



QUEENSLAND COUNCIL FOR CIVIL LIBERTIES

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Discussion Paper – National Security Legislation
Assistant Secretary
Security Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

By Email: CTconsultation@ag.gov.au

Dear Sir/Madam

National Security Legislation Discussion Paper

Once again the Council accepts and acknowledges that there is a risk that Australia may be the subject of criminal acts perpetrated by terrorists, and that the Australian government has a duty to protect its citizens from such acts. However the threat posed to us now is far less than that which faced this country in World War 2. The Islamic terrorists do not control a major industrial power with the capacity to threaten the existence our nation, the German and Japanese fascists did. Despite that Sir Robert Menzies, in introducing the National Security Bill 1939 (Cth) on 7 September 1939, stated:

Whatever may be the extent of the power that may be taken to govern, to direct and to control by regulation, there must be as little interference with individual rights as is consistent with concerted national effort ... the greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and to lose its own liberty in the process.

The QCCL commends the Attorney General for recognising the need to amend the current terrorism legislation and for releasing the discussion paper for public scrutiny. However, the Council believes that the paper released represents a mild approach to reform and is a large document without any real substantial attempt at reform. Overall, the Council submits that the proposed amendments characterise a timid response to mounting criticisms of the legislation as it stands, and holds that the reforms in their current form will do little to redress this situation.

This submission has been prepared by member Michael Brown and will address, in no particular order, what are seen to be the primary deficiencies in the Attorney-General's National Security Legislation Discussion Paper, namely;

- 1. Police Entry without Judicial Oversight**
- 2. Alterations to the Definition of a Terrorist Act**
- 3. Inclusion of "Physiological Harm"**
- 4. Continued Inclusion of Preventative Detention**
- 5. Amendments to the National Security Information Act**
- 6. Terrorist 'Hoaxes'**

7. Notable Omissions

The QCCL is disappointed particularly after the Haneef debacle that the proposed amendments have done little to satisfy the previous concerns of the Council, and have in fact in a number of instances sought to increase the draconian powers held under the legislation.

1. Police Entry without Judicial Oversight

Chapter two, part three of the Discussion Paper outlines the proposal to amend Division 3A of Part 1AA of the *Crimes Act 1914* to allow entry without a warrant in emergency circumstances.

This proposal would allow Australian Federal police to search premises without a valid warrant where a police officer suspects, on reasonable grounds, that there is material relevant to a terrorism offence or that there is a threat to a person's life, health or safety. The effect of the provision would be to grant the Australian Federal Police the power to enter premises without the requirement of judicial oversight, potentially opening it to misuse and violations of individuals' rights.

We oppose the granting of these types of powers. Under existing laws police may already obtain warrants at any time, as easily as over the phone, through an accelerated process where there is an imminent danger or a reasonable suspicion that a crime is about to be committed.

So far as we are aware this proposal is not based on any experiences where police have not been able to search premises due to delays over the attaining of a warrant. In contrast recent raids in Melbourne would suggest otherwise and serve as testament to the effectiveness of the existing criminal system.

The council submits that this proposed amendment is unnecessary and excessive.

2. Alterations to the Definition of a Terrorist Act

The Attorney-General in the discussion paper has proposed the amendment of divisions 100 and 101 of the *Criminal Code Act 1995 (Cth)*. The changes are discussed in chapter 1, part 3 of the Discussion Paper and take effect to broaden the definition of terrorist acts.

The reform seeks to insert the phrase "or is likely to cause" to the definition of a terrorist act, providing for what can be seen as a significant expansion of what constitutes a terrorist act. To this end the QCCL has already expressed its concerns over the wide scope of actions that may constitute a terrorist act and feels that this amendment will simply further the reach of this legislation and lead to the criminalisation of entirely legitimate conduct.

The council submits that the government has failed to justify this additional expansion of actions that constitute a terrorist act under the legislation. This amendment further complicates the uncertain meanings behind the already obscure definition of a Terrorist Act

3. Inclusion of 'Psychological Harm'

The Government proposes to change Division 100.1 (2)(a) and subparagraph 100.1(3)(b)(i) to include psychological harm within the definition of Terrorist Act. This amendment is achieved by removing the word 'physical harm' so that the definition instead reads 'serious harm to a person'.

The Council is concerned over the increased ambiguity that this term will lend to the already uncertain definition of a terrorist act (also see discussion above). By adding yet another concept, to which established criminal law has not yet settled upon, the legislation is open to a wide scope of interpretation. It allows for the potential for injustice and the removal of individual rights. This term has the prospective ability to be applied to scenarios that constitute little more than 'psychological

stress' as there is no established test or threshold for what actually comprises 'psychological harm'. These proposed offences are so broad that they may encompass preparing to cause psychological harm. In effect by having a plan to cause psychological harm and by possessing 'a thing' (a very indeterminate concept in itself) that may be used to cause this type of harm could amount to a breach to the legislation. Although these questions remain undetermined at present the possibility for such a low threshold undeniably exists.

This proposal is an unnecessary amendment and extension to the existing terrorism laws.

4. Continued Inclusion of Preventative Detention

Arising out of the Clarke Inquiry over the bungled *Haneef* case the government has seen the need to review these laws and has attempted to amend Part 5.3 of the *Criminal Code 1995*. Whilst a step in the right direction by seeking to impose a 'cap' of 7 days detention, non-inclusive of 20 hours questioning, the Council is concerned that this will amount to a license to hold detainees for the full period without charge. This amendment does not address the problem of detention without charge and maintains the reversal of the presumption of innocence. A worrying trend. A system of administrative detention, however well intended, is inconsistent with the basic tenets of our legal system.

5. Amendments to the National Security Information Act

Chapter 5 of the discussion paper seeks to expand the definition of national security to broaden the amount and type of information that cannot be reported in the media as well as seeking to conduct terrorist trials partially or completely behind closed doors. On top of this, and as a result of, the legislation effectively blocks a defendant and defence lawyers from seeing crucial prosecution evidence and therefore compromises the fairness of a trial.

The proposed amendments unacceptably reinforce measures that give attorney-general new flexibility to declare which "national security information" can be withheld or suppressed, and creates offences, punishable by up to two years imprisonment. It also disappointingly stipulates that lawyers must disclose all such information, violating client practitioner confidentiality.

The QCCL submits that any amendment to the NSIA increasing the already excessive powers to withhold or suppress information crucial to a trial or violating solicitor or journalist confidentiality is an unnecessary extension of governmental powers.

6. Terrorist 'Hoaxes'

Contained within the discussion paper is the proposition to create new offence under the title of 'Terrorism hoaxes', for intentionally inducing a false belief that a terrorist act has occurred or is likely to occur. Punishable by up to 10 years imprisonment, this vague offence carries with it a disproportionately severe sentence. We would submit that existing laws more than adequately cover this ground. If this is not the case, the Council submits that the seriousness of such a sentence is unacceptable without first addressing the ambiguous nature of the legislation.

7. Notable Omissions

The Council is troubled that areas of major concern in the current terrorism legislation are ominously absent from the proposed reforms. Numerous submissions made on behalf of the QCCL, the NSWCCCL and the ACCL have highlighted these deficiencies and yet the discussion paper neglects pertinent issues such as the excessive powers granted to ASIO, detainees' rights and control orders. Without review of these aspects of the legislation the Council believes that any attempt to reform the law will be devastatingly inadequate.

Possibly the most glaring omissions relate to that of ASIO's powers to detain non-suspects, including journalists and family members, for up to a week for questioning and the overzealous censorship of terrorist material that has seen books removed from university libraries.

The monitoring of communications between Detainees and their Lawyers and the restrictions placed on legal practitioners rights is in dire need of review. The QCCL recommends that in order for these laws to meet even the core principles of the Australian legal system detainees be given the right of private access to a lawyer. The detainee's legal advisor must also be empowered to interrupt and clarify questioning whilst providing frank and informed advice. Without these basic legal rights the QCCL cannot envisage a fair and just judicial process.

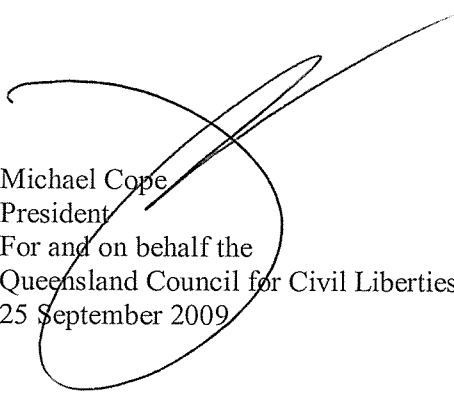
The final point to be highlighted is that controversial control orders remain largely in place without the implementation of robust safe guards. The Council holds that orders, such as those placed upon David Hicks, are unnecessarily restrictive and remove many of the liberties which underwrite our democracy.

Conclusions

Whilst the QCCL does commend the government for its attempts at review, in the discussion papers current form it could not support the tabled amendments. The Council submits that, amongst others, the government review its proposed amendments in regard to police entry without a warrant, definitions as to what constitutes a terrorist act or hoax, and the suppression of essential court documents under the National Security Information Act. It is also submitted that the government seek to include in future reviews legislation surrounding preventative detention, control orders, and ASIO's more draconian powers.

Without substantial reforms to the proposed amendments and wholesale reworking of the terrorism legislation, as suggested in previous submissions of the QCCL and like organisations, the terrorism legislation in its current form is unacceptable.

Yours faithfully,



Michael Cope
President
For and on behalf the
Queensland Council for Civil Liberties
25 September 2009