



VICTORIAN COUNCIL FOR CIVIL LIBERTIES

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Discussion Paper – National Security Legislation
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Submission in relation to the Attorney-General's Discussion Paper on Proposed Amendments to the National Security Legislation

Thank you for the opportunity to comment on the Attorney-General's Discussion Paper on the proposed amendments to the National Security Legislations.

Liberty Victoria is one of Australia's leading human rights and civil liberties organisations. Liberty works to defend and extend human rights and freedoms in Victoria.

Background

The Attorney-General's Ministerial Statement on Reforms to the National Security Legislation commences with these words:

There is no greater responsibility of Government than to protect the safety and security of its citizens.

Liberty Victoria does not agree. If safety and security trumps all other responsibilities of Government, we will no longer be a free and democratic society. It is by upholding our traditions as a liberal democracy that we defeat terrorism, not by removing the human rights which give us that distinction.

As Lord Hoffmann said in *A v Secretary of State for the Home Department*¹:

Terrorist crime, serious as it is, does not threaten our institutions of government or our existence as a civil community. The real threat to the life of the nation, in the sense of a people living in accordance with its traditional

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¹ [2005] 2 AC 68 at [97]

laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for parliament to decide whether to give the terrorists such a victory.

The context in which these reforms fall to be considered includes the following matters:

1. Serious failure on behalf of our security authorities in relation to the Dr Haneef affair;
2. Serious intrusions by authorities into particular communities who have been targeted as terrorist or potentially terrorist; and
3. Extremely lengthy and expensive trials in terrorism matters, in part occasioned by the complexity of the laws in question.

Liberty Victoria remains unconvinced that a separate regime of legislation in relation to terrorism offences can be justified at all.

Particular issues

A. Definition of “terrorist act”

The expansion of the definition of “terrorist act” in 100.1(1), and by implication, the entire scope of the terrorism laws regime, cannot be justified. In particular, the extension of the definition to cover reference to “psychological harm” is likely to greatly expand the scope of already broad legislation. Psychological harm is recognised by the courts as extending broadly (see for example *Giller v Procopets (No 1)* [2008] VSCA 236, where the court divided on the precise degree required).

Take a situation in which a particular international sporting event were to be held in Australia, and the administrators refused to permit a team from a particular country to compete because of the policy of that country on some particular issue – such as, for example, its treatment of an oppressed section of the population. It is reasonably foreseeable that this would cause psychological harm to athletes from that country. It is difficult to see how this would not become a terrorist act under this provision.

The definition should not be expanded in this way.

This is all the more so in view of the many ways in which the offence itself can be further expanded by other provisions in this legal regime. It is not merely the doing of a terrorist act that is a crime, but, for example, under these laws it is a crime to recklessly help an organisation indirectly engage in fostering the doing of a terrorist act.

B. Terrorism Investigations

Having a different legal regime for investigation of terrorism offences, as distinct from other offences, is not justified.

Insofar as international inquiries may be required, this is also required in relation to other offences, and the fact is that overseas agencies and Australian agencies work very closely together in any event.

Liberty Victoria is aware of several instances in which the power to hold persons without charge has been used as a threat to induce persons to talk to security authorities. This kind of power invites just this kind of abuse.

The provisions to hold a person in custody during investigation have only been used twice, so far as Liberty Victoria is aware:

- (a) in relation to the questioning of Dr Haneef over many days;
- (b) in relation to the questioning of one of the recently charged Somalis, who was questioned for several hours.

Under the current proposals, the outer limit of detention remains undefined. The periods which may accrue are as follows:

1. 23DB(5) – 4 hours;
2. 23DB(9)(a) to (l) – undefined, no limit applying except the practical limit of the time taken for each of these steps, which could take many days;
3. 23DB(9)(m), which is limited by 23DB(11) to seven days;
4. 23DF(7) – 20 hours.

Accordingly, the total is 8 days, together with such further (undefined) time as is required for the matters set out in 23DB(9)(a) to (l).

It is unsatisfactory, after the controversy surrounding the Dr Haneef affair, and the Clarke Inquiry which succeeded it, to leave the outer time for detention of suspects for questioning undefined.

Further, even an outer limit of 8 days cannot be justified from experience to date. The time limit should be no greater than for non-terrorism offences.

C. *Bail appeals*

At least in Victoria, the provisions in relation to bail appeals do not provide any benefit to accused persons. There is already a right to make a fresh application for bail (as distinct from an appeal) to the Supreme Court after refusal by a Magistrate. The stay of an order granting bail for a period of 72 hours cannot be justified. If a court orders a person to be released, then that should be given effect unless on application to a superior court a stay is granted on proper material.

Not touched in the discussion paper is the important issue of the reverse onus provision in relation to bail in terrorism matters. Not all so-called “terrorism” offences are of the same level of seriousness, and the application of the highest hurdle for all such charges – the same hurdle as is imposed in cases of murder - cannot be justified.

If this proposal is adopted, then any decision of a Magistrate granting bail against the opposition of the Commonwealth will have to be validated by the Court of Appeal before the accused can be released from custody. We are concerned that any period of detention between the grant of bail by a judicial officer and the review of that grant by a superior court could amount to arbitrary detention.

If the Magistrates Court has jurisdiction to grant a person their liberty, then any grant should be given effect unless and until the Supreme Court finds an error with that exercise of discretion.

This is especially so in view of the seriously adverse conditions under which terrorism suspects are currently held by prison authorities, a matter which has been the subject of significant criticism on several occasions.

D. *Terrorist Organisations*

The Discussion Paper fails to correct the serious injustices presently occasioned by the listing of terrorist organisations.

The relaxation of review periods from two years to three years is not justified. On average, parliamentary terms in Australia are less than three years, and the prospect is that these listings will not be reviewed in the life of every parliament.

There is no effective right of appeal against the listing of terrorist organisations. The primary reason for this is practical. Once an organisation is listed, who will swear an affidavit claiming to be a member of the organisation and claiming to be adversely affected so as to have standing to challenge the listing? Once there is no legal check on the exercise of power by the executive, the power is exercised without being subject to the rule of law, and is open to serious abuse.

Presently there are many organisations listed whose status as terrorist organisations would be strongly contested by substantial sections of the Australian community. Examples include the PKK, Hamas and Al-Shabaab.

E. *Search without warrant*

Proposed section 3UEA provides a power of search without warrant. Liberty Victoria is of the view that this power cannot be justified:

1. it is not available under Victorian law;
2. no example of any actual injustice or actual security threat occasioned by the absence of such a power to date has been offered;
3. given the abuse of existing powers by security authorities, notably in the Dr Haneef affair, there is no certainty that the grant of this power without oversight would not be abused;
4. there is no requirement in the provision for subsequent regularisation of the intrusion;
5. under 3UEA, the search in question may very well be covert, and therefore not capable of subsequent challenge;
6. currently, a warrant can be obtained by a telephone call. The inconvenience involved is minimal, whereas the protection to the community is important.

F. *Secret Trials*

The *National Security Information (Criminal and Civil Proceedings) Act 2004* is deeply flawed in several respects. This greatly expands the potential level of involvement of the Attorney-General in proceedings, and removes both litigants and their lawyers from being able to properly contest allegations against them.

However, the changes proposed are of a technical nature, and comparatively minor.

A more comprehensive and critical reappraisal of this legislation is required.

G. *Creation of Parliamentary Joint Committee of Law Enforcement – Australian Federal Police*

Liberty Victoria supports the creation of a body tasked with the provision of parliamentary oversight of the Australian Federal Police. The proposal includes a committee constituted by both houses and we believe it is warranted, improves openness, transparency and accountability and is beneficial to democracy in Australia.

The proposed model based on the Parliamentary Joint Committee on the ACC is appropriate and supported. Establishing a new stand alone Act for the new committee is prudent and represents best practice.

However, Liberty recommends amending the proposal to extend the reviewing function of the committee to include all matters it considers necessary. Openness, transparency and accountability will not be maximised if the committee is restricted in reviewing sensitive matters. It is in the interest of Australian democracy for the committee to monitor and report on the most important of matters. Courts and Royal Commissions have demonstrated that processes are available for considering sensitive matters, whilst meeting national security requirements. It is common for reports to be produced that balance the requirement to maintain confidentiality with openness. Liberty Victoria recommends that the proposed reform be amended accordingly.

H. *Sedition Renamed: Urging Violence Offences – Division 80 of the Criminal Code*

Liberty Victoria does not support the proposed amendments and therefore retention of section 80.2 - sedition. Deleting the word sedition and replacing it with inciting or urging violence is superfluous; Liberty's view is that the section is unwarranted and should be repealed.

Liberty encourages the government to bring the offences contained in s 80.2 into line with accepted human rights norms and concurs with the views expressed by the Law Reform Commissions in England and Wales, Ireland and Canada that sedition offences should be repealed on the grounds that they are:

- unnecessary in light of more modern criminal offences, such as incitement and other public order offences;
- undesirable in light of their political nature and history; and
- inappropriate in modern liberal democracies, where it is accepted that it is a fundamental right of citizens to criticise and challenge government structures and processes.

Existing offences are more appropriate

The proposed offences are not necessary as existing incitement offences are more appropriate. Under the incitement provisions, the prosecution is required to prove beyond reasonable doubt that it was the offender's object to induce commission of the offence in question, which requires a connection to a specific substantive offence. The thresholds of proof required to gain a conviction for inciting violence under existing provisions are accepted in society and, in Liberty's view, get the balance right. The proposed provisions overcome this requirement to prove a definite

causation. Liberty submits that it is not justified to lower the required thresholds in order to obtain convictions.

The proposed provisions contained in s 80.2 are not supported by Liberty. We recommend that the government repeal the existing provisions, utilise the existing incitement provisions and bring Australia into line with human rights norms. The recommendations of the Law Reform Commissions in England and Wales, Ireland and Canada provide appropriate models that protect the human rights, particularly freedom of expression.

I. Issues not considered by the review

There are several serious issues in relation to the terror laws which are not dealt with in the review, but in our submission should be. These include in particular:

1. control orders – the use of which in relation to Jack Thomas and David Hicks (the only two occasions these provisions have been used) was controversial, unnecessary, and ultimately discontinued;
2. preventative detention orders – which have never been needed;
3. ASIO powers – notably the power to hold in custody for questioning both suspects and non-suspects;
4. The offence of “association” with terrorist organisations which has wide effects on those who belong to particular communities with unavoidable ties to organisations which have been listed as “terrorist”.

Further, those involved with this legislation, including police, consistently state that navigating the complexities of these laws imposes a great burden, and great uncertainty.

Liberty Victoria supports the bill introduced by Senator Ludlam which deals with these and other matters.

Conclusion

The Discussion Paper avoids dealing with major and important reforms to the terror laws which need to occur.

The Discussion Paper is unduly cautious in the measures it proposes to reform to increase protection of those adversely affected by these laws.

Should you wish to discuss any aspect of this submission please feel free to contact Brian Walters SC on (03) 9600 1422 or walters@flagstaff.net.au .

Yours faithfully



Michael Pearce SC
President