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The Chairperson
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra,
ACT, 2600

11th November 2005

Dear Madam,

Re: Submission to the Senate Legal and Constitutional Committee
Inquiry into the Provisions of the Anti-Terrorism (No. 2) Bill 2000

1. Introduction

National Legal Aid represents the Directors of each of the 8 State and Territory Legal Aid Commissions. NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- Obtain access to independent legal advice;
- Afford the financial cost of appropriate legal representation;
- Obtain access to the Federal or Territory legal systems; or
- Obtain adequate information about access to the law and legal system

NLA makes this submission to the Inquiry on the basis that Commission services are likely to be required to provide assistance to people affected by the proposed changes. In particular, a large proportion of our services is dedicated to defending persons charged with criminal offences and whose rights to liberty may be affected. The proposed laws have the propensity to impact on this service and our clients.

2. Timeframe for Inquiry

The impact which these changes will have on the Australian community is great. It is of concern that the time frame for submissions to the Inquiry is so short.

More time is required to enable interested stakeholders to fully consider the changes being proposed, their actual or potential impact and develop and articulate any concerns identified.

We have not had sufficient time to fully consider the implications of the bill, but wish to raise some preliminary concerns.

3. Legal Professional Privilege

As Commissions provide legal services, we are particularly concerned the bill allows communications between a detained person and their lawyer to be monitored¹. Legal professional privilege provides that communications between a solicitor and client for the purposes of, or in the contemplation of, legal advice are confidential and will not be disclosed without the consent of the client. Monitoring of a conversation between a lawyer and client breaches this principle.

From a practical perspective, the monitoring of a conversation between lawyer and client may inhibit the client in the provision of relevant information to their lawyer and therefore restrict the quality of instructions which the client can provide. This has the potential to hinder the solicitor in the provision of advice and representation and, in the long term, may impinge on the right of the client to receive a fair trial.

4. Access to Legal Aid

It is doubtful whether legal assistance for persons the subject of an order is available under the current Commonwealth Legal Aid Guidelines under which all Legal Aid Commissions operate. This opens up the possibility that persons who are subject to involuntary detention orders will not have access to legal representation.

The Criminal Law Guidelines only apply if a person has been charged with a criminal offence. Control Orders and Preventative Detention Orders may not involve criminal charges and so legal aid would not be available under this section of the Guidelines.

The Civil Law Guidelines will only permit Legal Aid Commissions to provide assistance if:

- The order has a prospect of affecting a person's capacity to continue in his or her usual occupation;²
- 'Special circumstances' apply, such as language, literacy, intellectual, psychiatric or physical disability, living in a remote locality or is a child;³
or
- The Commonwealth Attorney-General has provided written approval⁴.

¹ Division 105.38

² 6.6.1(b)

³ 6.7.1 c. B and 6.7.2

⁴ 6.7.1 c. A

These provisions could seriously limit the ability of Legal Aid Commissions to provide legal advice and assistance to persons the subject of control and preventative detention orders.

The Guidelines can be changed to accommodate new legislation, however the process for this can be slow. The Guidelines are a schedule to Legal Aid Agreements between, in some cases, the Commission and the Commonwealth and in other cases between the Commonwealth and State/Territory governments. These latter Agreements are approved by State/Territory Cabinet processes.

The secrecy provisions of the bill raise specific concerns in relation to the representation which will be provided through legal aid commissions.

From a practical perspective, the secrecy provisions will make it extremely difficult to adequately represent a client. For example, how can a solicitor garner evidence if they are unable to explain to the witness why the information is being requested?⁵

It is not clear how the prohibitions on disclosure will apply to the receipt and processing of an application for aid. Can Commissions lawfully be told? Similarly, division 105.37 allows a detained person to contact a lawyer, as an individual, for the purposes of 'arranging' for the lawyer to act for the person. The scope of 'arranging' is not clear. Does it extend to the lawyer receiving information in relation to an application for legal assistance?

For the Commission to consider approving aid for representation in relation to control orders or preventative detention orders, they will need to have all relevant information necessary to apply the 'merits' test, that is to determine whether the matter has reasonable prospects of success. This would require the full disclosure of the allegations and basis of an application to the Court.

Even if the bill allowed the lawyer to receive information relating to an application for legal assistance, division 105.41(2) prohibits the lawyer from disclosing any information about the detention to anyone unless it is for the purposes of proceedings in a Federal Court, complaints to the Ombudsman, an officer or authority of a state or territory in relation to the treatment of the detained, or representations to an Australian federal police officer. It is not clear that the disclosure of information by the lawyer to a legal aid agency and the subsequent processing of legal aid applications is 'for the purposes of proceedings'. Unless this is clarified, liability under this division may fall to interpretation and the lawyer may face penalties of up to 5 years imprisonment.

5. Control Orders

Under Schedule 4 of the Bill, persons may have an interim control order issued against them by the Court. Under clause 104.5(3), control orders may have the effect of imposing obligations, prohibitions and restriction on a

⁵ Because of the disclosure provisions under division 105.41

person, including restricting a person's freedom of movement and association. The orders may last for up to 12 months so in many respects they can represent an intrusion into personal privacy and amount to effective detention for an extended period. Because of the extensive nature of the powers, we are opposed to their introduction.

If it is determined that control orders will become part of Australian law, it is important that they are expressed in a manner which accords with procedural fairness and natural justice and are therefore available to challenge and review.

Under division 104.4, control orders can be made on the grounds of preventing a terrorist act from occurring, without the need for existing criminal charges or findings of guilt against the person.

This aspect of the bill gives rise to several concerns, many of which have already been raised publicly:

- As Directors of legal services, we are concerned at the lack of due process and procedural fairness afforded to the person who is the subject of the control order. There does not appear to be provision for notice of the intention to make the order, access to information on which the order is to be made, the ability to be heard in relation to the making of the order, or access to information on which to base an application to revoke the order.

From a constitutional perspective, this feature exposes the bill to offending the principles of a right to a fair trial and the ability to conduct a judicial review on the merits.

- The burden of proof for issuing control orders is the balance of probabilities, which, when weighed against the nature of the orders, is too easy to discharge.
- The issuing of control orders may amount to an exercise of an executive power by a Chapter III Court and therefore breach the separation of powers doctrine.
- Control orders remove the presumption of innocence. Control orders may offend the principle of constitutional immunity from being imprisoned except by an order of the court that 'the involuntary detention of a citizen in custody ... exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.⁶

6. Preventative Detention Orders

Because the effect of both divisions 104 and 105 is to authorise involuntary detention, we have the same concerns in relation to preventative detention orders as those already expressed in relation to control orders above. In summary, these orders offend the presumption of innocence and the principle

⁶ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 @ 27

that involuntary detention should only be exercised as part of a judicial function to adjudge and determine criminal guilt.

Division 105 allows the 'issuing authority' to make preventative detention orders. Such an order will allow any member of the Australian Federal Police to take a person into custody and detain them for up to 48 hours.

Again, as with control orders, this aspect of the bill is lacking in basic safeguards such a procedural fairness and natural justice.

The conferral of powers by the Commonwealth to the States and Territories will enable them to pass complimentary legislation providing for periods of detention for up to 14 days. This is a lengthy period to be held without charge, without reasons and subject to extreme restrictions on freedoms of movement and association. We can already see that other jurisdictions, such as the UK have attempted to extend this period for up to 90 days.

The concern is that once this legislation is passed, the time period for detention may be extended through an amendment. So this Inquiry should consider not just the adequacy of the safeguards in the current bill, but also their adequacy should the regime impose even greater restrictions on individual rights.

It has been argued that the complementary state and territory legislation is necessary to bypass the constitutional protection provided through a writ of mandamus or prohibition or injunction against an officer of the Commonwealth under section 75(v) of the Constitution.⁷

It has also been argued that the separation of powers limitations in relation to the exercise of judicial power by a non-judicial officer will avoided by conferring of judicial power on a non-judicial officer of the State or Territory.⁸

Although these may be constitutionally valid means of achieving the government's objective, this Inquiry should consider whether it is desirable to erode some of the few guarantees provided under the Constitution.

7. International Law and Human Rights Considerations

Although Australia should be a leader in upholding human rights, the international reputation of Australia in this area has been steadily diminishing in recent years. We are concerned that fundamental principles should not be eroded unless there is no other alternative and appropriate processes and safeguards are in place.

It has been argued⁹, including by the President of the Human Rights and Equal Opportunity Commission¹⁰ that there are serious concerns that a

⁷ President von Doussa QC, President HREOC, Darwin 3 November

⁸ http://www.chiefminister.act.gov.au/docs/Gageler_advice_261005.pdf, p 20, citing *Kruger v Commonwealth* (1997) 190 CLR 1

⁹ http://www.chiefminister.act.gov.au/docs/Stanhope_advice_20051018.pdf;
http://www.chiefminister.act.gov.au/docs/Human_Rights_advice.pdf

number of International laws to which Australia is a signatory will be breached through the exercise of powers in accordance with this bill. In particular, the regime has the potential to contravene many covenants of the International Covenant on Civil and Political Rights. At the same time it has been rightly pointed out that the bill also aims to protect the right to life. It is acknowledged that a balance is necessary.

It is unnecessary to repeat the many concerns which have been raised in relation to the potential which this bill has to breach international law and human rights. We simply wish to encourage the Committee and the government to take adequate time to consider these concerns in detail and ensure that the legislation is adapted to accommodate these concerns.

8. Conclusion

There is a need for more time to consider legislation which amounts to fundamental changes to procedures and presumptions in matters which could seriously affect the liberty of Australian citizens and which will make it almost impossible to provide adequate legal representation and the right to due processes and a fair trial. This is particularly the case in light of concerns raised above regarding whether legal aid will be available to assist in matters covered by the bill.

We thank you for the opportunity to make this submission. Should you require anything further from us, please do not hesitate to contact me.

Yours sincerely,

Ms Suzan Cox QC
Chairperson
National Legal Aid

¹⁰ Darwin, 3 November 2005