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

TO THE PARIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

RESPONSE TO THE RECOMMENDATIONS OF THE SECURITY LEGISLATION REVIEW COMMITTEE (THE SHELLER INQUIRY)

July 2006

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

CONTENTS

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 ('CLC's') assist in excess of 60,000 people throughout Victoria each year by providing provide free legal advice, information, assistance, representation, and community legal education.

Overwhelmingly, the people who use CLC's are on low incomes, with most receiving some form of pension or benefit. CLC's also assist a considerable number of people from culturally and linguistically diverse communities.

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 also works to monitor the impact of State and Commonwealth anti-terrorism laws on affected communities and individuals. In light of this work the Working Group has contributed to a number of parliamentary and independent inquiries into Victorian and Commonwealth anti-terrorism legislation.

Introduction

In January 2006 the Federation made a written submission to the Security Legislation Review Committee ('the Sheller Inquiry') regarding the operation, effectiveness and implications of the following legislation:

- *Security Legislation Amendment (Terrorism) Act 2002*
- *Suppression of Financing of Terrorism Act 2002*

- *Criminal Code Amendment (Terrorism) Act 2003*

We have annexed our submission to the Sheller Inquiry hereto so as to aid the Committee's review.

Further to our written submission, on 7 February 2006 the Federation appeared as a witness to the Sheller Inquiry. The following discussion relates to the recommendations of the Sheller Inquiry insofar as they address those matters covered in our written submission and appearance to that Inquiry.

Recommendation 1: Further review

The above security legislation is in many ways a departure from traditional legal principles and practices. In recognition of this departure and the fact that this legislation was intended as an extraordinary measure to deal with particular historical circumstances, the legislation should be regularly reviewed to determine its on-going necessity. In our view it is also crucial, therefore, that a further sunset clause be applied to the above Acts. This will ensure that these extraordinary Acts do not inadvertently become a permanent part of the Australia's legislative landscape.

In this regard, the Federation supports the Sheller Inquiry's recommendation that there be legislative provision for further independent review of the above security legislation within a three year period.

In its report, the Sheller Inquiry observed that its own review of the above legislation had been limited in that only two matters relating to the amended provisions of the Criminal Code had reached trial.[1] The Federation concurs with the Sheller Inquiry's observation that a further independent inquiry in three years time would be better placed to review the operation, effectiveness and implications of the legislation. This will allow further time to facilitate meaningful

[1] *Report of the Security Legislation Review Committee*, June 2006 [18.1]

review while at the same time ensuring that any problems with the legislation may be detected at the earliest available opportunity.

The Federation also welcomes the Sheller Inquiry's references to the possibility of establishing an independent reviewer who would be required to report on the operation of the legislation every year, as occurs in the United Kingdom. [2] Given the breadth of many of the provisions in the above legislation (as identified by the Sheller Inquiry and as discussed below), it is important that the application of the legislation is regularly and frequently examined. The expansive nature of many of the legislative provisions means that their application is prone to being a matter of discretion. While the discretionary nature of the laws remains of fundamental concern to us, at the very least it is necessary to publicly monitor the way that these discretions are exercised.

Recommendation 2: Community education

The Sheller Inquiry has recommended that government take steps to better explain the security legislation to the public and to better communicate with Muslim and Arabic communities in particular.[3] In the context of the Sheller Inquiry's report, this recommendation appears to be a response to the many concerns expressed from the perspective of Muslim and Arabic communities, particularly with respect to the concern that security legislation and anti-terrorism policing overwhelmingly targets those communities.[4] The report suggests that by making more of an effort to understand the concerns and fears of community members the government will thereby be able to develop programs to allay those fears.[5]

[2] Ibid [18.5 – 18.8]
[3] Ibid [10.102]
[4] Ibid [10.92 – 10.97]
[5] Ibid [10.102]

Community education has always been one of the key roles of community legal centres and, as noted above, we have conducted community legal education programs regarding the anti-terrorism laws. Through this work it has become apparent to us that there is a need for greater understanding of the substance of these laws within communities. We would therefore welcome increased dissemination of information regarding Australia's security laws as recommended. We are concerned, however, at the suggestion that educational programs be aimed at allaying community fears and concerns. The legislation in question is extraordinary and in our view the community is right to be concerned about many aspects of these laws, as are we. Furthermore, the fact that all but one of the organisations listed as terrorist organisations are Muslim, the fact that only Muslim individuals have been charged under these laws and ASIO's statements that they are indeed targeting Muslim communities[6], would all seem to suggest that the fears of targeting held by the Muslim community are not entirely misguided. Where education programs are conducted by government there is a risk that such programs become means by which the government seeks to render laws that are unpalatable to the community more palatable; that the government uses such education to eliminate fears that are actually justifiable fears. This is not, in our view, a legitimate aim or even by-product of community education. It is therefore our opinion that, while the government should take steps to establish educative programs as recommended, such programs should be independently conducted and administered to ensure impartiality.

Recommendation 3: Reform of the process of proscription

The Federation remains adamantly opposed to the proscription of organisations, for reasons detailed in our written and oral submissions to the Sheller Inquiry.

[6] Hansard: Joint Committee on ASIO, ASIS and DSD, Reference: Review of ASIO's Questioning and Detention Powers, Thursday 19 May 2005, Canberra (available at: http://www.aph.gov.au/hansard/joint/committee/J8382.pdf)

If, however, the proscription regime is to remain intact, the Federation supports the Sheller Inquiry's recommendation that the process of proscription be reformed.[7]

In particular we agree that there should be clearly stated criteria for proscription contained in the legislation. This will limit the discretionary nature of the power to proscribe and make proscription more transparent, thereby rendering it less liable to being used in a politically-motivated manner. Ideally, clear criteria would also have the corollary effect of limiting the exercise of this power to organisations which pose a genuine threat. As expressed in our written submission to the Sheller Inquiry, it is our concern that the power has been exercised in an inconsistent and discriminatory manner to date. In particular, we are concerned that the power has been used to proscribe predominantly Muslim organisations including organisations which have no demonstrated link to Australia. Given the inherently anti-democratic nature of the proscription power, in our view it should only be exercised where absolutely necessary. The proscription of organisations which do not pose a threat to Australia would seem to go beyond a notion of 'proscription only where necessary'. We therefore recommend that one applicable criterion for proscription be that the organisation has demonstrated links with Australia and a further criterion that it poses a direct threat to Australia.

We also agree with the recommendation that organisations be notified of the government's intention to proscribe and that there be some process by which an organisation facing proscription be able to contest that proscription.[8] Proscription of an organisation renders its members liable to being charged with a range of serious criminal offences. As a matter of natural justice it is therefore imperative that organisations and interested parties are given the opportunity to contest or be heard in relation to impending proscription. Not only will this make the process fairer, but it will also help to make proscription more transparent.

[7] *Report of the Security Legislation Review Committee*, ibid [9.1]
[8] Ibid [9.1]

Recommendation 4: Process of Proscription

The Sheller Inquiry has proposed two alternative reforms to the process of proscription. The first proposal would maintain the current system with the addition of an independent advisory committee to advise the Attorney General.[9] Under the second proposal, proscription would occur via a judicial process in which the Attorney General would apply to the Federal Court.[10] In its report the Inquiry identifies benefits and problems associated with each suggestion.[11] Where the executive is given the power to proscribe there is always the risk that, at some stage, this power may be used in an inconsistent, discriminatory or politically-motivated manner. On the other hand, a judicial process does lack the on-going political accountability that a decision of the executive has.

In our view, the foreseeable problems relating to each proposal in part derive from the fundamentally anti-democratic nature of proscription. As discussed in more detail in our written submission to the Sheller Inquiry, at its core the proscription of organisations offends against the principle of freedom of association and fundamental principles of criminal law relating to the ascription of criminal responsibility to individuals for actual intentions or actions rather than mere affiliations. Whether proscription occurs via an executive or judicial decision these problems remain. In our view, therefore, the desirability of the proscription regime and its effectiveness in combating terrorist activity require on-going consideration. We would urge this Committee to remain open to the possibility that proscription is, in and of itself, undesirable, while still considering the recommendations of the Sheller Inquiry.

Notwithstanding our fundamental concerns regarding proscription, the Federation does favour a judicial process for proscription over proscription via an executive

[9] Ibid [9.34]
[10] Ibid
[11] Ibid [9.8 – 9.31]

decision. A judicial mechanism for proscription would ensure greater transparency and limit the risk of this extraordinary power being exercised in a discriminatory or politically-motivated manner. Ideally, a judicial process would also create the opportunity for the organisation or interested parties to be heard in a meaningful and fair manner in relation to the proposed proscription.

Recommendation 5: Publicity of proscription of a terrorist organisation

While we remain opposed to the proscription of organisations, where an organisation is proscribed the Federation agrees that the proscription should be widely publicised. In this way people connected with the organisation can become aware that they may be facing criminal prosecution. Furthermore, it is also imperative that detailed reasons/grounds for proscription be made public so that the relevant organisation or interested parties may be in an informed position to challenge the decision to proscribe.

Recommendation 6: Definition of a terrorist act – 'harm that is physical'

The Federation does not concur with the Sheller Inquiry's recommendation that the definition of terrorist act be expanded to include actions or threats intended to cause non-physical harm.[12] In our opinion the definition of 'terrorist act' is already overly expansive and may be applied to an exceedingly wide array of acts and threats of action. Our concern in this regard is heightened given that all terrorism offences, the criteria for identifying and proscribing 'terrorist organisations', and also the criteria for making control orders and preventative detention orders all hinge on this definition of a terrorist act. Expanding the definition of terrorist act to include non-physical harm may mean that more people are exposed to prosecution for terrorism offences, more organisations are liable to proscription and more control orders and preventative detention orders are made. This is of

[12] Ibid [6.9]

grave concern given the extraordinary nature of these other legislative mechanisms.

In our view, extending the definition of 'terrorist act' to include acts and threats of non-physical harm is also excessive and goes beyond commonly accepted notions of what constitutes an act of terrorism. As noted in our written submission to the Sheller Inquiry, although it may be argued that community fears of terrorist activity give the government a mandate to legislate in relation to such act, the current legislative definition of 'terrorist act' goes far beyond the range of 'terrorist' activity that the public is concerned about (such as bombings and hijackings, for example). In this sense the current legislation exceeds any such mandate. In our view, the definition of 'terrorist act' should be made significantly more specific and should more closely resemble acts of terrorism which are actual community concerns.

The removal of the 'physical harm' requirement also has implications for the exceptions relating to advocacy, protest, dissent and industrial action. If the Sheller Inquiry's recommendation is adopted, protest or industrial action aimed at causing some mental distress may be prosecuted as a terrorist act. As expressed in our written submission to the Sheller Inquiry, the Federation does not wish to see advocacy, protest, dissent or industrial action conflated with terrorism, even where harm results. Where death, physical harm or property damage arise from these activities such a result may be dealt with under existing criminal law (as has been done consistently until and after the advent of these security laws). It is not necessary, therefore, that participants in such activities also be prosecuted as perpetrators of an act of terrorism. In our view conflating political dissent with terrorism is inappropriate in a democratic society. Extending the definition of a 'terrorist act' to include non-physical harm will increase the likelihood that protestors, advocates, dissenters and industrial activists may find themselves subject to prosecution as terrorists. In our opinion this is entirely undesirable and inappropriate, not to mention unnecessary.

It was our unequivocal submission to the Sheller Inquiry that the definition of 'terrorist act' requires substantial refinement to make it less broad. Our views in this regard are on-going and we therefore oppose the Sheller Inquiry's suggestion that the definition of 'terrorist act' be broadened. In fact, rather than expanding the definition of 'terrorist act' we strongly urge this Committee to consider recommending a narrowed definition. In this regard we reiterate the numerous concerns expressed in our written submission to the Sheller Inquiry and would encourage this Committee to refer to that submission. We also urge this Committee to recommend that the exceptions relating to advocacy, protest, dissent and industrial action be unqualified.

Recommendation 7: Definition of a terrorist act – 'threat of action'

The Sheller Inquiry has recommended that the definition of 'terrorist act' be amended to remove threats of action. Further the Inquiry has recommended that a separate offence relating to threats to commit terrorist acts be inserted.[13]

The Federation supports the Sheller Inquiry's recommendation that the definition of 'terrorist act' should not encompass mere threats of action. The reasoning behind our position, however, varies substantially from that detailed in Chapter 6 of the Inquiry's report.[14] We acknowledge the ambiguities of the definition of terrorist act with respect to threats of action, as highlighted in the Inquiry's report. Our concerns relating to the inclusion of threats of action within the definition of terrorist act are not, however, confined to mere ambiguity. In our view, the real problem with the inclusion of threat of action arises when the definition of 'terrorist act' is applied in the context of the terrorism offences. In this regard we reiterate the views expressed in our written submission to the Sheller Inquiry:

[13] Ibid [6.14 – 6.15]
[14] Ibid [6.10 – 6.13]

The breadth of [the definition of 'terrorist act'] is substantially exacerbated by the inclusion of the mere 'threat' of the designated activities. This may be illustrated by looking at how a threat as 'terrorist act' may be applied in the context of the terrorism offences. A 'terrorist act' may be constituted by a politically, religiously or ideologically motivated threat to inflict some violence or damage for the purposes of coercion or influence. When applied within the terrorism offences, a terrorism offence may arise where a person does any act preparatory to or in planning for making the threat. This effectively creates offences that amount to thought crimes. For example, where a person simply contemplates making a threat of property damage for political reasons and has a discussion with another person regarding whether this is a good idea and whether that other person would hypothetically wish to be involved, a 'terrorist act' may be committed. It is unspecified in the definition of 'terrorist act' that the threat must be made publicly or broadcast in some manner. On the legislation as it stands, it may be that the threat is simply expressed to another individual. Even if it is deemed that a 'terrorist act' has not occurred here, the act of having that conversation may itself constitute doing an act preparatory to a terrorist act. These offences may be found regardless of whether the property damage occurs or would ever have in fact occurred, given the preliminary nature of the person's enquiry. It may even be that ultimately the threat itself is never made public or is never actually used to coerce or influence. While it may be perceived that prosecution of the offences in this example would be unlikely, nonetheless, the definition of 'terrorist act' would permit this to occur. It is also important to recall that evidence of potentially theoretical discussions regarding suicide bombing and 'jihad' have been used as evidence in the ongoing prosecution of Abdulla Merhi and others in Victoria to demonstrate that the individuals involved were members of an organisation that was planning/preparing a terrorist act. The Federation believes that this type of prosecution, which effectively creates thought crimes, has no place in a modern democracy and represents a massive excess of state power. This kind of inordinate interference into the liberty of the individual is particularly unjustified where it is unclear that an act of violence, endangerment or damage has been

committed, would ever be committed or would even be threatened in any public sense.[15]

The Sheller Inquiry recommendation that threats of action be removed from the definition of 'terrorist act' would seem to address our concerns, as expressed above, in that mere threats would no longer form part of the basis on which the other terrorism offences are formulated.

Recommendation 8: Offence of 'threat of action' or 'threat to commit a terrorist act'

Given our general opposition to the various terrorism offences contained in Division 101 (as discussed in our written submission to the Sheller Inquiry), we are unable to support the Sheller Inquiry's recommendation that a further offence relating to threats of terrorist acts be created. Nonetheless, transferring threats of action from the Section 100 definition to a separate offence would be preferable to the current formulation.

We note, however, that it is imperative that any offence related to threatening a terrorist act includes a requirement that the threat be in some way broadcast or publicly made. Without this additional condition, the offence proposed by the Sheller Inquiry has the capacity to capture private discussions which are intended to be largely theoretical or hypothetical. Such prosecutions would be an excess of state power and could lead to the prosecution of thought crimes in a way that exceeds the government's mandate to deal with threats to security. Furthermore, part (b) of the proposed offence should require that the threat itself is made with the intentions described in paragraphs (c) of the definition of terrorist act. This will further ensure that mere hypothetical discussions are not prosecuted. As formulated in the Sheller Inquiry's report, a hypothetical

[15] Federation of Community Legal Centres (Vic), *Submission to the Security Legislation Review Committee*, January 2006, available at www.ag.gov.au/slrc , p 12

discussion about a terrorist act may still fall within part (b) of the offence proposed, providing the terrorist act being discussed would satisfy paragraphs (b) and (c) of the definition of terrorist act. That is, the offence becomes a matter of the nature of the action threatened rather than a matter of the nature of the threat. In our view, this would be legislative overreach and the offence should be confined to situations where the threat itself is designed to coerce or influence by intimidation (not just where the action threatened would have such an intention).

Recommendation 9: Definition of 'advocates'

The Federation concurs with the Sheller Inquiry's recommendation that paragraph (c) of section 102.1(1A) be eliminated from the definition of 'advocates'.[16]

As a result of recent amendments the term 'advocates' is currently defined to include direct or indirect counselling, urging or providing instruction on the doing of a terrorist act and direct praise of the doing of a terrorist act. This has substantially broadened the criteria for proscription thereby exposing many more organisations to the possibility of proscription. It is also important to note that the proscription power hinges on the definition of 'terrorist act', which in our view is already very expansive in itself.

One of our key concerns regarding this criterion for proscription is its capacity to suppress freedom of political expression. The definition of 'terrorist act', insofar as it requires political, religious or ideological aims, and its links to various terrorism offences also mean that this amendment has the capacity to unduly limit people's freedom of religious and political association. In a liberal democracy it is not desirable that the executive be empowered to ban organisations for simply expressing praise for certain acts (however abhorrent those acts may seem to the broader public). It is the fundamental basis of any

[16] Ibid [8.10]

open, democratic society that its members be able to freely express their opinions, regardless of the content of those opinions. Paragraph (c) of Section 102.1(1A) seriously jeopardises this fundamental precept. Furthermore, the broad ministerial discretion involved in the exercise of the proscription power and the lack of judicial oversight mean that when this broader criterion is applied there is a very real risk that it may be used by the executive to suppress political opposition and dissent. In our submission, it is perilous to frame the definition of 'terrorist organisation' in this way, given the scope for misuse of the proscription power by the executive.

The current definition of 'advocates' also severs the link between proscription and concrete acts of political violence, particularly insofar as indirect counselling of a terrorist act or mere praise of a terrorist act may trigger proscription. The 'Explanatory Memorandum' to the Anti-Terrorism Bill (No 2) 2005 (which introduced this definition, stated that 'such communications and conduct are inherently dangerous because it [sic] could inspire a person to cause harm to the community'.[17] In our view, to say that such conduct 'could' inspire a person to commit terrorist acts actually indicates a tenuous link to actual terrorist acts. It does not, therefore, warrant the characterisation of 'inherently dangerous'. In turn, it is not justifiable to proscribe any organisation that has such tenuous links to actual terrorist activity.

This definition also has the collateral effect of exposing more people to being charged with terrorist organisation offences under the *Criminal Code,* namely: directing the activities of a terrorist organisation, membership of a terrorist organisation, recruiting for a terrorist organisation, training or receiving training from a terrorist organisation, giving or receiving funds from a terrorist organisation, providing support to a terrorist organisation, associating with a

[17] *Anti-Terrorism Bill (No. 2) 2005 (Cth) Explanatory Memorandum*, Schedule 1, Item 9, p 7 (available at http://parlinfoweb.aph.gov.au/piweb/browse.aspx?NodeID=156)

terrorist organisation.[18] These offences attract very serious sentences and most of them do not require actual knowledge, mere recklessness is enough. The possibility that people may be charged with such serious offences for simply being reckless in their connections with an organisation that merely praises the doing of a terrorist act is an unjustifiable extension of Australia's counter-terrorism laws.

The Federation is therefore in support of the Sheller Inquiry's recommendation in this respect. We would, however, urge this Committee to consider the implications of the remainder of the definition of 'advocates'. The Federation is opposed to the proscription of organisations on the basis of 'advocating' a terrorist act. In our opinion, advocating a terrorist act does not represent a sufficient nexus between the organisation and actual acts of terrorism so as to warrant proscription. This is particularly the case where the 'advocating' in question involves mere praise or 'indirect' counselling or urging.

Recommendation 10: Definition of 'terrorist organisation'

The Sheller Inquiry has recommended that consideration be given to the elimination of paragraph (a) of the definition of a 'terrorist organisation'. That is, that a 'terrorist organisation' only be an organisation that is listed and proscribed as such rather than any organisation deemed to be 'directly or indirectly engaged in, preparing, planning, assisting on or fostering the doing of a terrorist act'.

Whilst being opposed to the proscription of organisations, the Federation supports this recommendation. Our concerns regarding paragraph (a) of the definition of a terrorist organisation are detailed in our written submission to the Sheller Inquiry and a number of these concerns are summarised in the Inquiry's report.[19] The Federation also shares the concerns expressed by the Australian

[18] Sections 102.2 – 102.8 (Sub-Division B), *Criminal Code Act 1995 (Cth)*
[19] *Report of the Security Legislation Review Committee*, ibid [7.4 - 7.6]

Muslim Civil Rights Advocacy Network (AMCRAN) as cited in the Inquiry's report.[20] It is in light of the issues raised by ourselves and AMCRAN that we support this recommendation of the Sheller Inquiry, notwithstanding our general opposition to the proscription of organisations.

Recommendation 11: Section 102.3(2) – burden of proof

The Federation supports the Sheller Inquiry's recommendation with respect to the offence of membership of a terrorist organisation. Currently, a charge of membership may be countered where a defendant is able to demonstrate that he or she took all reasonable steps to cease to be a member of the organisation. The burden of proof in this regard is entirely on the defendant. The Inquiry has recommended that this burden of proof be reduced to an evidential burden only. This recommendation is more in line with the principle of innocent until proven guilty and the related requirement that prosecutors in criminal matters prove the elements of an offence beyond reasonable doubt.

Nonetheless, the Federation is disappointed that the Sheller Inquiry has elected not to make any recommendation with respect to the possibility that this offence may be made out where a person is a 'formal' or 'informal' member of the organisation in question. In our view, the inclusion of 'informal' members in the current offence excessively broadens the offence so that it may be applied to people who have an insubstantial connection with an organisation only, let alone any connection to actual terrorist activity. This is made all the worse by the expansive nature of the definition of 'terrorist organisation' contained in paragraph (a), as discussed above. Concerns in this regard were also raised in AMCRAN's written submission to the Sheller Inquiry and the Federation shares those concerns as cited in the Inquiry's report.[21] Furthermore, in our written submission to the Sheller Inquiry the Federation raised a number of issues

[20] Ibid [7.15]
[21] Ibid [10.11 – 10.12]

arising in relation to 'informal' membership given that there is no clear guidance on what will be deemed to constitute an 'organisation' and we refer the Committee to that written submission. In light of these concerns, we urge this Committee to also reconsider the elements of this offence, particularly with respect to the type of membership required.

Recommendation 12: Section 102.5 – training a terrorist organisation or receiving training from a terrorist organisation

In our written submission to the Sheller Inquiry the Federation raised concerns regarding the offence of training or receiving training from a terrorist organisation. In particular, our concerns relate to the breadth of this offence given that currently no link between the training and a terrorist act is required. In addition the type of training in question is not specified in any way. The Federation therefore supports the Sheller Inquiry's recommendation that Section 102.5 be re-drafted.[22] In particular, we support the recommendation that it be redrafted in a way that requires a connection between the training and a terrorist act. We also agree that the offence should require that the training in question could 'reasonably prepare the organisation' for a terrorist act. These refinements would address some of the concerns regarding this offence as highlighted in our written submission to the Inquiry. We also note the Sheller Inquiry's discussion regarding the issue of strict liability in relation to this offence and that the Federation is adamantly opposed to the imposition of strict liability in relation to this offence, particularly given the serious penalty involved.

The Federation has a number of general concerns regarding this and the other terrorist organisation offences. These were discussed in our written submission to the Sheller Inquiry and we ask that this Committee consider the issues raised there. Some of these issues are re-examined below in relation to the other

[22] Ibid [10.41 - 10.42]

terrorist organisation offences that were the subject of Sheller Inquiry recommendations.

Recommendation 13: Section 102.6 – getting funds to, from or for a terrorist organisation

The Sheller Inquiry's recommendations with respect to Section 102.6 relate to the exception created for the receipt of funds by a legal practitioner representing persons in proceedings under Division 102.[23] The Inquiry recommends that the exception should also apply to representation under the whole of Part 5.3. It is further recommended that the defendant in such cases should bear only the evidentiary burden, rather than the legal burden of proof as is currently the case. This is particularly an issue in relation to the doctrine of legal professional privilege. Professional privilege would prevent a legal practitioner from disclosing the nature of advice sought and received and would therefore make it impossible for a lawyer defendant to discharge the legal onus of proof currently borne by the defendant.

The Federation is in support of these recommendations regarding Section 102.6. The Inquiry's recommendation that the exception be broadened to apply to the legal advice regarding the whole of Part 5.3 will ensure that legal practitioners are not unnecessarily prosecuted due to the provision of advice in relation matters raised by Australian security legislation. The recommendation that the defendant bear only the evidentiary burden will lessen the threat posed to legal practitioners advising on such matters as a result of the doctrine of legal professional privilege. Further to the Inquiry's former recommendation, we would also suggest that the exception should apply to the provision of legal representation and advice in relation to other legal matters. It is foreseeable that an organisation may seek legal advice relating to business concerns, employment law, property law and a range of other things that are not related to

[23] Ibid [10.44 – 10.48]

any terrorist activity. It would seem inappropriate that legal practitioner be exposed to prosecution for advising on such matters. It would also seem undesirable that any organisation be impeded in discharging their legal obligations because of an inability to obtain legal advice. This will simply compound the sum of social ills being caused by the organisation.

Furthermore, in our view, the Sheller Inquiry recommendations do not go far enough. The Federation is concerned that Section 102.6, and the other terrorist organisation offences for that matter, do not require a nexus between the offence itself and an actual act of politically, religiously or ideologically motivated violence. In the case of Section 102.6 there is no requirement that the funds provided or received relate to a terrorist act. The offence may arise where no actual terrorist act has taken place and even where the organisation was never planning a terrorist act. For example, it may be that an organisation has somehow indirectly 'fostered' a terrorist act. Any person who then provides or receives a service to the organisation in exchange for money (apart from legal practitioners) would then be liable to prosecution. This would be the case whether or not the service provided was in any way related to terrorist activity or not. There is nothing in the act to prevent it applying to the provision of other, perfectly innocent goods and services such as accounting services, cleaning services, catering services, office supplies etc. The provision of these services may have no direct connection to any terrorist activity and indeed the organisation itself may not even be directly connected to terrorist activity (given the definitions of 'terrorist organisation' and 'terrorist act' as discussed above). In our view it is insufficient that only the provision of legal services has been the subject of an exception.

We presume that this kind of offence is aimed at making the continued operation of a terrorist organisation untenable by criminalising any dealings with such an organisation. We are concerned, however, that in this process persons who have no connection to actual terrorist activity may be caught by the laws. While we

recognise that prosecutions in cases such as these are unlikely, we are concerned that the legislation is so broad as to create the potential for this kind of legislative overreach. Furthermore, we contend that any involvement in actual terrorist activity should be able to be caught by the Division 101 terrorism offences, which criminalise acts rather than affiliations and connections.

We therefore urge this Committee to consider recommending the repeal of this and the other terrorist organisation offences.

Recommendation 14: Section 102.7 – providing support to a terrorist organisation

The Sheller Inquiry has recommended that Section 102.7 be amended to ensure that the term 'support' cannot be interpreted to encompass the mere publication of views favourable to a proscribed organisation.

The Federation strongly agrees with this recommendation in that the current provision disproportionately restricts freedom of expression. We believe, however, that this offence is generally too broad. On its current formulation, the offence could be made out where a person provided support to an organisation where that support would help the organisation to indirectly foster a terrorist act. Given the very broad definition of 'terrorist act', as discussed above and in our written submission to the Sheller Inquiry, this offence becomes very expansive indeed. As with the other terrorist organisation offences, we are concerned that this offence does not require any nexus between the support or resources offered and an actual terrorist act. In our view, as stated above, this takes the offence outside the scope of the legitimate aims and objectives of security legislation.

Recommendation 15: Section 102.8 – associating with terrorist organisations

The Federation supports the Sheller Inquiry's recommendation that the Section 102.8 offence of association with a terrorist organisation be repealed. In our opinion, this section is a gross departure from the fundamental principles of 'freedom of expression' and 'freedom of association' and is therefore inconsistent with Australia's international obligations under the *International Covenant on Civil and Political Rights*.[24] In this case, criminalising mere association without requiring any nexus between the association and terrorist activities places a greater restriction on the right to freedom of association that is necessary in the interests of national security. In this sense the association offence is disproportionate and overly intrusive.

We also share the many concerns regarding this provision as raised in the Sheller Inquiry report.[25] Further, we are not convinced by the reasoning of the Attorney General's Department in its written submission on this issue, as quoted in the Sheller Inquiry Report.[26] In our view, this offence is an unnecessary and unjustifiable departure from fundamental principles of human rights and criminal law. It is in light of these grave concerns that we support the Inquiry's recommendation that this Section be repealed.

Recommendation 16: Section 103.1 – financing terrorism

The Sheller Inquiry has recommended that the provision relating to financing terrorism be amended to include the term 'intentionally' in paragraph Section 103.1(1)(a).[27] The Federation expressed a series of concerns regarding this offence in our submission to the Sheller Inquiry, a number of which were referred

[24] Articles 19 and 22, *International Covenant on Civil and Political Rights*.
[25] *Report of the Security Legislation Review Committee,* ibid [10.56 – 1.73]
[26] Ibid [10.74]
[27] Ibid [12.13]

to in the Inquiry's report.[28] While we welcome this recommendation as a clarification of Section 103.1, we do not feel that it suffices to address the concerns we have raised.

We remain concerned that a potential sentence of life imprisonment applies to Section 103.1 given that it is an offence expressly intended to prosecute people who act recklessly regarding how the funds in question will be used. We are concerned that no nexus is required between the provision/collection of funds and an actual terrorist act and we reiterate the views expressed in our written submission to the Sheller Inquiry in this regard:

The offence does not specify that the funds must be provided to the actual perpetrator of a terrorist act, and in fact does not specify who the funds must be provided to at all. It is also not specified that the funds must actually be used to facilitate a terrorist act for the offence to be prosecuted. In addition, the term 'will be used' is highly ambiguous. The statutory provision does not clarify the degree of usage required to make out the offence. Would it be necessary that the funds provided were directly used to buy a bomb, for example? Or might it be sufficient that the funds provided were used to hire a meeting room in which making a terrorist threat was discussed? It would seem that both examples might fall within the scope of this offence given the breadth implicit in the words 'used to facilitate or engage in'.

Furthermore, the term 'provide or collects funds' is also extremely broad. It may be that a person provides money to an organisation as a charitable donation or it may be that the money provided is in exchange for goods or services received. Both of these are ordinary, quotidian transactions and yet this statutory provision seems to require that all citizens now exercise an inordinate degree of care in any such financial exchange.

[28] Ibid [12.13 – 12.14]

These issues are exacerbated by the very broad definition of a 'terrorist act', which has been discussed in detail above. As a terrorist act may be constituted by a mere threat of politically, religiously or ideologically motivated violence, it is possible that this offence may be made out even where there is only a tenuous link between the funds provided/collected and an act of violence. It is even more concerning, in this respect, that the statutory provision expressly contemplates prosecuting individuals for this offence where no terrorist act occurs.[29] *In our view, the prosecution of individuals who have only a minimal and recklessly-created link to terrorist acts that do not occur seems farcical. This is all the more the case where a potential sentence of life imprisonment is added to the equation. At the very least we would argue that this type of prosecution is an unwarranted and unjustified legislative excess.*

Given the very serious penalties involved it is deeply concerning that this part of the legislation has been so loosely drafted as to expose such a large number of people to prosecution. This offence also seems to significantly exceed the legislative purpose of deterring and punishing acts of terrorism, especially when it is considered that extended geographical jurisdiction applies to this offence. It is difficult to comprehend how prosecuting people for recklessly funding terrorist acts, where the funding and the acts both occur outside of Australia, will substantially assist in protecting Australia itself from a terrorist act. Even if some indirect deterrent or protective benefit may be derived, it would be minimal at best and in our view would not justify the expansive and far-reaching nature of the offence. It also seems to be a misdirected use of resources to be prosecuting individuals for recklessly providing/collecting funds that may be used to facilitate a terrorist act rather than focussing all attention and resources on dealing with the potential terrorist act itself and those who may perpetrate it.[30]

[29] Section 103.1(2), Schedule 1, *Criminal Code Act 1995 (Cth)*
[30] Federation of Community Legal Centres, ibid, p 33

We are also not convinced that Section 103.1 is entirely necessary in light to the more recent introduction of Section 103.2. As noted in our written submission to the Sheller Inquiry, it is difficult to conceive of a situation where Section 103.2 might not suffice to deal with a situation of financing terrorist activity, apart from situations where there really is a very tenuous link between the person providing/collecting funds and a terrorist act. Further, it is our view that under the latter circumstances there should be no prosecution in any event.

While the Federation consistently opposed the introduction of a further financing offence via section 103.2, now that section 103.2 has been enacted it would seem that section 103.1 is somewhat superfluous. While we take issue with both offences, we find that section 103.2 is more clearly drafted, specifying to whom the funds must be collected for or made available to and the connection between that person and a terrorist act.

In light of the above concerns we strongly urge this Committee to reconsider Division 103 in its entirety.

Recommendation 17: Section 103.2 – financing a terrorist

The Sheller Inquiry has also recommended that 'consideration be given to re-drafting paragraph (b) of Section 103.2(1) to make it clear that it is required that the intended recipient of the funds is a terrorist'.[31] The Federation also notes the ambiguity of Section 103.2 as highlighted out in the Inquiry's report.[32] We therefore support further clarification of the offence.

As noted above with respect to Section 103.1, however, our concerns regarding the Division 103 offences pertain to more fundamental issues. With respect to Section 103.2 we remain concerned that a penalty of life imprisonment applies

[31] *Report of the Security Legislation Review Committee*, ibid [12.15]
[32] Ibid

given that it is inherently an offence of recklessness. In light of the seriousness of the offence, we are also concerned about its breadth, particularly insofar as it captures indirect fund provision/collection. In this sense the concerns we have expressed in relation to Section 103.1 above also apply to Section 103.2.

We would therefore urge this Committee to reconsider the necessity, justification and appropriateness of both of the offences contained in Division 103.

Recommendation 18: Section 80.1(1)(f) – conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force

The Sheller Inquiry has made only one recommendation in relation to only one part of the offence of treason. The Federation is strongly opposed to the treason offence in its entirety for a number of reasons elucidated in our written submission to the Sheller Inquiry. In our written submission we discussed several of the various forms of conduct that comprise the offence. We are therefore disappointed that the Inquiry has focussed only on Section 80.1(1)(f) which relates to engaging in conduct that assists another country or organisation that is engaged in armed hostilities against the Australian Defence Force.

The Federation remains in opposition to the treason offences and we therefore reiterate those matters discussed in our written submission to the Sheller Inquiry with respect to treason:

The Security Legislation Amendment (Terrorism) Act 2002 amends the Criminal Code to provide for the offence of treason. Broadly this offence may be committed by:

- *causing death, harm or imprisonment to the Sovereign, Governor General or Prime Minister; or*
- *levying war against the Commonwealth; or*

- *assisting an enemy at war with the Commonwealth; or*
- *assisting an organisation or country that is engaged in armed hostilities against the Australian Defence Force (ADF); or*
- *instigating a non-citizen to invade Australian territory; or*
- *forming an intention to do any of the above and manifesting that intention by an overt act.* [33]

There is an exception relating to the provision of humanitarian aid which applies where the treasonous act consists of assisting the enemy or an organisation/country engaged in armed hostilities against the ADF or forming an intention to do so.

The Federation has a number of general concerns regarding this aspect of the legislation.

It is our view that the above offences are not appropriate to a modern, democratic society and we oppose the revival of these anachronistic offences in contemporary legislation. These offences fail to recognise that we live in highly pluralistic society which includes an immense variety of divergent political opinions and allegiances. These opinions and allegiances may include support for countries that at times contradicts Australian government policy. For example, there are a great many people in Australia who oppose the occupation of Iraq and support the Iraqi people's right to take up arms against what is widely regarded as an illegal invasion. This support may translate to providing financial or other material support to Iraqi organisations involved in resisting Western forces. The Federation does not believe that this type of activity should attract prosecution and is particular concerned about the suppression of political dissent and freedom of association involved.

In our view, it is also unclear why separate offences might be required for murder or threats to kill where committed against the officials specified above. This

[33] Section 80, *The Criminal Code*

would suggest that the murder of the Prime Minister or a threat to kill the Governor-General, for example, is in some way more serious than or diverse from the murder of or threats to kill any other person. The social purpose of punishing these offences separately to the equivalent crimes under ordinary criminal law is unclear, particularly in a contemporary setting.

The offences relating to assisting the enemy restrict freedom of political association. In our view, these offences are prone to being used to suppress dissent and opponents of government policy, particularly with respect to the activities of the ADF. In this respect we are particularly concerned that prosecutions of treason offences may not proceed without the consent of the Attorney-General. This raises the serious issue that criminal prosecution may be influenced by political motivations.

We would also question the continued need for these provisions, given the recent amendments to sedition law by the Anti-Terrorism Act (No 2) 2005 (Cth). While the Federation consistently opposed the reactivation of the archaic sedition offences, in our opinion, the updated sedition offences combined with ordinary criminal law are sufficient to prosecute the various offences contemplated in this section on treason.

We are also concerned about the inclusion of these offences in counter-terrorism legislation. This could lead to inconsistent application of the treason provisions, given the widespread political, legislative and public association with Muslim groups and terrorism, which is in more detail discussed above.

The Federation is further concerned about the severity of the penalties specified for these offences. It is particularly worrying that a penalty of life imprisonment may apply where a person simply forms an intention to engage in conduct that

assists another country that is engaged in armed hostilities with the ADF, especially given that the assistance may be 'by any means whatever'[34]*.*

The Federation submits that these offences should be repealed. Alternatively, they should be amended to reduce the penalties involved and to provide greater protection for freedom of political association.[35]

Recommendation 19: Customs' recommendations on border security

The Federation did not propose to examine the Border Security Legislation Amendment Act 2002 in our written submission to the Sheller Inquiry nor in our appearance before the Inquiry, this particular Act being beyond the scope of our knowledge and expertise. Similarly, at this stage we are not in a position to comment on this recommendation.

Recommendation 20: Hoax offence

In line with a suggestion from the Commonwealth Department of Public Prosecutions, the Sheller Inquiry has recommended that a separate offence be created relating to threats of terrorist activity where the making of the threat does not have political, religious or ideological motivations and the relevant intention to coerce or influence by intimidation.[36] In such cases the offence proposed would consist of making a threat to carry out a terrorist act where the threat is 'serious and credible'.[37]

Within the Criminal Code Act 1995 there currently exists an offence of making a hoax threat relating to explosives or dangerous substances.[38] This offence however only relates to hoaxes that are carried out via the post. Arguably this

[34] Section 80.1(1)(f), ibid
[35] Federation of Community Legal Centres (Vic), ibid, p 36
[36] *Report of the Security Legislation Review Committee*, ibid [17.4]
[37] Ibid [17.3]
[38] Section 471.10, Schedule 1, Criminal Code, *Criminal Code Act 1995 (Cth)*

does not reflect contemporary circumstances in that hoaxes via e-mail, the internet, text message, phone call etc are not covered by this offence.

The Federation takes the view that the various terrorism and terrorist organisation offences currently under review in themselves represent a legislative excess. We do not concur with the Sheller Inquiry's view that it is necessary to have the current raft of separate legislation to deal with the specific threat of terrorism and we are particular concerned about the expansive and discretionary nature of many of the laws created.

In the case of a separate 'hoax' offence it is our submission that current state criminal laws suffice to cover any foreseeable scenario. In Victoria, for example, the *Crimes Act 1958*, provides for the following offences

- Extortion with threat to kill (s 27)
- Extortion with threat to destroy property (s 28)
- Threaten to kill (s 20)
- Threaten to inflict serious injury (s 21)
- Threaten to destroy or damage property (s 198)
- Making false statements (by way of a hoax that there is a conspiracy to kill damage property etc) (s 247)
- Threaten to sabotage (to damage a public/government facility) (s247L)
- Threaten to contaminate goods (with intent to cause public alarm) (s250)[39]

These offences, and in particular the latter three provisions, would seem to cover the range of conceivable behaviour that might relate to the making of a hoax threat of terrorism. It is our view, therefore that existing criminal laws suffice to address the issue of hoax threats and that the creation of an additional offences in this regard is not required.

[39] *Crimes Act 1958 (Vic)*

Conclusion

In combination, the above discussion and our written submission to the Sheller Inquiry outline a number of serious concerns. In light of these concerns we strongly urge this Committee to recommend the repeal of the above security acts relating to terrorism. Alternatively, we believe that it is imperative that this legislation be substantially amended to address the many issues we have raised.

The above discussion has focused primarily on the key recommendations arising out of the Sheller Inquiry's report. There were, however a number of issues that were not taken up by the Sheller Inquiry or provisions which the Inquiry found to be satisfactory notwithstanding ours and other public submissions to the contrary. In this regard we strongly urge this Committee to read our written submission to the Sheller Inquiry, as some of the matters raised therein were not taken up by the Inquiry. Furthermore, should this Committee wish to receive additional information regarding these matters, our organisation may be in a position to make a further submission on those issues.