Secretary

Senate Legal and Constitutional Legislation Committee

Parliament House
Canberra ACT 2600

16 April 2004

Dear Secretary

Submission to Inquiry into the provisions of the Anti-Terrorism Bill 2004 (Cth)

I am an Associate Lecturer at the School of Law and Legal Studies, La Trobe University. One of the key areas of my research is Australia's anti-terrorism laws. For the Committee's information, I have listed my published writings including those on Australia's anti-terrorism laws at the end of this letter.

This letter provides a submission to assist the Senate Legal and Constitutional Legislation Committee ('the Committee') in its inquiry into the Anti-Terrorism Bill 2004 ('the Bill'). I am also prepared to appear before the Committee to give oral evidence if that should assist the Committee's inquiry.

My submission is divided into two main parts. The first surveys the main anti-terrorism legislation which have enacted since the September 11 attacks. It also draws attention to their breadth, the departures from established community standards that have resulted from these laws and the danger of these departures being normalised. The purpose of this part is to place the Bill in its context. The second part of my submission examines key changes proposed by the Bill. In the main, it contends that most of the changes have not been justified and should be rejected. Towards the end of this submission, I list my recommendations.

I POST-SEPTEMBER 11 ANTI-TERRORISM LEGISLATION

The anti-terrorism legislation enacted in Australia after the September 11 attacks rests 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.[1] 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'.[2]

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.[3] 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.[4] 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)'.[5] 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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[1] 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.

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

[3] *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).

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

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

offence.[6] 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.[7]

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).[8]

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.'[9] 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'.[10] The detention powers also fly in the face of the Committee's recommendation that it be only given the powers to compulsory question.[11] 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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[6] Division 3, Part II, *Australian Security Intelligence Organization Act 1979* (Cth).
[7] These offences were inserted by the *ASIO Legislation Amendment Act 2003* (Cth).
[8] 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.
[9] Michael Head, ' 'Counter-Terrorism' Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 Melbourne University Law Review 666, 688.
[10] George Williams, 'Australian Values and the War Against Terrorism' (2003) 26 *University of New South Wales Law Journal* 191, 196.
[11] 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.[12]

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'.[13]

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.

The risk of *normalisation of exceptions* is also apparent from that fact that some proposals to depart from established principles are being made with the most meagre of justifications. The Bill, for example, proposes a *strict liability* training offence on the basis that it will send a 'message' to would-be terrorists.[14] It also proposes changes which would have retrospective operation without advancing any decent explanation.[15] Another trend that compounds this risk is the forgetfulness that accompanies some of these legislative proposals. Not uncommonly, proposals are made without close examination of the existing 'terrorist' legal infrastructure. This Bill is no exception.[16] For example, it is extraordinary that the proposal to extend the 'investigation period' under the *Crimes*

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[12] 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).

[13] 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.

[14] See text below n 56.

[15] See text below nn 69-70.

[16] Another instance of such forgetfulness concerns the proposed amendments to the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), see text below nn 42-4.

Act 1914 (Cth) (‘*Crimes Act’*) has been made with *no* mention of ASIO’s detention and compulsory questioning powers.[17]

In sum, the context in which the Bill is to be appraised has three key elements. First, there is a broad ‘terrorist’ legal infrastructure based on broad criminal liability and sweeping executive powers. Second, this infrastructure is built upon significant departures from established community standards. Lastly, this context is one where there is a grave risk of these exceptions being normalised.

II EXAMINATION OF THE BILL

The part will now examine key changes proposed by the Bill. These changes will be examined according to the statute that is to be amended.

A *Amendments to the Crimes Act*

According to the government, the proposed amendments to the *Crimes Act* (‘*Crimes Act’*) are aimed at ‘improv(ing) the capability of Australia’s law enforcement agencies to properly investigate new terrorism offences’.[18] It is to ensure that ‘authorities investigating the commission of terrorist offences are not overly constrained.’ [19]

These aims are to be secured by two key changes to the *Crimes Act.* The Bill proposes to extend the maximum ‘investigation period’ under the Act to 24 hours for persons suspected of ‘terrorism’ offences and offences against Division 72 of the *Criminal Code Act*[20] (‘international explosive/lethal devices offences’). It also proposes to deem as ‘dead time’ time taken to obtain information from overseas in relation to persons suspected of committing these offences.

1 *Proposal to increase the maximum ‘investigation period’ to 24 hours for persons suspected of ‘terrorism’ and international explosive/ lethal devices offences*

[17] See text below n 28.
[18] Commonwealth, *Parliamentary Debates,* House of Representatives, 31 March 2004, 26473 (Philip Ruddock, Attorney-General).
[19] Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) 2.
[20] This division is headed ‘International terrorist activities using explosive or lethal devices’.

The concept of 'investigation period' essentially delimits the maximum amount of time that the police can *detain* a person arrested on suspicion of committing a Commonwealth offence before bringing the suspect before a 'judicial officer' or releasing her or him.[21] The *Crimes Act* presently provides that the 'investigation period' is a reasonable time but does not extend beyond two hours for persons under the age of 18 years and those of Aboriginal and Torres Straits Islander backgrounds. For all other arrested persons, the maximum 'investigation period' is, in the first instance, four hours. These maximums can, however, be extended by another eight hours for serious offences[22] if the police are able to satisfy a 'judicial officer' of various grounds including the fact that such an extension is necessary and the questioning is being conducted without undue delay.[23]

It is this last set of provisions that the Bill proposes to amend by allowing an extension of 20 hours for persons arrested on suspicion of committing 'terrorism' and international explosive/ lethal devices offences.[24] If passed, this amendment would generally mean that such persons could be detained by the police for a maximum of 24 hours.[25] This change has been justified by the government on the basis that 12 hours is an 'inadequate length of time in which to question suspects in the context of complex terrorism investigations that may have international aspects'.[26]

The key question is whether the time required for investigations of 'terrorism' and international explosive/ lethal devices offences should mean that the police be given additional power to deprive *suspects* of their personal liberty. Such persons, not being convicted of any crime, are entitled to the presumption of the innocence; even if they might be 'feared and hated'.[27] Most of all, they enjoy

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[21] *Crimes Act* s 23C(2).
[22] This is defined as a Commonwealth offence punishable by imprisonment exceeding a period of 12 months: ibid 23D(6).
[23] Ibid s 23D.
[24] The Bill, cl 7.
[25] Such persons who are under 18 years old or of Aboriginal or Torres Strait Islander background would be subject to a maximum of 22 hours' detention.
[26] Ruddock, above n 18, 26474. The Explanatory Memorandum to the Bill also states: '(a) total investigation period of 12 hours, as is currently the case, is not sufficient for complex terrorism investigations': Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) 3.
[27] In a speech made soon after the September 11 attacks, High Court Justice Michael Kirby cautioned:

> Keeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Defending, even under assault, and even for the feared and the hated, the legal rights of suspects. These are the ways to maintain the support and confidence of the people over the long haul . . . Every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause before acting precipitately. . . Always it is wise to keep our sense of reality and to remember our civic traditions.

Justice Michael Kirby, 'Australian law - After 11 September 2001' (2001) 21 *Australian Bar Review* 253, 263.

protection of the fundamental principle that any deprivation of personal liberty should be restricted to what is absolutely necessary.

In testing the necessity for this additional power, there needs to be a close consideration of existing powers. It is such an examination that appears lacking . It is startling that neither the 2nd Reading Speech nor the Explanatory Memorandum to the Bill alludes to ASIO's broad powers to compulsory question and detain persons suspected of having information related to a 'terrorism' offence; powers that will also extend to international explosive/ lethal devices offences (as these offences invariably mean that a 'terrorism' offence is committed). With these powers, ASIO, in conjunction with the Australian Federal Police ('AFP'), can compulsorily question and/or detain persons suspected of having the relevant information for rolling periods of seven-days. Such persons can be questioned for up to 24 hours, or 48 hours if an interpreter is used. During such questioning, such persons have no right to silence and have only a highly circumscribed right to legal representation. Moreover, if detained, they are detained incommunicado, and can be subject to body and strip searches.[28]

As things currently stand, if a Madrid-style bombing occurred in Australia, ASIO with the AFP could detain persons are not suspected of any criminal wrongdoing and interrogate them for at least 24 hours.[29] In light of such unprecedented powers, the proposal to arm the police with additional power in relation to suspects of 'terrorism' and international explosive/ lethal devices offences is simply unnecessary. Whatever complexities that arise from investigations into such offences should be dealt with by ASIO's compulsory questioning and detention powers.[30] I, therefore, **recommend that** the proposal to increase the maximum 'investigation period' to 24 hours for persons suspected of 'terrorism' and international explosive/ lethal devices offences be rejected.

2 *Proposal to deem as 'dead time' time taken to obtain information from overseas in relation to persons suspected of committing 'terrorism' and international explosive/ lethal devices offences*

[28] Division 3, Part II, *Australian Security Intelligence Organization Act 1979* (Cth).
[29] A Madrid-style attack was one of the justifications given by Victorian police commissioner, Christine Nixon, for supporting this proposal: Brendan Nicholson, 'Coalition to review law on suspects', *The Age,* Melbourne, 29 March 2004, 5.
[30] If this proposal is enacted, there is a further danger that the argument regarding complexity might be used more broadly to justify an increase in the police's detention powers in other areas, for instance, organised crime.

The *Crimes Act* presently deems various periods of time as 'dead time'. Once deemed as such, these periods do not count for the purpose of determining whether the maximum 'investigation period' has been reached.[31] The Bill proposes to insert an additional 'dead time' circumstance for suspects 'terrorism' and international explosive/ lethal devices offences. For these suspects, the time reasonably taken to obtain from overseas information relevant to the investigation will also be 'dead time'. Such 'dead time' is, however, capped at the time zone difference.[32] According to the Attorney-General, this proposal is to enable 'authorities . . . to make overseas inquiries without compromising their obligation to question a suspect fully'.[33]

The effect of this proposal, if enacted, is that a person suspected of 'terrorism' and international explosive/lethal devices offences can be detained for a longer period if overseas inquiries are made. On its face, this proposal is rather modest especially given that the amount of 'dead time' is capped at the amount of the time zone difference. It does seem, however, to introduce a new element to the 'dead time' provisions. Broadly speaking, the current 'dead time' provisions apply to conduct for the benefit of the suspect, e.g. legal representation and medical treatment, or investigatory activities which *require* the bodily presence of the suspect, e.g. forensic procedures.[34] These provisions would appear to be in keeping with the fundamental principle any deprivation of personal liberty should be restricted to what is absolutely necessary.

The present proposal, however, falls somewhat short of this principle in that it, arguably, will allow a suspect to be detained even the overseas inquiries could have been made prior to or without the detention of the suspect. If so, the suspect may, in some situations, pay a heavy price for delays in making such inquiries. In order to remedy this situation, I **recommend that** the Act provide that the questioning of the person is *not* reasonably suspended or delayed for the purpose of making overseas inquiries if those inquiries could have been reasonably made:

- without detaining the suspect; or
- prior to the arrest and detention of the suspect.

B *Amendments to the Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)*

[31] *Crimes Act* s 23C(7).
[32] The Bill cl 5.
[33] Ruddock, above n 18, 26474.
[34] Crimes Act s 23C(7).

Currently, the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) makes it an offence for a person to engage in hostile activity in a foreign State or to enter into a foreign State with the intention to engage in such activity.[35] Acts preparatory to the commission of this offence is also illegal.[36] With respect to persons who are not Australian citizens or residents, these offences only apply if the person was present in Australia at any time during the period of one year before the commission of the offence and such a stay was for the purpose of committing the offence ('one year condition for non-Australians').[37] Moreover, these offences do not apply to conduct engaged in the course of a person's service with the armed forces of a foreign government from its foreign incursion offences ('armed forces defence').[38]

The most important change the Bill proposes in relation to the *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)* is that the armed forces defence *not* apply to 'prescribed organisations'. Such organisations are those:

- prescribed by regulations; and
- that are 'terrorist organisations' under the *Criminal Code Act.*[39]

These changes have been justified by the government on the basis that 'where a terrorist organisation is part of the armed forces of a government, a person involved in that terrorist organisation will not be liable for an offence under the Foreign Incursions Act.'[40] As such, the changes are meant to adapt to 'today's security environment (where) terrorist organisations may be fighting as part of or alongside the armed forces of a foreign state. In some cases, those foreign forces may be fighting against our own Defence Forces.' [41]

While the statements concerning the reach of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) are accurate, they imply that present criminal law does not cover the above situations. On the contrary, a person engaging in armed hostilities against the Australian Defence Force,

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[35] *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) s 6.
[36] Ibid s 7.
[37] Ibid s 7.
[38] Ibid ss 6(2)(b) & 7(2)(b).
[39] The Bill, cl 15.
[40] Ruddock, above n 18, 26474.
[41] Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) 4. See also Ruddock, above n 18, 26474: 'In future conflicts there is a real possibility that terrorist organisations will continue to operate with the armed forces of sympathetic foreign states.' and Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) 1: 'to enhance the foreign incursion offences, particularly in situations where the terrorist organisations are operated as part of the armed forces of a state'.

whether *or not* as part of a 'terrorist' organisation, is guilty of treason; a crime punishable by life imprisonment.[42] Similarly if such a person harms any Australians overseas, such conduct is punishable by heavy penalties.[42a] Moreover, the 'terrorist organisation' offences in the *Criminal Code Act* criminalise participation in such organisations. Because of their *extra-jurisdictional reach*,[43] these offences will mean that providing support to 'terrorist organisations' so that it can engage in 'terrorist acts' *anywhere in the world* is punishable by 25 years.[44] As with the proposal to extend the 'investigation period' for 'terrorism' and explosive/lethal devices offences, this proposal to amend the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) has be made without a close examination of the existing law. Once examined, it is clear that existing law adequately cover the situations mooted in the 2nd Reading Speech and the Explanatory Memorandum, hence, there is no need to expand the reach of the foreign incursion offences.

More generally, there is no justification to amend the Act in the manner proposed. In particular, the Bill's proposal to allow the prescribing of organisations by regulations *without* any specified criteria should be rejected. No good reason has been given for such unfettered power. Such a power, if granted, would mean that serious criminal liability could be imposed on the whim of the executive. Moreover, adopting this proposal will mean that arbitrary executive power, in clear violation of the rule of law, becomes a more entrenched feature of the legal system. I, therefore, **recommend that** the proposal to amend the armed forces defence be rejected.

Another change proposed by the Bill is the removal of the one-year requirement for non-Australians.[45] While there does not seem to be any objections in principle to this change, it does throw up some constitutional issues. The foreign incursions offences are presumably based upon the external affairs power[46] and/or the implied nationhood power.[47] Both would require some nexus between the offences and Australia's interests.[48] The removal of the one-year requirement for non-Australians might mean that this nexus cannot be made out with respect to such persons. I, therefore, **recommend that** the constitutional issues arising from the proposed removal of this requirement be further investigated.

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[42] *Criminal Code Act* s 80.1.
[42a] Ibid ss 104.1-104.4.
[43] Ibid s 102.9.
[44] Ibid s 102.7.
[45] The Bill, cl 14.
[46] *Commonwealth of Australia Constitution Act* s 51(29).
[47] See, for example, *Davis v Commonwealth* (1988) 166 CLR 79, 92-3.

C *Amendments to the Criminal Code Act 1995 (Cth)*

The Bill proposes several changes to the *Criminal Code Act's* 'terrorist organisation' offences. Its proposal in relation to the membership offence seems sensible in that it addresses an anomaly. The same cannot, however, be said of the change it is proposing in relation to the training offence.

The *Criminal Code Act* presently makes it an offence for a person to intentionally provide or receive training from a 'terrorist' organisation in two circumstances: the person knows the organisation to be a 'terrorist' organisation or is reckless as to this fact ('training offence').[49] If knowledge exists, a maximum jail term of 25 years applies whereas recklessness will mean a maximum term of 15 years. The Bill proposes to repeal these provisions. In its place, the recklessness provision will remain but subject to an increased penalty of 25 years. More importantly, the Bill proposes a strict liability offence with a defence that the accused *prove* that s/he was not reckless ('strict liability training offence').[50]

It is instructive, in this context, to recall some of this Committee's statements. In opposing absolute and strict liability 'terrorism' offences, this Committee rightly pointed out that:

> (i)n Australia's system of law, it is not the practice to create strict or absolute liability offences for other than regulatory or minor offences. Such a departure from fundamental principles of criminal law needs to be justified. While the Committee acknowledges the nature of terrorist offences is very serious and that the safety and interests of the Australian population must be protected, the rights and liberties of individuals, including those charged with criminal offences, must also be safeguarded. The fact that the offences are very broadly defined and could potentially cover a wide range of activities and items makes this even more compelling.[51]

The Committee's insistence for compelling justification is all the more important in relation to the training offences. These offences are fairly broad. They can triggered by the executive act of listing a 'terrorist organisation'; a decision that is made on the basis of a vague statutory formula.[52] Further, the substantive elements of the training offences are widely drawn. These offences apply to 'terrorist' organisations; a concept which 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

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[48] This is clear with respect to the implied nationhood power but would also appear to be the case in relation to the external affairs power, see *Horta v Commonwealth* (1994) 181 CLR 183, 194-5.
[49] *Criminal Code Act* s 102.5.
[50] The Bill, cl 20.
[51] Senate Legal and Constitutional Legislation Committee, above n 8**,** 44.
[52] *Criminal Code Act* s 102.1.

work but is also indirectly involved in a 'terrorist' act.[53] 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.[54] 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 training offences, thus, vividly illustrate how the 'terrorism' offences impose guilt by association.

In this context, the strict liability training offence should not be introduced. The accompanying documents to the Bill, moreover, makes no serious argument for introducing such an offence. No reason is given in the Explanatory Memorandum to the Bill.[55] In the Attorney-General's 2nd Reading Speech, no reason is given other than the change 'will send a clear message to those who would engage in the training activities of terrorist organisations . . . that they can expect to be dealt with harshly.'[56] Why sending such a message requires imposition of criminal liability on those who did not *know* that the organisation was a 'terrorist' organisation is far from obvious. In any event, the breadth of current 'terrorist' legal infrastructure sends strong enough a message. Another reason for rejecting a strict liability training offence is that such an offence risks becoming a staging post for arguing that other 'terrorist organisation' offences are anomalous and, therefore, should be made strict liability offences. If this occurs, there will clearly be a normalisation of exceptions. For all these reasons, I, therefore, **recommend that** the proposal to introduce a strict liability training offence be rejected.

D *Amendments to the Proceeds of Crime Act 2002 (Cth)*

The *Proceeds of Crime Act 2002* (Cth) sets up a legislative framework for making various orders in relation to the proceeds of crime. Among others, it provides for the making of 'literary proceeds' orders. The term, 'literary proceeds', is misleading as it is not confined to benefit resulting, for example, from the writing of books but is much more broadly cast. The term includes:

> any benefit that a person derives from the *commercial exploitation* of . . . the person's notoriety resulting from the person committing an indictable offence or a foreign indictable offence.[57]

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[53] Ibid s 102.1.
[54] Ibid s 102.5.
[55] See Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) 5.
[56] Ruddock, above n 18, 26475.
[57] *Proceeds of Crime Act 2002 (Cth)* s 153(1) (emphasis added).

The Act includes as an instance of 'commercial exploitation' 'any use of media from which visual images, words or sounds can be produced.'[58] So, for example, a person who seeks to use her or his speeches as an opportunity to earn income would come within the meaning of 'commercial exploitation'.

Several features of the 'literary proceeds' scheme should be noted. First, if an order is made, it will impose a penalty upon a convicted person *additional* to the sentence served. Second, while the court must be satisfied that a person has committed an indictable offence, the person does not have to be convicted of such an offence.[59] Indeed, an acquittal does not affect the court's power to make a 'literary proceeds' order.[60] Thirdly, the effect of an order is not merely to make writing books unprofitable. The breadth of the term, 'literary proceeds', mean that an order can have a profound impact upon a person's earning capacity. While convicted persons should not be able to directly profit from their criminal conduct, these features of the 'literary proceeds' scheme mean that any proposal to expand its ambit should be carefully scrutinised.

In this, the Bill proposes various changes specific to the literary proceeds provisions. Of note is the proposal that the term 'literary proceeds' be amended so that the element of notoriety can directly or *indirectly* result from the commission of the indictable offence.[61] According to the Attorney-General, this amendment would capture situations where the 'notoriety . . . flow(s) from where the person was detained rather than from the commission of the offence'.[62]

Apart from vague statements that this change is meant 'to improve restrictions on any commercial exploitation by a person who has committed foreign indictable offences',[63] no other reason has been put forth for this change. On this ground alone, this proposal should be rejected. There should not be any increase in the penalties that can be imposed by government without it offering a good reason.

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[58] Ibid s 153(2)(b).
[59] Ibid s 152(1)(b) & (2)(b).
[60] Ibid s 157.
[61] The Bill cl 24.
[62] Ruddock, above n 18, 26476.
[63] Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) 1. See also ibid 5.

More than this, there are reasons in principle why this proposal should be rejected. This proposed amendment goes beyond preventing convicted persons from directly profiting from their *criminal conduct.* For example, it proposes to extend the 'literary proceeds' scheme to cover profiting from writing or speaking about governmental actions in apprehending and detaining such persons. Given the character of 'literary proceeds' orders as a penalty over and above the sentence served and their impact on a person's livelihood, this is a disproportionate extension of the scheme.

Indeed, it may, in some situations, be in the public interest for a convicted person to write about his or her detention. The fact that a person has committed an indictable offence does not mean that the government has carte blanche over the bodies: such persons are still entitled to due process. The case of David Hicks and Mamdouh Habib, the Australians who have been detained without trial by the United States government at Guantanamo Bay, Cuba, for more than two years is instructive. Even *assuming* that Hicks and Habib have committed an indictable offence (*and this has yet to be proven*), the circumstances of their detention remain highly objectionable. Former High Court justice, Mary Gaudron, for instance, has condemned the Guantanamo Bay detention camp as a 'legal no-man's land in which there would be no rule of law only the rule of military victory.'[64] Even more disturbing are the allegations that torture is being carried out at this camp with detainees being deprived of sleep for extended periods, shackled, beaten and confined in awkward positions in hours.[65]

If the definition of 'literary proceeds' is extended in the manner proposed by the Bill, the public would face an unnecessary hurdle in knowing of the punitive circumstances existing in Guantanamo Bay. More generally, this proposal, if enacted, will mean that casting light on arbitrary detention of convicted persons will confront greater difficulty. For these reasons, I **recommend that** the proposal to extend the definition of 'literary proceeds' be rejected. Moreover, the definition of 'literary proceeds' should be amended to make clear that it does not go beyond preventing convicted persons from directly profiting from their criminal conduct. I, therefore, **recommend that** the element of notoriety in the definition of 'literary proceeds' must *directly* result from the commission of the indictable offence

[64] Quoted in Ian Munro, 'Asylum law is a fiction: ex-judge', *The Age*, Melbourne, 5 March 2004, 3.
[65] For further information, see Center for Constitutional Rights, 'CCR Provides Further Specific Evidence of Torture and Other Inhuman and Degrading Treatment of Prisoners by the United States', 6 March 2003 (available at http://www.ccr-ny.org/v2/reports/report.asp?ObjID=KgkN52VvCF&Content=203; accessed on 14 April 2004).

The Bill also proposes to amend the definition of 'foreign indictable offence'. It is important to stress that these proposed changes go beyond 'literary proceeds' orders as commission of a 'foreign indictable offence' can be grounds for making other orders under the *Proceeds of Crime Act 2002* (Cth[66]).

Presently, a 'foreign indictable offence' is made out if there is conduct which is an offence against a law of a foreign country which was *also at time of the conduct* an offence against Australian law punishable by more than 12 months' imprisonment.[67] The Bill proposes two key changes to the this definition. First, it proposes that the time for testing whether the conduct was an offence at Australian law be the time at which an application is made for an order under the Act. Second, it proposes that an offence against a law of a foreign country include:

> an offence triable by a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.[68]

While the Explanatory Memorandum to the Bill states that '(n)one of these amendments are intended to operate retrospectively,' [69] it is clear that the first change will mean that conduct, legal at time it was committed, can be retrospectively subject to laws applying at the time an application is made under the *Proceeds of Crime Act 2002* (Cth).[70] The government has not given any good reason for such retrospectivity hence, I **recommend that** the proposal to amend the definition of 'foreign indictable offence' so that the time for testing the legality of conduct at Australian law be the time at which an application is made under the *Proceeds of Crime Act 2002* (Cth) be rejected.

As with the second change, it proposes to recognise the legitimacy of military tribunals that have been established to try offences against some of the Guantanamo Bay detainees. If enacted, this proposal stands the risk of constitutional invalidity. This risk stems from the possibility that this

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[66] See, for example, *Proceeds of Crime Act 2002* (Cth) s 19(restraining orders) and s 49 (forfeiture orders)
[67] Ibid s 338.
[68] The Bill, cl 26.
[69] Explanatory Memorandum, Anti-Terrorism Bill 2004 (Cth) 1.
[70] This retrospectivity is tempered by the requirement that some orders be made within six years of the conduct: see, for example, *Proceeds of Crime Act 2002* (Cth) s 19 (restraining orders) and s 49 (forfeiture orders). While there is no such time limit with 'literary proceeds' orders, the time that has elapsed since the conduct was committed is a factor in the exercise of judicial discretion: ibid s 154(a)(v).

change may constitute legislative punishment of particular persons[71] because recognition of these tribunals will only affect two Australians, David Hicks and Mamdouh Habib.

Constitutional questions aside, there is no good reason in principle for recognising such irregular tribunals; tribunals which have been denounced by Lord Steyn, a member of the House of Lords, as 'kangaroo courts'.[72] Describing these tribunals, Lord Steyn said:

> The prisoners have no access to the writ of habeas corpus to determine whether their detention is even arguably justified. The military will act as interrogators, prosecutors, defence counsel, judges, and when death sentences are imposed, as executioners. The trials will be held in secret. None of the basic guarantees for a fair trial need be observed. The jurisdiction of the United States courts is excluded. The military control everything. It is, however, in all respects subject to decisions of the President as Commander-in-Chief even in respect of guilt and innocence in individual cases as well as appropriate sentences. It is an awesome responsibility. The President has made public in advance his personal view of the prisoners as a group: he has described them all as "killers."[73]

The irregular character of these tribunals is underscored by the fact that statements made under duress, even torture, are admissible as evidence before such chambers.[74] To recognise such tribunals at Australian law would be to normalise a very exceptional state of affairs. I, therefore, **recommend that** the Bill's proposal to insert an inclusive definition of 'an offence against a law of a foreign country' be rejected.

I thank you for taking the time to read my submission.

Yours sincerely,

(Joo-Cheong Tham)

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[71] See *Polyukhovich v R* (1991) 172 CLR 501, 535, 617.
[72] Lord Johan Steyn, *Guantanamo Bay: the Legal Black Hole,* 27th F A Mann Lecture given on 25 November 2003, 23 (available at http://www.fairgofordavid.org/htmlfiles/documents.htm; accessed on 15 April 2004). See also Clare Dyer, 'Guantanamo a 'kangaroo court' - British judge', *The Age,* Melbourne, 27 November 2003.
[73] Ibid 15.
[74] This is the effect of s 4(3) of Military Order of 13 November 2001, *Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism* 66 F.R. 57833 (Nov. 16, 2001).

III LIST OF RECOMMENDATIONS

I recommend that:

- the proposal to increase the maximum 'investigation period' to 24 hours for persons suspected of 'terrorism' and international explosive/ lethal devices offences under the *Crimes Act* be rejected;
- the *Crimes Act* provide that the questioning of the person is not reasonably suspended or delayed for the purpose of making overseas inquiries if those inquiries could have been reasonably made:

- without detaining the suspect; or

- prior to the arrest and detention of the suspect;

- the proposal to amend the armed forces defence under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) be rejected;
- the constitutional issues arising from the proposed removal of the one-year requirement for non-Australians under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) be further investigated;
- the proposal to introduce a strict liability training offence under the *Criminal Code Act 1995* (Cth) be rejected;
- the proposal to extend the definition of 'literary proceeds' under the *Proceeds of Crime Act 2002* (Cth) be rejected;
- the definition of 'literary proceeds' under the *Proceeds of Crime Act 2002* (Cth) be amended so that the element of notoriety must directly result from the commission of the indictable offence;
- the proposal to amend the definition of 'foreign indictable offence' under the *Proceeds of Crime Act 2002* (Cth) so that the time for testing the legality of conduct at Australian law be the time at which an application is made under the Act be rejected;
- the proposal to insert an inclusive definition of 'an offence against a law of a foreign country' under the *Proceeds of Crime Act 2002* (Cth) be rejected.

IV LIST OF PUBLISHED WRITINGS

1 *Chapters of Books and Monographs*

1.1 Joo-Cheong Tham, 'Employment Security of Casual Employees: A Legal Perspective' in Michael Barry and Peter Brosnan (eds), *The Proceedings of the 17th AIRAANZ Conference: Refereed Papers* (2004), AIRAANZ, 9 pp

1.2 Joo-Cheong Tham, 'Campaign Finance Reform in Australia: Some Reasons for Reform' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy* (2003), Federation Press, 114-29

1.3 Joo-Cheong Tham, 'Legal conceptions of casual employment' in Peter Holland (ed), *The Proceedings of the 17th AIRAANZ Conference: Refereed Papers* (2003), AIRAANZ, 10 pp

1.4 Joo-Cheong Tham, 'Legal Regulation of Political Donations in Australia: Time for Change' in Glenn Patmore (ed), *Labor Essays 2002: The Big Makeover: A New Australian Constitution* (2001), Pluto Press, 72-86

1.5 Joo-Cheong Tham, 'Industrial Action and Unemployment Income Support in Australia' in Ian McAndrew and Alan Geare (eds), *The Proceedings of the 16th AIRAANZ Conference: Volume 1: Refereed Papers* (2001), AIRAANZ, 476-86

1.6 Christopher Arup, John Howe, Richard Mitchell, Anthony O'Donnell, Joo-Cheong Tham, 'Employment Protection and Employment Promotion - The Contested Terrain of Australian Labour Law' in Marco Biagi (ed), *Job Creation and Labour Law: From Protection Towards Pro-action* (2000), Kluwer Law International, 99-120

1.7 Joo-Cheong Tham, 'The APS Shake-up' in Richard Naughton (ed), *The Workplace Relations Act in Operation: Eight Case Studies* (1998), Centre for Employment and Labour Relations Law Occasional Monograph No. 7, 63-

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2 ***Contributions to refereed journals***

2.1 Joo-Cheong Tham and Anna Chapman, 'Regulation of Information in the Labor Market: What Employees May Learn about Employers' (2001) 22 *Comparative Labour Law & Policy Journal* 433-70

2.2 Joo-Cheong Tham, 'Deregulation of Australian labour law: Some recent trends and tensions' (2002) 44(11) *Japanese Journal of Labour Studies* 60-78

2.3 Joo-Cheong Tham, 'ASIO and the rule of law' (2002) 27(5) *Alternative Law Journal* 216-9

2.4 Joo-Cheong Tham, 'Industrial Action and Unemployment Income Support' (2002) 15(1) *Australian Journal of Labour Law* 40-68

2.5 Anna Chapman and Joo-Cheong Tham, 'The Legal Regulation of Information in Australian Labour Markets: Disclosure to Employers of Information About Employees' (2000) 21(4) *Comparative Labor Law*

2.6 *& Policy Journal* 613-50

Anthony O'Donnell and Joo-Cheong Tham, 'Participation for All? The McClure Report on Participation Support for a More Equitable

2.7 Society' (2000) 13(3) *Australian Journal of Labour Law* 297-307 (report)

2.8 Joo-Cheong Tham, 'The MUA Cases' (1999) 25(2) *Monash Law Review* 181-202 (refereed case-note)

Joo-Cheong Tham, ' "Take it or leave it" AWAs: a question of duress?' (1999) 12(2) *Australian Journal of Labour Law* 142-8 (case-note)

3 ***Other publications including contributions to non-refereed journals and newspaper opinion pieces***

3.1 Joo-Cheong Tham, 'Fear politics yet again on new terror laws', *Sydney Morning Herald: Web Diary,* Sydney, 31 March 2004

3.2 Joo-Cheong Tham, 'Money politics: corporate contributions to political parties' (2003/2004) 13 *Dissent* 27-8

3.3 Joo-Cheong Tham, 'The danger to our freedoms posed by the ASIO Bill', *The Age,* Melbourne, 1 December 2003, 15

3.4 Joo-Cheong Tham, 'Ruddock's new ASIO secrets: an analysis', *Sydney Morning Herald: Web Diary,* Sydney, 28 November 2003

3.5 Joo-Cheong Tham, 'New terror laws for the hell of it: the lies Ruddock's telling us', *Sydney Morning Herald: Web Diary,* Sydney, 6 November 2003

3.6 Joo-Cheong Tham, 'No case for greater ASIO powers', *Sydney Morning Herald: Web Diary,* Sydney, 3 November 2003

3.7 Joo-Cheong Tham, 'Abbott's Honest Politics Trust a Liberal Party front: Donor disclosure required', *Sydney Morning Herald: Web Diary,* Sydney, 19 September 2003

3.8 Joo-Cheong Tham, 'How not to fight the 'War on Terrorism': the Criminal Code Amendment (Terrorist Organisations) Bill 2003', *Sydney Morning Herald: Web Diary,* Sydney, 15 September 2003

3.9 Joo-Cheong Tham, 'Enforcing disclosure: AEC can make Abbott give sworn evidence on slush fund', *Sydney Morning Herald: Web Diary,* Sydney, 4 September 2003

3.10 Joo-Cheong Tham, 'When litigation's just another way to play politics', *Sydney Morning Herald: Web Diary,* Sydney, 3 September

3.11 2003

Joo-Cheong Tham, 'The normalisation of corporate contributions to political parties', posted on http://democratic.audit.anu.edu.au in January 2003, 4 pp. Present contributors to website include

3.12 Professor George Williams and Professor Ken Coghill.

3.13 Joo-Cheong Tham, **'**Welfare reform and the dangers of the valorisation of paid work' (2003) 5(7) *Social Security Reporter* 77-8

3.14 Joo-Cheong Tham, 'Opinion: The role of social welfare in the work and family debate: A brief comment' (2002) 5(5) *Social Security Reporter* 49-50

3.15 Joo-Cheong Tham, 'Opinion: Who really pays for political donations?', *The Age,* 14 June 2001, 17.

END OF SUBMISSION