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Margaret Swieringa
Secretary
Parliamentary Joint Committee on ASIO, ASIS & DSD
Parliament House
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21 June 2005

Dear Margaret,

Following NACLC's appearance at the ASIO hearing in Sydney on Monday 6 June, attached is the report we referred to in our evidence. Also attached is our opening statement.

There were 5 points that came up for clarification, We wish to respond to those as a supplementary submission. The 5 points were -

1. The list of proscribed organisations

The Committee indicated that it believed the UN listed organizations do not trigger ASIO's powers.

By way of clarification, the UN listed organisations are incorporated into United Nations Charter Act [SEE REG 6A(1)(D) CHARTER OF UNITED NATIONS (TERRORISM AND DEALINGS WITH ASSETS) REGULATIONS 2002] and relate to the financing of terrorist organisations.

It is correct that the organisations listed under the UN Charter do NOT trigger the ASIO powers. However, only those organisations specifically proscribed under s 102.1 of the criminal code are relevant to the offence of financing of terrorism under Section 103.1 of the criminal code and therefore do trigger ASIO questioning and detention powers, by virtue of section 4 of the Australian Security Intelligence Organisation Act.

In other words, financing of the 18 (the Committee had thought 17) organisations proscribed under Criminal Code do in fact trigger the powers.

2. The Narrowing of the Terrorism Act.

The Chair referred to this point later in the day and sought clarification. Following is NACLCL's clarification.

The definition of a 'terrorist' act is contained in the Criminal Code and accordingly, the Committee may argue is not really up to it to review that definition. What this committee could focus on are the triggers or links between definitions of terrorist offences rather than just terrorist acts.

For instance, training with a 'terrorist organisation' is a 'terrorism offence' that does trigger ASIO's powers under the Act but training with a 'terrorist organisation' is not a 'terrorist act'.

The point NACLCL wishes to make is that the terrorist offences that trigger ASIO's powers should be narrowed. This is not about re-defining what is a terrorist act. It is about the trigger. It is about when the questioning and detention powers of ASIO could be used.

NACLCL supports PIAC's recommendation in relation to this point and as set out below and provided to you as a supplementary submission.

PIAC suggests the following amendment to the conditions that trigger the operation of those powers. These would replace existing sub-sections 34C(3)(a) and 34D(1)(b): 34C(3) The Minister may, by writing, consent to the making of the request, but only if the Minister is satisfied:

- (a) that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence **the collection of which is necessary to prevent an imminent terrorist act**; and 34D(1) An issuing authority issue a warrant under this section relating to a person, but only if:*
- (b) the issuing authority is 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 **the collection of which is necessary to prevent an imminent terrorist act**. 'Terrorist act' is defined in the Criminal Code Act 1995 (Cth), Schedule 1 at section 100.1.*
By 'imminent', we intend that there be an identifiable and immediate terrorist act before the special powers can properly be triggered.

This position is supported by ASIO's public disclosure of the practical use of the special powers. In PIAC's opening address to the Committee, I referred to ASIO's unclassified submission in which ASIO stated that questioning warrants 'come to the fore' when:

- the threat of harm is immediate and other methods of intelligence*

collection will be too slow or *too indirect to be effective in the time available;*

- *limited insight has been gained into terrorist activity using other intelligence methods, but the security measures adopted by the individual or group have foiled ASIO's attempts to identify all those involved or to assess the full extent of the threat; or*
- *there is reasonable suspicion of terrorist activity but efforts to resolve it have been unsuccessful and those involved have refused to co-operate.*

ASIO's description of its own criteria indicate that it understands the special powers to be a last resort measure to be used where there is a reasonably identifiable and immediate terrorist threat against which alternative intelligence gathering methods have not been or could not reasonably be used effectively.

PIAC submits that the test it offers is consistent with ASIO's own understanding of the special powers. Further, in PIAC's submission, the proposed test provides the basis for a more narrowly focused application of the special powers consistent with the purpose of preventing or minimising the effect of any terrorist act.

3. Right of Review to Issue a Warrant

While NACLCLC agrees with the Committee that the Act contains a right of review to issue the warrant and the treatment thereunder (s34E), we would like to emphasise that there are aspects of the Act that do in fact limit that right in the following ways:

- The Right to review is limited in effect - most critically the provisions of the Act that limit the scope of the subject to access legal advice. For example, 34D (4A) - which says the warrant for questioning can specify times when the person is permitted to contact someone identified as a lawyer of the persons's choice to "after the person has been brought before a prescribed authority for questioning". Without a lawyer, a person may not be able to either understand or exercise their right to review.
- There is no provision to complain to the relevant State Ombudsman about the behavior of state police that may be involved in the issuing or carrying out of a warrant.

4. Secrecy Provisions

We further emphasise to the committee the importance of considering the impact of the legislation on members of specific communities such as Muslim and Arabic communities that are being targeted under this act through informal and formal questioning conducted pursuant to this Act. In particular we would like the committee to note that while education and information sessions about the Act can assist to better inform the community about the Act and its scope, the current provisions of the Act, in particular the secrecy provisions, lie at the core of the

concerns. The communities that are negatively affected by the secrecy provisions, are concerned that these provisions prevent them from dealing with trauma of being questioned (either informally or formally) by sharing it with their family members, religious leaders, counselors and employers.

5. Ismae - Listen: National Consultations on Alienating Prejudice Against Arab and Muslim Australians

The website for the HREOC report referred to in our evidence is:
<http://www.humanrights.gov.au/racial%5Fdiscrimination/isma/>

During the public hearing there seemed to be some question regarding whether or not the report produced by the Human Rights and Equal Opportunity Commission, regarding prejudice against Arab and Muslim communities was tabled after the introduction

of the Amendments to the ASIO legislation in 2003. NACLC would like to confirm that the "Ismae - Listen: National Consultations on Alienating Prejudice Against Arab and Muslim Australians" report by the Human Rights and Equal Opportunity Commission was published in 2004.

NACLC specifically highlights the following sections:

Section 2.3.8.2 - refers to impact of policing

Section 2.3.8.3 - refers to the impact of counter-terrorism measures and talks about the vulnerability people in the community have felt as a result of the laws.

Thank you once again for the opportunity to engage in this very important public inquiry.

Yours sincerely

Julie Bishop
Director
National Association of Community Legal Centres (NACLC)