19 April 2004

The Secretary
Senate Legal & Constitutional Affairs Committee

Dear Madam/Sir

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

We refer to the committee's present inquiry into the Anti-Terrorism Bill 2004 ("**the Bill**"). On behalf of the Civil Rights Network ("**CRN**") we hereby provide a submission to assist the committee in its inquiry. The CRN is a group of concerned individuals who aim to bring the increasing erosion of civil liberties in the 'War on Terror' to the attention of the broader Australian public. Its membership draws upon a wide cross-section of society with trade unionists, lawyers, academics and members of faith organisations being part of the Network. For further information in relation to CRN please see our website at http://www.civilrightsnetwork.org.

The submission will deal with various sections of the Bill in parts.

1. A proposal to increase the "investigation period" for persons suspected of terrorism offences.

The CRN does not support the proposed increase in the "investigation period" for terrorism offences to a maximum of 24 hours as set out in the Bill. We are concerned that this proposal does not seem to have arisen from any real, practical difficulty which has been experienced. Further, there has been a complete absence of debate as to the reasons for and necessity of this amendment. When changes to Australia's legal system which have the potential to severely impact on individual's liberty and rights are proposed it is fundamentally important that the community is properly consulted and informed before our elected representatives act.

This Bill singles out "terrorism offences" as requiring a different regime for the questioning of suspects to all other federal offences. It should be noted that the "investigation period" referred to in the legislation is in fact a period during which a suspect can be detained and questioned. It is somewhat misleading to simply refer to this period as an "investigation period" and then as is done in the explanatory memorandum, to talk about the complexity of an investigation into terrorism offences. The period during which a suspect is detained is not the sole period during which investigations into the alleged terrorism offences will be conducted.

The extended period for questioning proposed under this Bill is justified in the explanatory memorandum by the complexity and nature of investigations into terrorism offences including their international aspect. This justification alone is not enough to support an extension of the period for questioning. Many federal offences have an extra territorial element: in particular, importation of prohibited imports and other customs related offences. Furthermore, investigations into offences which have links to organised crime, particularly

transnational organised crime, are of a nature and complexity arguably similar to that of terrorism offences. Investigations into offences such as money laundering and sophisticated tax evasion schemes are also very complex. At the point when a suspect is arrested for questioning, the investigation has been substantially completed. The questioning of a suspect involves, in most cases, putting allegations to that person with the intention of having those allegations confirmed (through admissions) and is not an interrogation intended to elicit information which is not already known.

It should be noted that the Australian Security and Intelligence Organisation now has unprecedented powers to detain suspects for question with respect to terrorism offences and to demand answers. Whilst this questioning is for intelligence (or information gathering) purposes and not part of the investigation of an individual for prosecution, it is nonetheless a vehicle for extending questioning.

It is accepted that there may be need to conduct investigations and inquires in other jurisdictions while a person is being questioned in relation to terrorism offences. It would, therefore, seem acceptable that the concept of "dead time" be extended to incorporate delays caused by differences in time zone.

Although it is currently the position that an application to extend a questioning period can be made before a judicial officer, defined as either a Magistrate, a Justice of the Peace, or a person authorised to grant bail, nonetheless we have concerns as to the suitability of all of those categories of persons to decide whether a person's liberty shall be removed for an extended period of time in circumstances where they are a suspect. In our submission the committee should consider whether it be appropriate for all applications to be made before Magistrates.

2. Proposed Amendments to the *Crimes (Foreign Incursions) Act 1978* (Cth)

We accept the assertion that altering the penalty in Item 14 from fourteen years to twenty years brings the penalty for this offence in line with penalties for all crimes for treason and terrorism offences. However, we cannot endorse this increase simply because it brings this offence into line with other, recently amended offences. We question whether penalties for these offences have any real deterrent effect.

We are unable to support proposed amendments for which there is scant justification or explanation. For example, we question whether there has been an example of an alleged offender escaping prosecution under the *Crimes (Foreign Incursions) Act 1978* (Cth) ("**Foreign Incursions Act**") because their presence in Australia was more than one year prior to the offence.

The proposal to grant the power to prescribe terrorist organisations under the Foreign Incursions Act and to make it an offence to fight with the armed forces of the State if also involved in a prescribed organisation is problematic on a number of levels:

(i) the Attorney General already has the power to list organisations as terrorist organisations without those organisations being listed by the United Nations. Under this Bill the Attorney General would also have the power to prescribed organisations under the Foreign Incursions Act. Neither the Explanatory Memorandum nor the Bill identifies what criteria will be used before an organisation is prescribed. Given the clear intention expressed in the explanatory memorandum to be able to prescribe organisations swiftly it is imperative that clear criteria be given in order to justify such listing. Whilst regulations may be

disallowable, any actions taken under that instrument before it is disallowed could have significant impacts upon the life and liberty of Australian citizens overseas.

(ii) Given the rapidly changing nature of international geopolitics it would seem likely that an organisation which may be listed as a terrorist organisation in some circumstances would not be considered to be such an organisation in others. We recommend that the committee considers whether it is appropriate (if it accepts that the Attorney General should have the power to prescribed terrorist organisations under this Bill) to insert what in effect would be a sunset clause for the listing of organisations. It may well be that there should be a provision that requires the reconsideration of the status of any organisation listed under this Act.

(iii) It should be made clear that if a person enters into a foreign state with the intent to engage in hostile activity while in an organisation and that organisation is acting at the behest of that foreign state, and at that time that organisation is not a prescribed organisation, any prospective listing of that organisation will not extend liability to that person. It would be against the rule of law to retrospectively impose criminality upon an individual.

We therefore recommend that the proposed amendments to the *Crimes (Foreign Incursions) Act 1978* (Cth) be rejected until or if further information or justification is provided.

3. Proposal to broaden the scope of terrorist organisation offences by amending the *Criminal Code Act 1995* (Cth)

The Bill proposes to repeal section 102.5 of the *Criminal Code Act 1995* (Cth) which currently makes it an offence for a person to intentionally provide or receive training from a 'terrorist organisation' where the person knows, or is reckless as to the fact, that the organisation is a 'terrorist organisation'. The Bill also proposes to increase the penalty for being reckless as to the fact that an organisation is a 'terrorist organisation' to 25 years, from 15 years, and creates a strict liability offence for which the onus is on the accused to prove that they were not reckless.

The introduction of a strict liability offence should be avoided. Strict liability is generally applied to administrative penalties that do not carry the possibility of imprisonment. Strict liability is most commonly used to regulate areas of social importance such as public health and safety, rather than as a means of dealing with crimes which result in serious consequences. While clearly national security is an issue of social importance the provision is so broadly drawn, including organisations that may be indirectly involved in a 'terrorist' act and encompassing any training which is received from or provided to a 'terrorist organisation', the public interest in such an offence cannot justify removing from the offence the requirement to have reference to the state of mind and knowledge of the accused.

The adoption of an offence of strict liability is not adequately explained in either the Explanatory Memorandum to the Bill or the Second Reading Speech of the Attorney-General. We therefore recommend that that the proposal to introduce a strict liability training offence be rejected.

4. Proposal to broaden the scope of the *Proceeds of Crime Act 2002* (Cth)

The Bill proposes a number of changes to the *Proceeds of Crime Act 2002* (Cth). The result of these amendments, if adopted, will be to broaden the scope of the Act and effectively

provide it with retrospective application.

Currently the *Proceeds of Crime Act 2002* (Cth) applies to proceeds a person derives from exploiting the notoriety 'resulting' from their criminal activities. This prevents criminals from financially benefiting from their crime. The Bill proposes to replace the word 'resulting' with 'directly or indirectly'. As outlined in the Second Reading Speech of the Attorney-General, this is intended to prevent a person exploiting the notoriety derived from their place of imprisonment as well as from their crime.

The result of such an amendment may well prevent the experiences of those who have been detained and suffered as a result of their imprisonment due to deprivation or torture from being revealed to the public. While we have no criticism in general terms of the intention to prohibit convicted criminals from profiting from their crime, we do not support amendments which inhibit the publication of information of public interest. For example, there is a great public benefit to be derived from hearing the stories of those released from detention where that detention has not conformed to international standards or community expectations.

The intended application of these amendments specifically to the situation in Guantanamo Bay is clear from the expansion of the definition of 'foreign indictable offence' to include offences triable by a military commission of the United States under a military order. The military commission established by the United States at Guantanamo Bay has been heavily criticised by eminent jurists and legal academics in both Australia and elsewhere. The amendments therefore legitimise such military commissions in Australian law, a development which should be strenuously avoided.

A further amendment to the provisions relating to 'foreign indictable offences' has the effective of giving the Act retrospective application. Currently for a person who has committed an offence in a foreign country to be covered by the *Proceeds of Crime Act 2002* (Cth), the offence must have also been an offence in Australia at the time that the offence was committed. The Bill proposes an amendment so that the equivalent offence must exist in Australia at the time the application is made for the restraining or confiscation order under the *Proceeds of Crime Act 2002* (Cth). This will allow the Government to amend the laws in Australia in order to prevent a person convicted in another country from deriving proceeds from the notoriety of their crime where that crime was not a criminal offence in Australia at the time it was committed. While the Explanatory Memorandum to the Bill expressly states that the amendments are not intended to be retrospective, this is the resulting effect of the proposed amendments.

These amendments have not been adequately justified in either the Explanatory Memorandum to the Bill or the Second Reading Speech of the Attorney-General. As a result we recommend that these proposed amendments to the *Proceeds of Crime Act 2002* (Cth) be rejected.

This submission has been prepared by the Civil Rights Network and is a submission of that organisation, not of individual members. Should you wish to contact a representative of the CRN, please feel free to contact Peta Murphy on (03) 96877444 or Jude McCulloch on (03) 9903 2252.

Yours faithfully,

The Civil Rights Network