inquiry recommendation that threats of action be removed from the definition of 'terrorist act' and a separate threat

offence enacted. This would more appropriately address our concerns that mere threats should not form part of the basis on which the other terrorism offences or other aspects of the terrorism regime are formulated.

The breadth of the current definition with respect to threats may be illustrated by looking at how a threat as 'terrorist act' may be applied in the context of the terrorism offences. A 'terrorist act' may be constituted by a politically, religiously or ideologically motivated threat to inflict some violence or damage for the purposes of coercion or influence. When applied within the terrorism offences, a terrorism offence may arise where a person does any act preparatory to or in planning for making the threat. This effectively creates offences that amount to thought crimes. For example, where a person simply contemplates making a threat of property damage for political reasons and has a discussion with another person regarding whether this is a good idea and whether that other person would hypothetically wish to be involved, a 'terrorist act' may be committed. It is unspecified in the definition of 'terrorist act' that the threat must be made publicly or broadcast in some manner. On the legislation as it stands, it may be that the threat is simply expressed to another individual. Even if it is deemed that a 'terrorist act' has not occurred here, the act of having that conversation may itself constitute doing an act preparatory to a terrorist act. These offences may be found regardless of whether the property damage occurs or would ever have in fact occurred, given the preliminary nature of the person's enquiry. It may even be that ultimately the threat itself is never made public or is never actually used to coerce or influence.

Additional proposals for reform to the definition of a 'terrorist act'

The Discussion Paper does not address our other significant and longstanding concerns about the broad definition of a 'terrorist act', which include:

- The criminalisation of political, religious and ideological acts by section 101.1(1)(b) is prone to being applied in a discriminatory manner or in a way that suppresses political dissent. Section 101.1(1)(b) also raises the important question of whether the motivation for the act should be a relevant factor and in fact a suitable matter for legislative application. In our view, it is the action itself that poses the social problem, regardless of the motivation for that act and hence section 101.1(1)(b) should be repealed.
- The qualifications which have been placed on the exceptions relating to protest, advocacy, dissent and industrial action in section 101.1(3) create the danger that these activities may, under certain circumstances, be regarded as terrorist activity. Should any of the excepted outcomes such as death or endangerment result from protest, advocacy, dissent or industrial action those outcomes could be the basis for criminal prosecution under existing criminal law. It is not necessary that those involved be prosecuted as the perpetrators of an act of terrorism nor that political dissent be equated with terrorism in such cases. We would support amendments that would ensure that the exceptions relating to advocacy, protest, dissent and industrial action are unqualified.

New terrorism hoax offence

We do not support the proposal to enact a terrorism-specific hoax offence. In our view, the various terrorism and terrorist organisation offences represent a legislative excess. In the case of a separate 'hoax' offence it is our submission that current state criminal laws suffice to cover any foreseeable scenario and the creation of an additional offence in this regard is not required. In Victoria, for example, the *Crimes Act 1958* (Vic), provides for the following offences

- Extortion with threat to kill (s 27)
- Extortion with threat to destroy property (s 28)
- Threaten to kill (s 20)
- Threaten to inflict serious injury (s 21)
- Threaten to destroy or damage property (s 198)

- Making false statements (by way of a hoax that there is a conspiracy to kill damage property etc) (s 247)
- Threaten to sabotage (to damage a public/government facility) (s247L)
- Threaten to contaminate goods (with intent to cause public alarm) (s250)

These offences, and in particular the latter three provisions, would seem to cover the range of conceivable behaviour that might relate to the making of a hoax threat of terrorism.

At the very least this proposal should be referred to the National Security Monitor, once established with the requisite power to consider necessity as a facet of proportionality.[2]

[2] The Finance and Public Administration Legislation Committee Report on the National Security Legislation Monitor Bill 2009 recommends that the bill be amended to require the Monitor to assess proportionality. See Recommendation 11.

Part 4 Amendments to the terrorist organisation listing provisions and offences in Division 102 of the Criminal Code

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. As outlined below the proposals in the Discussion Paper do not address our concerns.

We urge that there be a comprehensive public consultation and community engagement process as part of the COAG review of counter-terrorism laws scheduled for 2010 to ensure that the impact of the proscription power upon communities can be properly understood.

Definition of 'advocates' in Division 102 of the Criminal Code

The determinative criteria for listing are whether the Attorney-General is satisfied on reasonable grounds that the organisation:

- is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or
- advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

We are not aware that the second criterion has been relied upon by the Attorney-General to list an organisation as a terrorist organisation in any case. This raises the fundamental question as to whether this second criterion remains necessary or proportionate given the balance of the protection of national security and the protection of fundamental rights and freedoms. In our view, section 102.1(2)(b) of the Criminal Code should be repealed in its entirety without the need to amend the definition of 'advocates'. At the very least the question of necessity should be referred to the National Security Monitor, once established with the requisite power to consider proportionality.[3]

One major concern about the current listing provisions is the breadth of the criteria. The criteria hinge on the definition of 'terrorist act' which itself covers an expansive array of acts and threats of acts. Furthermore, the scope of the criteria is extra-territorial and there is no requirement that the terrorist act in question be directed to a non-military target. The definition may therefore include acts or threats of action anywhere in the world, regardless of whether they are directed towards a brutal regime, in support of self-determination, or are the acts of a national army during a period of armed warfare.

The PJCIS has commented on the breadth of the statutory criteria in the context of relisting reviews. In its 'Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU as terrorist organisations' in June 2007, the Committee commented that:

> *The definition does not explain why certain organisations who engage in, prepare, plan, assist in or foster the doing of a terrorist act have not been proscribed under the Criminal Code whereas others have.*[4]

The breadth of the statutory criteria is such that many organisations worldwide could be listed by the Australian Government. This includes a significant proportion of the United Nations 1267 Committee's Consolidated List, as well as many organisations on the Department of Foreign Affairs and Trade's Consolidated List (as maintained pursuant to Resolution 1373 of the UN

[3] The Finance and Public Administration Legislation Committee Report on the National Security Legislation Monitor Bill 2009 recommends that the bill be amended to require the Monitor to assess proportionality. See Recommendation 11.

[4] Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU as terrorist organisations*, June 2007, paragraph 2.2.

Security Council). Given that only 18 organisations are currently listed, the application of the listing provisions is clearly a matter of executive discretion, which we understand to be exercised largely on the basis of ASIO's advice.

In our submission, the degree of discretion afforded to the executive by the listing provisions is excessive. The statutory criteria are so broad that the listing power may be exercised in a purely politically-motivated or discriminatory manner. The fact that all except 1 of the organisations listed to date are Muslim organisations highlights at the very least, the discriminatory impact of this power.

On the assumption that section 102.1(2)(b) is to be retained, the insertion of the word "substantial" as proposed in the Discussion Paper 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.

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. The amendment may however be critical to section 9(A)(2)(c) of the *Classification (Publications, Films and Computer Games) Act 1995*.

Whilst we do not support the proposals to expand the definitions of 'terrorist act' as it applies to classification, we support the insertion of the word "substantial" in section 9(A)(2)(c) of the *Classification (Publications, Films and Computer Games) Act 1995*. This however does not address our concerns about this provision.

In our view, 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 current provisions that the Bill enacted in section 9A are particularly disproportionate due to the expansive definitions of 'terrorist act' and 'advocates', with the latter somewhat addressed by the proposal in the Discussion Paper. Even with this amendment, there will remain potential for excessive censorship of political, religious and ideological material. In this regard we remain concerned that section 9A contravenes internationally accepted human rights principles, may be unconstitutional and even goes beyond the principles espoused in the Classification Scheme itself.

Expiration of regulations which list terrorist organisations

The Discussion Paper proposes 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.

Clarifying the offence of providing support to a terrorist organisation

Material support

Community Legal Centres support the clarification of the word 'support' through the addition of 'material' support. We have long been concerned with section 102.7 and the broad nature of the term 'support' in that it disproportionately restricts freedom of expression. As with the other terrorist organisation offences, we are concerned that this offence does not require any nexus between the support or resources offered and an actual terrorist act. In our view, this takes the offence outside the scope of the legitimate aims and objectives of security legislation. The

substitution of the term "material support" seeks to narrow the interpretation of the provision and may assist to prevent a scenario such as the Dr Haneef incident reoccurring.

Clarifying fault elements
We support the intention to clarify the fault elements of this offence. However in our view these proposals are not satisfactory because they remove the requirement that the material support be intended to help an organisation engage in terrorism. The proposals at items 11 to 15 of the *Anti-Terrorism Laws Reform Bill 2009* are far preferable.

The case of Dr Haneef illustrates the danger inherent in the breadth of Section 102.7. This offence may be committed recklessly or with knowledge and it may involve either direct or indirect provision of support/resources. This means that, despite the extremely tenuous link between Dr Haneef and the actual act of terrorism i.e. the Glasgow car bombing, he was able to be arrested 'for a terrorism offence' and subsequently detained for an extended period while the police conducted their investigations. Even though the police had insufficient evidence to ultimately charge Dr Haneef with this offence, the breadth of the offence is such that even a tenuous link to a terrorist act was able to give rise to an arrest and extended detention.

Clarifying interaction between delivery of humanitarian aid and terrorist organisation training offence
Community Legal Centres have long been concerned that the section 102.5 offence of providing training to or receiving training from a terrorist organisation is too broad. The existing provision does not specify what type of training is prohibited, nor that there be a link between the training and any terrorist activity. Both Sheller and the PJCIS Report recommended that the offence be narrowed. The amendments proposed in the Discussion Paper are not consistent with these recommendations.

In our view the proposal to establish a ministerial authorisation scheme for aid organisations is not worthy of support. It fails to address the underlying problems with this offence that the Sheller and PJCIS recommendations seek to address.

Chapter 2 - Amendments to the *Crimes Act 1914*

Part 1 Amendments to the investigation regime for terrorism offences in Part 1C of the *Crimes Act 1914*

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. As outlined below, the proposals in this chapter of the Discussion Paper do not address our concerns. Whilst some of the proposed amendments are an improvement on the current provisions, they do not go far enough and other proposed amendments in our view will not improve the current situation.

Division 1 – Introduction

Revised definitions of 'arrested' and 'under arrest'

We support these proposals, which seek to clarify that a person is no longer "under arrest' (and therefore the powers of detention under Division 2 of Part 1C cease to apply) if the person is released under section 3W(2) of the Crimes Act (where the police officer no longer believes on reasonable grounds that the person committed an offence).

However, we suggest that the wording of the proposed note below section 23C and (existing) section 23CA would provide greater clarity if rephrased to state "A person is no longer arrested …," rather than 'A person would not be arrested …".

New definition of 'authorising officer'

This proposed new definition is relevant to the introduction of the proposed new sections 23DC and 23DE. These proposed sections introduce a (minor) safeguard in that a senior police officer must approve an application under existing section 23CB (regarding Specifying time during which suspension or delay of questioning may be disregarded (Dead time)) or existing section 23DA (Extension of investigation period if arrested for terrorism offence), before the application is made.

We support these proposals as they appear to be a small improvement on the current situation.

Definition of 'judicial officer'

This proposal is simply centralising the existing definition of "judicial officer". We have no objection to the proposal.

Restructure of Division 2 of Part 1C (Powers of detention)

The proposal in the Discussion Paper is to separate the terrorism and non-terrorism provisions in Division 2 (Powers of Detention) of Part 1C (Investigation of Commonwealth Offences) into 2 separate subdivisions.

The Discussion Paper states this may assist identification of the relevant provisions.

We 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?

Under Part IC, Division 2 of the *Crimes Act* 1914 the Australian Federal Police (AFP) are permitted to detain persons suspected of committing terrorism offences for the purposes of investigation for a 'reasonable time' or a maximum period of 4 hours. Section 23DA, however, creates the possibility that the AFP may obtain an extension of the investigation period from a judicial officer (a Magistrate, Bail Justice of Justice of the Peace) up to a maximum of 24 hours in total. Not included in this maximum 24-hour investigation period is any 'dead time' such as for the suspect to sleep, eat, pray etc. Section 23CB also provides that a judicial officer may specify that certain 'reasonable' time or delays are to be disregarded as 'dead time' in situations where, for example, the AFP require time to collate information relevant to the investigation or are seeking information from a source outside of Australia in a different time zone.

Whilst we note the considerable arguments in support of specific legislation for terrorism offences, we maintain that in a just and democratic society, there is no place for the abrogation of fundamental rights and freedoms. The operation of these provisions has come under significant scrutiny in recent times, largely due to the case of Dr Mohamed Haneef and the subsequent Clarke Inquiry into the circumstances of that case which raises a number of critical areas of concern in respect of these provisions. Based on these concerns, we take the view that the special provisions pertaining to terrorism offences contained in Part IC, Division 2 should be entirely repealed so that the sections relating to non-terrorism offences cover all Commonwealth offences. At the very least the National Security Monitor, once established with the requisite power to consider proportionality, should be tasked with considering whether there is a need for longer periods of pre-charge detention for terrorism offences.[5]

If the above view is not accepted, we make the following comments on the specific proposals raised in the Discussion Paper.

Division 2 – Terrorism and Non-terrorism offences

Period of investigation if arrested for an offence
For terrorism offences and non-terrorism offences, the proposed new subsections aim to clarify that a person could not be detained for the purpose of questioning once the investigation period has ceased. It also clarifies that this provision would not affect any other power to detain the person, for example, under State or Territory legislation or the Commonwealth preventative detention regime in Part 5.3 of the Criminal Code.

We support this clarification.

'Belief' or 'suspicion' threshold test in existing section 3W and paragraphs 23C(2)(b) and 23CA(2)(b)
Subsection 3W(1) provides that a constable may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds that the person has committed or is committing a Commonwealth offence (the 'arrest test').

'Reasonable grounds to believe' requires a higher degree of satisfaction of the facts than 'reasonable grounds to suspect'.

We agree with the Discussion Paper that the threshold for arrest without warrant under s3W(1) should remain "believes on reasonable grounds …". In our view, suspicion is not a sufficient state of mind to deprive a person of their liberty.

[5] The Finance and Public Administration Legislation Committee Report on the National Security Legislation Monitor Bill 2009 recommends that the bill be amended to require the Monitor to assess proportionality. See Recommendation 11.

For terrorism offences and non-terrorism offences, paragraphs 23C(2)(b) and 23CA(2)(b) enable a person to be detained for the purpose of investigating an offence that is different to the offence for which they were arrested, as long as the investigating official reasonably suspects that the person committed the other offence (the 'investigation test').

We would also support amendments so that, while a person is arrested, an investigating official can only detain the person for the purpose of investigating the offence for which they were arrested or another offence that the investigating official reasonably *believes* (rather than just 'suspects') the person to have committed. We do not accept the need for a different test for terrorism and non-terrorism offences.

The operation of current sections 23CA and 23CB of the Crimes Act, 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 arrest a person primarily in order to investigate that person rather than because they have some basis on which to bring charges against that person. We believe that the case of Dr Haneef has demonstrated this.

In the case of Dr Haneef, it is now accepted that the police did not have sufficient evidence to connect Dr Haneef to the terrorist act – they simply had a small amount of evidence that connected him to a person who was in turn linked to a person involved in the terrorist act. As has later been confirmed, this evidence was never sufficient to charge Dr Haneef.

We can only assume, therefore, that the police hoped to obtain additional evidence in order to make out some charge against Dr Haneef. In these circumstances, the arrest of a person becomes less about charging a suspect and more about 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. It is our strong view that the belief threshold should be reinstated.

Investigation period and disregarded time

Community Legal Centres believe that the current section 23CB grounds for specifying time as 'dead time' are open to abuse. In the case of Dr Haneef the initial grants of investigative 'dead time' were for 2 and then 4 days. In the context of a regime which permits a maximum investigation period (exclusive of dead time) of 24 hours, we view these periods as manifestly excessive. Furthermore, in the case of Dr Haneef, at a certain point in the course of his detention it became apparent that the police did not have sufficient evidence to make out a charge against Dr Haneef. Although Dr Haneef was originally arrested for a 'terrorism offence', the purpose of that arrest could no longer be maintained and yet the police were still able to obtain extensions of the investigative 'dead time'. The grant of excessive investigative 'dead time' and the repeated extension of investigative 'dead time' notwithstanding the lack of police evidence incriminating Dr Haneef – clearly indicate that the grounds for granting investigative 'dead time', and for determining the parameters thereof, are inadequate.

In light of these concerns about section 23CB and our concerns about the adequacy of the judiciary in vetting applications for 'dead time' (discussed below), we take the view that subsection 23CA(8)(m) is excessively broad and that it facilitates the on-going detention of suspects far beyond what is a reasonable time. By allowing for the inclusion of any 'reasonable' delay or suspension in the concept of 'dead time', the AFP are given a dangerous and largely unfettered discretion to prolong a suspect's detention.

All of these issues are exacerbated by the fact that neither section 23CA(8)(m) nor 23CB provide any cap on the maximum amount of 'dead time' available. This issue was the subject of some discussion in the Clarke Inquiry report and it was recommended that a cap on the investigative dead-time be introduced. As detailed below we consider the proposed cap period of 7-days, to be far too lengthy to ameliorate these concerns.

In our view the proposed amendments do not sufficiently address our concerns.

Investigation period and disregarded time – Can periods of disregarded time under existing subsections 23C(7) and 23CA(8) occur simultaneously or are the periods of time cumulative?
We support the intention of proposed new paragraphs 23C(7A)(a) (re non-terrorism offences) and 23DB(10)(a) and (c) (re terrorism offences).

We agree that periods of disregarded time under sections 23C(7) and 23CA(8) (proposed new 23DB(9)) can occur at the same time, and that if the reasons for delay or suspension of time overlap, the time should only be disregarded once.

If these periods were to be double-counted, or added cumulatively, the person could be deprived of their liberty for much longer periods of time than necessary for the allowable period of questioning to occur.

We are concerned, however, that the wording of the proposed new paragraphs 23C(7A)(a) and 23DB(10)(a) may not be sufficient, and could be improved by inserting "simultaneously" at the end.

Investigation period and disregarded time - Can questioning occur during a period of time that is disregarded from the investigation period under subsections 23C(7) or 23CA(8)?
This applies for terrorism offences, and non-terrorism offences.

We acknowledge that during some of the events listed in section 23C(7) and renumbered section 23DB(9) (existing 23CA(8)), there may be times when it is reasonable, will assist a prompt investigation, and/or may assist a prompt release of the person, to resume questioning, up to the maximum investigation period.

Obvious examples are questioning while awaiting a decision on an application for extension of the investigation period, or, (as can be specified under existing s23CB) while waiting for information to arrive from overseas (so long as the maximum investigation period has not already been reached).

Clearly, any period of time during which questioning does occur, should count towards the investigation period, and should not be disregarded. The investigators should not be able to gain additional questioning time, just because an application for an extension is pending decision.

We also note that in most situations, any application to extend the investigation period (and therefore the period of detention), should only occur towards the end of the investigation period, not with several hours left to run. We believe a decision as to whether further detention / investigation is necessary cannot reasonably be made near the beginning of the investigation period. Therefore, in most cases, there should be no, or little, investigation period remaining when an extension is sought, and therefore the ability to resume questioning should be somewhat redundant.

On the other hand, some of the events listed in sections 23C(7) and 23DB(9) are clearly times when questioning should not occur, nor resume. It would be safer and avoid misunderstandings,

if the legislation clearly set out all the events during which questioning must be suspended / delayed, and all of the events during which questioning can, but need not be, delayed or suspended.

We welcome the commentary that :

> The amendment is also not intended to affect the rights of individuals or obligations of investigating officials. Proposed subsection 23C(7A) does not suggest, for example, that the prohibition against questioning a person during a forensic procedure should be overridden. Nor does it override the requirement to delay questioning until a person's lawyer arrives. It simply clarifies that when questioning is able to occur, and does occur, the investigation period should continue to run.

However, we suggest that the wording of the proposed new paragraph 23C(7A)(b) and (proposed new) paragraph 23DB(10)(b) could be modified to explicitly clarify that it does not override prohibitions on questioning found elsewhere.

Investigation period and disregarded time - Cap on specified time that can be disregarded from the investigation period for terrorism offences

The Discussion Paper proposes that a seven day cap should be placed on the amount of time that can be disregarded under paragraph 23DB(9)(m) (current 23CA(8)(m)). Current 23CA(8)(m) is only relevant in relation to terrorism offences, and allows a judicial officer to approve periods of time which can be disregarded from the investigation period.

Fundamentally, we submit that current section 23CA(8)(m) should be repealed, as it is an unwarranted provision that serves to keep a person in (potentially incommunicado) detention, without charge, for a longer period than the standard investigation period.

We agree that if section 23CA(8)(m) is retained, the period of time that can be disregarded under current section 23CA(8)(m) should be capped.

Arguably the proposed cap of 7 days on suspension of time under s23CA(8)(m) is 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.

Investigation period and disregarded time - Specification of time during which suspension or delay of questioning may be disregarded – application and decision

We support the proposed amendment requiring approval by a senior police officer ("authorising officer"), before an application is made for the specification of time to be disregarded under s23CA(8)(m). This provides a (minor) safeguard against the abuse of power, which is welcome.

We support the proposed amendment whereby the decision to specify time which may be disregarded can no longer be made by a justice of the peace or a bail justice.

Restricting the power to make this decision to magistrates is an improvement on the current position, however, given the seriousness of the consequences (prolonged detention without charge), we submit that this power is instead more appropriately exercised by a Federal Court judge given the seriousness of the decision in question. Further discussion of this is provided below with regards to applications for extension of the investigation period.

We support the proposed new provision s23DC(6), whereby before consideration by the magistrate, the person or their legal representative must be given a copy of the application and

informed of the right to make representations to the magistrate. This is fundamental to the provision of natural justice.

We do not support proposed subsection 23DC(5), nor subsections23DC(7) in its current format.

These proposed subsections contain provisions regarding information that does not need to be disclosed in the application, and/or can be removed from the copy of the application 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"). The reasons expressed in these exceptions are too broad, and are likely to be interpreted by police broadly.

Given that proposed s23DC(7) allows for information of that kind which is included in the application to be removed from the copy to be given to the person (or their representative), we do not believe that s23DC(5) is necessary.

It is not in the interests of justice and a proper assessment of whether the specification of time to be disregarded is appropriate, for the magistrate to decide the application without this information.

Furthermore, removal of a broad range of information from the copy given to the person, unfairly impacts upon the person's ability to properly contest the application, which may result in a significantly longer period of time spent in detention without charge.

We have similar concerns relating to proposed s23DD(4).

An additional issue, not raised in the Discussion Paper, is the criteria specified in renumbered s23DD(2), of which a magistrate must be satisfied before approving a period of time which may be disregarded. We submit that this provision should specifically require the magistrate to take into account human rights considerations, including the presumption of innocence, and the right to liberty, when deciding whether the specification of time is "appropriate".

Investigation period and disregarded time - Other comments on proposals regarding time that is disregarded

We are concerned that some of the re-wording under proposed sections 23(7) and 23DB(9) may inadvertently increase the amount of time that may be disregarded from the investigation period, for both terrorism offences and non-terrorism offences.

For example, the proposed s23(7)(k), "to allow a forensic procedure to be carried out …", seems broader than section 23XGD, "detention period as is reasonable necessary to carry out the forensic procedure". If the intention is that section 23XGD will prevail, our concern is not justified. We note however that there seems no justification for disregarding time under 23(7)(k) if it is already disregarded under 23XGD(2)(a)–(g). Moreover, although questioning may need to wait for information to arrive from overseas, there seems no justification as to why forensic procedures would need to wait.

There is no commentary on this in Discussion Paper.

In summary, we would not support this aspect of the proposal if it means that an increase is made to the current categories of time which may be disregarded from the investigation period.

Extension of investigation period for terrorism and non-terrorism offences

The investigation period begins when the person is arrested and, for non-ATSI adults, can last for a reasonable time, up to a maximum of four hours. The investigation period may be extended for

serious non-terrorism offence and for terrorism offences. However, the total length of the periods of extension cannot be more than eight hours for a serious non-terrorism offence or 20 hours for a terrorism offence. This amounts to a total maximum investigation period of 12 hours for a serious non-terrorism offence or 24 hours for a terrorism offence.

For terrorism offences, the investigation period may be extended any number of times, upon application by police, up to the 20 hours maximum total extension.

The Discussion Paper states unlimited extensions for serious non-terrorism offences can be made, however s23D(5) clearly provides that only 1 extension is possible.

The proposal to convert the current provisions regarding extensions into 2 separate sections (proposed ss23D and 23DA, and ss23DE and 23DF), one covering the application for an extension of the investigation period, and the other covering the magistrate's power to extend the investigation period seems sensible.

Extension of investigation period - Who may grant an extension of the investigation period?

Currently an application for an extension of the investigation period must be made to and granted by a magistrate, any justice of the peace or a bail justice.

We agree with the Clarke Inquiry report conclusion that an application for the extension of the investigation period (and therefore, of detention) is too important to be dealt with by someone other than an experienced judicial officer.

We support the proposed amendment (which would restrict the power to grant an extension to magistrates) as it is an improvement on the current provision. However in our view the decision should be made by a Federal Court judge, rather than a magistrate.

The case of Dr Haneef raises questions about the role of the judiciary in extending investigative dead time. The statutory provisions governing the granting of investigative dead time permit that dead time to be repeatedly extended, such that a person might be indefinitely detained, contrary to the principle of habeas corpus. Dr Haneef's experience demonstrates that the mere fact that it is a Magistrate from whom the AFP seek any grant or extension of investigative dead time is not sufficient to ensure that the principle of habeas corpus prevails.

Given the lack of police evidence to support the continued detention of Dr Haneef, the case also raises the concern that a presiding magistrate may simply become a rubber-stamp for the demands of the AFP. We also note that a decision was never made (due to the AFP withdrawing their application) regarding Mr Kiem's submission that the magistrate, Mr Gordon, should be disqualified on the grounds of 'apprehended bias' as he had been alone with the applicant during previous applications with neither Dr Haneef nor his lawyers present.

Extension of investigation period - Form and notice of applications to extend the investigation period

We support the additional safeguards proposed for applications for an extension of the investigation period (section 23D for non-terrorism offences, and renumbered section 23DE for terrorism offences), namely:

- that applications for extensions of time can only be made in writing (not by telephone) (proposed ss23D(1) and 23DE(1));
- that the application must contain certain specified information, relevant to whether an extension is permissible and necessary (proposed ss23D(2) and 23DE(3));

- that a copy of the application must be given to the person, or to his or her legal representative;
- that the investigating official must inform the person that he or she or their legal representative may make representations to the magistrate about the application (proposed ss 23D(4) and 23DE(5)).

We do not support proposed subsections 23D(3), nor subsections 23D(5) and 23DE(6) in the format proposed in the Discussion Paper.

These proposed subsections contain provisions regarding information that does not need to be disclosed in the application, and/or can be removed from the copy of the application 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"). The reasons expressed in these exceptions are too broad, and are likely to be interpreted by police broadly.

Given that proposed ss23D(5) and 23DE(7) allow for information of that kind which is included in the application to be removed from the copy to be given to the person (or their representative), why are ss23D(3) and 23DE(5) necessary? It is not in the interests of justice and a proper assessment of whether an extension is necessary, for the magistrate to decide the application without this information. Furthermore, removal of a broad range of information from the copy given to the person, unfairly impacts upon the person's ability to properly contest the application.

The Discussion Paper refers to s23D(3) as an "avoidance of doubt" provision, which is based on ss104.12A(3) of the Criminal Code (relating to control orders).

In our opinion s23D(3), and s23DE(5), are more than an avoidance of doubt provisions. As there is no other provision requiring this information to be given to the magistrate by other means, if this information is not included in the application to the magistrate, it is likely that the magistrate will have to make a decision in the absence of this information. We submit that proposed ss23D(3) and 23DE(5) should not be included in the legislation.

Proposed ss23D(5) and 23DE(7) state that the investigating officer may remove information in the copy of the application given to the person (or their representative). In our opinion, any decision, or order, to withhold information from the person (or their representative) should only be made by a judicial officer, and not by the investigating officer.

The Discussion Paper says:

> The Clarke Report raised the issue of how sensitive or classified information should be treated in applications of this nature. It stated that 'it should be borne in mind that a judicial officer might be required to consider sensitive or classified information in the absence of the person under arrest and/or their lawyer.'
>
> The Report considered that there should be specific provisions in the legislation addressing this situation and referred to Schedule 8 of the United Kingdom Terrorism Act 2000 as an example or starting point for considering this issue. That Act contains a specific provision for the judicial officer to make an order that material may not be provided to the person or their legal representative if satisfied that for stipulated reasons there are reasonable grounds for believing that the information should be kept secret.

However, for the reason detailed above, the proposed ss23D(5) and 23DE(7) are much weaker than the provision in the UK Terrorism Act. We submit that if ss23D(5) and 23DE(7) are included in the Bill, they should give this power to the magistrate, not to the investigating officer.

The Discussion Paper states that proposed subsection 23D(5) is based on subsection 104.12A(3) of the *Criminal Code*, which deals with the information that must be given to a person in relation to a control order, and was adopted to ensure consistency within Commonwealth legislation.

Community Legal Centres' opposition to control orders is well documented and we maintain that they should not they are a disturbing departure from the principle of innocent until proven guilty and should be removed from our legislative framework. We do not believe therefore that this is an appropriate provision to copy into this context.

Part 2 Amendments to the search warrant provisions in Part 1AA, Divisions 1 and 2 of the *Crimes Act 1914* to allow re-entry in emergency situations

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 (expansion from within 1 hour to within 12 hours, section 3J(2)(aa)). 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 (section 3JA). 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.

Part 3 New provision in Division 3A of Part 1AA of the *Crimes Act 1914* to allow entry without warrant in emergency situations when investigating terrorism

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. In our view current police powers are sufficient to the task of addressing the threat of terrorism and the Discussion Paper fails to provide evidence that existing police powers are inadequate. Furthermore, we believe that such radical extensions of police powers unduly infringe civil liberties and therefore represent a disproportionate response to the threat of terrorist activity. We are also concerned that these powers are also particularly prone to being applied in a discriminatory manner.

The AFP already has extensive without warrant search and questioning powers contained in Part 1AA, Division 2 of the *Crimes Act 1914*. These include the power to stop and search a person in a range of circumstances, the power to demand a person's name and proof of identification, and the power to search a vehicle. Furthermore, there is already a lack of safeguards around the use of the existing powers.

We are concerned that the proposed amendments will allow police to conduct "sneak and peek" searches. The proposal is equivalent to covert search powers provided to state police that does not require a person to be notified of a search of their premises through prior perusal of a warrant. The law recognises the right of quiet enjoyment of property through trespass laws. These can be abrogated by a search warrant upon due consideration by an appropriate judicial authority. The proposed amendments that allow for without warrant entry and search, represent a fundamental shift in the balance of an individual's right to privacy and state power that is unwelcome and unnecessary.

If the proposal is not withdrawn, we suggest it be referred to the National Security Monitor, once established with the requisite power to consider proportionality.[6]

If this proposal is to be enacted, we support the requirement that a search warrant be sought before a further search is conducted.

[6] The Finance and Public Administration Legislation Committee Report on the National Security Legislation Monitor Bill 2009 recommends that the bill be amended to require the Monitor to assess proportionality. See Recommendation 11.

Part 4 Inserting a right of appeal for the prosecution and defendant in the bail provisions in national security cases in section 15AA of the *Crimes Act 1914*

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. If this is not to be addressed in these proposals, it is clearly a matter that should be referred to the National Security Monitor, once established.

Chapter 3 - Amendments to the *Charter of United Nations Act 1945*

Community Legal Centres support the proposals to improve the standard for listing under the Charter Act and to provide for regular review of listings.

The Parliamentary Joint Committee on Security and Intelligence Report *Review of Security and counter-Terrorism Legislation* recommended that section 15 of the Charter Act and regulation 6 be amended to improve the capacity for judicial review of a Minister's decision under the *Administrative Decision Judicial Review Act 1975*. We welcome the proposal in the Discussion Paper that seeks to implement this recommendation with respect to section 15 of the Charter Act. We note that the Government response to the recommendations of this PJCIS Report released on 23 December 2008 states that the government supports similar amendments to regulation 20, which is the relevant regulation currently in place of regulation 6. We would support this amendment to regulation 20 but cannot see it included or referenced in the Discussion Paper.

The periodic review mechanism proposed in the Discussion Paper 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.

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.

Chapter 4 - Amendments to the National Security Information (Criminal and Civil Proceedings) Act 2004

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 Discussion Paper respond to our concerns about this Act.

The *National Security Information (Criminal and Civil Proceedings) Act* 2004 allows the Attorney General to closely monitor and regulate court processes in both criminal and civil proceedings. We see this as a clear breach of the doctrine of the separation of powers, a corner stone of our legal system. We strongly oppose the proposals in the Discussion Paper that seek to expand the interventionist capacity of the Attorney-General and the power of the government to control who participates in legal proceedings and the evidence that is presented.

The current regime of security clearances is inconsistent with the principle of a judiciary which is independent from government. In our view, the power to determine how proceedings will be run should rest with the court. The regimes constructed in the Act for closed hearings, Ministerial certificates and security clearances are not the only method of dealing with classified and security sensitive information. The courts should be allowed to make a broad range of orders to protect such information.

Chapter 5 - Amendments to improve oversight of the Australian Federal Police

Community Legal Centres support in principle the proposal to improve oversight of the Australian Federal Police by extending the functions of the current Parliamentary Joint Committee on the Australian Crime Commission to include oversight of both the AFP and the ACC.