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Submission 0006/04

Ms Louise Gell
Secretary
Senate Legal and Constitutional Committee
Parliament House
CANBERRA ACT 2600

Dear Ms Gell

Provisions of the Anti-Terrorism Bill 2004

Thank you for inviting the Australian Institute of Criminology to comment on the *Provisions of the Anti-Terrorism Bill 2004*.

It remains a truism that terrorism cannot be completely prevented from impacting negatively upon the societies within which it operates. The prospective aim of governments should therefore, it has been suggested[i], be one of containment and disruption through the effective pre-emption of terrorist activities. These pre-emptive activities should include: intelligence gathering and analysis; the controlling of terrorists' access to financing; and where feasible their prosecution.

This Bill, *in toto*, seeks to facilitate these endeavours by logical enhancements of pertinent sections in applicable statutes.

In respect of the Bill itself, we would make three brief observations.

1. Clause 20

Clause 20 of the Bill which introduces a new S.102.5 of the Criminal Code Act 1995 notes (in subsection 1) that a person commits an offence if:

(a) the person intentionally provides training to, or intentionally receives training from, an organisation;
(b) the organisation is a terrorist organisation; and
(c) the person is reckless as to whether the organisation is a terrorist organisation.

It is not clear from the Bill what precisely might be constituted by "training". Conceivably, training might entail a range of activities from teaching a terrorist to fly a plane, to drive a truck or to operate complex financial accounts. Indeed, all manner of

objectively innocuous training, including, for example university studies on terrorism and organised crime, might lead directly or indirectly to the perpetration of a future terrorist act or the development and enhancement of the structure or organisation of a terrorist group. A lack of definition may provide defendants (guilty and not-guilty alike) with a counter-productive (in terms of the fight against terrorism) degree of legal manoeuvrability.

The Criminal Code Act 1995 provides (s.5.4) that

(1) A person is reckless with respect to a circumstance if:
    (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
    (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:
    (c) he or she is aware of a substantial risk that the circumstance exists or will exist; and
    (d) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

The Attorney-General has pointed out[ii] that "[t]he net effect of [Clause 20] is to place an onus on persons to ensure that they are not involved in training activities with a terrorist organisation." It is conceivable, however, that the person concerned in Clause 20 could be deemed "reckless" for providing any form of training to, or receiving any form of training from, an organisation that turned out to have terrorist affiliations or connections. One might accept (following the events of September 11, 2001) that flying instructors, e.g. ought to be aware of the persons to whom they provide training. It is not quite so easy, however, to reconcile that degree of awareness with other forms of training especially in light of the Bill's silence on the definition of "training". Logically, this may capture a number of 'ordinary' training providers/receivers who may not be in a position to determine whether the training provided or sought originates from a terrorist source. Pragmatically, the proposed onus of responsibility might be too great.

2. Proceeds of Crime Act 2002

The overall effect of the proposed changes to the Proceeds of Crime Act 2002 is to close the lacunae, which the current concentration upon proceeds generated within Australia alone created. In terms of the Committee's query as to the overall impact of the amendments in the advancement of the objectives of the Act it appears that such impact will be both significant and insignificant. In practical financial terms it seems likely that the amendments will serve only to thwart a limited number of publicity

seeking opportunists and that the net effect of the seizure or interception of literary proceeds of terrorism or terrorism related activities upon the impact of terrorism is likely therefore to be slight. However, as the media coverage offered, e.g. to Bin Laden's infrequent audio messages confirms, all publicity, however small, has a disproportionately inflammatory impact upon the cause of, and support for, terrorism. For this reason alone, the amendment may have a disproportionately positive counter-terrorist effect and should therefore be supported.

3. Investigation and Prosecution of Commonwealth Terrorism Offences

The Committee also seeks advice on the benefits that might accrue from the amendments in terms of the investigation and prosecution of Commonwealth terrorism offences.

It seems certain that the effective investigation of terrorism is likely to yield an array of useful intelligence that may undermine future terrorist action and/or provide sufficient evidence upon which to prefer charges against a suspect.

In terms of prosecutions that might ensue from such investigations it seems clear that the rigid application of the rule of law should pertain.

It might be argued that to attempt to deal with terrorist offences as anything other than criminal offences might effectively undermine the rule of law. The rule of law gains its strength from the law's consistent and rigid application. Laws based on distaste for an activity or upon perceived rather than actual harm become worthless and, in the martyr rich environment of the terrorist, dangerous.

It follows from this premise that a terrorist brought to trial should be afforded the rights of any other defendant. However, this raises some problematic issues including the fact that due process would afford the defence the right to full disclosure of evidence. In terrorism cases such evidence is likely to have been obtained by intelligence agencies from confidential sources. Revealing such sources might jeopardise current and future investigations and indeed may place operatives in danger. Defendants would also be afforded the right to cross-examine any witnesses appearing against them. This again may prove rather difficult to achieve.

Given the enormity of the events of September 11, 2001, it may also prove somewhat difficult to gather a jury that could divorce itself from those events and render a fair verdict based solely on the evidence presented to it. It is not necessary to establish that it would happen, merely that it could.

It may well be the case that a traditional court of law is not best placed to deal with terrorist cases given that terrorism itself is rapidly becoming transnational both in

terms of structure and impact. The United States Institute of Peace has suggested nine possible judicial forums in which the prosecution of terrorist suspects might occur[iii].

Above all else, however, it might be argued that the pursuit of terrorists through the current criminal justice system may not be the most effective way of dealing with terrorism. It may restore a sense of justice but captured terrorists become heroes and prosecuted ones become martyrs. The organisations of which they form a part continue to operate with increased vigour and venom. It is better perhaps to place stronger and more effective focus on the disruption/prevention of terrorism through, *inter alia*, the seizing of funds than on the apprehension and prosecution of terrorist group members.

With kind regards

Yours sincerely

Signed by

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Acting Director

16 April 2004

[i] Privy Counsellor Review Committee, 'Anti-terrorism, Crime and Security Act 2001 Review: Report, 12 December 2003, The Stationery Office, para. 83, p. 24.
[ii] Second Reading Speech provided at www.aph.gov.au/senate_legal
[iii] Scheffer, D, 'Options for Prosecuting International Terrorists', Special Report 78, United States Institute of Peace, www.usip.org/pubs/specialreports/sr78.html