

18th February 2003

Ms Jo Metcalf
Director, TMCU – Legal Policy
Department of Justice
55 St Andrews Place
Melbourne 3000

Re: Proposed Terrorism (Powers and Obligations) Bill.

Dear Ms Metcalf,

Thank you for your letter of 11 February advising of the counter terrorism bill to be introduced in the upcoming session of Parliament. We are grateful for the opportunity to make comments in relation to the draft legislation —Terrorism (Powers and Obligations) Act 2003— received with your letter.

The Federation of Community Legal Centres comprises forty-six specialist and generalist legal centres across Victoria. Community Legal Centres provide free legal advice and assistance, advocacy, community legal education and initiate law reform to enhance access to justice.

The Federation of Community Legal Centres made extensive written and oral submissions to the Parliamentary Joint Committee on ASIO, ASA and DSD and subsequent Senate Legal and Constitutional Reference Committee into the ASIO Legislation Amendment (Terrorism) Bill 2002 and the Senate Legal and Constitutional Committee that considered amongst other bills the Security Legislation Amendment (Terrorism) Bill 2002.

The Federation has been active in informing the community about the possible ramifications of legislative changes in relation to terrorism. The Federation is opposed to legislation which increases police powers at the expense of human rights. The Federation believes that protecting fundamental human rights and traditional civil liberties provides the best basis for minimising the risk of serious crime and terrorism.

In 2002 the High Commissioner for Human Rights emphasised the importance of ensuring that innocent people do not become victims of counter-terrorism strategies¹ and proposed that in taking specific measures state action should be guided by human rights principles contained in international law.

It is our view that existing police powers are adequate to deal with threats, violent acts and damage to property caused by ‘terrorist acts’. However, in response to the specific proposals contained in the proposed bill the Federation of Community Legal Centres makes the following comments.

¹ UN Doc E/C/N.4/2002/18 (27 February 2002) para 2.

Definition of terrorism:

The Bill does not create an offence of terrorism, notwithstanding its definition of Terrorist Act in Section 4. The operation of Section 4, in particular Section 4 (1) (a), has the potential to create significant confusion regarding the ambit of a 'terrorist act'. The legislation should ensure that advocacy, protest, dissent or industrial action cannot fall into the ambit of 'terrorist acts'. An intention to advance 'political, religious or ideological cause' is very broad and not adequately defined.

This legislation would define 'right to lifers' as terrorists because they create 'risk to the health or safety of a section of the public' (in terms of obstructing women's access to abortion and contraception – not to mention killing security guards at abortion clinics).

More problematic than this, however, is the issue of protests such as student protests which may cause damage to property and/or risk public safety. While these actions may not be lawful they should not be treated as terrorism.

The Bill fails to define and distinguish political, religious or ideological causes and advocacy, protest, dissent or industrial action.

Covert Search Warrants

The provision for covert search warrants represents a fundamental shift in the balance between state power and individual liberty. The law recognises the importance of private property and quiet enjoyment of that property through the law of trespass. Current laws which allow police in certain limited circumstances to enter and search private premises are designed to balance the interests of the community in crime control with citizen's right to privacy.

Covert search warrants will allow police to conduct 'sneak and peek' searches. The subject of such covert searches will not know that police have entered their premises and have no opportunity to check for irregularities in the search warrant or the process of the search. In addition the power to covertly search will provide a temptation to corruption that some police will be unable to resist.

Checking for irregularities in the warrant

- If a search is covert, occupants or subjects of the warrant will have no opportunity to check the warrant for irregularities. If police are at the wrong address or mistakenly believe the premises are occupied by certain people, for example the previous tenants, the occupants will have no opportunity to alert police as to the nature of the mistake.
- If a search is covert, occupants or subjects of the warrant will have no opportunity to verify or ensure that the search is carried out only within the appropriate confines of the warrant. If the warrant specifies a stolen car, for example, searching in an underwear draw may be unlawful.

Providing an incentive to police corruption

- 'Sneak and peek' searches will provide an irresistible incentive to corruption amongst that inevitable percentage of police who are vulnerable to temptation. Occupants who do not witness a search and do not even know that a search has taken place will be in no position to complain or report valuable items missing. Suspicion in such cases is likely to fall on family members or people, such as

cleaners, who might have easy access to property that is the target of covert searches.

- If property is discovered missing and complaints are made to police that valuable items have gone missing, the complainant will not make the complaint in the knowledge that police have conducted a search. Will police who take such a report have the advantage of knowing that the premises have been the subject of covert search? If not will valuable police time be taken up conducting an investigation without the knowledge that a logical consideration of the evidence in the context of a covert search would reveal fellow police as prime suspects? If the police who receive the report know that a covert police search has taken place, will they include police who took part in the covert search in any investigation and how could they conduct a proper investigation without divulging to the complainants that a covert search had taken place?

While the Federation opposes the provisions that allow covert searches, if such a process is to become law then a far greater level of accountability needs to be built into the process.

- All covert searches should be video taped to ensure the lawfulness and propriety of the search. This will provide a disincentive to police corruption and also provide police with protection against any unfounded allegations.
- Given the serious nature of these powers we believe that a more senior police officer should be required to seek the approval of the Chief, Deputy or Assistant Commissioner to apply for the issue of a warrant. The approval should be sought by a senior police officer such as a Chief Inspector. Once approval is given by the Chief, Deputy or Assistant Commissioner it should then be the Chief, Deputy or Assistant Commissioner themselves who applies to the Supreme Court for the warrant.

A telephone application should not be permitted on the basis of an unsworn affidavit. It does not ensure the Court has adequate information to assess the application.

Police Powers to Detain and Decontaminate

Our comments in relation to the issue of covert search warrants are relevant here also. It would be more appropriate for the authorisation, in relation to a terrorist act occurring and that persons may have been exposed to contamination, be given by the Chief, Deputy or Assistance Commissioner rather than a senior police officer. This is particularly important because the authorisation allows for powers to hold and detain a person for up to 8 hours.

Detention of a person for up to 8 hours - for the purpose of protecting persons from chemical, biological or radiological contamination. We ask why this is necessary?

People should have the right to access a lawyer as currently provided in the Crimes Act 1955. For whatever reason a person is detained by police, they should have the right to access a lawyer.

We do not support the extension of the period to a period of 16 hours.

Use of reasonable and necessary force – we are concerned about the vagueness of these terms and the potential abuse that may arise.

Protection of Counter-Terrorism Information

We are concerned that the definition of terrorism, being vague and broad, means that these provisions could be used extensively. This legislation could potentially inhibit a broad range of legal proceedings, criminal and civil. For instance some of the actions of S11 protesters could be construed as terrorist acts (serious damage to property with the purpose of intimidating the government or a section of the public) or at least suspected terrorist acts.

Would an individual's right to have access to all information relevant to the allegations against them be identified as 'in the public interest'?

FOI exemptions

The Federation of Community Legal Centres is extremely concerned about the legislation providing for exemptions to the Freedom of Information Act. These changes will weaken the Act and the spirit of the Act – transparency, openness and accountability.

This legislation allows VCAT to decide whether a document is exempt by a Department Head or Chief Commissioner of Police but it gives it no power to do anything about it, in other words to release it. The ultimate power resides with the Minister and not VCAT because the Minister can choose not to accept VCAT's decision that there are not reasonable grounds for the exemption. All the Minister needs to do is let Parliament know. The Minister should be required, as in Section 58A (3) (c) of the Freedom of Information Act 1982 (Cth), to read the notice to Parliament.

The proposed legislation severely limits the rights of applicants to get access to documents and to have decisions not to disclose documents, reviewed. While there are common law rights to appeal, the avenue to review will be severely restricted.

Given the vagueness of the notion of information related to 'terrorism', we are concerned that a significant amount of information may be withheld from the public on the basis of this legislation and we have no way of knowing if it in fact is related to 'terrorism'.

We would like to see the clause (3) in Section 33 of the Freedom of Information Act 1982, included in the Victorian legislation. This clause provides for the identification by the Minister of parts of a document containing the exempt matter.

Expiry

We are pleased to see that there is an expiry date for the legislation. However, given the extensive and unique powers of this legislation we believe that it should expire before 30 June 2006. We suggest an extensive review after the first year of the legislation, commencing 30 June 2004 with an expiry date of the Bill set at 1 December 2004.

Accountability and Reporting

There should be greater accountability measures and reporting measures included in the legislation.

Annual Reports under clause 13 should include

- number of arrests and number and types of charges arising from the exercise of covert searches.
- An inventory of all items seized

- The grounds upon which warrants were applied for
- The number and length of detentions under the Act
- The number of exemptions claimed on national security grounds under the Act

In conclusion the Federation of Community Legal Centres is very concerned about the ramifications of the proposed legislation. In particular, the lowering of the bar for police to get search warrants. In the last few days The Age has reported on Victoria Police corruption. Fifty-two police have been charged with various serious offences. In another article a police officer was convicted for stealing goods from a suspect car while being videotaped by the Victoria Police Ethical Standards Department (The Age February 18 page 8). More concerning still is the recent confidential report to the Victorian Parliament by State Ombudsman Barry Perry detailing the widespread abuse of police surveillance. Covert searches are an invasion of privacy and should be subject to a high level of scrutiny and accountability.

Also of great concern is the Freedom of Information legislation. The proposed changes severely restrict rights of review under FOI in Victoria. Particularly given the Minister can override the decision of VCAT. This goes against the spirit and purpose of the FOI Act. There are insufficient safeguards for the public in what is proposed.

If you have any queries in relation to the above comments please do not hesitate to contact me on 9602 4949.

Yours sincerely,

Dr Debbie Kirkwood
Policy Officer
Federation of Community Legal Centres