

**Christine McDonald**  
Committee Secretary  
Senate Standing Committee on Finance and Public Administration  
PO Box 6100  
Parliament House  
Canberra ACT 2600

27 July 2009

### **Inquiry into the National Security Legislation Monitor Bill 2009**

Dear Ms McDonald

The Federation welcomes in principle the proposal to establish a National Security Legislation Monitor, a permanent mechanism for independent review of counter-terrorism and national security legislation. The counter-terrorism laws are extraordinary and it is imperative whilst they are in place that they are subject to regular, comprehensive and independent review.

The Federation's position in relation to independent monitoring of the counter terrorism laws has been clearly articulated in previous submissions, in particular our submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the *Independent Reviewer of Terrorism Laws Bill 2008 [No 2]*. We attach this submission for your consideration as part of this inquiry into the *National Security Legislation Monitor Bill 2009*, as the same arguments apply with respect to both Bills.

In addition we wish to emphasise the following points in relation to the scope of the Reviewer's mandate in particular by reference to the amended *Independent Reviewer of Terrorism Laws Bill 2008*, passed by the Senate on 13 November 2008.

The Federation has previously argued that criteria should be established against which the Independent Reviewer/ Monitor may assess the operation, effectiveness and implications of the terrorism laws. In particular, these criteria should refer to:

- International human rights standards;
- Unofficial use of the laws;
- Discriminatory impacts of the laws; and
- Impacts on civil liberties.

Section 6(1)(b)(i) of the *National Security Legislation Monitor Bill 2009* limits the Monitor's considerations to whether the relevant legislation "contains appropriate safeguards for protecting the rights of individuals". Section 6(2)(a)

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excludes review by the Monitor of “priorities of, and use of resources by, agencies”. Section 9 provides that emphasis must be given to “provisions of that legislation that have been applied, considered or purportedly applied ... during that financial year or the immediately preceding financial year.” Read together, these sections appear to significantly narrow the mandate of the Monitor to exclude review of the operation of the legislation and consideration of the issues that the Federation has previously outlined.

Section 8(a) of the *National Security Legislation Monitor Bill 2009* requires the Monitor to have regard to “Australia’s obligations under international agreements (as in force from time to time)”. Whilst this section is clearly intended to include Australia’s obligations under human rights treaties, it is not clear whether these obligations are to be given priority over other “international agreements” such as bilateral intelligence sharing agreements.

In our view section 8 of the amended *Independent Reviewer of Terrorism Laws Bill 2008*, provides a much clearer outline of the mandate of the Reviewer. This section provides an unambiguous mandate to assess both the legislation and its operation in terms of not only human rights, privacy and other international obligations but also to assess any adverse social consequences. In our view this section should be adopted for the Monitor.

In the second reading of the *National Security Legislation Monitor Bill 2009* on 25<sup>th</sup> June 2009, Senator Wong states that, “The Monitor may initiate his or her own investigations”. Section 7 of the Bill proposes that “The Prime Minister may refer a matter ... to the Monitor either at the Monitor’s suggestion or on his or her own initiative”. Our interpretation of this section is that, contrary to the stated intention of the Bill, the Monitor has no power to conduct own motion investigations outside of the general review functions outlined in section 6. Section 7(3) also gives the Prime Minister power to set the Monitor’s priorities. In our view, Section 8 of the amended *Independent Reviewer of Terrorism Laws Bill 2008* provides a much clearer capacity for own motion investigations with clear capacity for independent determination of priority issues.

We welcome the opportunity to elaborate further on this submission or to furnish the Committee with further information if that would assist. Please Do not hesitate to contact me directly on 03 9652 1511 or [sarah\\_nicholson@clc.net.au](mailto:sarah_nicholson@clc.net.au).

Sincerely

**Sarah Nicholson**  
Policy Officer

**SUBMISSION OF THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC**

**TO**

**THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE**

**INQUIRY INTO THE INDEPENDENT REVIEWER OF TERRORISM LAWS BILL 2008 [NO 2]**



Federation of  
Community Legal Centres  
VICTORIA

September 2008

This submission was prepared by Marika Dias of the Anti-Terrorism Laws Working Group, on behalf of the Federation of Community Legal Centres (Vic).

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## About the Federation of Community Legal Centres Victoria

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for fifty-two Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres provide free legal advice, information, assistance and representation to more than 100,000 Victorians each year. We exercise an integrated approach combining assistance of individual clients with preventative community legal education and work to identify and reform laws, legal and social systems.

Community Legal Centres have expertise in working with excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds. We operate within a community development framework. We provide a bridge between disadvantaged and marginalised communities and the justice system. We work with the communities of which we are a part. We listen, we learn, and we provide the infrastructure necessary for our communities' knowledge and experiences to be heard.

The Federation, as a peak body, facilitates collaboration across a diverse membership. Workers and volunteers throughout Victoria come together through working groups and other formal and informal networks to exchange ideas and strategise for change.

The day-to-day work of Community Legal Centres reflects a 30-year commitment to social justice, human rights, equity, democracy and community participation.

The Anti-Terrorism Laws Working Group is one of a number of issue-specific working groups within the Federation comprising workers from member centres. This Working Group supports CLC's to provide targeted community legal education programs for communities affected by the State and Commonwealth anti-terrorism laws and supports CLC lawyers to provide up-to-date legal advice to clients affected by the State and Commonwealth anti-terrorism laws. The Working Group recently published *Anti-Terrorism Laws: A Guide for Community Lawyers, 2008* which is available from the Legal Resources section of [www.communitylaw.org.au](http://www.communitylaw.org.au). The Working Group also works to monitor the impact of State and Commonwealth anti-terrorism laws on affected communities and individuals.

## Need for an Independent Reviewer of Anti-Terrorism Laws

Since the events of 11 September 2001 and the Bali bombings, the Australian government has introduced a swathe of anti-terrorism laws. In the last five years, the government has repeatedly responded to international events like the Bali bombings, the London bombings and the Madrid bombings by introducing new legislation with the purported aim of preventing terrorism and responding to incidents of terrorism where they do occur. Broadly-speaking, these laws have been characterized by increased powers to government, law-enforcement and intelligence gathering agencies, departures from fundamental democratic principles and departures from long-accepted principles of criminal law.

We now have laws which allow for the detention of non-suspects, via the preventative detention and ASIO detention warrant regimes. We have a system of control orders, through which an array of restrictions can be applied to non-suspects by the State. We have seen a significant expansion of the powers of law enforcement and intelligence-gathering agencies, through the ASIO questioning and detention warrant regime, the police stop, search and question powers in prescribed security zones, increased questioning time in Australian Federal Police (AFP) investigations, and the 'notice to produce' regime, not to mention the various state acts which have expanded state police powers in investigations relating to terrorism.

Our legislation operates with an extremely broad definition of 'terrorist act', which criminalises political, religious and ideologically motivated acts or threats of action that are aimed at coercing the government or public and that cause violence or significant property damage. There is an equally broad definition of 'terrorist organisation' which derives from this definition of 'terrorist act'. We have seen the introduction of an array of broadly-framed terrorism offences which are aimed at criminalising anything even remotely connected with a 'terrorist act'. Similarly we have seen the introduction of offences relating to 'terrorist organizations', which criminalize even innocuous and indirect links to organizations which are labeled as 'terrorist'. Our government now also has the power to list terrorist organizations, triggering offences that will capture mere association with members of those organizations.

Since the introduction of these terrorism laws, the Federation has made a number of submissions, at various times, to this Committee, the Parliamentary Joint Committee on Intelligence and Security ('the PJCIS'), the Security Legislation Review Committee ('the Sheller Committee') and to Victorian state inquiries. In these prior submissions, we have consistently expressed opposition to the anti-terrorism laws in so far as we found those laws to be undemocratic, discriminatory, excessively broad in the framing of powers and offences, and an abrogation of fundamental criminal law principles.

In light of these concerns, the Federation welcomes the proposal to introduce an Independent Reviewer of Terrorism Laws ('an Independent Reviewer'). In our view, the terrorism laws are extraordinary and they should not become a permanent part of the legislative landscape. It is, therefore, imperative that they are subject to regular, comprehensive, independent review. Furthermore, while these laws do remain in force, and Independent Reviewer will hopefully ensure greater accountability and transparency in the use of the laws.

While broadly supporting the introduction of an Independent Reviewer, we do, however, wish to express a note of caution. In our view, the appointment of an Independent Reviewer is not a substitute for repeal of undemocratic and excessively harsh laws. When these laws were introduced, they were recognized as an extraordinary response to particular global circumstances, as departing from fundamental principles and as impinging on civil liberties. Consequently, sunset clauses were included in the various acts and the legislation provides for independent and parliamentary inquiries to assess the operation of the laws and their on-going necessity. As these laws were introduced as extraordinary measures, we hope that the establishment of an Independent Reviewer is not an indication of the permanency of these laws. It should always be within the scope of the Independent Reviewer's role to recommend full repeal of all of the laws.

## **Conduct of Inquiries by the Reviewer**

The *Independent Reviewer of Terrorism Laws Bill 2008 [No 2]* ('the Bill') provides little guidance as to how the Independent Reviewer should conduct reviews.

In our experience, in reviews of the terrorism laws to date government, law enforcement and intelligence-gathering agencies have been well-represented while non-government organizations and groups from affected communities are significantly less represented. Reviews of the terrorism laws need to include proper community consultation. This requires more than announcement of the reviews on the parliamentary website and a one-off media release. The Independent Reviewer should engage with peak and community organisations in order to build links with affected communities and other groups with an interest in the terrorism laws. Reviews should be publicized broadly within affected communities. Given that the communities directly affected by the terrorism laws to date have been ethnic minorities, it is important that special measures be taken to engage these communities in reviews of the laws. To that end, plain-language explanations of the legislation under review should be available and there should be processes for non-written contributions to the reviews.

In this regard it is also imperative that the Independent Reviewer is resourced sufficiently so that it can undertake effective and comprehensive reviews of the terrorism laws.

Up until now inquiries into the terrorism laws (including this inquiry) have involved exceedingly short time-frames for public submissions. This impedes broad public consultation and limits the number of submissions received. The conduct of reviews by the Independent Reviewer should always allow ample time to allow the public to contribute.

The Federation is concerned that the Bill does not in any way compel the Independent Reviewer to conduct reviews into the terrorism laws. As noted in the Second Reading speech of the Bill, both the Sheller Committee and the PJCS have recommended the establishment of an Independent Reviewer. In the Sheller Committee's report on this issue, that Committee referred to the existence of an Independent Reviewer in the United Kingdom. As indicated in the Sheller Committee's Report, the UK Independent Reviewer is required to report annually on certain matters relating to the Independent Reviewer's mandate. In our submission, an Australian Independent Reviewer should be required to review all terrorism laws periodically, whether one piece of a legislation at a time or en masse.

To address all of these issues, it is our recommendation that there also be the introduction of protocol to guide the Independent Reviewer's inquiries. These protocol could regulate the conduct of reviews and well as the criteria for review (see below).

## **Assessing the Operation, Effectiveness and Implications of Anti-Terrorism Laws**

In the last 4 years, the Anti-Terrorism Laws Working Group has conducted numerous community legal education sessions on terrorism laws and participated in numerous community forums. The Working Group has worked with communities affected by terrorism laws, in particular Islamic, Kurdish, Tamil and Somali communities. In addition, lawyers in the Working Group have advised in a number of matters related to terrorism laws.

In that time a large number of community members, especially from affected communities, have expressed their concern regarding the terrorism laws and raised issues regarding the laws impact on them and their communities. There have been a limited number of public cases involving control orders, prosecutions of terrorism offences, ASIO detention and questioning warrants, prescribed security zones, and use of AFP investigation powers.

In our experience, however, the impact of the terrorism laws has been much broader than the number of publicised cases would suggest. Our work with communities and individuals has indicated that after 11 September 2001 and the Bali bombings there was fairly widespread questioning in Islamic communities by ASIO. There have been numerous reports that ASIO officials have sought to coerce people into participating in informal questioning using the threat of detention/questioning warrants. The most publicly known example of this is the conduct reported in the case of Ul-Haq.

Working group lawyers have also assisted people who have been subject to ASIO search warrants, AUSTRAC inquiries, surveillance by state Security and Intelligence police, attention of local police in relation to sedition laws and AFP investigations.

We have also assisted groups relating to concerns about offences relating to financing of terrorism and terrorist organizations. All of these matters have been directly or indirectly connected with the terrorism laws and all have involved subjects of ethnic or religious minorities. It is our view, therefore, that the Independent Reviewer must carefully examine both official and unofficial use of the laws, as well as their discriminatory application.

The efficacy of the Independent Reviewer in examining impacts such as these depends on its methods and criteria for assessing the operation, effectiveness and implications of the terrorism laws. As it stands, the Bill does not provide any criteria against which to make this assessment.

The Federation supports additions to the Bill that would require the Independent Reviewer to review the terrorism laws in light of clearly identified criteria. These criteria should cover the rights outlined in the International Covenant on Civil and Political Rights. More specifically, the Federation is concerned that the Independent Reviewer assess the operation, effectiveness and implications of terrorism laws in terms of:

- the discriminatory impact of the laws;
- the impact of the laws on civil liberties;
- community concerns about the laws; and
- consistency of the laws with fundamental principles of criminal law.



## **Recommendations Made by the Reviewer**

In April 2006 the Sheller Committee reported on its inquiry into Australia's security legislation. In its detailed report the Sheller Committee made 20 recommendations relating to the terrorism laws, in addition to a number of other findings. In December 2006 the PJCIS reported on its Review of Security and Counter Terrorism Legislation. It made 26 recommendations, some of which confirmed and supported the recommendations of the Sheller Committee.

To our knowledge, none of the recommendations flowing from these reviews have been taken up to date. This Bill is the first step towards taking up just one of the many recommendations made in these prior reviews, an Independent Reviewer having been recommended by both the Sheller Committee and the PJCIS (as noted above).

Against this background, it is crucial that there be some governmental commitment to at least consider the recommendations of the Independent Reviewer. Section 11 of the Bill is therefore imperative. Importantly, it includes the requirement that the Independent Reviewer's reports and recommendations be tabled in parliament and that Minister provide a written response to them, which is also tabled in parliament. Certainly, it would be a waste of resources establishing an Independent Reviewer if the recommendations made by that Reviewer are without impact. The Federation therefore recommends that Section 11 be included in the Bill if it is passed as legislation.

## Conclusion

The Federation broadly supports the establishment of an Independent Reviewer. In summary, in respect of the Bill the Federation draws the Committee's attention to the following:

- The introduction of an Independent Reviewer of Anti-Terrorism Laws should not act as a substitute for repeal of those laws that are undemocratic, unjust or excessively broad.
- Protocol to regulate the conduct of reviews should be established to ensure that:
  - There is adequate community consultation by the Independent Reviewer, in particular with affected communities and non-government organisations.
  - The time-frames for reviews allow ample opportunity for the public to make submissions and contribute.
- The Independent Reviewer should be required to report regularly.
- Some criteria should be established against which the Independent Reviewer may assess the operation, effectiveness and implications of the terrorism laws. In particular, these criteria should refer to:
  - International human rights standards
  - Unofficial use of the laws
  - Discriminatory impacts of the laws
  - Impacts on civil liberties
- Section 11 of the Bill should be retained and there should be some commitment by government to ensure that the recommendations of the Independent Reviewer are not without consequence.

We trust that the Committee will duly consider the matters raised in this submission and we thank the Committee for its attention. We would welcome the opportunity to elaborate on this submission or to furnish the Committee with further information.