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

TO THE SCRUTINY OF ACTS AND REGULATIONS COMMITTEE

TERRORISM (COMMUNITY PROTECTION) (AMENDMENT) BILL 2005 (VIC)

January 2006

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

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About the Federation of Community Legal Centres Victoria

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for forty-nine 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 Community Legal Centres are on low incomes, with most receiving some form of pension or benefit. Community Legal Centres also see a considerable number of people from culturally and linguistically diverse communities.

This submission has been prepared on behalf of the Federation by its Anti-Terrorism Laws Working Group, in consultation with various other members of the Federation. 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 seeks to monitor the impact of State and Commonwealth anti-terrorism laws on affected communities and individuals.

Introduction

This submission relates to the *Terrorism (Community Protection) (Amendment) Bill 2005 (Vic)* ('the Bill').

The Federation is fundamentally opposed to the passage of the Bill due to numerous of serious concerns which are detailed below. We have, however, also included commentary and recommendations on the substance of the Bill which we hope will assist the Committee in its deliberations, particularly in the event that it is minded to recommend that the Bill be passed.

At the outset we would like to express our dismay at the limits that have been placed on public discussion and proper scrutiny of this proposed legislation. It is clear from the Council of Australian Government's Communique, that State and Territory leaders have already agreed to implement the legislation which is the subject of this Committee's enquiry.[1] It would seem, therefore, that passage of the Bill in some form is already guaranteed. Under these circumstances, the scope for true public debate as to the merits of the Bill is substantially restricted and the possible outcomes of this enquiry significantly limited.

General Concerns

Justification for Legislative Change

The Federation is concerned that the Government has failed to provide the public with justification for these legislative amendments. In the wake of the London bombings the Commonwealth Government announced that Australia is in need of further legislation to counter terrorism domestically. The national terrorism threat level has, however, remained at 'medium' since 11 September 2001, notwithstanding such overseas events. This means that a terrorist act 'could' occur in Australia but is neither 'likely' (which would attract a 'high' level assessment) nor 'imminent' (which would attract an 'extreme' level assessment). Given that the national level of terrorist threat, as assessed by our national

[1] *Council of Australian Governments' Communique: Special Meeting on Counter Terrorism*, 27 September 2005 (available at http://www.coag.gov.au/meetings/270905/index.htm); COAG Joint Press Conference, Parliament House, Canberra, 27 September 2005 (available at http://www.pm.gov.au/new/interview/Interview1588.htm)

security agencies, has not increased, it is difficult to comprehend the need for legislative change.

Furthermore, the Bill provides for a number of amendments and new legislative regimes that represent a curtailment of civil liberties and a significant departure from fundamental legal principles (which are discussed below). In light of the extraordinary nature of this proposed legislation, we submit that it is particularly unjustifiable in a context where our national security agencies are only able to indicate that a terrorist act may, or similarly may not, occur.

The Explanatory Memorandum to the Bill ('the Explanatory Memorandum') states that it 'was recognised at COAG that there was a clear case to strengthen Australia's counter-terrorism laws' and then goes on to explain the various counter-terrorism initiatives agreed on by Commonwealth, State and Territory leaders as a result. We are concerned, however, that the basis for this assessment has not been made clear to the public. Given that the national terrorist threat level has remained constant it is difficult to imagine the grounds on which recognition of such a 'clear case' might have been based. As the Bill includes amendments which depart from traditional democratic and legal principles and which seriously impinge on civil liberties, it is crucial that the public be privy to the reasons for making these amendments. Such extraordinary legislation must be justified by equally extraordinary circumstances. At present the public is not in a position to assess whether the proposed legislation is justified in this way or not, as it does not have access to the relevant information. In our view, to facilitate proper public debate of the Bill, factual information regarding the grounds for legislative change should be made public.

The Government has also failed to demonstrate how these legislative measures will more effectively deal with the threat of terrorism in Australia. In introducing what some state leaders have admitted is 'draconian' legislation, at a minimum it is imperative that the Government demonstrates that the legislative amendments

will be effective for their purpose. Given the complex nature of terrorist operations, it is unclear how the Bill will actually serve to prevent terrorist acts. The Bill certainly arms law enforcement agencies, with an array of new powers. Given the inherently covert and underground nature of terrorist activity, however, we submit that the Government has failed to demonstrate that it will, or even how it might, act preventatively. Furthermore, it is our view that the Government has failed to engage with issues around the root causes of terrorist activity, and in particular the ways the Commonwealth Government's own policies and alliances contribute to making Australia a terrorist target. Instead of resorting to further curtailments of individual rights and liberties we believe that the Government would be better served to address the issue of these roots causes. In the absence of engagement with these broader issues, it would seem that this Bill is simply a 'band-aid' solution for far deeper problems and is therefore unlikely to be an effective preventative measure.

The Government has also failed to demonstrate that our existing anti-terrorism legislation is insufficient to prevent the occurrence of terrorist acts. In public hearings before the Parliamentary Joint Committee on ASIO, ASIS and DSD (now the Parliamentary Joint Committee on Intelligence and Security) relating to ASIO's special powers both Dennis Richardson, then head of ASIO, and representatives of the Australian Federal Police ('AFP') appeared.[2] In response to direct questioning, Dennis Richardson expressly indicated that ASIO were not arguing for increased powers and that he was satisfied that the existing powers equipped them to do their job. The AFP representatives also did not argue for increased powers and did not suggest that their existing powers were insufficient. Only eight months later, no evidence has been provided to indicate that these statements no longer apply. Similarly, with respect to existing Victorian counter-terrorism legislation, no evidence has been put forth to demonstrate that it is in some way deficient and requires such significant amendments.

[2] Proof Committee 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)

The recently passed Commonwealth *Anti-Terrorism Act (No 2) 2005* ('the Commonwealth Act'), *inter alia*, provides for 2 day preventative detention and gives all police officers increased powers to stop, search and question individuals. Given that Australia's counter-terrorism laws have already been enhanced in this way, we believe that the further enhancements proposed in the Bill are not justified. In our view, the Commonwealth Act already represents a disproportionate legislative response, given the level of terrorist threat in Australia. In providing for 14 day preventative detention and further increasing the powers of police officers, the Bill is an even more extreme response. We believe that it is incumbent on the Government to demonstrate that legislation over and above that which has been recently passed at the Commonwealth level is necessary. This requires that the Government demonstrate both its proportionality prior to passing the Bill. It is our submission this has not occurred.

Other Legislative Reviews

Australia already has a raft of counter-terrorism legislation that was introduced after the New York bombings on 11 September 2001. Much of that legislation was recognised to be quite extraordinary at the time of passage and consequently includes sunset clauses. The Security Legislation Review Committee, is currently in the process of reviewing our key pieces of counter-terrorism legislation. That Committee is due to report back on the results of its review before July 2006. The Victorian *Terrorism (Community Protection) Act 2003* ('the Act') is also due to be reviewed this year and a report on its operation is to be completed by 30 June 2006.[3]

We believe that it is particularly imprudent to introduce new counter-terrorism measures before the results of the reviews of our existing legislation have been made public. Firstly, surely it is impossible for the Government to assess whether our existing laws really are insufficient and need to be supplemented without

[3] Section 38 *Terrorism (Community Protection) Act 2003 (Vic) ('the Act)*

receiving the outcomes of these reviews. Further, the public is in no position to meaningfully determine for itself whether our existing laws are inadequate and whether it agrees with the Government's assertion that we need enhanced counter-terrorism laws. In this way, passing the Bill before the reviews of our current legislation are complete has the effect of hampering proper public discussion of the legislation.

We are also deeply concerned that Clause 9 of the Bill, which provides for review of the Bill after 5 years, actually serves to eliminate the review of the Act currently scheduled for this year. Clause 9 amends the principal Act to make the review date 30 June 2011. Providing this amendment is inserted prior to 30 June 2006, the currently anticipated review will be legislated away. In our view, eliminating the review of our current legislation in this way is completely unacceptable. When the principal act was passed, it was recognised that it provided police with extraordinary powers that depart from fundamental democratic principles and that require close monitoring. As a result a review provision was inserted. The elimination of this review by stealth, that is, by using the review date of an amendment act, should not be permitted.

We recommend that the Bill not be passed until the outcomes of reviews of existing counter-terrorism legislation are made public, at which time a further enquiry into the Bill may be conducted.

Discriminatory Impact

The Federation is particularly concerned that this proposed legislation will disproportionately impact on the Muslim community.

In the last year the writers of this submission have conducted community legal education sessions on counter-terrorism legislation with Muslim groups. We have also had significant experiences conducting legal casework in this area. Through these activities it has come to our attention that the Muslim community has been

targeted by law enforcement officials and national security agencies as a result of our existing counter-terrorism laws. Disturbingly, the vast majority of Muslim people we have encountered through our work have either known someone or have themselves been contacted for questioning by ASIO. Anecdotally, Muslim people have expressed feeling harassed by ASIO's intelligence-gathering operations and some have even described harassment by law enforcement officials. There is, however, such a level of fear regarding our existing laws and the stigma of being labelled 'a terrorist', that community members have not spoken out widely about these experiences. We are concerned that, if passed, the Bill will only serve to exacerbate this targeting and justify the fears of the Muslim community.

Soon after the Prime Minister's initial media release relating the proposals now contained in the Bill, the Police Federation of Australia openly stated that these proposals will inevitably lead to racial profiling with respect to the Muslim community.[4] In his appearance at public hearings before the Parliamentary Joint Committee on ASIO, ASIS and DSD on 18 May 2005, then head of ASIO Dennis Richardson, expressly confirmed that ASIO were targeting the Muslim community in its intelligence gathering activities.[5] We are concerned that state law enforcement agencies are also focussed on the Muslim community in their counter-terrorism operations. In this regard, despite Governmental assurances that these new counter-terrorism initiatives are not aimed directly at the Muslim community, it is clear that they will overwhelmingly impact on Muslim people in their application, just as our existing counter-terrorism laws have done. While the Bill itself may not specifically refer to Muslim people, they are the community group that will bear the brunt of this legislation. Legislation that has the effect of targeting one particular racial or religious group in this way should be of very grave concern to the whole community. It is also an inadequate response to

[4] Milovanovic, Selma, ' Suburbs may be "left exposed"', *The Age*, 28 September 2005.
[5] Proof Committee 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)

simply gloss over this issue on that basis that the Bill is not discriminatory in its content. As long as the Muslim community will be directly and disproportionately targeted as a result, this Bill should not be passed.

Sunset Provisions

The Federation does not believe that the proposed 10 year sunset provision is appropriate, given the extraordinary nature of the Bill. The Bill provides law enforcement agencies with unprecedented powers that have the potential to impact significantly on individual freedoms. We submit that 10 years is far too long to allow these powers to remain part of Victorian law. There is a serious risk that after 10 years these powers will have become a permanent part of our legislative landscape, despite the fact that they are currently intended as a temporary measure. The longer this legislation remains in place, the less likely it is that it will be allowed to lapse. If this Bill is to be passed, it is our recommendation that the duration of the Bill be substantially reduced. This will more adequately reflect that this legislation is intended to be temporary only and that it is recognised to be a departure from traditional legal principles and practices.

The Federation is also particularly concerned that the Bill has the effect of extending the operation of the whole Victorian Act by a further 10 years whereas that Act is currently due to expire on 1 December 2006.[6] As noted above, a review of the Act is yet to be conducted and therefore its ongoing operation beyond the current expiry date should still be a subject of debate. As it stands, therefore, the Bill will function as a somewhat underhanded way of extending the Act's operation, prior to any investigation into or debate on that topic. It would clearly create legislative problems if the 10 year sunset clause applied only to the amendments contained in the Bill – in the event that the remainder of the Act were permitted to expire, there would be no principle legislation for the Amendment Act to rest on. We therefore reiterate our recommendation above:

[6] Section 41, *The Act*

that passage and consideration of the Bill be postponed until after review of the existing Act is complete. This is only a matter of 6 months and in our view, given the extraordinary nature of the proposed legislation, such a waiting period is entirely warranted.

We also believe that review of this legislation, if it is passed, should be conducted by an independent specialised review committee after 3 years. This will allow enough time for meaningful review while at the same time ensuring that any problems with the legislation may be detected at the earliest available opportunity. It is important that a specific review committee be used, rather than simply the COAG (as indicated in the Explanatory Memorandum), so that the review is conducted by a group that has specialist expertise in this area of law and that does not have the political agendas that Commonwealth, State and Territory leaders necessarily have.

In addition to the general issues detailed above, the Federation has a number of concerns regarding specific aspects of the Bill.

Preventative Detention

The Federation is in fundamental opposition to any detention of non-suspects without charge and therefore opposes legislation that establishes a regime of preventative detention.

Detention of non-suspects

The proposed Part 2A of the Bill provides for the detention of non-suspects. This is a gross violation of the principle of 'innocent until proven guilty', a fundamental tenet of our criminal justice system. The presumption of innocence requires that a person is presumed to be innocent until found to be guilty by a court after the elements of an offence have been proven. More generally, the presumption of

innocence also requires that individuals who have not been found guilty be free from coercive state powers. Our criminal justice system does permit limited departure from this principle insofar as individuals who are suspected on reasonable grounds of committing a criminal offence may be remanded pending their appearance before a judicial officer. The Bill's proposal for preventative detention, however, goes far beyond this by allowing for the detention of non-suspects where no criminal charges have been brought. This is also a departure from the traditional legal principle of habeus corpus, which requires that an imprisoned person be brought before a court to determine the lawfulness of that person's imprisonment.

Insofar as it derogates from these fundamental principles, the Federation is deeply concerned about the proposal for preventative detention and strongly recommends that it be removed from the Bill if it is to be passed.

Length of Preventative Detention Orders

Given that preventative detention orders will apply to non-suspects, the Federation is of the view that the potential duration of such orders is far too long. Generally speaking, Victorian sentencing practices are such that a term of imprisonment is only imposed in relation to repeat offenders or with respect to particularly heinous crimes. It is therefore of grave concern that the Bill proposes the imprisonment of individuals who ostensibly have not committed any crime for a period of up to 14 days. In our view 14 days is an excessive time to detain a non-suspect where the aim is to prevent a criminal act occurring or to preserve evidence of a criminal act. In this respect, the proposed regime of preventative detention also represents a grossly disproportionate legislative response given the level of terrorist threat in Australia (as discussed above).

Grounds for Preventative Detention

Section 13E provides that a preventative detention order may be made in relation to a person where the Supreme Court or a senior police officer is satisfied that the person:

(A) will engage in a terrorist act; or

(B) possesses or has under his or her control a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or

(C) has done an act in preparation for, or planning, a terrorist act.[7]

'Terrorist act' is broadly defined in Section 4 of the Act as an action or threat of action done or made with

- the intention of advancing a political, religious or ideological cause; and
- with the intention of coercing or influencing by intimidation any government form.

Further, to be a 'terrorist act', the action must either cause or threaten serious physical harm to a person, serious property damage, a person's death, endangerment to a person's life, a serious risk to public health or safety, or serious interference with an electronic system.[8]

This is an extremely broad definition which may include mere threats of the above activity. Given the broad definition of 'terrorist act', arguably, preventative detention orders may be made in a wide array of circumstances, even despite the Section 13E(2) requirement that the act be imminent. Presumably the types of terrorist acts which the Bill intends to prevent are those which are more serious, that is, which have the potential to cause death or harm to people or substantial property damage. In our view, if it is to be passed the Bill should be amended to limit the types of terrorist acts in relation to which a preventative detention order may be made. Orders should only be made where the terrorist act in question would be likely to cause death or serious injury or significant

[7] Section 13E, *The Bill*
[8] Section 4, *The Act*

property damage and, in particular, should not be made in relation to mere threats.

The Federation is also concerned that two of the above grounds for obtaining a preventative detention order are actually bases for bringing criminal charges. Under existing Commonwealth law, namely the *Criminal Code*, it is an offence to possess a thing that is connected with preparation for, the engagement of a person, or assistance in a terrorist act.[9] This offence may be committed with actual knowledge or recklessly and carries a maximum penalty of 15 years imprisonment. Under the *Criminal Code*, it is also an offence to do 'any act in preparation for, or planning, a terrorist act'.[10] This offence carries a maximum penalty of life imprisonment. Sub-sections 13E(1)(a)(i)(B) and (C) raise the possibility that preventative detention may be used by police to detain a person whom they would wish to charge with an equivalent offence but against whom they do not have sufficient evidence.

This also calls into question the necessity of such powers, given that police could detain a person by charging them with the relevant criminal offences rather than by detaining them without charge. The *Criminal Code* contains a broad range of terrorism offences which allow police to charge persons before the actual commission of a terrorist act, particularly when conspiracy offences are brought into play. Presumably, where a terrorist act is truly imminent (as required in order to obtain a preventative detention order by Section 13E(2) of the Bill), one or more of the existing terrorism offences under the criminal code will have been committed. For example, where a subject is intending to blow up a bomb at a particular location and this comes to the attention of police as an imminent threat, the subject will have no doubt engaged in planning to blow up the bomb, will in all likelihood possess materials connected with the bombing and will possibly even have related documents such as invoices, maps, etc. All of these things would

[9] Section 101.4, *Criminal Code Act 1995 (Cth)*
[10] Section 101.6(1), ibid

constitute grounds for bringing criminal charges against the person. Where the person has not committed these offences, it is unlikely that the threat could be truly imminent, in which case a preventative detention order would not be able to be obtained anyway.

It is possible to envisage a situation where a person is suspected of committing one of the above offences preparatory to a terrorist act and where the police have not yet gathered sufficient evidence to charge that person and so cannot yet bring that person into custody. Such a situation is still no justification for the introduction of preventative detention, as we already have laws that allow both Federal and State police significant leeway to detain people in such cases. Section 23CA of the *Crimes Act 1914 (Cth)* provides that where a person is arrested for a terrorism offence, that person may be detained for the purpose of investigating whether that person has committed that or another terrorism offence. While the 'investigation period' is generally 4 hours[11], Section 23DA allows for repeated extension of the 'investigation period' up to a total of 20 hours. Furthermore, Section 23CA(8) provides for a range of events that will be disregarded for the purposes of calculating the investigation period. These include (amongst other things):

- any time used to transport the person;
- any time during which questioning is suspended or delayed while the subject is contacting friends or relatives;
- any time during which questioning is suspended to allow a friend, relative or lawyer to arrive;
- any time during which questioning is suspended or delated for medical treatment of the subject;
- any time questioning is suspended or delayed because the subject is intoxicated;

[11] Section 23CA(4)(b), *Crimes Act 1914 (Cth)*

- any time questioning is suspended or delayed to allow the person to rest and recuperate.[12]

There is also a 'catch-all' provision that allows any reasonable time that is a time during which questioning of the person is reasonably suspended or delayed to be disregarded, although this requires approval of a magistrate.[13] In combination, all of the time periods to be disregarded (and the legislation does, in actual fact contain a more extensive list than we have provided above) may result in a significant period of detention.

Clearly, existing legislation already has built into it sufficient preventative mechanisms by virtue of the fact that conduct preparatory to terrorist acts has been criminalised and detention periods allowed for the investigation of terrorism offences. We therefore submit that the regime of preventative detention in the proposed Part 2A is a superfluous and unjustified amendment to our laws.

Preserving Evidence

Section 13E (1)(b) of the Bill also permits preventative detention of a person where a terrorist act has already occurred and the detention is necessary to preserve evidence of or relating to that terrorist act.[14] This would seem to be contrary to notion of a 'preventative' purpose. Clearly this aspect of the Bill is more about the preservation of evidence to facilitate subsequent criminal prosecution than it is about preventing an imminent terrorist act. It is therefore beyond the scope of what should be permitted under any regime purporting to be aimed at preventing an imminent terrorist act.

[12] Section 23CA, ibid
[13] Sections 23CA(8)(m) and 23CB, ibid
[14] Section 13E(1)(b) *The Bill*

Orders Made Without Notifying the Subject

Where a preventative detention order is made by a senior police officer, that order may last for a maximum of 24 hours. There is no requirement in such cases, that the subject of the order be notified prior to the making of the order. Where an application for a preventative detention order is made to the Supreme Court, the subject may be notified in advance, however this is not required. At Section 13E(4) the Bill provides that, where a subject has not been notified of the application, the Court *may* make an interim order pending a final hearing of the matter.[15] The corollary of this is, of course, that the Court may on the other hand decide to make a final order at the outset. The Federation is concerned that the Bill affords the Supreme Court with the discretion to make a final preventative detention order in relation to a person who has not been advised in advance of the order sought. Given that the potential period of detention which the Court may order is 14 days, in our view it is crucial that all subjects be given the opportunity to contest such an application, to put evidence before the Court, to test the applicant's evidence and to testify in their own defence if they wish.

Where the Supreme Court does elect to make an interim order, that order may be for a maximum of 48 hours.[16] The Note to Section 13E(4), however, specifies that the interim order may last for a maximum of 48 hours or until the final hearing, whichever is later. This means that effectively a person may be detained under an 'interim' order for the full 14 days, if that is how long it takes for the matter to be determined. Section 13E(6) further creates the possibility that a person may even be detained for longer than the maximum 14 days where there is an interim order that has not been finally determined within a 14 day period.[17]

If this Bill is to be passed, it is our recommendation that, where the Supreme Court intends to make an interim or final order in relation to the subject of a preventative detention application, that subject must be notified of the application

[15] Section 13E(4) *ibid*
[16] Section 13G(3) *ibid*
[17] Section 13E(6) *ibid*

and given the opportunity to contest the application. Further, the ambiguous drafting of Section 13E(6), which creates the potential for detention for more than 14 days, must be remedied.

Standard of Proof

The Federation is deeply concerned that the standard of proof in preventative detention order applications is that of being 'satisfied on reasonable grounds'. We submit that this is standard is too low and that the higher, criminal standard of proof should apply in such cases.

The standard of proof in all criminal matters is 'beyond reasonable doubt'. This applies in all matters, irrespective of whether the suspect may be facing a term of imprisonment or not. It is therefore critical in preventative detention order applications, where the possible outcome of an application is the deprivation of a person's liberty, that the standard of proof also be 'beyond reasonable doubt'. Requiring that the criteria be demonstrated 'beyond reasonable doubt' will ensure that preventative detention orders are not imposed in inappropriate circumstances. Given the inherently punitive and intrusive impact of preventative detention orders, it is crucial that all steps be taken to ensure that they are not imposed improperly and unless absolutely necessary.

Multiple Preventative Detention Orders

Section 13K imposes certain restrictions on multiple preventative detention orders in relation to a given person. It does not, however, preclude multiple orders altogether. Firstly a subsequent preventative detention order may be made in relation to preventing a different terrorist act, where the order is based on information that only came to light after the prior order was made.[18] This also applies where the prior preventative detention order was made pursuant to preventative detention laws of the Commonwealth or another State or Territory[19].

[18] Section 13K(1), *ibid*
[19] Section 13K(3) *ibid*

Furthermore, Section 13K does not prohibit the making of a subsequent preventative detention order for the purpose of preserving evidence, where the prior order was for the purpose of preventing a terrorist act. Effectively, where a person is detained under a preventative detention order for the purpose of preventing an imminent terrorist act and a terrorist act nonetheless occurs, that person may then be subject to a further, new preventative detention order for the purpose of preserving evidence. The Federation is concerned that this will be used to extend the detention of a person where a terrorist act occurs and yet there is insufficient evidence to link the person to the terrorist act and therefore charge him or her. In this regard, preventative detention orders may be used by police as means of circumventing traditional criminal justice procedures with respect to the prosecution of criminal offences. Worryingly, the impact of this will be that a person who is innocent of any criminal offence may be imprisoned without charge for longer than the maximum 14 day period.

Furthermore, Section 13K seems to allow for successive initial preventative detention orders to be made where they are made based on new information. This creates the possibility that, where the police are continually uncovering new information (as often occurs) and believe that there are various terrorist targets, a person may be repeatedly and successively subject to new preventative detention orders. That is, a person may be detained for an overall period much longer than the 14 day maximum. Again, this is particularly of grave concern considering that the subject being detained has not been charged with any criminal offence.

In our view, as the Bill provides for a 14 day preventative detention period, it is not then justifiable to also allow for the possibility of multiple orders. Where, in the Commonwealth Act, preventative detention orders may only last for 48 hours, multiple orders are much less intrusive and have less potential for the deprivation of liberty. As the Victorian Bill provides for 14 day orders, allowing multiple orders

potentially creates medium-term imprisonment of non-suspects and thereby a gross violation of individual liberty.

While the Committee may perceive that it would be unlikely that multiple preventative detention orders would be utilised in the above ways, nonetheless, the drafting of the Bill allows for that to occur. If the Bill is to be passed, in our submission, multiple preventative detention orders should be altogether precluded.

Informing the Subject

At Section 13ZA, the Bill provides that a subject must be provided with a copy of the preventative detention order and a summary of the grounds on which the order was made.[20] This also applies to prohibited contact orders which may preclude the subject from contacting certain individuals. It is important to note, however, that that summary does not have to include information where the disclosure of that information is likely to prejudice national security.[21]

If a person is to be imprisoned, it is only humane that the person be informed of the reasons for their imprisonment. Where information is excluded from a summary on national security grounds, this may give rise to the situation where people are imprisoned without charge, they will know that they are subject to a preventative detention order but they may have no understanding of why this has happened to them.

We are also concerned that a summary of grounds may not be sufficient information to allow a subject and his or her lawyer to effectively contest or apply for revocation of an order. It is unclear from the Bill what may be included in such a summary and to what extent the factual evidence relied upon will be revealed. It is possible that a mere summary may not give a subject an adequate idea of

[20] Section 13ZA(1), *ibid*
[21] Section 13ZA(2), *ibid*

the evidence relied upon by the police. In criminal matters, suspects are generally provided with a summary of charges as well as witness statements, a list of exhibits and access to those exhibits. It therefore seems highly unfair that in preventative detention matters, where a term of imprisonment is the potential outcome, a subject is only given a summary of grounds.

Section 13X(2) details a number of matters that the police officer effecting detention must inform the subject of. These include the following

> (a) the fact that a preventative detention order has been made;
> (b) the period of detention;
> (c) any restrictions on contact with other people during detention;
> (d) where the order was made by a senior police officer, the fact that an application may be made to the Supreme Court for a further order;
> (e) the person's right to complain to the ombudsman and regarding what;
> (f) the right to seek remedy from a court;
> (g) the entitlement to contact a lawyer; and
> (h) the name and work telephone number of the senior police officer overseeing the detention.[22]

Section 13Z(1), however, provides that any requirement to furnish the above information does not apply where the subject's actions make this impractical.[23] It is unclear from the Bill what would satisfy this exemption. If the subject is belligerent or asleep will that be a reasonable excuse for not advising them that they are in preventative detention? If a subject suffers from mental illness or a cognitive disability with that be sufficient grounds for failing to advise them of their rights?

[22] Section 13X(2) *ibid*
[23] Section 13Z(1) *ibid*

Section 13Z(2) provides that the obligation to inform is discharged even if the explanation of the matters detailed above is not precise.[24] Furthermore, under Section 13Z(3) where a subject is of non-English speaking background, it is the police officer effecting detention who makes the assessment as to whether the subject requires an interpreter or not.[25] The subject is not able to determine this for themselves. This may create difficulties for subjects who have sufficient command of the English language to engage in basic conversation but are unable to comprehend legal terminology and complex instructions.

It is our concern that all of these provisions will result in people being detained without adequate knowledge of why they are so detained and their rights and entitlements while under detention.

Revocation or Variation

The Bill provides that a subject may only apply for revocation or variation of a preventative detention order with leave of the Supreme Court.[26] In turn, leave of the Court may only be granted where the Court is satisfied that new facts or circumstances have arisen since the order was made.[27] We believe that this system of review renders it extremely difficult for subjects who feel they have been wrongly detained to challenge their imprisonment. For example, subjects seeking review of an order that was made *ex parte* may not be able to show 'new' facts and circumstances even though all of the relevant facts and circumstances may not have been put before the Court when the order was made.

The requirement that there be 'new facts and circumstances' also means that review of decisions which were wrongly made will not be possible. Revocation applications will not function as a mechanism of judicial review. Effectively, a

[24] Section 13Z(2) *ibid*
[25] Section 13Z(3) *ibid*
[26] Section 13N(1) *ibid*
[27] Section 13N(2) *ibid*

decision granting a preventative detention order will therefore not be able to be appealed or subject to a further level of judicial review.

Given that preventative detention orders involve the detention of non-suspects, it is our view that subjects should have unrestricted access to apply for revocation or variation of orders. This is particularly important where the order was made without the prior notification of the subject.

Restrictions on Legal Advice

The Bill imposes a number of restrictions on the provision of legal advice to subjects, which we believe will act to their detriment. We are particularly concerned about these restrictions given that they relate to the detention of non-suspects for periods up to 14 days and, as discussed above, potentially longer where multiple orders are made.

The Bill provides that a subject's lawyer must be given a copy of the preventative detention order and a summary of the grounds upon which that order was made, on request by the subject.[28] As noted above, however, it is unclear what will constitute a summary of grounds and how much information regarding police evidence that will include. It is possible that a summary may contain only limited information regarding police evidence. It may also only contain partial information regarding the grounds for an order, where the disclosure of that information would be prejudicial to national security.[29] As a result it will be extremely difficult, and maybe impossible, for a lawyer to provide a subject with meaningful legal advice regarding the detention, its lawfulness and the potential merits of an application for revocation.

Pursuant to Section 13ZG(1), all communications between subject and lawyer will be monitored.[30] It has been long-recognised in our legal system that the

[28] Section 13ZA(6) *ibid*
[29] Section 13ZA(2) *ibid*
[30] Section 13ZG(1) *ibid*

capacity for lawyers to truly advise and fully represent the interests of their clients hinges on legal advice being provided in a confidential environment. The Bill's departure from this understanding will impede a lawyer's ability to receive full instructions and to provide comprehensive legal advice.

A further restriction is that subjects may be prevented from contacting the lawyer of their choice where that lawyer is specified in a prohibited contact order.[31]

If this aspect of the Bill is to be passed and a regime for the detention of non-suspects established, it is our recommendation that any person detained under such a regime be given unfettered access to confidential, legal advice. We further recommend that a subject's lawyer be entitled to receive a full brief of evidence, rather than a mere summary of grounds.

Restrictions on contact

The Bill also proposes that, once preventatively detained, a subject will be significantly limited with respect to contacting other persons.

Effectively, Section 13ZD provides that a subject is entitled to contact one family member, a housemate and one work colleague.[32] The subject will only be able to tell those people that he or she is safe and cannot contact them further for the time-being. Section 13ZD(3) expressly prohibits the subject from advising those people that a preventative detention order has been made or even that the subject has been detained, nor is the subject permitted to indicate how long the detention is expected to last. Effectively subjects will be able to provide two people with just enough information to make them curious and worried, and then nothing further. These limitations on contact are not only somewhat farcical (it is difficult for anyone to imagine that any family member would be satisfied with that kind of explanation for one's 14 day absence) but they also act to prevent any

[31] Section 13ZI, *ibid*
[32] Section 13ZD *ibid*

discussion of a subject's detention while it is occurring. This in turn prevents broader scrutiny of police conduct and transparency of processes. This mirrors the equivalent provision contained the Commonwealth Act.[33] The Commonwealth Act, however, permits preventative detention for up to 48 hours, whereas the Victorian Bill proposes detention orders of up to 14 days. In our submission, these significant restrictions on contact and the information that can be provided to the people contacted by a subject are not appropriate given the potential length of preventative detention orders under the Victorian Bill.

The Bill also provides that any letters sent by or to a subject who is being detained in a prison must be handed to the police officer.[34] Presumably this is to ensure that communications regarding terrorist activity are not made via mail, despite the other contact restrictions. There is no requirement, however, that the police officer who receives the mail is obliged to forward it to the relevant person once it has been determined that the mail's contents is not suspect in any way. This will potentially function to prevent subjects sending or receiving mail. The *Corrections Act 1986 (Vic)* and Corrections Operating Procedures provide that prisoners are entitled to send and receive mail except where that mail may threaten prison security, be used to further unlawful activity, be of a threatening or harassing nature or contain indecent material, *inter alia*.[35] Given that mail to or from subjects would already be monitored and checked for prejudicial material by prison officials, in our view preventing the sending or receiving of mail by subjects is an unjustifiable restriction on contact.

If this Bill is to be passed, it is our recommendation that subjects be permitted to contact a wider range of other people, including via mail, and that they be permitted to disclose that they are being preventatively detained.

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[33] Paragraph 105.35 *Anti-Terrorism Law Act (No 2) 2005 (Cth)*
[34] Section 13ZC(3), *The Bill*
[35] Sections 47(n) and 47D, *Corrections Act 1986 (Vic)*

Orders relating to children

The Federation is deeply concerned about the proposal that preventative detention orders be applicable to children aged between 16 and 18 years old. Again this mirrors the Commonwealth Act, however, that Act only provides for preventative detention orders of up to 48 hours. As noted above, the Federation is fundamentally opposed to the detention of non-suspects. That the persons being detained may be children only serves to heighten our concerns. In addition, the Bill does not make it clear where it is contemplated that children might be detained and under what circumstances. We are concerned that this lack of specificity will lead to situation where children are detained alongside adult prisoners for significant amounts of time.

If this part of the Bill is to proceed, it is our recommendation that preventative detention orders only apply to subjects aged 18 years old and above.

Disclosure Offences

Section 13ZJ of the Bill renders it an offence for subjects of preventative detention and the people they contact to convey any information about an order, or even about the mere existence of an order, to any other person.[36] It is difficult to envisage what might be gained by this prohibition on disclosure except that it will allow people to be detained largely in secret, without the fact of their detention being able to be publicly disclosed. This kind of secretive detention of individuals is certainly inappropriate in an open, democratic society. Further, it may act as a hindrance to transparency of police activities and close monitoring of police conduct with respect to these extraordinary powers.

As noted above, we believe that subjects of preventative detention orders should be permitted to disclose that they are being preventatively detained and why. We particularly favour minimal restrictions on disclosure and contact in light of the lengthy term of preventative detention orders under the Bill. We therefore

[36] Section 13ZJ *ibid*

recommend that the disclosure offences be removed from the Bill, if it is to be passed.

Given all of the above concerns, the Federation strongly recommends that measures for preventative detention are not passed as part of this Bill.

Special Police Powers

The Bill proposes to insert a new Part 3A into the Act, which will provide police officers with special extended powers, once authorisation for those powers has been given.

Broadly, authorisation for the special police powers may be given:

- in relation to events which might be the subject of a terrorist act;[37]
- to prevent or reduce the impact of a terrorist act;[38]
- to assist in the investigation of or recovery from a terrorist act;[39] or
- to protect essential services from a terrorist act.[40]

The special police powers which are triggered by the above authorisations include to:

- obtain disclosure of identity;[41]
- stop and search any person or anything in their possession;[42]
- search vehicles;[43]
- move vehicles;[44]
- enter and search premises;[45]

[37] Section 21B, *The Bill*
[38] Section 21D, *ibid*
[39] Section 21E, *ibid*
[40] Section 21F, *ibid*
[41] Section 21O, *ibid*
[42] Section 21P, *ibid*
[43] Section 21Q, *ibid*
[44] Section 21R, *ibid*

- cordon off an area for the purposes of searching person, vehicles or premises;[46] and
- seize or detain things found during searches.[47]

These powers may be exercised by any police officer (State or Federal) and by any person acting under the instructions of a police officer (although the latter are prevented from conducting strip searches).[48]

Police may also use such force as is reasonably necessary to exercise the above powers.[49]

Broadly speaking, the Federation is opposed to any extension of police powers. It is our view that current police powers are sufficient to the task of addressing the threat of terrorism in Victoria, particularly in light of the level of terrorist threat (as discussed above). The Government and police have also failed to demonstrate that existing police powers are inadequate. Furthermore, we believe that such radical extensions of police powers unduly infringe civil liberties and therefore represent a disproportionate response to the threat of terrorist activity. We are also concerned that these powers are also particularly prone to being applied in a discriminatory manner.

Necessity

Given the extraordinary and highly intrusive nature of the above powers, it is imperative that such an extension of police power be justifiable in all the circumstances. The Federation is of the view that the extension of police powers proposed in the Bill is unnecessary.

Currently, the *Crimes Act 1914 (Cth)* provides AFP members with broad search and questioning powers. Pursuant to the *Australian Federal Police Act 1979*

[45] Section 21S, *ibid*
[46] Section 21T, *ibid*
[47] Section 21U, *ibid*
[48] Section 21K, *ibid*
[49] Section 21V, *ibid*

(Cth) AFP officers may stop and search a person in a range of listed circumstances, including where there is a reasonable belief that the person has something that he or she will use to cause damage or harm to a place or person 'in circumstances that would be likely to involve the commission of a protective services offence'.[50] Furthermore, AFP officers are permitted to demand a person's name and proof of identification where there are reasonable grounds to believe that a person might have just committed, might be committing or might be about to commit a protective service offence.[51] The definition of a 'protective service offence' encompasses the various terrorism offences that exist under the *Criminal Code*. We have also detailed above (in relation to preventative detention) the extensive powers of AFP officers to detain persons suspected of committing a terrorism offence for extended periods of investigative questioning.

Victorian police officers are able to stop and question a person where it is reasonably suspected that that the person is committing or has just committed a criminal offence or may be able to assist them with information about an offence. Police can also demand name and address without reason from people who are driving a vehicle or are on public transport or in licensed premises. The Commonwealth *Crimes Act 1914* also permits State and Federal police officers to search premises without a warrant where it is believed on reasonable grounds that a person who has committed an indictable offence may be there.[52] The Victorian *Crimes Act* empowers police officers to search premises without a warrant where it is believed on reasonable grounds that a person who has committed or is committing a serious indictable offence is there

Police may also search any vehicle with out a warrant if they reasonably believe that something relevant to an indictable offence is in the vehicle and, if the search is not done then and there the thing may be concealed, destroyed or lost;

[50] Section 143(1), *Australian Federal Police Act 1979 (Cth)*
[51] Section 141, ibid
[52] Section 3ZB *Crimes Act 1914 (Cth)*

and the circumstances are serious and urgent.[53] These powers do not require that an indictable offence must have already been committed.

There is an extremely broad array of terrorism offences contained the *Criminal Code Act 1995 (Cth)*, all of which are indictable offences. These include offences relating to preparation or planning for a terrorist act and offences relating to possessing a thing connected with a terrorist act.[54] There are also conspiracy offences, which make it an offence to conspire to commit any of these terrorism offences as well.[55] It would therefore be likely that existing police powers would already be activated in a wide array of circumstances that may involve a threat of terrorist activity.

In light of the various police powers discussed above, it is clear that there is a gamut of existing coercive and intrusive police powers, which may readily be used to respond to or prevent terrorist activity. It is therefore our view that the additional powers sought in the Bill are an excess of police power and are not necessary.

<u>Terrorist Act</u>

In all cases, authorisation for the exercise of special police powers hinges on the definition of a 'terrorist act'. As discussed above, a 'terrorist act' is defined in Section 4 of the Act as an action or threat of action done or made with

- the intention of advancing a political, religious or ideological cause; and
- with the intention of coercing or influencing by intimidation any government form.

Further, to be a 'terrorist act', the action must either cause or threaten serious physical harm to a person, serious property damage, a person's death,

[53] Section 3T *ibid*
[54] Sections 101.1 – 101.6, Division 101 *Criminal Code Act 1992 (Cth)*
[55] Section 11.5 *ibid*

endangerment to a person's life, a serious risk to public health or safety, or serious interference with an electronic system.[56]

An exception has been created for advocacy, protest, dissent or industrial action that is not intended to cause death, physical harm, endangerment to a person or a serious risk to public health or safety.[57]

The definition of 'terrorist act' is very broad and consequently may be applied to an inordinately wide array of acts and threats of acts. With such an expansive nature, this definition of 'terrorist act' goes beyond commonly accepted notions of what constitutes an act of terrorism. It may be rightly argued that community fears of terrorism give the government a mandate to legislate in relation to such acts. Where, however, the resulting legislation goes far beyond the acts that the public are concerned about, it is our view that any such mandate has been exceeded. With respect to the proposed Part 3A, the overly broad definition of 'terrorist act' makes it possible that the above authorisations may be made in a wider range of circumstances. In turn, more people may be subjected to the exercise of the special police powers in circumstances which are not characterised by an imminent threat of serious violence.

It is our view that authorisation in such a broad range of circumstances is disproportionate to threat of terrorism and also gives rise to an excess of police power. Bearing in mind the highly intrusive and extraordinary nature of the powers which may be authorised, if this Bill is to be passed, the types of terrorist acts which trigger authorisation should be limited to more serious terrorist acts which are likely to cause death or serious injury.

[56] Section 4, *The Act*
[57] Section 4(3), *ibid*

Authorisations

We note with concern that the Bill does not provide for public grounds to be given when making an authorisation. Authorisations relating to preventing or reducing the impact of a terrorist act and assisting in the investigation of or recovery from a terrorist act must be made by the Supreme Court (although the Chief Commissioner of police may make a 24 hour interim authorisation). The Bill does not, however, make it clear whether Court proceedings relating to an authorisation would be a matter of public record or would be *in camera* due to the security issues involved. It is not even clear from the Bill, how or whether the public are to be notified that such an authorisation has been made. Even where the Supreme Court proceedings are open to the public, this does not amount to giving public notification of the authorisation. Given the significant increase in police powers triggered by authorisation, we submit that authorisation proceedings should be open to the public and that there should be public notification once an authorisation is made.

Broad Discretion

Once an authorisation is made, police are afforded complete discretion in determining whether to exercise the special powers or not. Under the Bill, any person, vehicle or premises within the area specified in the authorisation may be the subject of the extended police powers. As a result, it is almost certain that these powers will cause far more people to come into contact with police, including a majority who do not pose any threat to the community. This is particularly concerning given the humiliating impact public police searches and questioning may have on people that are subject to this kind of policing. The discretionary nature of these powers is such that there is also the danger that the powers will be misused. The Federation is concerned that these powers will be used for collateral purposes that are not aimed at apprehending criminal offenders, for example to gather evidence or information, or for harassment or targeting of individuals. This is particularly a risk given that there is absolutely not requirement that the exercise of these powers must relate to a terrorist act or

terrorism offence. On the Bill as it stands, police may therefore lawfully use these powers to assist them in dealing with any type of criminal activity or for any law enforcement purpose whatsoever.

If this Bill is to be passed, it is critical that limits be placed on the exercise of the special powers by police. At the very least, the special powers should only be able to be used in relation to terrorism offences or acts.

Use of Force

The Federation is also concerned that Section 21V of the Bill authorises police to use reasonable force to exercise the special powers. This authorisation of the use of force is unqualified and does not distinguish between the types of powers being exercised. By only providing that the force used must be 'reasonably necessary', the Bill affords police a wide discretion to determine whether it is appropriate to use force or not. This is worrying in that, even where it is later found that a particular use of force was not reasonable, already that time an individual may have been seriously injured or even killed. It is our view that there should be no specific authorisation to use force in relation to the special police powers. The powers themselves are intrusive enough. When police use of force is added to that, they become grossly excessive. If, however, the use of force is deemed a necessary part of the Bill, then it is crucial that the circumstances in which force may be used be clearly enunciated and limited to extremely serious and potentially dangerous situations.

Racial Profiling

As noted above, in response to the Government's new counter-terrorism initiative, including the proposals now contained in the Bill, the Police Federation of Australia has commented that there will be inevitable racial profiling of the Muslim community.[58] The Federation is concerned that the special police powers will be particularly prone to racist or discriminatory exercise. We are particularly

[58] Milovanovic, op cit

worried about discriminatory use of the powers given that, in authorisation areas, no reason for exercising the powers will be required. It will therefore be a matter of police discretion whether the powers are exercised or not.

There is already a disproportionate focus on the Muslim community by the media, law enforcement agencies, intelligence gathering agencies and the broader community whenever the issue of terrorism is raise. We are concerned that the Muslim community will be subject to further disproportionate and arbitrary police interference as a result of these powers. Police targeting of the Muslim community is clearly an undesirable outcome and may even have a counter-productive effect with respect to criminal investigation, insofar as an alienated community is less likely to be cooperative with police investigations. Most importantly, however, over-policing along racial or religious lines that is facilitated by legislation amounts to officially sanctioned racial and religious discrimination. It also has the danger of perpetuating and even exacerbating racial and religious prejudice in the broader community. This should be something that our society is working to counteract, rather than enacting laws that are inherently prone to discriminatory application such as these.

In light of the above concerns, it is our view that the proposed Part 3A of the Bill should not be passed.

Covert Search Warrants

Clause 8 of the Bill seeks to amend Section 6 of the Act, which relates to covert search warrants. As noted above, the principle Act is due to be reviewed in the coming year. In our view, any amendments to existing regimes in that Act should therefore be postponed until after the operation of those regimes has been evaluated. While the review is still pending it is impossible for the public, and

arguably even legislators, to adequately determine whether the existing regimes require amendment and what kind of amendments might be appropriate.

Generally speaking, the Federation is opposed to the use of covert search warrants. Covert searches are an inordinate intrusion by the state into the lives of individuals. Furthermore, such warrants are unable to be scrutinised or challenged by the persons subject to the searches, nor is the broader public able to ensure that police are acting lawfully in obtaining and executing warrants. A system of covert search warrants circumvents processes that ensure accountability and transparency. This creates an excess of police power that is readily open to being abused or misused because it cannot be closely monitored. In our view, such a regime is completely out of place in a modern democratic society.

Clause 8 of the Bill broadens the circumstances in which covert search warrants may be obtained. It provides that such warrants may now be obtained in respect of premises where:

- a terrorist act has been, is being or is likely to be committed; OR
- a person who resides at or visits those premises
    - has done an act in preparation for or planning a terrorist act; or
    - has provided training to or received training from a terrorist organisation connected with a terrorist act; OR
- there has been or is activity on those premises connected with preparation for, planning of, engaging in or assisting a terrorist act.

In the Act as it currently stands, there is only the first of the above three criteria.[59]

Under the Act, it must also be the case that the entry and search of the premises would substantially assist in preventing or responding to a terrorist act and that it is necessary that the search be conducted without the owner's knowledge.[60]

[59] Section 6(1)(a) *The Act*
[60] Section 6(1)(b) and (c) *ibid*

Terrorist Act

As discussed above, 'terrorist act' is very broadly defined in the Act and may encompass a wide array of activities that do not fall within commonly accepted notions about what a terrorist act is. Furthermore, a terrorist act may also be constituted by a mere threat.[61] The criteria for obtaining a covert search warrant hinge on this definition of terrorist act.

This means that covert search warrants may be obtained in an expansive range of circumstances, which are not always related to what would be commonly regarded as serious acts of terrorism, such as bombings and high-jacking. In our view, because of the broad definition of terrorist act, the range of situations in which a covert warrant may be obtained is already broad enough. We do not support the expansion of the circumstances in which such warrants may be obtained. We also oppose the increased use of such warrants, as would in all likelihood result from the amendments proposed in the Bill.

'Resides At Or Visits'

The phrase 'resides at or visits those premises' means that covert search warrants may be applied to the premises of individuals who are only very tenuously linked to terrorist activity. That is, individuals who simply know a person who is connected to terrorist activity. Those individuals may have no terrorist involvement themselves, they may not be aware of the current activities of the person in question at all and they may have no knowledge of that person's past activities such training. As noted above, covert searches of premises are highly intrusive and fundamentally a departure from democratic principles. It is therefore imperative that the class of people who may be subject to such warrants be highly restricted. Clause 8(1)(a)(ii) has the opposite effect and would greatly expand the number of people that may be subject to covert searches.

[61] Section 4 *ibid*

Past Activity On The Premises

Pursuant to Clause 8(1)(a)(iii), covert search warrants may also be obtained in relation to premises where there has been some activity connected with preparation or planning for, engaging in or assisting a terrorist act. Again, this is a broad criterion. The activities on the premises must only be 'connected' with the preparatory acts in some way and the acts need only be preparatory or helpful to terrorist acts, rather than terrorist acts themselves. Given the broad definition of 'terrorist act' (as discussed above) this may apply to a startling array of activities. Furthermore, no time limit has been specified as to when those activities may have occurred. Under the Bill, warrants may potentially be obtained in relation to premises where the relevant activities occurred in the remote past and where the present owner's have no connection with those activities.

As argued above, given the highly intrusive nature of covert search warrants, it is crucial that their use be limited as much as possible. The criterion relating to activity on the premises unduly broadens the potential circumstances in which covert warrants may be used.

Other Expansions

The Bill also includes further amendments to the covert search warrant regime that will allow warrants to be more easily obtained. As noted above, under the Act, to obtain a warrant it must also be the case that the entry and search of the premises would substantially assist in preventing or responding to the terrorist act in question.[62] The Bill seeks to amend the Act so that prevention may be assisted by merely 'gaining knowledge of an act being done in preparation for, or planning, a terrorist act or connected with the engagement of a person in, or assistance in, a terrorist act.'[63] This means that police do not even need to show that they would gain knowledge about a terrorist act. The degree of assistance that the warrant would provide is therefore lowered significantly by this provision.

[62] Section 6(1)(b) *ibid*
[63] Clause 8(2)(a) *The Bill*

For example, under the Bill police may simply demonstrate that they would gain some knowledge of an act that is connected with engaging a person to assist in a terrorist act. The act that they may gain knowledge about may not be substantially linked to the terrorist act at all. Furthermore, the Bill also provides that warrants may be obtained even there the suspicion or belief does not relate to a specific terrorist act.[64]

The Federation is opposed to these further expansions of the covert search warrant regime. These amendments make the criteria for obtaining such a warrant increasingly vague and open to interpretation. Given the extraordinary nature of the power these warrants give the police, in our view they should be issued in a very limited number of situations only.

Given these serious concerns regarding the covert search warrant regime and given that a review of the existing regime has not yet been conducted, we strongly recommend that the amendments relating to covert search warrants are not passed, even where the remainder of the Bill becomes law.

Conclusion

In light of the above concerns, we strongly urge the Committee to recommend that this Bill should not be passed. Alternatively, should the Committee be mindful to recommend passage of the Bill, we submit that it should be substantially amended to address the many issues we have raised above.

[64] Clause 8(3) *ibid*