THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: MM:vk:1305071

5 May 2010

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Ms Dennett,

Re: National Security Legislation Amendment Bill 2010

Thank you for the opportunity to comment on this Bill.

The New South Wales Law Society's Human Rights Committee ("the Committee") has responsibility to consider and monitor Australia's obligations under international law in respect of human rights; to consider reform proposals and draft legislation with respect to issues of human rights; and to advise the Law Society Council on any proposed changes.

The Committee supports many of the changes proposed in the Bill including:

1. The amendments to the treason offences in the *Criminal Code 1995* (Cth) (the "*Criminal Code*").

2. The amendments narrowing the scope of the sedition offences in the *Criminal Code* (and the re-naming of those offences as "urging violence offences").

3. The amendments to the *National Security (Criminal and Civil Proceedings) Act 2004* which streamline the process by which evidence said to be prejudicial to national security may be excluded from criminal trials.

4. The amendments to the *Acts Interpretation Act 1901* of the definitions of de facto partner, child, step-parent and step-child to ensure the equality of same sex partnerships now in Commonwealth legislation are to apply to, or are replicated in, the *Criminal Code*, and

5. The establishment of a Parliamentary Joint Committee on Law Enforcement to improve the oversight of the Australian Federal Police.

However, the Committee opposes two proposals in the Bill, as follows:

1. The revisions to the current paragraph 23CA(8)(m) of the *Crimes Act 1914* (Cth).

At present there is a theoretical possibility that an arrested suspected terrorist may be held indefinitely between the time of arrest and the time of charge under this provision, under which Dr Mohamed Haneef was held for some 12 days before charge in 2007.

The Committee notes that the government's proposal is to place a cap on the amount of time that can be disregarded under the paragraph at seven days. In that event a terrorist suspect could be held for up to eight days, including the 24 hour maximum investigation period.

In the United States of America, a person arrested for a federal offence must be brought before a Magistrate "without unnecessary delay" which the Discussion Paper - National Security Legislation, July 2009 ("Discussion Paper') at page 88, said has "been generally interpreted to mean 48 hours" in relation to U.S citizens.

In Canada, as the Discussion Paper (page 127) notes, a person arrested without warrant can be detained and questioned for a maximum period of 24 hours.

Against that, in the United Kingdom, as the Discussion Paper (page 127) also notes, a person may be held without charge for 28 days, but only with judicial approval.

At Common Law and by legislation which applied in this country for at least 200 years after 1788, an arrested person had to be taken before a Court as soon as reasonably practicable. In *Bales v Parmeter* (1935) SR (NSW) 182 at 189, Chief Justice Frederick Jordan not only repeated that principle but said that an arrested person must be taken to the court "by the most reasonably direct route" the rationale being to ensure that detention by an arm of the executive government before a person was brought before an independent court, was minimised.

The Committee strongly believes that the principle of minimising the time before an arrested person is charged before a court is an important one. The Committee accepts that in relation to non-terrorist offences the present statutory investigation period of 4 hours, not including "time out" (also known as "dead time") periods, which can be extended to 12 hours on application to a Magistrate, is appropriate. The Committee also recognises that there is an argument that terrorist offences are of such a nature that it was appropriate that the maximum period of extension of eight hours should have been increased to 20 hours, in accordance with the legislative changes made in 2001.

Further, it is appropriate that "time out" or "dead time" be excluded from the maximum 24 hour investigation period for terrorism offences. However, such dead time should be confined to periods in which the person is unable to be questioned.

In all the circumstances, the Committee recommends that the maximum period between arrest and charge for terrorist suspects be 24 hours, as extended by limited "dead time" provisions to cover sleep periods, periods being conveyed to the Court and other short periods referred to in Part 1C of the Act. That was the pre-2004 position under federal law.

The ultimate rationale for confining the period of detention after arrest and before charge is to respect the right to liberty of persons not charged with criminal offences, in accordance with our international human rights obligations - Article 9, International Covenant on Civil and Political Rights ("ICCPR"). This principle was reflected in the

Common Law, as amended by legislation, which applied at all times in Australia prior to this century.

Dr Haneef's case was a classic example of the consequences of the executive government having a power of extended detention. He was held in circumstances where there was not a shred of evidence against him.

The ultimate protection against such abuse of power is the supervision of an open, independent Court constituted under Chapter III of the Australian Constitution. However, the jurisdiction of such a Court is engaged only at the time a charge is laid.

2. The insertion of a new section 3UEA in the *Crimes Act 1914* (Cth).

This proposal would allow a police officer to enter and search premises without a warrant in (alleged) emergency situations.

Searches of premises without a warrant by the executive government were first outlawed in the 1760s in England after a series of cases involving then member of the House of Commons, John Wilkes and certain associates whose homes were searched by the Government under pressure from King George III. In the case of *Entick v Carrington* (1765) 95 ER 807, Lord Camden pronounced that such searches were illegal and executive searches without warrant have rarely been sanctioned since - until this century in the wake of the World Trade Centre terrorist attack.

The Committee sees no proper basis for executive searches without a warrant. The need for a police officer to obtain a warrant by providing a sworn document is a powerful safeguard against abuse, the abolition of which should not be contemplated. In this century, in which communication with a Justice or Court authorised to issue a warrant is easier than at any time in history, there is no proper basis for allowing a police officer the discretion to enter and search premises without obtaining a warrant.

The arguments in favour of such a provision are inadequate.

Reference was made in the Discussion Paper (page 151) to a "range of state and territory laws" authorising entry without warrant in limited circumstances. One of those provisions, Section 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) allows police to enter (but not search) premises to stop or prevent physical injury or a breach of the peace, where immediate entry is necessary.

That provision is not a precedent for a search power without a warrant, based on mere suspicion as is the proposal in the Bill. Once police are allowed to enter premises on suspicion without warrants, every citizen is exposed to the possibility of their home and privacy being invaded (contrary to Article 17 ICCPR) because an anonymous false complaint to the police that the person is a terrorist and/or may have terrorist materials on the premises, would be enough to engage the section.

A further argument is made that a police officer under section 3T of the *Crimes Act 1914* is allowed to stop and search motor vehicles in emergency situations. This is however, a far cry from searching a person's residence.

Then there is section 10 of the *Criminal Code*. This section provides a defence to a police officer in similar circumstances to the NSW provision referred to above.

Additionally, at Common Law a police officer can enter premises without a warrant to prevent a felony, as approved by the High Court (per Gaudron and McHugh JJ) in *Plenty v Dillon* (1991) 71 CLR 635.

These emergency powers of entry but not search, cannot be exercised on mere suspicion and seem reasonable and necessary. A power of entry *and search* without warrant, based on suspicion only, is entirely different.

So far as we are aware, in the last four years, all persons arrested for terrorist offences in Australia have been arrested after lengthy periods of electronic surveillance. The practical need for a power to enter premises without warrant has not been demonstrated.

The means of detection of terrorist offences, which are in almost all cases pre-meditated, has never been easier. The police and the intelligence services have a multitude of electronic and other means of surveillance which did not exist even 20 years ago and the Committee does not accept that breaches of the fundamental rights to liberty and privacy can be justified.

Omissions from the Bill

The Committee further submits that there are still areas of the terrorist provisions in the *Criminal Code* that have not yet received the appropriate review.

In particular, it is our view that the extraordinarily wide offences set out in Division 101: section 101.4 (Possessing things connected with a terrorist act), section 101.5 (Collecting or making documents likely to facilitate a terrorist act) and section 101.6 (Other acts done in preparation for or planning terrorist acts) need to be reviewed.

Section 101.6 for example, catches a conspiracy (i.e. an agreement) to take a step in preparation for a terrorist act. The Committee's concern in relation to that offence is that even if there is an argument that the time at which human action can attract criminal liability should be pushed back along the time continuum in the case of terrorist offences, the maximum penalty of life imprisonment for an agreement to do an act *in preparation* is far too severe.

The allegation need not involve an agreement to take any later steps. Thus, an instant after making such an agreement, a person may retreat from further action, but by then the offence, punishable by life imprisonment, has been committed.

To impose a severe penalty for a mere agreement to take what may be a trivial preparatory step, well prior to a terrorist act, may result in juries being unprepared to convict, much like English juries of two hundred years ago.

Another Division of the *Criminal Code* that concerns the Committee is Division 102 which sets out various offences associated with membership of a terrorist organisation. In particular, section 102.3 criminalises mere membership of such an organisation. The Committee is very concerned that this offence imposes a ten year maximum jail sentence for merely associating with say, a group of friends, because such a group may fall within the definition of a terrorist organisation. The Committee opposes this offence because it infringes freedom of association principles (Article 22, ICCPR).

The Committee also notes that the repeal of Section 102.8 ("Associating with terrorist organisations") was recommended by the Sheller Committee (the Security Legislation Review Committee) in 2006. This is another provision in breach of Article 22 of the ICCPR.

Finally, Divisions 104 and 105 (Control Orders and Preventative Detention) and ASIO's detention and questioning powers, all of which were excluded from the Sheller Committee's review, should also be considered for reform – as there are arguable breaches of the right to liberty (Article 9, ICCPR) in both of these provisions.

Once again, thank you for the opportunity to comment on this Bill.

Yours sincerely

Mary Macken
President