VICTORIAN COUNCIL FOR CIVIL LIBERTIES

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Committee Secretary
Senate Legal and Constitutional Committee
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Parliament House
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Dear Secretary,
Re: National Security Legislation Amendment Bill 2010

Thank you for the opportunity to comment on the National Security Legislation Amendment Bill 2010 ("the Bill").

Liberty Victoria (the Victorian Council of Civil Liberties) is one of Australia's leading human rights and civil liberties organisations. Liberty works to defend and extend human rights and freedoms in Victoria.

Schedule 1 – Treason and Urging Violence
The renaming of sedition offences as "urging violence" does not deal with the fundamental problem of sedition offences, and the criminality which is targeted is already covered by existing laws.

Clause 80.2B has an extraterritorial operation, and might well criminalize a person in Australia urging that arms be taken up in relation to some foreign cause (for example, a civil war in a foreign country). If a person were charged with such an offence, it would then be for the courts to determine whether the violence proposed would "threaten the peace order and good government of the Commonwealth" – something which would bring into question Australia's foreign policy in relation to particular disputes. This is properly a matter to be determined by the Executive, as accountable to Parliament, not the Judiciary. This clause should not be enacted.

Under already existing incitement provisions, the prosecution is required to prove beyond reasonable doubt that it was the offender's object to induce commission of the offence in question, which requires a connection to a specific substantive offence. The thresholds of proof required to gain a conviction for inciting violence under existing provisions are accepted in society and, in Liberty's view, get the balance right. The proposed provisions overcome this

requirement to prove a definite causation. Liberty submits that it is not justified to lower the required thresholds in order to obtain convictions.

There is no definition of "urging" which is a broad term and widens the ambit of previously understood criminality. This provides excessive discretion to public officials.

The lack of prosecutions in this area, and the low thresholds required to obtain convictions, leads to a danger that the threatened use of these provisions, rather than their actual use, will lead to a "chill effect" which will stifle free speech.

The proposed "urging violence" provisions contained in s 80.2 are not supported by Liberty. We recommend the repeal of existing provisions, so that we can utilise the existing incitement provisions and bring Australia into line with human rights norms. The recommendations of the Law Reform Commissions in England and Wales, Ireland and Canada provide appropriate models that protect the human rights, particularly freedom of expression.

Schedule 2 – Terrorism
Listing of terrorist organisations to have effect for 3 years instead of 2 years (clause 3 in relation to paragraph 102.1(3) of the *Criminal Code*) is an unfortunate change, for the reasons set out in relation to Schedule 7 (below).

Schedule 3 – Investigation of Commonwealth Offences
Having a different legal regime for investigation of terrorism offences, as distinct from other offences, is not justified.

Insofar as international inquiries may be required, this is also required in relation to other offences, and the fact is that overseas agencies and Australian agencies work very closely together in any event.

Liberty Victoria is aware of several instances in which the power to hold persons without charge has been used as a threat to induce persons to talk to security authorities. This kind of power invites just this kind of abuse.

The provisions to hold a person in custody during investigation have only been used twice, so far as Liberty Victoria is aware:

(a) in relation to the questioning of Dr Haneef over many days;
(b) in relation to the questioning of one of the recently charged Somalis, who was questioned for several hours.

Under the provisions in the Bill, the outer limit of detention remains undefined. The periods which may accrue are as follows:

1. 23DB(5) – 4 hours;
2. 23DB(9)(a) to (l) – undefined, no limit applying except the practical limit of the time taken for each of these steps, which could take many days;
3. 23DB(9)(m), which is limited by 23DB(11) to seven days;
4. 23DF(7) – 20 hours.

Accordingly, the total is 8 days, together with such further (undefined) time as is required for the matters set out in 23DB(9)(a) to (l).

It is unsatisfactory, after the controversy surrounding the Dr Haneef affair, and the Clarke Inquiry which succeeded it, to leave the outer time for detention of suspects for questioning undefined.

Further, even an outer limit of 8 days cannot be justified from experience to date. The time limit should be no greater than for non-terrorism offences.

Schedule 4 – Powers to search premises in relation to terrorism offences
Clause 3UEA provides a power of search without warrant. Liberty Victoria is of the view that this power cannot be justified:

1. it is not available under Victorian law;
2. no example of any actual injustice or actual security threat occasioned by the absence of such a power to date has been offered;
3. given the abuse of existing powers by security authorities, notably in the Dr Haneef affair, there is no certainty that the grant of this power without oversight would not be abused;
4. although there is now a requirement of subsequent *notice* in sub-clause (7), there is no requirement in the provision for subsequent *regularisation* of the intrusion by reference to some other authority;
5. the police officer may also, under 3UEA(5) "do anything to make the premises safe" – the width of this power, in the light of jurisprudence in relation to "safety", is extraordinary, and, depending on the decisions taken by police, this might well give rise to the acquisition or destruction of property;
6. currently, a warrant can be obtained by a telephone call. The inconvenience involved is minimal, whereas the protection to the community is important.

Schedule 6 – Amendments relating to bail
At least in Victoria, the provisions in relation to bail appeals do not provide any benefit to accused persons. There is already a right to make a fresh application for bail (as distinct from an appeal) to the Supreme Court after refusal by a Magistrate. The stay of an order granting bail for a period of 72 hours cannot be justified. If a court orders a person to be released, then that should be given effect unless on application to a superior court a stay is granted on proper material.

Not touched in the Bill is the important issue of the reverse onus provision in relation to bail in terrorism matters. Not all so-called "terrorism" offences are of the same level of seriousness, and the application of the highest hurdle for all such charges – the same hurdle as is imposed in cases of murder - cannot be justified.

If this proposal is adopted, then any decision of a Magistrate granting bail against the opposition of the Commonwealth will have to be validated by the Court of Appeal before the accused can be released from custody. We are concerned that any period of detention between the grant of bail by a judicial officer and the review of that grant by a superior court could amount to arbitrary detention.

If the Magistrates Court has jurisdiction to grant a person their liberty, then any grant should be given effect unless and until the Supreme Court finds an error with that exercise of discretion.

This is especially so in view of the seriously adverse conditions under which terrorism suspects are currently held by prison authorities, a matter which has been the subject of significant criticism on several occasions.

Schedule 7 – Listings under the *Charter of the United Nations Act 1945*
The relaxation of review periods from two years to three years is not justified. On average, parliamentary terms in Australia are less than three years, and the prospect is that these listings will not be reviewed in the life of every parliament.

There is no effective right of appeal against the listing of terrorist organisations. The primary reason for this is practical. Once an organisation is listed, who will swear an affidavit claiming to be a member of the organisation and claiming to be adversely affected so as to have standing to challenge the listing? Once there is no legal check on the exercise of power by the executive, the power is exercised without being subject to the rule of law, and is open to serious abuse.

Presently there are many organisations listed whose status as terrorist organisations would be strongly contested by substantial sections of the Australian community. Examples include the PKK, Hamas and Al-Shabaab.

Schedule 10 – Parliamentary Joint Committee on Law Enforcement
Liberty supports the creation of the Parliamentary Joint Committee on Law Enforcement. Providing parliamentary oversight of the Australian Federal Police through a committee constituted by both houses is warranted, improves openness, transparency and accountability and is beneficial to democracy in Australia. However, Liberty recommends amending the Bill to extend the reviewing function of the committee to include all matters it considers necessary. Openness, transparency and accountability will not be maximised if the committee is restricted in reviewing sensitive matters. It is in the interest of Australian democracy for the committee to monitor and report on the most important of matters. Courts and Royal Commissions have demonstrated that processes are available for considering sensitive matters, whilst meeting national security requirements. It is common for reports to be produced that balance the requirement to maintain confidentiality with openness.

Conclusion
The terror law regime has already given rise to significant injustice in relation to Mr Haneef and the prosecution of three Tamils here in Victoria. There is a need for proper reform, if not repeal, of those laws.

The changes proposed in this Bill operate at the margins only, whereas root and branch reform is needed. Moreover, several aspects of the Bill are unfortunate.

Liberty would be happy to assist further with the deliberations of the Committee as required.

Yours faithfully,

Michael Pearce SC
President