Australian Federal Police Association

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

Inquiry into the *National Security Legislation Amendment Bill 2010*

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Senator Trish Crossin
Chair, Senate Legal and Constitutional Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

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Dear Madam Chair,

RE: Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the *National Security Legislation Amendment Bill 2010.*

We are pleased to present this submission to this Committee's Inquiry into the *National Security Legislation Amendment Bill 2010* on behalf of the members of the Australian Federal Police Association (AFPA.)

The AFPA represents the industrial, social and professional interests of the majority of Australian Federal Police (AFP) employees. As a long running representative of AFP sworn officers we are well situated to advance an informative view on the amendments proposed in the legislation that is currently before the Committee.

The AFPA strongly supports the proposed provisions in the National Security Legislation Amendment Bill 2010. In particular, we note that many of the changes in this bill are informed by the Clarke Inquiry into the case of Mohammed Haneef (November 2008.) The AFPA was active in this Inquiry via the submission process and we are gratified that its findings have led to substantive reform.

Nevertheless, there are a number of important reforms that are not included in the current legislation. The Association has lobbied over a number of years for improvements to the *Crimes Act 1914 (Cth)* as well as the *Criminal Code Act 1995 (Cth.)* While some of these issues have been addressed in the Bill, many have not. The AFPA is committed to legislative reform in order to enhance the ability of Australia's law enforcement professionals to acquit their duties effectively and efficiently. It is in this spirit that we present our recommendations on the Bill.

Some of our recommendations relate to amendments that are currently proposed and others are for the inclusion of additional provisions into the Crimes Act. The Association is primarily concerned with schedules 3 – 5 which deal with Part 1C and Part 1AA of the Act.

Yours faithfully,

Jon Hunt-Sharman
National President
Australian Federal Police Association

Schedule 3 – Investigation of Commonwealth Offences

Crimes Act 1914 (Cth), subsection 23C – The "Four Hour Rule"

The AFP is one of the only law enforcement agencies in Australia where a four hour rule is imposed to limit the time that an arrested person can be detained for the purpose of interview in relation to an investigation. Section 23C of the Crimes Act 1914(Cth) places this restriction on investigating officials investigating Commonwealth offences. Under section 23D the investigation period may be extended for a period not exceeding eight hours and must not be extended more than once. Legislation in most other jurisdictions does not place this limitation on Police services and law enforcement agencies. For example the Victorian Police have a 'reasonable time' rule with no specific time limits applying.

The AFP operates within a dynamic and complex law enforcement environment involving transnational organised crime and other serious crime impacting on the Commonwealth. Operationally, the four hour rule has now become impractical when interviewing persons in relation to complex criminal activity, particularly in the areas of complex frauds, high tech crime and international drug importations. In the current AFP environment such interviews are routinely extended by the investigating officer through application for an *'extension of the investigation period'*.

The AFPA asserts that the current restrictions under section 23C are obsolete and unnecessary. The AFPA makes this assertion based on the fact that under section 23F the investigating official must, before starting to question the person, caution the person that he or she does not have to say or do anything, but that anything the person does say or do may be used in evidence. Under section 23G the investigating official must also inform the person that he or she may communicate, or attempt to communicate, with a friend or relative to inform that person of his or her whereabouts; and communicate, or attempt to communicate, with a legal practitioner of the person's choice and arrange, or attempt to arrange, for a legal practitioner of the person's choice to be present during the questioning. The investigating official must defer the questioning for a reasonable time to allow the person to make, or attempt to make, the communication and, if the person has arranged for a legal practitioner to be present, to allow the legal practitioner to attend the questioning. As such, any person participating in such an interview is clearly doing so voluntarily and often with legal counsel present. They can cease participation in the interview process at any time. It can be argued that the limitation of a four hours investigation period can directly conflict with the 'desires' of the arrested person who wishes to continue to voluntarily speak under criminal caution. It also creates unnecessary administrative processes, time delays and additional court and police costs, without providing any substantial benefit to the person being interviewed.

To avoid the inefficiencies that are currently evident under the legislation, where investigating officers are regularly required to apply for extensions, the AFPA believes a more effective process would be to reverse the current requirements so that the initial investigation period is up to eight hours with the investigating official having the option to submit an application for an extension of the investigation period for a maximum of a further four hours. The net result is the same in that the maximum period that a person can be interviewed is still twelve hours which is the current case under legislation. If the Courts and society accept that a voluntary interview of twelve hours does not place undue stress or duress or fatigue on an individual, then surely an initial eight hour period is not overburdening for a person, particularly when they can in fact cease their participation at any time within that eight hours.

Recommendation 1.1

Amend Section 23C of the *Crimes Act 1914 (Cth)* to extend the "four hour rule" to "eight hours" and reduce the extension of "up to eight hours" to "up to four hours".

Crimes Act 1914 (Cth), proposed amendment to subsection 23D - Extension of investigation period if arrested for non-terrorism offence

Section 23D of the *Crimes Act 1914 (Cth)* currently states that:

(1) If a person is under arrest for a serious offence (other than a terrorism offence), an investigating official may, at or before the end of the investigation period, apply for an extension of the investigation period.

(2) The application must be made to:

(a) a magistrate; or

(b) if it cannot be made at a time when a magistrate is available—a justice of the peace employed in a court of a State or Territory or a bail justice; or

(c) if it cannot be made when any of the foregoing is available— any justice of the peace.

The magistrate, justice of the peace or bail justice to whom the application is made is the ***judicial officer*** for the purposes of this section and section 23E.

Under the proposed legislation the above provisions would be changed to restrict the granting of an extension to a magistrate only. This is an unnecessary "raising of the bar" that would place additional strain on magistrates who are already often unavailable to approve such applications due to their extensive responsibilities. This would create unnecessary administrative delays and inefficiencies and could prolong the investigative process due to the “dead time” required to finalise an extension application.

Search warrants are granted by Issuing Officers (a justice of the peace employed by the court) and a similar arrangement is appropriate in terms of extending the investigation period in the absence of a magistrate. The execution of a search warrant is comparable to being investigated after an arrest, therefore there should be parity in the way that these two provisions are administered. The AFPA accepts that a justice of the peace who is not employed by a State or Territory court may not have the kind of expertise to deal with such applications. However we strongly believe that a justice of the peace employed by the court clearly has the appropriate knowledge and background to consider applications for extending the investigation period.

Recommendation 1.2

That the current amendment to s23D of the *Crimes Act 1914 (Cth)* be expanded to allow a justice of the peace employed in a court of a State or Territory or a bail justice to approve extensions of the investigation period of a non-terrorism offence.

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

Crimes Act 1914, Proposed section 3UEA - Emergency entry to premises without warrant

The proposed amendment to the *Crimes Act 1914 (Cth)* limits the circumstances in which a premises may be entered without a warrant to instances in which there is "a serious and imminent threat to a person's life, health or safety."

The current amendment does not take into account the substantial economic loss to Australia that could occur if critical infrastructure was targeted in the execution of a serious crime. Such an attack

may not necessarily result in a "serious and imminent threat to a person's life, health or safety" and therefore this provision would not be applicable.

The proposed legislation would be enhanced by the inclusion of additional instances whereby emergency entry to premises without a warrant may occur. These instances could be based on language in the *Criminal Code 1995 (Cth)* which prioritizes trade, critical infrastructure and electronic systems as key areas that require protection above and beyond any link to a person's life, health or safety.

Recommendation 1.3

That an additional subsection be included within proposed section 3UEA of the *Crimes Act 1914 (Cth)* that extends the grounds upon which premises may be entered without a warrant to include instances where there are reasonable grounds to believe that there is a "serious or imminent threat to trade, critical infrastructure or electronic systems."

Schedule 5 – Re-entry of premises in emergency situation

Crimes Act 1914 (Cth), Section 3F – The things that are authorised by a search warrant

Under section 157(1)(e) of the *Police Powers and Responsibilities Act 2000 (Qld),* Queensland police have the ability to detain people while executing a search warrant. The Crime Act 1914 (Cth) does not have such a provision.

Section 157(1) states:
A police officer may lawfully exercise the following powers under a search warrant (search warrant powers) – (e) power to detain anyone at the relevant place for the time reasonably necessary to find out if the person has anything sought under the warrant;

This provision has several practical benefits:
• It ensures that search warrants can be executed efficiently and effectively even in circumstances where a person is not arrested or charged.
• It could prevent the loss of evidence and or interference with evidence.
• It enables police to identify all persons at the target premises.
• It protects the safety of police officers.

Recommendation 1.4

That the *Crimes Act 1914 (Cth),* Section 3F be amended to include a similar power to that provided in s157(1)(e) of the *Police Powers and Responsibilities Act 2000 (Qld).*

Crimes Act 1914 (Cth):
Section 3Y – Power to arrest without warrant a person on bail;
Section 3ZB – Power to enter premises to arrest offender;
Section 3W – Power of arrest without warrant by constables.

The current legislation is unclear in relation to entering premises to arrest a person who has been released on bail where the constable believes on reasonable grounds that the person has contravened or is about to contravene a condition on which bail was initially granted.

Recommendation

Subject to subsection (3), if:

a) a constable may, under section 3W, arrest a person without warrant for an offence; and
b) the offence is an indictable offence; and
c) the constable believes on reasonable grounds that the person is on any premises;

the constable may enter the premises, using such force as necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the person or arresting the person.

d) a constable may, under section 3Y, arrest a person without warrant who has been released on bail for an offence; and

e) the constable believes on reasonable grounds that the person is on any premises; the constable may enter the premises, using such force as necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the person or arresting the person.

Crimes Act 1914 (Cth), Section 3ZF and 3ZE – Power to conduct an ordinary search and frisk search of an arrested person.

Currently the *Crimes Act 1914 (Cth)* does not give police the power to conduct a frisk search or ordinary search without taking a person into custody.

Sections 29 and 30 of the *Police Powers and Responsibilities Act 2000 (Qld)* provide:

29 Searching persons without warrant

1) A police officer who reasonably suspects any of the prescribed circumstances for searching a person without a warrant exist may, without a warrant, do any of the following

a) stop and detain a person;

b) search the person and anything in the person's possession for anything relevant to the circumstances for which the person is detained.

2) The police officer may seize all or part of a thing

a) that may provide evidence of the commission of an offence; or

b) that the person intends to use to cause harm to himself, herself or someone else; or

c) if section 30(b) applies, that is an antique firearm.

30 Prescribed circumstances for searching persons without warrant

The prescribed circumstances for searching a person without a warrant are as follows

a) the person has something that may be

i) a weapon, knife or explosive the person may not lawfully possess, or another thing that the person is prohibited from possessing under a domestic violence order or an interstate domestic violence order; or

ii) an unlawful dangerous drug; or

iii) stolen property; or

iv) unlawfully obtained property; or

v) tainted property.

These provisions have significant practical benefits. They ensure the operational safety of police. They also increase efficiency by satisfying police suspicion immediately and preventing unnecessary arrests.

Recommendation 1.5

That the *Crimes Act 1914 (Cth)* adopts provisions similar to those in the *Police Powers and Responsibilities Act 2000 (Qld)* to allow police to conduct a frisk search and ordinary search without having to take the person into custody or obtain a warrant.

Crimes Act 1914 (Cth), Section 3ZE, 3ZF, 3ZG - Searching a Suspect in Custody

At present the legislation only allows for "a constable who arrests a person, or who is present at such an arrest" to conduct a search of the suspect (s3ZE, 3ZF, 3ZG *Crimes Act 1914 (Cth).* The exception to this is when a person has not had an ordinary search conducted and the person is brought into a Police Station. Then s3ZH allows for a person to have an ordinary search or a strip search conducted.

In most instances in the AFP the arresting officer (or persons present) hand the suspect over to other AFP Police Officers for processing and lodging in the watch-house. Under the legislation as it stands, the Police Officer who takes custody of the suspect is not entitled to conduct a search. This is a serious Police Officer safety issue and needs to be addressed.

Recommendation 1.6

That the Crimes Act 1914 (Cth) be amended to allow for a search to be conducted by police officers taking a suspect into custody.

Summary of Recommendations

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