Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC, IN CONSULTATION WITH MEMBER CENTRES

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Submission

To the Senate Standing Committee on Legal and Constitutional Affairs

Inquiry into the Anti-Terrorism Laws Reform Bill 2009

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About the Federation of Community Legal Centres (Vic) Inc

The Federation is the peak body for fifty two community legal centres across Victoria. The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged
- works to build a stronger and more effective community legal sector
- provides services and support to community legal centres
- represents community legal centres with stakeholders

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About the Anti-Terrorism Laws Working Group

This submission has been prepared for the Federation by the Anti-terror Laws Working Group, one of a number of issue-specific working groups within the Federation comprising workers from member centres. This Working Group coordinates the Federation's response to Federal and State anti-terrorism laws by:

- campaigning to improve the laws;
- contributing to various Federal and State inquiries and reviews;
- building links with affected communities and providing support and legal education to those communities;
- building capacity and supporting Community Legal Centres and Federation networks to work on anti-terrorism issues.

About Community Legal Centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

Executive Summary

The Federation strongly supports the *Anti-Terrorism Laws Reform Bill* 2009 (hereafter referred to simply as The Bill). The Bill is the first step in addressing some of the communities' deeply held concerns about Australia's counter-terrorism response since September 2001 and should be supported by all in the Federal Parliament who seek to uphold the fundamental principles of democracy, the rule of law and human rights.

The Federation has actively participated in the debate about Australia's counter-terrorism response since the events of September 2001. We have written countless 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 appear to have been given scant regard as the counter-terrorism laws have developed. The Bill is the one exception.

Community Legal Centres do not usually provide legal representation to people charged with terror-related offences. Our role has been to 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. In much of the debate the voices of these communities are not heard and the impact of Australia's counter terrorism response upon these communities is not understood. This is partly due to the fact that many of these communities are fearful of active participation in public debate because of the potential legal and social consequences.

This submission draws upon the detailed arguments that have previously been put by the Federation and others to various reviews. We take the Committee through each item of the Bill seeking to explain the problems with the existing provision and the proposals for amendment through the lens of the communities we work with.

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

Items 1 and 2 – Repeal of Sedition offences

The Federation strongly supports these amendments which would repeal the offence of sedition. We support the Law Council of Australia's arguments that these laws are "unnecessary, lack clarity and precision, and have a chilling effect on free speech and expression."[1]

The Federation has long been fundamentally opposed to the criminalisation of so-called seditious acts. We are of the view that the conduct criminalised by current sedition laws should not be the subject of criminal prosecution and should not fall with the application of the criminal law. 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, it is our view that they are not transferable into the context of modern democracy. It is fundamental to true democracy that citizens are able to challenge governmental structures and processes and this should not be impeded via legislation. Further, the incursions on freedom of speech and freedom of political association effected by sedition laws are both undemocratic and an undue impingement on civil liberties.

The historical background of Australian sedition laws, in particular the fact that their enactment coincided with the establishment of the Communist Party of Australia, indicates that these offences have been primarily aimed at the suppression of political dissent and opposition.[2] It is anti-democratic and dangerous that the government be able to shield itself from criticism and dissent via criminal legislation. This creates the potential for bad governance to go unchecked because it is legally impossible to challenge.

The offences do not require a direct connection between the offending conduct and actual terrorist activity or actual violence. At the same time the offences constitute a massive incursion on the right of citizens to freely criticise and oppose government and government policies. They also inordinately restrict the forms of political organisation and activist that citizens may be involved in or advocate. In our view these incursions are unjustified in light of the tenuous connection so-called seditious conduct may have with the acts posing a social problem, that is terrorist activity and violence.

Given Australia's current governmental and societal stability it is difficult to envisage the need for laws criminalising mere speech against the government and the established order. Prior to and since revising, and effectively reinvigorating, the sedition laws, the Government has failed to identify the precise need for this re-activation and the exact social problem that these laws are intended to address.

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. The offences of incitement to treason and treachery may, in practice, function as legislative replicas of several of the sedition offences. There is also 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.

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1 Senate Hansard, Senator Ludlam, Second Reading Speech, 23 June 2009, page 4.

2 *Issues Paper 30*, Australian Law Reform Commission, available at http://www.alrc.gov.au, 35

Items 3 and 4 – Definition of *terrorist act*

The Federation has 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 and the regimes for control orders and preventative detention orders derive from this key definition. In our view the overly broad definition of 'terrorist act' requires urgent refinement and clarification and items 3 and 4 should be supported.

The Federation supports the proposal to remove mere threats from the definition of "terrorist act". The breadth of the current definition 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.

The Federation supports the proposal to remove the element of criminalising political, religious and ideological acts from the definition of "terrorist act". In our view the existing provision necessarily criminalises politically, religiously and ideologically motivated acts only, particularly insofar as committing a 'terrorist act' is an offence in itself. In this sense this definition is particularly prone to being applied in a discriminatory manner or in a way that suppresses political dissent. This also raises the important question of whether the motivation for the act is actually 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. We are concerned that, politically and in the media, terrorist activity has been imbued with some special status that is unjustified and that is politically expedient. This mythology seems to have also permeated the legislative arena. Designating terrorist activity as a special kind of offence does not necessarily assist in dealing with terrorism as a problem. In our submission, the widespread quasi-mystical regard for politically and religiously motivated violence should not be pandered to by the legislature nor should it be legislatively enshrined.

The Federation has previously expressed concern that certain qualifications have been placed on the exceptions relating to protest, advocacy, dissent and industrial action. This creates 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. In this regard, the definition of 'terrorist act' as it stands serves to conflate dissenting political activity and activism with terrorism in certain situations. While the those situations may themselves pose a particular social problem, for example where death arises from some sort of protest or industrial action, it is not necessary to equate political dissent with terrorism in such cases. The Bill does not entirely address these concerns.

Item 5 – Possessing things connected with terrorist acts

The Federation supports item 5 which would repeal of section 101.4 of the Criminal Code, making it an offence for a person to possess a thing which is connected with preparation for, the engagement of a person in, or assistance in a terrorist act. As the law currently stands, the person must know, or be reckless as to the existence of the connection between the thing and the terrorist act. For the offence to be made out, a terrorist act does not need to occur. Further, the thing does not need to be connected with preparation for, the engagement of a person in, or assistance in a specific terrorist act.

It is a defence that possession of the document or thing was not intended to facilitate preparation for, engagement in or assistance of a terrorist act. The accused bears an evidential burden of adducing evidence that raises this defence.

The Federation is concerned that the offence may be committed without intending to commit a violent act, and, where a terrorist act does not occur. The connection required that the person knew or was reckless as to the existence of the connection does not require to be a nexus between the offence and an actual act of politically, religiously or ideologically motivated violence. It is unclear what might constitute such a connection or the degree of connection required.

In our view, there should be a close nexus between offences and acts of terrorist violence. All of the offences in division 101 suffer from this absence (sections 101.2, 101. 4 101.5 and 101.6.) Insofar as these offences lacks this close nexus, the above regime of terrorism offences exceeds the legislative purpose of preventing acts of terrorism in Australia and thereby represents a disproportionate response to the threat of terrorism in Australia. Therefore we support the repeal of 101.4, and continue to advocate for the repeal of the other offences in this division.

Item 7 – Definition of *terrorist organisation*

The Federation supports Item 7 which seeks to narrow the broad definition of "terrorist organisation".

Items 6, 8 and 10 – Terrorist organisation regulations

The Federation has repeatedly expressed its concerns regarding the listing provisions in previous submissions to the Parliamentary Joint Committee on Intelligence and Security and to the Security Legislation Review Committee ('the Sheller Committee'). In general, the Federation takes the view that the listing provisions are fundamentally inconsistent with the aspirations of a democratic society and that they compromise fundamental principles of the criminal law. The automatic criminalisation of political affiliations, associations and convictions by executive discretion, in the absence of direct harm to the physical safety of Australian citizens, is dangerous and draconian. We continue to advocate for repeal of these provisions in their entirety.

The Bill proposes a number of amendments to the listing provisions contained in Division 102 of Schedule 1 of the Commonwealth *Criminal Code Act* 1995 ('the Criminal Code') ('the listing provisions'). The Federation supports these proposals as they will address some of the problems with the listing process. We address each of the proposals:

Notification, right to be heard and community consultation
We strongly support the proposal that the organisation proposed to be listed is notified, and that the organisation and its members be given every opportunity to have the right to be heard, before a determination is made.

We also support the proposal that an advisory committee be established, and that its role include engaging in public consultations. Communities likely to be affected by the proscription should be consulted before a listing is made and a publicly available assessment on the potential impact on Australian citizens and residents should be made out. The very serious and disproportionate consequences of proscription necessitate this express statutory provision.

Setting aside our general objections to the listing provisions, the lack of community consultation in the listing process to date, has in our view been a fundamental procedural flaw in the listing regime. In our last two submissions to the Parliamentary Joint Committee on Intelligence and Security of 42nd Parliament (hereafter PJCIS), the Federation expressed our concerns about the government's repeated failure to engage in any process of community consultation prior to deciding to re-list organisations.[3] There has been no attempt to provide the community with information regarding any re-listing prior to the decision to re-list.

As we have previously noted, the PJCIS has repeatedly emphasised the importance of community consultation in the listing process. The PJCIS has previously recommended that:

> *A comprehensive information program that takes account of relevant community groups, be conducted in relation to any listing of an organisation as a terrorist organization.*[4]

Subsequently, in its 2007 Review of the Re-listing of the Six Organisations, the PJCIS again expressed the view that 'it would be most beneficial if a community information program occurred prior to the listing of an organisation under the Criminal Code'.[5]

Furthermore, in its 'Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code', the PJCIS acknowledged that the banning of certain political associations is bound to be controversial in a liberal democracy[6] and it expressed disappointment in the Government's limited efforts to provide community information to date.[7] In that Inquiry the PJCIS ultimately recommended that 'the Attorney-General's Department develop a communication strategy that is responsive to the specific information needs of ethnic and religious communities'.[8]

Despite all of these remarks and recommendations, the Government has not attempted any community consultation or community information provision in respect of any listing or re-listing. In consideration of the lack of action in this matter, it is entirely appropriate that community consultation be specified as function of the Advisory Committee, in the Criminal Code. Community consultation should seek to ascertain the views and effect of listing upon particular affected communities so that this can be taken into account in decision-making. In June 2009, Hizballah was relisted and no community consultation conducted. That this did not occur in this instance is of added concern because, in our view, the Government should be abundantly aware that certain communities in Australia have an interest in the re-listing of Hizballah. Indeed, the Statement of Reasons provided by the Australian Security and Intelligence Organisation ('ASIO') in respect of

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[3] Federation of Community Legal Centres (Vic) Inc, *Submission to the PJCIS: Review of the Re-listing of Six Organisations*, May 2009, 5; Federation of Community Legal Centres (Vic) Inc, *Submission to the PJCIS: Review of the re-listing of Hizballah's External Security Organisation as a terrorist organization under the Criminal Code Act 1995,* June 2009, 7-8.

[4] Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations*, March 2005

[5] 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 1.23

[6] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, September 2007, paragraph 3.16

[7] *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*,ibid, paragraph 3.24

[8] *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*,ibid, paragraph 3.25

the ESO ('the Statement of Reasons'), noted that Hizballah is a recognised political party in Lebanon with representation in the Lebanese parliament and in cabinet.[9] The Federation views the Government's failure to conduct a process of community consultation prior to re-listing the ESO as a grave procedural deficiency. Without information from relevant communities, the government made a decision based on an uncontested set of arguments.

The manner of the proposed Advisory Committee's function in calling for public submissions before any decision to list is made must be carefully considered. It is imperative that communities be notified in advance when the listing power is to be exercised, particularly communities with links to the organisations that are proposed for listing. The manner of informing communities must take into account the fact that such groups may struggle to engage with parliamentary processes and may not have the resources to respond with written submissions.

For example, in its report on the 2007 review of the ESO's re-listing the PJCIS noted that it had placed an advertisement in The Australian calling for submissions but had only received two submissions from academics.[10] This was counter-posed to the desirability of community consultation. In our view, a call for written submissions made via one newspaper is insufficient. Groups with a potential interest should be identified and directly provided with notification of the proposal for listing and given the opportunity to comment either in writing or orally. Advertising should be conducted through a variety of media that reflect news sources regularly utilised by the relevant community and should be in community languages.

The consultation process needs to take into account that communities with an interest in opposing a listing may be understandably reluctant to identify themselves as opposed to a listing, or to identify themselves as having any connection to an organisation, given the very serious offences which flow once an organisation is listed.

The timeframes for comment should take into account the limited resources of most community groups, which are often staffed by volunteers from the relevant community. The Federation notes with great concern that a new listing of the Somali group Al-Shabaab was announced by the Attorney General on Friday the 21 August 2009. The deadline for submissions, is however just two weeks later, on Monday the 7 September 2009, reflecting the disallowance period of 15 sitting days from the date the regulation was tabled in parliament. In our experience such a short period of time for submissions provides no real opportunity for public input and compromises the legitimacy of a review process.

This process of consultation should be wholly the responsibility of the Government, via the Advisory Committee (not the body reviewing a re-listing) and should be conducted before a decision to list is made.

Community consultation and information can potentially play a role of countering (to some degree) the extraordinary exercise of executive power facilitated by the listing provisions. Without consistent practices of informing communities, consulting and considering community views, the listing regime amounts to an unfettered exercise of executive discretion, highly prone to abuse and misuse. It is our view, that in listing to date where there has been no such community consultation, as was the case with the re-listing of the ESO in June 2009, it is our submission that any

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[9] ASIO, Statement of Reasons, May 2009, as annexed to the submission of the Attorney-General, available at http://www.aph.gov.au/house/committee/pjcis/hizballah_eso/subs/sub%201.pdf, page 1

[10] Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of Hizballah's External Security Organisation (ESO)*, July 2007, available at http://www.aph.gov.au/house/committee/pjcis/hizballah/report.htm, paragraph 1.16.

listings or re-listings made in these circumstances have not been made with due process and should be disallowed.

The Advisory Committee and the non-statutory criteria

It is clear that the Attorney-General relies heavily on the advice of ASIO in determining whether to list or re-list an organisation.

In a hearing relating to the 'Review of the listing of six terrorist organisations' on 1 February 2005, ASIO informed the PJCIS about its evaluation process when recommending organisations for listing.[11] ASIO provided the following criteria in a confidential exhibit:

- engagement in terrorism;
- ideology and links to other terrorist groups or networks;
- links to Australia;
- threats to Australian interests;
- proscription by the UN or like minded countries; and
- engagement in peace/mediation processes.

Although these criteria are not statutorily enshrined, the PJCIS has acknowledged that these criteria have formed the basis for testing the listings that it has reviewed.[12]

We submit that the establishment of the Advisory Committee is a critical measure to supplement and balance ASIO's advice to the Attorney-General and to provide expertise and perspectives from civil society. ASIO is a secret organisation whose functions turn on a great deal of expansive discretion. ASIO's significant role in the decision making process is arguably problematic due to its vested interest in proscribing organisations in order to increase the scope of its operational powers. The criteria extend ASIO's discretion by imposing automatic criminal liability for actions, views, and speech acts which go beyond direct harm to civilians. Furthermore it is difficult to establish how such views, speech acts, and affiliations could automatically be preparatory to violence against civilians. It is concerning that the process for listing lends ASIO such discretion and that ASIO's advice then triggers the Minister's decision to proscribe. This gives rise to a particularly subjective form of executive criminalisation of organisations.

We maintain concerns however, about how the proposed Advisory Committee will ensure a greater degree of procedural fairness in practice vis-à-vis ASIO's role in advising the Attorney-General.

In previous submissions to the Parliamentary Joint Committee on Intelligence and Security, we have argued that the application of the non-statutory criteria has been unclear. That is, it is not clear that the criteria have been applied in any systematic fashion and, rather, it seems that they have been applied inconsistently.

The PJCIS itself has on numerous occasions highlighted inconsistencies in the application of the criteria, in particular noting that the criteria pertaining to links to Australia and threats to Australia's interests have been given little consideration in many listings.[13] For example, despite

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[11] *Review of the listing of six terrorist organisations*, ibid, paragraph 2.24.

[12] Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers Party (PKK)*, 2006, paragraph 2.3.

[13] Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations*, ibid, paragraphs 3.22, 3.26, 3.35, 3.45, 3.49; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation*, May 2005, paragraphs 2.24, 2.28; *Review of the listing of seven terrorist organisations*, August 2005, paragraphs 3.12, 3.17, 3.38, 3.41, 3.50, 3.52, 3.61, 3.73, 3.74, 3.82, 3.83; *Review of the listing of four terrorist organisations*, September 2005, paragraphs 3.33, 3.37, 3.62, 3.64, 3.66, 3.80, 3.81, 3.82, 3.89

recommending that the listing remain, the PJCIS indicated that the case for the listing of Palestinian Islamic Jihad had not been entirely clear. The PJCIS stated that:

> *The immediate and threatening aspects of a particular entity, its transnational nature and the perceived threats to Australia or involvement of Australians should be given particular weight when considering a listing. This does not appear to have occurred in this listing. Nevertheless, the Committee does not object to this listing. However, it would like to see a more considered process in any future regulations. Given the serious consequences attached to listing, it should not be taken lightly.*[14]

In September 2005, the PJCIS requested by recommendation that ASIO and the Attorney General specifically address all of the six criteria in future Statements of Reasons, particularly for new listings.[15] The PJCIS stated that it 'would like to stress the need for clear and coherent reasons explaining why it is necessary to proscribe an organisation under the Criminal Code'.[16]

In its review of the re-listing of six organisations in 2007, the PJCIS again pointed out that 'matching information within the statements of reasons with the criteria has proved to be elusive' and that the Attorney-General had still failed to use the criteria as the basis of Statements of Reasons.[17] Now, in 2009, these comments still apply. The Statements of Reasons relating to the ESO's re-listing, as provided by the Attorney-General, did not address the non-statutory criteria in any discernible manner. In our view, this is quite possibly because the non-statutory criteria have not been applied to this re-listing. Indeed, the PJCIS in its report on the re-listing of the ESO stated '…the absence of information in relation to these guidelines is not determinative of the listing of an organisation.'[18]

We view this as a grave concern, particularly given the extraordinary breadth of the statutory criteria and the wide discretion afforded to the executive by the listing provisions.

This concern was also expressed in the minority report relating to the original listing of the PKK, which found that the non-statutory criteria were not met in the case of the PKK. There the minority argued that:

> *Implicitly accepting that conclusion, those advocating the listing instead argued that the PKK fell within the literal terms of the statutory definition of a terrorist organisation.*
>
> *If the Joint Committee accepts justifications for new listings without a proper basis and that are inconsistent with the reasoning of its prior reports and not based on existing (or any) stated policy we invite inconsistency. It would permit ad hoc decisions, incapable of justification on rational grounds to be reached. That would be inconsistent with the Joint Committee's obligations to the Parliament.*[19]

The lack of transparency and consistency around the government's application of the criteria to individual listings also creates a situation where the public are unable to clearly comprehend the

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[14] Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of Palestinian Islamic Jihad*, June 2004, paragraph 4.11

[15] *Review of the listing of four organisations*, ibid, 47 Recommendation 1

[16] *Review of the listing of the Kurdistan Workers Party (PKK),* ibid, paragraph 23.8.

[17] *Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU as terrorist organisations*, ibid, paragraph 2.4

[18] *Review of the re-listing of Hizballah's External Security Organisation (ESO) as a terrorist organisation,* June 2009, paragraph 2.5.

[19] Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers' Party (PKK),* April 2006 Minority Report, paragraph 1.8

decision-maker's reasoning. Arguably, as the situation currently stands, this is an improper exercise of executive power.

The inconsistent application of the non-statutory ASIO criteria to date, therefore requires that the proposed Advisory Committee have a critical role in ensuring procedural fairness in applying any statutory and non-statutory criteria in advising the Attorney-General. The Federation recommends the Advisory Committee have a role in the provision and application of transparent and clear criteria and public disclosure of all such criteria, evidence and processes involved in its exercise.

Right of Appeal to the Administrative Appeals Tribunal

The Federation strongly supports the inclusion of a right of appeal to the Administrative Appeals Tribunal. We submit that the current provisions for de-listing of an organisation, while they allow parliament to play a limited role, are not an independent review mechanism in the absence of full and judicial merits review. This is especially critical given the severe impediments to the listing review process conducted by parliament as outlined above.

Item 10 – Training a terrorist organisation or receiving training from a terrorist organisation

The Federation strongly supports Item 10 that seeks to repeal and re-draft section 102.5. The section provides that it is an offence to provide training to a terrorist organisation or receive training from a terrorist organisation. In our view the existing provision is too broad and does not specify what type of training is prohibited, nor that there be a link between the training and any terrorist activity. Item 10 would have the effect of clarifying that these issues by requiring a connection between the training and the training provider's knowledge or recklessness as to the organisation being a terrorist organisation.

Item 11 to 15 – Providing support to a terrorist organisation

The Federation supports Items 11 to 15 that seek to modify the provisions in section 102.7 by deleting "support" and substituting "material support". The Federation has long been concerned with this section 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 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.

The Federation considers that the substitution of the term "material support" would narrow the interpretation of the provision and therefore prevent a scenario such as the Dr Haneef incident reoccurring. Moreover, the Federation supports Items 11 to 15 and believes that such amendments clarify these broad provisions.

Item 16 – Associating with a terrorist organisation

The Federation strongly supports the Bill's proposal to repeal Section 102.8 of the *Criminal Code Act*. The Federation has long been concerned with this provision and supports the Sheller Inquiry's recommendation that the offence of association with a terrorist organisation be repealed. In our opinion, this section is a gross departure from the fundamental principles of 'freedom of expression' and 'freedom of association' and is therefore inconsistent with Australia's international obligations under the International Covenant on Civil and Political Rights.[20] In our view the offence criminalises mere association without requiring any nexus between the association and terrorist activities. This places a greater restriction on the right to freedom of association than is necessary in the interests of national security. In this sense the association offence is disproportionate and overly intrusive.

[20] Articles 19 and 22, *International Covenant on Civil and Political Rights*.

Schedule 2- Amendments to the *Crimes Act 1914*

Item 1 – Bail

The Federation supports the Bill's proposal to repeal 15AA of the *Crimes Act* which provides that defendants who have been charged or previously convicted of terrorism offences must not be granted bail unless they are able to show that 'exceptional circumstances' justify the granting of bail. In our submission, the breadth of the terrorism offences is such that a blanket presumption against bail is unjustified. As discussed above, some of the Criminal Code's terrorism offences are designed to even capture conduct of a preparatory nature that has only a remote connection with actual acts of terrorist violence. This occurs due to the broad terminology used in framing the offences and that fact that all of the offences hinge on the definition of 'terrorist act', which is itself broadly defined and can include mere threats. Consequently, for example, terrorist offences can include offences which are remotely preparatory to the making of a threat of a political violence even where there was not intention to actually carry out any act of violence. In our view, a presumption against bail in such a case is absolutely without justification.

This view is confirmed by the other offences that section 15AA of *Crimes Act* designates as involving a presumption against bail. Apart from the terrorism offences, all other offences must involve conduct that caused the death of a person. This is in stark contrast to the types of terrorism offences that attract the same presumption against bail, which can include, for example, recklessly possessing a thing connected with a terrorist act or recklessly collecting documents likely to facilitate a terrorist act in situations where the 'terrorist act' referred to may be a mere threat.

This being the case, it is our view that there should be a presumption of bail in cases involving terrorism offences and we support the proposal to repeal section 15AA. We also support this proposal insofar as it will remove the presumption against bail that currently pertains to the *Crimes Act* offence of treachery (section 24AA) and the Criminal Code's treason (Division 80), sedition (Division 80) and espionage (Division 91) offences. In particular, in the case of the former three classes of offences, we are opposed to the continued existence of these offences on the basis that they are anachronistic and inappropriate in the context of a contemporary, liberal democracy.

Items 2 to 7 – Powers of detention

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.

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.

The case of Dr Haneef raises a number of critical areas of concern in respect of these provisions of the *Crimes Act*. 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. Nevertheless, we strongly support the Bill as it is a major improvement on the current legislation.

Items 3 to 6

We are concerned that the current section 23CB grounds for specifying time as 'dead time' are inadequate. 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 by the police and yet they 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.

We are also concerned that the operation of Sections 23CA and 23 CB 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. The case of Dr Haneef shows, however, that in practice the operation of the investigative dead time provisions undermines this crucial statutory protection of the principle of habeas corpus.

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's report and it was recommended that a cap on the investigative dead-time be introduced.

Item 7

The case of Dr Haneef also 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 continued to 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.

The proposal in Item 7 of Schedule 2 of the Bill provides that such applications be brought before a Federal Judge. This proposal would attract a higher level of judicial scrutiny which more adequately reflects the seriousness of the decision.

Item 2

We are also concerned that Dr Haneef was not represented by a lawyer when the first order relating to investigative 'dead time' was made. Given the deprivation of liberty involved and the complexity of the relevant laws, it is imperative that a detainee be represented and that submissions be made in respect of the AFP application on behalf of that person. It is also imperative that a detainee be adequately informed of their rights and that the AFP be compelled by law to provide them with this information. Section 23F of the *Crimes Act* does oblige the AFP to caution a suspect as to their right to silence and Section 23G creates an obligation that they inform a suspect of their right to contact a friend, relative and a lawyer. There is, however, no obligation that the AFP inform a suspect that they or their lawyer have a right to make submissions to a judicial authority who is considering an AFP application for an extension of investigative time. Section 23CB does create such an obligation, however, only in respect of applications for the specification of 'dead time' (and in any event, the Bill proposes repeal of this section).

Item 2 of Schedule 2 proposes to impose a positive obligation on the AFP to inform a suspect of their rights in relations to AFP applications to extend the investigation period. Given the extraordinary nature of this kind of prolonged detention, it is imperative that suspects are fully informed of all of their rights. Furthermore, a suspect who has been adequately informed of their rights is in a stronger position to assert those rights, including the right to legal representation. This proposal should be supported

Schedule 3 - Amendments to the *Australian Security Organisation Act 1979 (ASIO Act)*

The Bill proposes to make a number of amendments to Part III, Division 3 of the Australian Security Intelligence Organisation Act 1979 ('the *ASIO Act*'). This Division gives the Australian Security Intelligence Organisation (ASIO) special powers in respect of terrorism offences. Broadly speaking, it gives ASIO the power to obtain 'questioning' and 'questioning and detention warrants' in respect of persons believed to have information that will 'substantially assist' ASIO in the collection of intelligence in respect of a terrorism offence. Division 3 also sets up the regime for the issuing and execution of these warrants.

The Federation has stood in opposition to Division 3 of the *ASIO Act* since these amendments to the *ASIO Act* were first made public. In 2005, when the then-Parliamentary Joint Committee on ASIO, ASIS and DSD (now the Parliamentary Joint Committee on Intelligence and Security) reviewed the operation, effectiveness and implications of Division 3 ('the 2005 Review'), we made written and oral submissions expressing this opposition.[21]

We remain opposed to Division 3 of the *ASIO Act* in its entirety and advocate that it be wholly repealed. In our view, the detention of non-suspects for the purposes of gathering intelligence has no place in a liberal democracy. Furthermore, detention without the right of judicial review is contrary to the fundamental principal of habeas corpus and it also contravenes international human rights law, including the International Covenant on Civil and Political Rights (ICCPR).[22] We also take the view that the gross restriction of liberty permitted by Division 3 is disproportionate and that it is not justified by Australia's current terrorism threat level. We are also deeply concerned that these coercive powers can potentially be used against a wide range of people because their use hinges on the terrorism offences contained in Part 5.3 of the Criminal Code. These terrorism offences are themselves defined in broad terms (which, as discussed above, the Bill seeks to address) and relate to an array of preparatory conduct that may only have a tenuous connection to actual acts of terrorism.

Notwithstanding, our general objections to Division 3 of the *ASIO Act*, we strongly support these items as a substantial improvement on the current legislation.

Items 1 to 4 – Questioning and detention warrants

Items 1 to 4 of this Schedule of the Bill seek to amend the *ASIO Act* so that ASIO cannot obtain repeat questioning and detention warrants in respect of a person unless the subsequent warrants relate to a terrorism offence that was committed after the first warrant has been wholly executed or the subsequent warrants relate to an offence that arose in different circumstances to the offence relevant to the earlier warrant. It proposes to effect this change by changing the bases on which the Minister and the Issuing Authority 'may not' consent to a warrant.

We support this proposal. In our view this amendment will ensure that the ASIO's special powers relating to terrorism offences are less prone to abuse, in that people will not be able to be subject to repeated warrants in respect of the same offence. At present, the *ASIO Act* does nothing to prevent this kind of abuse of the special powers regime. Given the broad grounds upon which

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[21] Our written submission is available at http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/subs/sub50.pdf and the transcript of our appearance before the PJCIS is available at http://www.aph.gov.au/hansard/joint/commttee/J8386.pdf

[22] *International Covenant on Civil and Political Rights*, Article 9

ASIO can obtain such warrants (as noted above), we believe that it is imperative that the Division 3 powers be subject to this type of restriction.

Item 6 – Directions by prescribed authority

At present, Division 3 warrants must permit a subject to contact a 'single lawyer' of that person's choice. Sub-section 34K(10) provides, however, that a person who is in custody or detained pursuant to a Division 3 warrant is not permitted to contact anyone and can be prevented from contacting anyone through the period of their detention unless the warrant expressly permits them to contact another person. Sub-section 34K(11) provides an exception for contact with the Inspector General of Intelligence and Security (IGIS), the Commonwealth Ombudsman, the Australian Federal Police (AFP) Commissioner or certain others for the purpose of making a complaint. This means that subjects of Division 3 warrants have no right to contact family members, friends or employers to advise them of their detention. The Bill proposes that sub-section 34K(10) be repealed in its entirety.

We support Item 6 of Schedule 3 of the Bill as it is a step towards eliminating incommunicado detention of people subject to Division 3 warrants. Without this amendment, Division 3 currently allows the quasi-incommunicado detention of non-suspects, in that subjects of questioning and detention warrants may be detained for up to 1 week without being able to inform their family or employer. The only secured right is to contact a lawyer, however, that lawyer is prohibited from relaying any information pertaining to the detention to the subject's family or employer by section 34ZS of the *ASIO Act*. We support Item 6 of the Bill as it eliminates the possibility that ASIO may willfully and easily prevent subjects from contacting other persons. We would submit, however, that Item 6 of the Bill does not go far enough. In addition to the amendment proposed by Item 6 of the Bill, it is essential that Division 3 contain a positively-framed right to communicate with a family-member or friend and an employer. In our view, a positively expressed right to communicate with family, friends and employers is necessary in order to adequately ensure that detention under 'questioning and detention' warrants is not incommunicado.

Items 5 and 7 – Persons not to be detained for more than 24 hours

Under Division 3 the maximum continuous detention permitted under a questioning and detention warrant is 168 hours (7 days). The Bill proposes that this be reduced to 24 hours.

We support this amendment. At present, although the maximum period of detention permitted by Division 3 is 168 hours, pursuant to section 34R only a total of 24 hours questioning can take place in this time. Taking into account that subjects must be permitted to sleep 8 hours per night and have meal and rest breaks between bouts of questioning, that still leaves several days of detention in which a subject would be detained without any questioning taking place. In our view this indicates that the 7 days detention either has some punitive purpose or, at the very least, some purpose beyond mere intelligence gathering. In our view, this is entirely inappropriate and we therefore welcome the reform proposed in the Bill.

Items 8 to 11 – Repeal of other provisions

Item 8

Section 34ZP of the *ASIO Act* provides that (to avoid doubt) a person before a prescribed authority pursuant to a Division 3 warrant may be questioned in the absence of a lawyer of their choice. The Bill proposes repeal of this section. The Federation supports this proposal.

We are deeply concerned by the various limitations on a subject's right to lawyer imposed by Division 3. Given the additional restrictions on contacting other persons (as discussed above), the

subject of a Division 3 warrant is in a highly vulnerable position. This is exacerbated by the serious criminal penalties for failing to provide information or providing false information. Subjects' rights are substantially curtailed by Division 3 and if they are to understand and exercise any of the rights afforded to them, such as the right to complain to the IGIS or Commonwealth Ombudsman, it is imperative that they have access to a lawyer during their questioning.

Whilst we support this item, this amendment will not deal with the other problematic sections in the legislation that restrict a subjects' rights to legal representation. A number of these restrictions were highlighted in ours and various other submissions to the 2005 Review.[23]

The Bill does not address the fact that a subject may be prevented from contacting the lawyer of their choice if the Prescribed Authority precludes that lawyer pursuant to section 34ZO. It also fails to address the fact that a subject's lawyer may be removed from the questioning their conduct is deemed unduly disruptive to the questioning. Furthermore, a lawyer present during questioning has no right to intervene in the questioning or to address the prescribed authority except to clarify an ambiguous question. This means that lawyers have difficulty acting in their client's best interests for fear of being ejected from the questioning. This issue was also raised by the IGIS in his submission to the 2005 review, in which he pointed out that prescribed authorities had been interpreting section 34U very strictly and not permitting any questions from lawyers. He also indicated that while subjects where permitted to ask questions, they may have difficulty expressing themselves. The IGIS recommended that lawyers be permitted to address the prescribed authority on matters beyond mere clarification of ambiguous questions.[24] This issue was also raised in the submissions of Victoria Legal Aid and the then-Human Rights and Equal Opportunity Commission to the 2005 review.[25] We support this recommendation.

Another significant impediment to the effective legal representation of subjects is sub-section 34ZQ(2). This sub-section provides that contact between a subject and their lawyer must be able to be monitored by ASIO. A lawyer's inability to have confidential communications with their client significantly hinders the effective provision of legal advice. It impedes the lawyer's ability to obtain full and frank instructions and it makes it very difficult to provide comprehensive legal advice. This sub-section also makes the protection of client legal privilege unfeasible in any practical sense. While Division 3 purports to protect 'legal professional privilege' via section 34ZV, in practice sub-section 34ZQ(2)'s prohibition on confidential communications between client and lawyer makes this an impossibility because all of those conversations are monitored.

Item 9

Section 34ZR currently provides that parents or guardians of a child subject may be removed from the questioning where their conduct is judged to be unduly disruptive. This section also identifies the information that must be given to a subject and it provides that a new representative (such as another parent or guardian) must be found before questioning can continue.

Our general position is that children should not be able to be subjected to these warrants. Given, however, that Division 3 does permit the issue of warrants in respect of minors aged between 16 and 18 years old, it is imperative that a parent, guardian or other appropriate adult be present to provide support and assistance in an interventionist way to assist the young person to under-

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[23] See submissions of Victoria Legal Aid, the then Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission), Amnesty International and the Public Interest Advocacy Centre. Available at http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/subs.htm

[24] Inspector General of Intelligence and Security, *Submission to the Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers*, March 2005, available at http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/subs/sub74.pdf, 7

[25] Available at http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/subs.htm

stand and exercise their rights. This is necessary to ensure Australia's is compliant with international human rights and other standards about the questioning of children under 18.

The term 'unduly disruptive' is open to a range of subjective interpretations and we are concerned that an over-zealous interpretation may prevent children from having the representative of their choice present during questioning. Given that Division 3 warrants may be issued in respect of non-suspects, it is imperative that child subjects be afforded every possible protection. We therefore support Item 9.

Item 10

Sub-section 43ZS(2) criminalizes the disclosure of operation information relating to a warrant at any time in the 2 years after the warrant has expired. In our submissions to the 2005 review we argued that this 'secrecy provision' is entirely inappropriate in an open, democratic society and that it should be removed. Similar arguments were made by a number of organizations and there was significant concern expressed about this provision in the course of the 2005 Review.[26] We strongly support Item 10 of Schedule 3 of the Bill, which proposes to repeal sub-section 43ZS(2).

The secrecy provisions contained in section 43ZS exacerbate the coercive nature of ASIO's special powers. By preventing open discussion about ASIO's conduct during the execution of warrants, subjects are prevented from disclosing inhumane treatment in the public sphere. Furthermore, media reporting on the conduct of this government agency is also dangerously restricted. This lack of transparency means that it is impossible for ASIO to be held accountable for its operations under Division 3 and public monitoring of ASIO's conduct is entirely curtailed. This creates a great danger of abuses of power and concealment of such abuses behind this legislative veil of secrecy. As noted in our submission to the 2005 review, in any meaningful democracy executive agencies must be open and accountable. It is therefore imperative that people be able to publicly discuss their treatment by government agencies to the media and to their community. We therefore lend the strongest possible support to Item 10 and we urge this Committee to recommend repeal of section 43ZS.

Item 11

Section 34ZT of the *ASIO Act* provides that a lawyer's access to 'classified or 'security controlled information' may be prohibited or regulated where that lawyer is acting for the subject of a Division 3 warrant in connection with a remedy relating to that warrant or regarding that person's treatment in connection with the warrant. The Bill proposes that this section be repealed in its entirety. We support this proposal.

As noted above, there is already significant secrecy surrounding the exercise of these special powers and that secrecy is ensured by provisions contained in Division 3 itself. This, combined with the fact that ASIO is by nature an agency that operates covertly, creates a lack of transparency and accountability. Where lawyers representing people in cases relating to their treatment in connection with warrants can be barred from obtaining information relevant to those cases, this lack of accountability is exacerbated. In our view, it is imperative that ASIO are wholly accountable for their conduct in connection with these special powers. It is therefore essential that information be freely available to subjects and their lawyers in relation to any legal proceedings that arise as a result of this extraordinary regime.

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[26] See for example, the submissions of Amnesty International, Dr Patrick Emerton, the Law Institute of Victoria, Victoria Legal Aid and Professor George Williams and Dr Ben Saul, available at http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/subs.htm

Other Matters

In addition to the matters addressed above, there are many other aspects of Division 3 that we find deeply concerning. Whilst these issues are not addressed by the Bill, we take the opportunity to outline these issues to further demonstrate the need for urgent reform of this Act.

Right to silence - false information offence

One major concern regarding Division 3 is that it abrogates a subject's right to silence. It does this in two ways. Firstly, pursuant to section 34L(2) it is an offence punishable by a maximum sentence of 5 years imprisonment for a subject to fail to provide information requested. In a situation where subjects do not have 'derivative-use' immunity from prosecution (as will be discussed below), this is an abrogation of a person's right to silence, which a fundamental tenet of our criminal justice system. Secondly, if a subject fails to provide information, the only available defence to criminal charges is that the subject did not know the information sought. Pursuant to section 34L(3), however, the evidentiary burden in respect of this defence lies with defendant. That is, the onus is on the defendant to adduce enough evidence to suggest the reasonable possibility that they did not know the information sought. Practically speaking, because a defendant would have to testify as to their lack of knowledge in order to discharge their evidentiary burden, this means that a defendant would almost always have to forego their right to silence in order to make out this defence.

Immunity from Criminal Prosecution

Sub-sections 34L(8) and (9) provide that any information, records or things provided by a subject pursuant to a warrant, cannot be used as evidence to criminally prosecute that subject. Division 3 does not, however, provide subjects with 'derivative use' immunity. This means that information, records or things provided by subjects under warrants can be used to get evidence that is then used to prosecute the subject. In our view, given that the aim of Division 3 is to provide ASIO with special intelligence gathering powers and that its aim is not one of law enforcement, the failure to provide subjects with 'derivative-use' immunity amounts to a misuse of the special powers regime.

Passports and Leaving Australia

Where a warrant is sought in relation to a person, that person must surrender any passport they hold, both foreign and Australian, to an enforcement officer pursuant to section 34JBA. In section 34JBB the *ASIO Act* also specifies that a person must not leave Australia after they have become aware that a warrant has been sought. This applies whether or not a warrant is ultimately issued. Such significant restrictions on a person's freedom of movement are unreasonable. A subject's movements should only be restricted after they are made aware that a warrant has actually been issued.

Complaints

We are also concerned that Division 3 does not provide subjects with an adequate complaints mechanism. While subjects are permitted several avenues of complaint regarding the execution of warrants, including via the IGIS, the Commonwealth Ombudsman and others, there is no complaints process established to deal with questionable conduct by the Prescribed Authority. Given the significant role of the Prescribed Authority in the execution of Division 3 warrants, in our view it is imperative that subjects be able to complain about the conduct of the Prescribed Authority and that they be provided with information about that complaints process.

Section 34C provides for the establishment of a written statement of procedures to be followed when ASIO is exercising authority pursuant to Division 3 warrants ('the Protocol'). The Director-General has established such a protocol and it has been given the Minister's approval. There is, however, nothing in Division 3 to guarantee the subject of a warrant a right to receive a copy of the protocol. This is a significant flaw in the attempt to safeguard subjects' rights. It is a great

impediment to a subject's right of complaint if they are completely unaware of their rights and the standards that ASIO should be adhering to pursuant to the Protocol. Division 3 should be amended to ensure that all subjects of warrants are given a copy of the Protocol, time to read it and time to obtain an independent explanation of it by their legal advisor.

Schedule 4 – Repeal of the *National Security Information (Criminal and Civil Proceedings) Act 2004*

Item 1 – Repeal

The Federation supports repeal of the *National Security Information (Criminal and Civil Proceedings) Act* 2004.

The Act 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 which is a corner stone of our legal system. The act gives extensive power to the government to control who participates in legal proceedings. The regime of security clearances is inconsistent with the principle of a judiciary which is independent from government. We submit that 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.