Secretary

Senate Legal and Constitutional Legislation Committee

Parliament House
Canberra ACT 2600

1 August 2004

Dear Secretary

Supplementary submission to Inquiry into the provisions of the Anti-Terrorism Bill 2004 (No 2) (Cth)

I am an Associate Lecturer at the School of Law and Legal Studies, La Trobe University and appeared before the Senate Legal and Constitutional Legislation Committee ('the Committee') on Monday, 26 July 2004 in its public hearing inquiring into the Anti-Terrorism Bill (No 2) 2004 (Cth) ('the Bill'). I foreshadowed during my appearance that I intended to lodge a supplementary submission. I hereby do so. This supplementary submission incorporates matters dealt with in my submission dated 25 June 2004 and the opening statement I made to the Committee in my evidence.

This supplementary submission focuses on the proposal to insert a new offence of 'Associating with Terrorist Organisations' ('terrorist organisation' association offence') into the *Criminal Code Act 1995* (Cth) ('*Criminal Code Act'*).

The post-September 11 anti-terrorism laws and the normalisation of exceptions

In the public hearing held on Monday, 26 July 2004, several Senators noted to the 'accretion' of numerous anti-terrorism laws that have been passed since the September 11 attacks.[1] As I noted in my submission to the Committee on the Anti-Terrorism Bill (No 1) 2004 (Cth), any new anti-terrorism measure must be evaluated in the context of these existing measures.

[1] Legal and Constitutional Legislation Committee, Senate, Sydney, 26 July 2004, 43 (Senator Brandis) and 54 (Senator Payne).

These measures rest on three key planks. First, a range of 'terrorism' offences came into existence. At the base of these offences is the broad statutory definition of a 'terrorist act'; a term which, at its margins, embraces certain acts of industrial action like picketing by nurses.[2] These offences travel far beyond acts like bombing and hijackings to not only criminalise 'terrorist acts' but also conduct ancillary to 'terrorist acts'. For example, a 'terrorism' offence is committed by merely possessing a thing in connection with engagement in a 'terrorist act'.[3]

Second, powers have been conferred on the government to ban 'terrorist' organisations. Part 4 of the *Charter of the United Nations Act 1945* (Cth) requires the Foreign Minister to list a person or entity if satisfied, among others, that such a person or entity is involved in a 'terrorist act'; a term that is not defined by the Act.[4] Such a listing will mean that it becomes illegal to use or deal with the assets of the listed person or entity. It will also be an offence to in/directly provide assets to a listed person or entity.[5] Moreover, under the *Criminal Code Act 1995* (Cth) ('*Criminal Code Act'*), regulations can be passed listing an organisation as a 'terrorist organisation' so long as the Attorney-General is satisfied, on reasonable grounds, that the organisation is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)'.[6] Such a listing means that the 'terrorist organisation' offences under this Act will apply to the organisation.

Thirdly, the Australian Security Intelligence Organisation ('ASIO') now has unprecedented powers to compulsorily question and detain persons *suspected of having information* related to a 'terrorism'

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[2] While the definition of a 'terrorist act' excludes 'industrial action' (*Criminal Code Act* s 100.1), this is unlikely to afford any protection to picketing which has been found not to be 'industrial action' under the *Workplace Relations Act 1996* (Cth): *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR, 550, 575 per Wilcox and Cooper JJ (with whom Burchett J agreed at p. 586). For commentary on this case, see John Howe, 'Picketing and the Statutory Definition of 'Industrial Action'' (2000) 13 *Australian Journal of Labour Law* 84-91. The ruling in Davids has subsequently been applied in *Auspine Ltd v CFMEU* (2000) 97 IR 444; (2000) 48 AILR ¶4-282 and *Cadbury Schweppes Pty Ltd v ALHMWU* (2001) 49 AILR ¶4-382.

[3] *Criminal Code Act* (Cth) s 101.4.

[4] *Charter of the United Nations Act 1945* (Cth) s 15 and *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002* (Cth) reg 6(1). See generally Jude McCulloch, Sharon Pickering, Rob McQueen, Joo-Cheong Tham and David Wright-Neville, 'Suppressing the Financing of Terrorism' (2004) 16(1) *Current Issues in Criminal Justice* 71-8.

[5] Such conduct is not illegal if authorised by the Foreign Minister: *Charter of the United Nations Act 1945* (Cth) ss 20-1.

[6] *Criminal Code Act* s 102.1. This power was conferred by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

offence.[7] Furthermore, the exercise of such powers by ASIO is now virtually cloaked with secrecy with the law now making it illegal to disclose information relating to most of ASIO's activities.[8]

This survey demonstrates the breadth of current anti-terrorism measures. Built upon the base of a 'terrorist act' is a superstructure of broad criminal offences and sweeping executive power. The former imposes guilt by association and criminalises conduct peripherally connected with extreme acts of ideological/religious violence. The net of criminal liability has grown even wider since the enactment of the *ASIO Legislation Amendment Act 2003* (Cth). It is now an offence to dis*close information* relating to *ASIO's investigations* into *persons suspected of having information* concerning a *'terrorism' offence*. There are more than seven degrees of separation between such offences and acts like bombing and hijackings. Moreover, the panoply of sweeping executive powers means that Australia now has a detention without trial regime with respect to 'terrorism' offences. It also has a proscription regime under the *Criminal Code Act* that bears 'disturbing similarity' to the *Communist Party Dissolution Act 1950* (Cth).[9]

The breadth of these measures also reveals how these laws have departed from established community standards. They make '(s)erious inroads into long-standing principles such as the prohibition on detention without trial, the presumption of innocence and the freedom of speech and association.'[10] This is apparent with ASIO's compulsory questioning and detention powers. These powers differ only in modest ways from that originally proposed by the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth); a Bill that has been denounced as not being 'out of place in former dictatorships such as General Pinochet's Chile'.[11] The detention powers also fly in the face of the Committee's recommendation that it be only given the powers to compulsory question.[12] The undemocratic impact of these powers have also been deepened with the newly-enacted secrecy offences; offences that were condemned by the major media organisations as

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[7] Division 3, Part II, *Australian Security Intelligence Organization Act 1979* (Cth).
[8] These offences were inserted by the *ASIO Legislation Amendment Act 2003* (Cth). For discussion, see Michael Head, 'Another Threat to Democratic Rights: ASIO detentions cloaked in secrecy' (2004) 29(3) *Alternative Law Journal* 127-30.
[9] George Williams quoted in Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] etc* (2002) 47.
[10] Michael Head, ' 'Counter-Terrorism' Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666, 688.
[11] George Williams, 'Australian Values and the War Against Terrorism' (2003) 26 *University of New South Wales Law Journal* 191, 196.
[12] Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002).

> pos(ing) a grave threat to Australian democracy, by gagging the media and its ability to report on national security issues involving ASIO and totally remove from public scrutiny, all discussion of ASIO's activities in relation to terrorism.[13]

The departure from established community standards is similarly evidenced by the government's power to proscribe 'terrorist' organisations under the *Criminal Code Act 1995* (Cth); a power which bears close parallels with the proposal previously rejected by this Committee on the basis that it conferred a 'broad and effectively unreviewable power'.[14]

What is even more disturbing is that these departures from established community standards are in real danger of being normalised. The mere existence of a broad 'terrorist' legal infrastructure built upon arbitrary executive power and guilt by association desensitises us to the fact that key civic principles have already been sacrificed on the basis of preventing 'terrorism'. With such an infrastructure, changes that would otherwise be seen as significant can be characterised as technical changes which only tinker with the edges of this infrastructure. This Bill itself poses the serious risk of *normalisation of exceptions.*[14a] A key source of this risk is the rhetorical use of the term, 'terrorist organisation'. As noted below, the Attorney-General in his 2nd Reading Speech to the Bill uses the phrase 'terrorist organisation' as if it bore a self-evident or colloquial meaning. Virtually no effort is made to draw out the fact that this phrase is a technical term that goes way beyond embracing organisations' whose principal activities involve political violence or those that are explicitly committed to the use of violence for political ends. Such rhetorical use of the term, 'terrorist organisation', does not seem to be confined to holders of political office for the same can be said of the Australian Federal Police's submission and its evidence to the Committee[15] as well as evidence given by the Attorney-General's Department.[16]

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[13] Letter from Bruce Wolpe, Manager, Corporate Affairs, John Fairfax Holdings Limited; Warren Beeby, General Editorial Manager, News Limited; Julie Eisenberg, Head of Policy, Special Broadcasting Service; Joan Warner, Chief Executive Officer, Commercial Radio Australia Limited; Professor Ken McKinnon, Chairman, Australian Press Council and Stephen Collins, Corporate Counsel, Australian Broadcasting Corporation to the Senators, 3 December 2003 (copy on file with author). See also Sophie Morris, 'More terrorists on loose, ASIO warns', *The Australian,* Sydney, 4 (available at http://www.theaustralian.news.com.au/common/story_page/0,5744,8056307%255E2702,00.html on 5 December 2003).

[14] Senate Legal and Constitutional Legislation Committee, above n 8, 58. The *Criminal Code Act's* proscription regime prior to the enactment of the *Criminal Code (Terrorist Organisations) Act 2004* (Cth) has also been criticised as for being 'subversive of the rule of law': Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2003) 211.

[14a] See also the sentiments expressed by Duncan Kerr in Duncan Kerr MP, 'Australia's Legislative Response to Terrorism: Strengthening arbitrary executive power at the expense of the rule of law' (2004) 29(3) *Alternative Law Journal* 131, 133.

[15] Legal and Constitutional Legislation Committee, Senate, Sydney, 26 July 2004, 50-1 (Commissioner Michael Keelty).

In light of this panoply of anti-terrorism measures, my key contention is that this offence should be rejected. The Committee should do so because:

- how the proposed offence promotes human security is far from obvious;
- it is productive of insecurity by conferring broad executive discretion and such insecurity risks being selectively applied to Muslim sections of the Australian community; and
- the proposed offence stands on insecure constitutional foundations.

I will deal with these grounds in turn.

Lack of necessity

While the Attorney-General's 2nd Reading Speech is emphatic in denouncing the 'fundamental unacceptability of terrorist organisations as entities',[17] it is important to appreciate that the concept of a 'terrorist organisation' is a statutory notion.

Moreover, it is a statutory notion that embraces organisations that many members of the Australian public will not consider 'terrorist' organisations. This notion, firstly, draws upon the wide definition of a 'terrorist act'[18] Moreover, it is not restricted to organisations whose key aim is the promotion and engagement of extreme acts of ideological/religious violence. A 'terrorist' organisation can, for example, be an organisation which is predominantly involved in charitable work but is also indirectly involved in a 'terrorist' act.[19]

The breadth of this concept is further amplified because the *Criminal Code Act* confers an *executive* proscription power. This power can be exercised upon the Attorney-General reaching satisfaction that on reasonable grounds, that the organisation is an organisation:

> directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).[20]

The Attorney-General's decision can only be directly challenged through an application for judicial review.[21] Given that such review only tests the legality and not the merits of the Attorney-General's

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[16] Ibid 37 (Mr Geoff McDonald, Assistant Secretary, Criminal Law Branch, Attorney-General's Department)**.**
[17] Commonwealth, *Parliamentary Debates,* House of Representatives, 17 June 2004, 300063 (Attorney-General, Philip Ruddock). See also Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2004 (Cth) 32.
[18] *Criminal Code Act* s 100.1.
[19] Ibid s 102.1.

decision, this power can be legally exercised upon factually wrong but legally unimpeachable grounds. In other words, an executive proscription power, in conjunction with the restricted character of judicial review, has the effect of broadening the range of organisations that can be considered 'terrorist organisations'.

When the true character of a 'terrorist organisation' is appreciated, there is no case for glibly characterising it as fundamentally unacceptable. Recognising the range of organisations that can be legally proscribed as 'terrorist organisations' under the *Criminal Code Act* is also key in evaluating the desirability of any new 'terrorist organisation' offence.

As it stands, the 'terrorist organisation' offences criminalise conduct distantly related to acts like bombings and hijackings. The 'terrorist organisation' training offence vividly illustrates this. As noted above, a 'terrorist' organisation can, for example, be an organisation which is predominantly involved in charitable work but is also indirectly involved in a 'terrorist' act. Moreover, the training element of these offences does not have to be related to a 'terrorist act': it suffices that any training is received or provided to a 'terrorist' organisation.[22] For example, an aid worker providing 'first aid' training in to a predominantly charitable organisation s/he knows has, on a few past occasions, engaged in an extreme act of ideological/religious violence would clearly be committing a training offence. Given that there is knowledge that the organisation is a 'terrorist' organisation, the aid worker presently faces the prospect of 25 years in jail.

The proposed 'terrorist organisation' association offence clearly threatens to expand this dragnet. Underlying all these grounds is the breadth of this offence. Various examples can be given to illustrate this breadth including those very correctly given by Petrou Georgiou[23] and Senators Bolkus, Brandis and Mason.[24] Let me add another which will also elucidate some of the constitutional issues.

> assume that this offence applied prior to East Timor gaining independence. At that time, there were probably ALP local branches openly supporting Fretilin's armed struggle and

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[20] Ibid s 102.1(2).
[21] Such an application can be made at common law, for example, pursuant to section 75(v) of the *Constitution,* or under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
[22] *Criminal Code Act* s 102.5.
[23] Commonwealth, *Parliamentary Debates,* House of Representatives, 24 June 2004, 31695-6 (Petrou Georgiou).
[24] Legal and Constitutional Legislation Committee, Senate, Sydney, 26 July 2004, 43 (Senator Bolkus); 6-7, 40-1 (Senator Brandis) and 12-3, 52-3 (Senator Mason).

> some might even have been funding this struggle. Such support would mean that these branches are 'terrorist organisations' under the *Criminal Code Act 1995* (Cth): at the very least, they would be fostering a 'terrorist act'.[25] This would also mean that the Attorney-General could legally proscribe these branches. If proscribed, it will be illegal for those who know of the branches' support for Fretilin's armed struggle to associate with members of these branches in order to provide them support. In such circumstances, campaign and party meetings would all be illegal.

The breadth of the proposed offence which extends to the criminalisation of electoral activity identifies a key reason for rejecting it: the necessity for this offence on the ground of preventing extreme acts of political/ideological violence is far from proven. In this, those justifying the proposed offence have claimed that it will cut off support for so-called 'terrorist organisations'. To this argument, two points should be made. First, it fails to recognise the breadth of the meaning of 'terrorist organisation' which would embrace the ALP local branches previously referred to. Moreover, it evinces a fundamentalism that is increasingly apparent with proponents of anti-terrorism laws, that is, an attitude that any conduct is remotely connected with acts labelled as 'terrorism' should be criminalised even when it has no immediate nexus to acts of physical violence.

Perversely, the breadth of this offence might even mean that it would undermine efforts to prevent extreme acts of political/ideological violence. By making illegal even activity like party meetings, it places public officials in the police, ASIO and the Director of Public Prosecutions in the invidious position of deciding whether or not to investigate (or prosecute as the case may be) in politically-sensitive cases with no clear guidance from the legislature.[26] At the same time, the policing of this broad offence might very well mean a diversion of resources from more appropriate areas. Lastly, as argued below, the breadth of this offence risks selective exercise especially the targeting of Muslim sections of the Australian community. Should there be such singling out, it will exacerbate the lack of trust some Muslims already have in government agencies.[27] This will then erode the basis of co-operation that police and intelligence organisations need in preventing extreme acts of political/ideological violence.

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[25] *Criminal Code Act 1995* (Cth) s 102.1.
[26] See Legal and Constitutional Legislation Committee, Senate, Sydney, 26 July 2004, 41 (Senator Mason).
[27] See Human Rights and Equal Opportunity Commission, *Isma - Listen: National Consultations on eliminating prejudice against Arab and Muslim Australians* (2004) 90-1.

Insecurity due to broad executive discretion

The proposed offence appears to have been modelled upon consorting offences under state criminal law.[28] Like such offences,[29] this offence will confer broad executive discretion in terms of who is investigated and prosecuted. This discretion is layered upon the significant discretion conferred upon the Attorney-General in terms of which organisation is proscribed as a 'terrorist organisation'.

There has always been the danger that such discretion will be selectively and arbitrarily exercised. There is now good evidence that this danger has been realised. In its review of the listing of the Palestinian Islamic Jihad, the Parliamentary Joint Committee on ASIO, ASIS and DSD urged, I quote, 'a more considered process', in the proscription of 'terrorist organisations.[30] The Parliamentary Library has recently published an excellent research note entitled, 'The politics of proscription in Australia'. Its key thesis is that the *Criminal Code* proscription power has, to date, been exercised on an inconsistent basis: for instance, some organisations with links to Australia have not been proscribed while others with no links have been banned.[30a]

Importantly, there is evidence that the anti-terrorism laws have been disproportionately applied to Muslim members of the Australian community.[31] So far, all persons charged with either a 'terrorist act' or a 'terrorist organisation' offence have been Muslim.[32] Moreover, the overwhelming majority of individuals and organisations proscribed under the *Criminal Code Act* and *Charter of United Nations Act 1945* (Cth) appear to be Muslim.[33] There is then some reason to suspect that this proposed offence, if enacted, will be directed at Muslim individuals and groups. If so, this will undermine a key tenet of the rule of law, equality before the law. It will also erode the multicultural fabric of Australian society.

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[28] See, for example, Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2004 (Cth) 30.
[29] See generally Alex Steel, 'Consorting in New South Wales: Substantive Offence or Police Power?' (2003) 26(3) *University of New South Wales Law Journal* 567.
[30] Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of the Palestinian Islamic Jihad* (2004) para 3.23.
[30a] Department of Parliamentary Library, *The politics of proscription in Australia: Research Note No 63/2003-04* (2004).
[31] This has also been a concern raised by Muslim organisations, see Barney Zwartz, 'Muslims write to MPs about fears on laws', *The Age,* Melbourne, 16 June 2004, 2 and Bilal Cleland, Islamic Council of Victoria quoted in Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] etc* (2002) 27-8.
[32] For details, see Brendan Nicholson, 'Bail for terror accused', *The Age,* 3 June 2004, 1-2.
[33] For organisations proscribed under the *Criminal Code Act,* see *Criminal Code Regulations 2002* (Cth) Schedule 1 & 1A. For persons and entities proscribed under the *Charter of UN Act,* see http://www.dfat.gov.au/icat/persons_entities (accessed on 24 May 2004).

Insecure constitutional foundations

Likely infringement of the implied freedom of political association

While the Bill provides for an exemption in relation to the constitutionally implied freedom of political *communication,*[34] this exemption does not deal with what, perhaps, is the most important constitutional question for the proposed offence: a breach of an implied freedom of political *association.*

While the question whether a freedom of political association should be implied from the *Constitution* has yet to be settled by the High Court.[35] such an implication can be plausibly argued on the basis that it arises from the constitutionally-prescribed system of representative democracy, in particular, sections 7 and 24 of the *Constitution.*[36] McHugh J in *Kruger v Commonweatlh,* for example, stated that:

> the Constitution necessarily implies that "the people" must be free from laws that prevent them from associating with other persons . . . for the purposes of the constitutionally prescribed system of government and referendum procedure.[37]

In a similar vein, Williams has cogently argued that freedom of political association lies within the 'core of representative democracy'. According to this commentator:

> (t)he ability to associate for political purposes is obviously a cornerstone of representative government in Australia. How could the people 'directly choose' their representatives if denied the ability to form political associations and collectively seek political power? The ability to 'choose' must entail the ability to be chosen.[38]

It should be noted that these statements indicate that such a freedom can be implied independently of the implied freedom of political communication.[39]

Assuming that such a freedom is implied from the *Constitution,* the test for validity would be a modified version of the *Lange* test that, in essence, substitutes freedom of political association for freedom of political communication.[40] This test would ask whether:

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[34] The Bill, proposed s 102.8(6).
[35] This question might, however, be decided shortly in the case of *Mulholland v Australian Electoral Commission* shortly. For transcripts of the proceedings, see *Mulholland v Australian Electoral Commission* [2004] HCATrans 7-8 (High Court, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 11-2 February 2004).
[36] These sections respectively require that Senators and members of the House of Representatives be 'directly chosen by the people'.
[37] *Kruger v Commonwealth* (1997) 190 CLR 1, 142 per McHugh J.
[38] George Williams, 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20 *Melbourne University Law Review* 848, 861.
[39] The freedom can also be seen as ancillary to the implied freedom of political communication, see *Kruger v Commonwealth* (1997) 190 CLR 1, 120 per Gaudron J.
[40] See *Kruger v Commonwealth* (1997) 190 CLR 1, 128 per Gaudron J.

- the proposed offence effectively burdens freedom of association about government or political matters either in its terms, operation or effect?
- if it does, is the offence reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people?[41]

The reach of the proposed offence would mean an affirmative to the first question. The example I gave at the outset clearly demonstrates that it burdens freedom of political association. This burden is quite significant considering that most Australian political parties have, at some point or another, supported armed struggle.[42]

The question then is whether this offence is reasonably adapted to the aim of preventing extreme acts of political/ideological violence. The answer is likely to be no: the offence criminalises conduct only peripherally connected to such acts and, moreover, criminalises conduct that lies at the heart of this implied freedom: association for electoral purposes.

Built upon a proscription regime enacted on shaky constitutional foundations

Not only is the offence itself constitutionally suspect but the proscription regime it is built upon is also constitutionally insecure. It is seriously arguable that this regime usurps judicial power by giving rise to Bills of Attainder. In this, there is a constitutional prohibition against such Bills arising from the separation of judicial power. A majority of the High Court supported such a prohibition in *Polyukhovich v Commonwealth;*[43] a position that was confirmed by three members of the High Court in *Lim v Minister for Immigration.*[44] Such a prohibition has also been supported by academic commentators including Zines who has characterised the reasoning in *Polyukhovich* as 'unimpeacheable'.[45]

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[41] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-8.
[42] See also remarks Legal and Constitutional Legislation Committee, Senate, Sydney, 26 July 2004, 19, 25-6 (Senator Brandis) and Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 30, paras 3.21-3.22.
[43] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 539 (Mason CJ); 612 (Deane J); 648 (Dawson J); 686 (Toohey J); 706 (Gaudron J) and 721 (McHugh J). Brennan J did not discuss this question. For a discussion of this case, see James Thomson, 'Is it a Mess? The High Court and the War Crimes Case: External Affairs, Defence, Judicial Power and the Australian Constitution' (1992) 22 *Western Australian Law Review* 197-215; Helen Roberts, 'Retrospective Criminal Laws and the Separation of Judicial Power' (1997) 8 *Public Law Review* 170-85 and Greg Taylor, 'Retrospective Criminal Punishment under the German and Australian Constitutions' (2000) 23(2) *University of New South Wales Law Journal* 196, 203-8. It should be noted that historically, a Bill of Attainder referred to an Act which imposed the death penalty on a specified person/s whereas an Act of this kind which imposed a lesser penalty was referred to as a Bill of Pains and Penalties. For ease of discussion, I shall follow the example of the High Court in *Polyukhovich* and use the term, 'Bill of Attainder' to refer to both types of Acts.
[44] *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 34 (Brennan, Deane and Dawson JJ).
[45] Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 169.

The following discusses what is a Bill of Attainder and the reasons why the regulations proscribing 'terrorist organisations' are likely to be Bills of Attainder.

What is a Bill of Attainder?

According to Mason CJ in *Polyukhovich v R:*

> The distinctive characteristic of a bill of attainder . . . is that it is a legislative enactment adjudging a specific person or specific persons guilty of an offence constituted by past conduct and imposing punishment in respect of that offence.[46]

While these statements require that the statute in question proclaim a particular person/s guilty of an offence, the preferable view would be to dispense with such a requirement. If it applied, the prohibition against Bills of Attainder will be largely formalistic as it could be effortlessly avoided merely by omitting to make such proclamation while still imposing a punishment on particular person/s.[47] Moreover, such a formal requirement fits uneasily with statements made by Brennan, Deane and Dawson JJ in *Lim.* In that case, their Honours stated that:

> In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with *substance and not mere form. It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt*.[48]

The italicised statements would strongly suggest that a formal proclamation of criminal guilt is not an essential element of a Bill of Attainder.

Putting aside the requirement for a formal proclamation of criminal guilt, Mason CJ's statements identify two key elements to a Bill of Attainder. The statute must be directed at a person or group of persons. This could occur either because such person/s are named or because the statute lays down specified characteristics that identify such persons.[49] An example of the latter is when the statute 'designate(s) the persons it seeks to penalize by means of some characteristic (such as membership of an organization) that is independent of and not equivalent to the criminal activity which it is the

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[46] Ibid 535 (Mason CJ). See also ibid 612 (Deane J).
[47] See, for example, comments by Zines: Leslie Zines, *The High Court and the Constitution* (1997, 4th ed) 208.
[48] *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (emphasis added).
[49] 'Legislation will amount to a bill of attainder only where it is apparent that the legislature intended the conviction of specific persons for conduct engaged in the past. The law may do that by penalizing specific persons by name or by means of *specific characteristics which, in the circumstances, identify particular persons'*: *Polyukhovich v R* (1991) 172 CLR 501, 647 (Dawson J) (emphasis added). See also ibid 721 (McHugh J). Note that Dawson J merely assumed and did not decide that the separation of judicial power prohibited a bill of attainder.

purpose of the law to prohibit or prevent.'[50] Further, the statute must impose punishment on such person/s.

The Criminal Code proscription power and Bills of Attainder

In the case of *Criminal Code* proscription power, it could not be said that the legislative provisions granting the power constitute a Bill of Attainder: they are not directed at particular person/s nor do they impose punishment on any person/s. The real question is whether proscribing regulations are Bills of Attainder because they are a form of 'disguised legislative punishment'?[51]

This question cannot be answered without comprehending the difference effected by a proscribing regulation in the prosecution of a 'terrorist organisation' offence. In the absence of such a regulation, a successful prosecution of a 'terrorist organisation' offence depends upon proof beyond reasonable doubt that the organisation in question is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)'.[52]

The prosecution is, however, relieved of this burden in relation to proscribed organisations: all that needs to be proven is that the organisation in question is an organisation that has been specified in the *Criminal Code Regulations.* Once that is proved, the organisation is punished because it becomes illegal in many ways to associate with such an organisation.[53] Considered in isolation, a proscribing regulation meets the description of a Bill of Attainder because it will mean that:

> (a) court in applying such a law is in effect confined in its inquiry to the issue of whether or not (the organisation) is one of the (organisation) identified by the law. If (it) is, (its) guilt follows. The proper judicial inquiry as to whether an accused has been guilty of prohibited conduct has thus been usurped by the legislature. [54]

The matter can also be approached by analogy. A law that stated that Mohammad was guilty of a crime and sentenced him to 10 years' gaol would clearly be a Bill of Attainder. Take, however, a different law which did not directly convict and punish Mohammad but criminalised various forms of association with Mohammad: it is seriously arguable that such a law would still be a Bill of

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[50] *Polyukhovich v R* (1991) 172 CLR 501, 647 (Dawson J). See also ibid 536-7 (Mason CJ) and 721 (McHugh J).
[51] Zines, above n 45, 172.
[52] *Criminal Code Act* s 102.1(1).
[53] Ibid ss 102.2-102.7.
[54] *Polyukhovich v R* (1991) 172 CLR 501, 647 (Dawson J). See also ibid 536 (Mason CJ); 706 (Gaudron J) & 721 (McHugh J).

Attainder because, in substance, it usurped the judicial function of adjudgment and punishment of criminal guilt.

Substitute Mohammad for Mohammad and his friends and you essentially have the basic outline of the *Criminal Code* proscription regime. Groups of persons are directly punished for being members of the group and also indirectly punished through other 'terrorist organisations' offences.[55] It is the fact that such persons are being punished for their status, for who they are, and not what they have done or their conduct that taints the proscription regime with constitutional invalidity. It is this feature of the proscription regime that is likely to mean that there has been a usurpation of judicial power.

There is, of course, the availability of judicial review of the Attorney-General's decision to proscribe.[56] Does such availability mean that there is no usurpation of judicial power? This will depend on whether judicial review of the Attorney-General's decisions can be said to be an adequate substitute for judicial determination of whether an organisation is a 'terrorist organisation' in a criminal trial. If such review were an adequate substitute then it cannot be said that the proscribing regulation has 'substituted the judgement of the legislature for that of a court.'[57]

In favour of adequacy is the fact that judicial review is directed at the question whether a proscribed organisation is a 'terrorist organisation'. Despite this, it falls far short of being a proper substitute for judicial determination of this question in a criminal trial. Judicial review is merely concerned with the legality of the Attorney-General's decision. As noted above, this means that factually incorrect decisions will not necessarily be set aside.[58] In a criminal trial, however, there must be proof beyond reasonable doubt that the organisation in question is a 'terrorist organisation'. Moreover, the burden of proof in such trials lies on the prosecution whereas in an application for judicial review, the applicant bears the burden. Summing up, the inadequacy of judicial review means that it is strongly arguable that the regulations proscribing organisations are Bills of Attainder because they impose criminal punishment upon specified groups of persons.

Thank you for reading my submission.

Yours sincerely,

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[55] *Criminal Code Act 1995* (Cth) Subdivision B, Division 102.
[56] *Administrative Decisions (Judicial Review) Act 1977* (Cth) and section 75(v) of the *Constitution.*
[57] *Polyukhovich v R* (1991) 172 CLR 501, 646 (Dawson J).
[58] See generally Roger Douglas, *Douglas and Jones's Administrative Law* (2002, 4th edition) Chapter 15.

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