Submission to the Senate Finance and Public Administration Committee concerning the National Security Legislation Monitor Bill 2009

The NSW Council for Civil Liberties expresses its thanks to the Senate Committee for its invitation to comment on this bill.

The New South Wales Council for Civil Liberties (CCL) is committed to protecting and promoting civil liberties and human rights in Australia.

CCL is a non-government organisation in special consultative status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

CCL was established in 1963, and is one of Australia's leading human rights and civil liberties organisations. Our aim is to secure the equal rights of everyone in Australia and oppose any abuse or excessive use of power by the State against its people.

New South Wales
Council for
Civil Liberties

New South Wales Council for Civil Liberties Inc

43 / 203 Castlereagh St
SYDNEY NSW 2000
Australia
Ph 61 2 9286 3767
Fax 61 2 9286 3544

Correspondence to:

PO Box A1386
SYDNEY SOUTH, NSW 1235
Australia

DX 1111 Sydney
Email office@nswccl.org.au
www.nswccl.org.au

A. Reasons for rejecting the bill.

1. The bill proposes the creation of a National Security Legislation Monitor, somewhat after the model of the United Kingdom's Independent Reviewer of Terrorism Legislation. But Australia differs from the United Kingdom in two important respects: we do not have a human rights act, and United Kingdom public bodies are required to act in conformity with the European Convention on Human Rights unless legislation specifically requires otherwise. An Australian monitor would be able to refer to international legislation to which the nation has subscribed, but has no other standards to appeal to in declaring that a law fails to safeguard human rights.

CCL opposed the earlier bill proposed by Senator Ludlum on the grounds that a reviewer confined to examining the effectiveness and implications of the anti-terrorism laws would not achieve that general review of the laws which we consider is necessary, and might indeed inhibit such a review. The monitor proposed in the present bill has further powers, including that of finding that an existing provision is unnecessary—with the implication that it should be repealed. That goes some way to meeting that objection. But the proposal still would leave the monitor with insufficient powers.

2. CCL has argued for some years that there is no need for special legislation to criminalise terrorist actions. The ordinary criminal law is sufficient. We have argued that legislation which permits the Attorney General to ban an organisation is open to serious abuse; that the definition of 'terrorist act' used in Federal and State legislation is too broad; that giving ASIO the power to detain people without charge is an affront to civil liberties; that the telecommunications powers are too broad and are being abused; that much of the legislation severely curtails human rights, but targets crimes other than terrorist ones: that the laws on sedition should be repealed; and we have argued in particular against the use of control orders and preventative detention orders.

Much of this legislation is inconsistent with Australia's international obligations, including the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.

3. We note Senator Wong's assertion in her Second Reading Speech that the review mechanism 'will increase and maintain public confidence in those laws.' That is the opposite effect from that which a civil libertarian would expect to result from an independent examination of them. We are concerned lest the monitor be subject to capture by the security or law enforcement communities.

Another risk is that reports by the monitor which recommend major changes will simply be ignored, in the same way that the Ombudsman's reports on Immigration Detention were ignored; or that the monitor will be monstered by the Government of the day if the reports of reviews are not to its taste. We recall the reception of distinguished international critics of Australia's terrorism and immigration detention laws.

Our recent experience leads us to the view that these risks are real. On balance, the introduction of a National Security Legislation Monitor is not the best means of bringing the unsatisfactory legal situation that exists at present into a more satisfactory position.

Recommendation 1: That the Senate Committee recommend that the bill does not proceed.

B If the bill is to proceed.

If the Bill is to proceed, CCL submits that the following changes should be made.

1. Clause 3. The object of the act.

An important weakness of the private members' bill was that it did not empower the monitor to report on whether the existing legislation is necessary. That weakness is corrected in this bill, at subparagraph 6(1)(b)(ii). The *objects* also should include a further subsection, reflecting this important matter.

Recommendation 2: That a further subsection be added to proposed section 3, as follows:
'(e) is necessary in the light of other legislation'.

2. Clause 6. Disproportionate and intolerable intrusions upon civil liberties.

Powers such as those to detain without trial, control orders, power to prevent accused persons and asylum seekers or their lawyers from knowing the evidence presented against them and B-Party telecommunications

surveillance make very substantial intrusions on human rights. It is an important question at any time whether the powers are excessive in relation to the threats they combat, and indeed whether they are an intolerable intrusion on human rights, whatever the situation.

Paragraph 6(1)(b) includes appropriately the requirement that the monitor report on whether anti-terrorism laws are necessary, and subparagraph (i) allows the monitor to propose new safeguards. But the monitor is not given the function of considering whether a law is proportionate to the threat of terrorism at the time, nor, crucially, to advise that a law is intolerable.

Recommendation 3: That an additional subparagraph be added to paragraph 6(1)(b): '(iii) is proportionate to the current threat of terrorist acts.'

3. The normalisation of emergency powers.

Powers which are granted on the grounds that they are needed to counter the emergencies of terrorism are in danger of being normalised, especially by spreading to cover other purposes. In New South Wales, for instance, covert police surveillance can now be carried out for a variety of purposes other than preventing terrorist actions. The report to Parliament on the Telecommunications (Interception and Access) Act in 2008 contains positive encouragement for agencies to use the B-Party surveillance power in the context of other crimes. If we are going to have a monitor, it could be useful if he or she reported regularly on the spread in the use of counter-terrorism and national security legislation for other purposes.

Recommendation 4: That the monitor's functions include that of reviewing the extent to which powers originally granted to counter a threat of terrorism are being extended in reach to other areas of law enforcement.

4. The interpretation of the law.

The significance of a law is to be seen not merely in bare text, but in how that text is interpreted by those who apply it. In particular, a law's reach may be significantly extended or diminished by the interpretation which is placed on its terms. It is not entirely clear that the monitor's functions, as proposed, cover this.

Recommendation 5: That a subsection be added to proposed section 6, stating that to avoid doubt, the monitor's functions include an examination of how anti-terrorism laws are interpreted and implemented by security and law enforcement agencies.

5. Reporting.

The requirements that the monitor report to the Prime Minister, and that the latter have the power to vet the report compromise the

monitor's independence, and will create scepticism about the reports. The monitor should report directly to Parliament.

Recommendation 6: That proposed section 29 be amended so that the monitor presents the annual report directly to the Federal Parliament.

Recommendation 9. That a new section be added enabling the monitor to provide Federal Parliament with the reports of his or her inquiries.

Recommendation 10. That the requirements that the monitor report to the Prime Minister be omitted from the bill.

Martin Bibby
Co-convenor, Civil and Indigenous Rights Subcommittee