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Committee Secretary
Parliamentary Joint Committee on ASIO, ASIS and DSD
Parliament House
Canberra ACT 2600

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Dear Sir/Madam

PARLIAMENTARY JOINT COMMITTEE ON ASIO, ASIS AND DSD REVIEW OF ASIO'S SPECIAL POWERS RELATING TO TERRORISM OFFENCES AS CONTAINED IN DIVISION 3 PART III OF THE AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION ACT 1979

The National Human Rights Network of the National Association of Community Legal Centres welcomes the opportunity to participate in the public review of the Australian Security Intelligence Organisation's ("ASIO") special powers relating to the terrorism offences.

The Committee's role of review is essential to ensuring that the government's efforts to prevent politically and/or ideologically motivated violence, are undertaken in manner that is transparent, accountable and consistent with the rule of law.

About the National Association of Community Legal Centres (NACLC)

The National Association of Community Legal Centres ("NACLC") is the peak body representing the eight state associations of community legal centres ("CLCs") and 207 CLCs nationally.

Community legal centres are located throughout Australia in metropolitan, outer-metropolitan, regional, rural and remote Australia. Community legal centres are experts in "Community Law" – the law that affects our daily lives. They provide services to approximately 350,000 clients per year. They are often the first point of contact for people seeking assistance and/or the contact of last resort when all other attempts to seek legal assistance have failed.

While there is much diversity amongst community legal centres, there is also much in common. One of those features is a commitment to justice for everyone. Each community legal centre pursues this end in ways particular and appropriate to the region in which it is located, and the community it serves.

Many community legal centres provide legal advice, casework and advocacy around legal and social justice issues. They also conduct community legal education and participate

in law reform where laws and/or procedures that hinder justice are identified. As such, CLCs are well placed to provide informed submissions to this Inquiry.

NACLC and several member organisations have been following the development of counter-terrorism laws in Australia, particularly since 11 September 2001, and have made submissions to Senate and Joint Parliamentary Committee inquiries relating to law reform in this area.

Terms of Reference

This submission does not attempt to address all terms of reference, but addresses those areas of the Act that most impact on human rights. We have summarised our concerns below and would be happy to address the Committee if that would be useful to the Committee's deliberations.

NACLC would like to begin by endorsing the submissions made by its member organisations, these include: the Federation of Community Legal Centres (Victoria), the Public Interest Advocacy Centre, Illawarra Community Legal Centre, and the University of Technology Sydney Community Law Centre.

This submission supplements the submissions made by NACLC member organisations. Our concerns focus on several areas in the *Australian Security Intelligence Organisation Act 1979* ("**the Act**") and ASIO's special powers relating to terrorism offences that have an adverse impact on the human rights of people in Australia.

Detention without charge or trial

While the Act provides that a person against whom a warrant has been issued must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment [s 34J], NACLC contends that the actual extended detention of a person without charge or trial illustrates a lack of respect for their humanity.

While the specific criteria for detention are reasonably tight, the Act breaches the legal principle that no person should be detained without charge or judicial trial.

The central tenet of this principle is that people should not be deprived of their liberty at the whim of the executive arm of government. This principle is central to a democratic system that provides key checks and balances on the power of the executive. Such safeguards against the punitive powers of the state are an essential component of democracy and provide protection against abuses of power and human rights.

The special detention powers granted to ASIO are particularly concerning as they are specifically aimed at the detention of non-suspects. It is precisely because a person is not a suspect in a terrorism offence that a person might be detained and questioned under the ambit of these powers. If a person were actually suspected of involvement in a terrorism offence they would most likely be detained, questioned and charged by the Australian Federal Police ("**AFP**") or a State police force. This is evidenced by one of the small protections provided in the Act – a limited right against self-incrimination. While the Act stipulates that the person being questioned under a warrant has no right not to answer a questions or to refuse to produce a record or thing simply because it might be self-incriminating or make them liable for a penalty [s 34G(8)], it does provide that anything said or produced is not admissible in criminal proceedings against that person,

other than offences against s 34G [s 34G(9)]. If ASIO or the AFP suspected a person of involvement in a terrorism offence but did not have sufficient grounds to charge them, it seems unlikely that they would detain and question them under the ASIO powers rather than under police powers.

In conclusion, the questioning and detention without charge of non-suspects not only leaves open the possibility for abuses of executive power, but also suggests that these powers effectively circumvent existing safeguards against self-incrimination and extended detention without charge that exist for suspects of crime – including terrorism offences.

NACLCLC recommends that given the serious nature of depriving someone of their liberty, the circumstances must:

- a) be justified to the particular context and only for the imminent protection of others, and for a limited period of time, and;
- b) require a greater guarantee of procedural safeguards. (As listed at page 5 of this submission)

Lack of necessity

NACLCLC contends that ASIO's special powers are unnecessary because ASIO already has sufficient surveillance powers. Indeed, the principle function of ASIO is to obtain, correlate and evaluate intelligence relevant to security – where 'security' is defined as:

- (a) the protection of, and of the people or, the Commonwealth and the several States and Territories from:
 - ...
 - (iii) politically motivated violence;
 - ...
 - and
- (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).¹

As NACLCLC understands it the aim of Division 3 and the powers relating to terrorism offences is to prevent politically motivated violence. However, as illustrated in the definition of 'security' ASIO already has significant and sufficient surveillance jurisdiction in this area.

Secondly, NACLCLC believes that the special detention and questioning powers may prove to be counter-productive in the prevention of terrorist offences, precisely because they may, or may be seen to, negatively impact and alienate communities that may prove to be helpful in providing important information relating to potential criminal or terrorism offences.

¹ *Australian Security Intelligence Organisation Act 1979*, s4.

NACLC maintains that the additional questioning and detention powers are unnecessary and recommends that they be removed.

Breadth of powers

As noted above and in several of the submissions endorsed by this submission ASIO's detention and questioning powers are not limited to those suspected of being involved in terrorist activities or with links to terrorist organisations. In fact, these powers target precisely those not suspected of terrorist offences.

NACLC continues to be concerned that ASIO's special powers hinge on a broad definition of a terrorist act and the pursuant terrorism offences contained in Part 5.3 of the Criminal Code[s 4], which cover a wide range of conduct. A special questioning or detention warrant can only be issued in relation to a 'terrorism' offence, as such it is this triggering of the powers by reference to a 'terrorism' offence, as defined in the Criminal Code, that grants ASIO powers of extensive breadth.

As indicated in numerous submissions by CLCs and other community organisations to this Inquiry and to various Senate Legal and Constitutional Legislation Committee inquiries related to counter-terrorism laws since September 11, 2001, the definition of 'terrorist' act contained in Part 5.3 of the Criminal Code is extremely broad. The key concern with the definition is that it criminalises action or threat of action that involves both the "intention of advancing a political, religious or ideological cause" and that has the "intention of coercing, or influencing by intimidation" [s 100.1(1)]. Many community members remain concerned about the range of activities that may fall under the definition as a result of these components of the definition, for example: freedom or resistance movements that in the past may have included movements such as the African National Congress (ANC) and East Timorese independence movements; moral protests regarding social issues – eg abortion; and even civil disobedience in the context of industrial action if there is intent to cause harm. In the context of ASIO's powers, the breadth of the definition of terrorism in the Criminal Code is intensified by the power to detain non-suspects incommunicado for rolling periods of up to seven days. NACLC continues to be concerned that the criteria for the issue of a special warrant are not specifically limited to the prevention of terrorist acts, but rather include areas that are already adequately covered by police powers.

NACLC is particularly concerned that the grounds for the issue of a warrant are not consistent for both the Attorney-General and the Issuing Authority. The Attorney-General must be satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence in relation to a terrorism offence [s 34C(3)(a)] *and* that relying on other methods of collecting that intelligence would be ineffective [s 34C(3)(b)]. However the Issuing Authority must only be satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence [s 34D (1)(b)]. It is concerning that the Issuing Authority is not also guided by the requirement that relying on other methods of collecting that intelligence would be ineffective.

NACLC recommends that the role of ASIO should be limited to the prevention of actual terrorist activities and that the powers should be defined more clearly and should not hinge on the broad and arbitrary definition of 'terrorist' act contained in the Criminal Code.

Secrecy offences

The secrecy offences introduced in December 2003 are perhaps one of the most concerning provisions contained in the ASIO Act. These provisions make it not only illegal to disclose information relating to ASIO's conduct while a warrant is in force, but more significantly it is also an offence to disclose any 'operational information' for two years following the expiry of the warrant. The definition of 'operational information' is broadly defined to mean any information relating to ASIO's knowledge and activities. Moreover, the strict liability clause means that someone can be found criminally liable for disclosure of 'operational information' even if the disclosure is inadvertent or they were unaware the information disclosed is 'operational information'.

NACLC maintains that the two-year non-disclosure period severely curtails freedom of the press and political expression – which may suggest that the Act may be inconsistent with rights implied by the Constitution. Equally if not more concerning is the limitations that this place on public scrutiny and accountability. These provisions limit not just disclosure of information by detainees and their lawyers, but the free and informed public debate of human rights and civil liberties advocates, journalists, academics and indeed politicians. The detention of non-suspects is serious enough, but to effectively place a moratorium on the public debate and scrutiny is perhaps the most draconian aspect of the legislation. Indeed, with a two-year lag period on the disclosure of any relevant information there will be a cooling down effect, and if and when information is available in the public arena it may be played down by hindsight.

NACLC recommends that the two-year non-disclosure period be removed and the ASIO questioning and detention powers be open to full public disclosure.

Inadequate safeguards

If the current powers (which many submissions to the 2002 Inquiries argued were not necessary) continue to be considered necessary by the Committee, NACLC stresses that the current safeguards provided for in the Act are inadequate. Even with significant amendments prior to the passage of the legislation, there remain critical gaps in the safeguards provided. The most significant is that there is no avenue to appeal the issuing of a warrant or the direction to detain a person under the Act. While, NACLC notes the role of the Inspector General of Intelligence and Security and the requirement that a person detained under ASIO's special powers must be permitted to make a complaint to the Inspector General of Intelligence and Security or to the Commonwealth Ombudsman [s 34F(9)(b)], such a complaint is limited to the conduct of ASIO or AFP offices and is by

no means a right of appeal. NACLC maintains that the need for secrecy should in no way rule out an appeal mechanism that would allow the person to appeal their detention. This is particularly important given that the powers allow for detention without charge.

Secondly, while the Act provides that a person detained under ASIO's special powers must be permitted to make a complaint to the Inspector General of Intelligence and Security or to the Commonwealth Ombudsman [s 34F(9)(b)], there is no equivalent provision for making a complaint to a State Ombudsman or statutory investigation bodies, such as the NSW Police Integrity Commission, when State police are involved the detention or questioning. With the duplication of State and Federal Police powers, the absence of such provisions remain a significant gap. Further, NACLC is concerned if the person detained wished to make a complaint regarding the conduct of the Proscribed Authority, there is no overseeing body or complaint mechanism. These are significant gaps in the safeguards provided by the Act. Given the serious nature of detaining non-suspects without charge for extensive periods of time, it is not unreasonable for the procedural safeguards to be equally rigorous.

If the questioning and detention powers of ASIO in relation to terrorism offences are maintained, NACLC recommends serious improvement to procedural safeguards, including:

- * The right to appeal detention
- * Provision for complaints to be made to State Ombudsman where State Police forces are involved in questioning or detention
- * The establishment of a complaint mechanism for complaint regarding conduct of Proscribed Authority
- * Stronger powers for the Inspector General of Intelligence and Security, including a) more explicit powers to investigate breaches of ASIO Protocol; and b) permitted disclosure for this purpose

Legal representation

NACLC is concerned that where a person is being questioned under the Act that there is no requirement that ASIO permit the person to obtain legal advice or to have a lawyer present. Where a person is permitted to contact a lawyer, ASIO may question them prior to the arrival of the lawyer and before they have a chance to obtain legal advice. The failure to ensure adequate legal representation is aggravated by the person being required to answer questions or face penalty.

NACLC notes that where a detention warrant is issued the person is allowed to contact a lawyer, however, there appears to be a gap if a questioning warrant is issued and then the Proscribed Authority issues a detention order. In this situation it is not clear that there is an obligation or requirement that the person be allowed to contact a lawyer of their choice at this stage. This is a clear oversight and should be rectified as a result of this review to guarantee anyone questioned under the Act to be informed of their right to contact their lawyer of choice.

The right to legal representation is unduly limited and uncertain under ASIO's special powers. Given the absence of the right to silence and the seriousness of matters being

investigated in cases relating to terrorism offences, it is imperative that a person undergoing questioning have unfettered access to legal advice before and during questioning. NACLCL maintains that such advice should extend well beyond the current limitations on legal representatives that allow lawyers to intervene during questioning only to clarify questions [s 34U(4)]

NACLCL believes that the key principles for legal representation should be incorporated and guaranteed in relation to ASIO's special questioning and detention powers relating to terrorism offences:

- that the person undergoing questioning must be permitted to contact a lawyer of choice;
- that the lawyer be permitted to provide effective representation;
- that the lawyer must be present during questioning; and
- that the lawyer must be able to provide legal advice.

NACLCL thanks the Committee for the opportunity to contribute to this review and would welcome the opportunity to further elaborate on the issues raised in this submission should the Committee decide to hold a public hearing.

Yours sincerely

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National Association of Community Legal Centres