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SUBMISSION TO INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM BILL 2004

This submission in relation to the Inquiry into the Provisions of the Anti-Terrorism Bill 2004 has been prepared by Patrick Emerton on behalf of the Castan Centre for Human Rights Law.

This submission relates to the Committee's current inquiry into the Anti-Terrorism Bill 2004 ('the Bill'). If passed, the Bill would bring about a number of changes to existing law. In all cases, little justification has been offered for these changes. Furthermore, in many cases there are good reasons for not making the contemplated changes. I therefore believe that these changes should be opposed.

This submission will go through each of the principal changes proposed by the Bill, and set out the reasons for opposing those changes.

Amendments to the *Crimes Act 1914*

Increase in permitted investigation period

As it currently stands, section 23C of the *Crimes Act 1914* provides that a person arrested in relation to a Commonwealth offence must be released or remanded within 4 hours (2 hours if the person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander), unless the investigation period is extended pursuant to section 23D. That section permits a single extension to the investigation period, of up to 8 hours, if the person is under arrest for a Commonwealth offence that is punishable by imprisonment for more than 12 months.

The Bill would introduce a new section 23DA which, in the case of a person arrested in relation to a terrorism offence (ie an offence against Division 72 or Part 5.3 of the *Criminal Code*), would permit multiple extensions of time, of up to 20 hours in total (proposed section

23DA (7)). This would double the maximum permitted time of detention, from 12 to 24 hours (or 22 hours in the case of indigenous or child suspects).

When considering the merits of this proposed amendment to the *Crimes Act 1914*, it is important to keep in mind that the offences defined by Part 5.3 of the *Criminal Code* cover a tremendous variety of activities. At the heart of Part 5.3 is the definition of 'terrorist act' in subsection 100.1 (1). From this definition a number of offences flow, including participating in such an act, planning such an act, or possessing a thing connected with such an act. This definition is also the basis of the Government's power to proscribe an organisation if there are reasonable grounds to believe it to be 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act' (section 102.1). Once an organisation has been proscribed, further offences are enlivened. These offences include being a member of that organisation, or training with it.

The definition of 'terrorist act' in Australian law goes well beyond such obvious terrorist conduct as participation in a bombing or a hijacking. For example, under subsection 100.1 (1) of the *Criminal Code*, it is a terrorist act to intentionally create a serious risk to the health and safety of a section of the public, that is intended to intimidate a section of the public, in order to advance a political cause. Therefore certain sorts of industrial action, such as pickets by nurses of public hospitals, could constitute terrorist acts (note that paragraph 101.1 (3) (a), which excludes certain industrial action from the definition of 'terrorist act', does not exclude industrial action which is intended to create a serious risk to the health and safety of a section of the public).

From the breadth of the definition of 'terrorist act', it follows that the offences defined under Part 5.3 cover a very broad range of activity. For example, as noted above, section 101.4 makes it an offence to possess a thing connected with preparation for a terrorist act. In the envisaged scenario, of picketing by nurses, this offence could be committed by the possession of the minutes of a union meeting. The breadth of the definition of 'terrorist act' also means that the Government's power to proscribe organisations, and thus to enliven the various offences relating to terrorist organisations, has a very broad application.

The Explanatory Memorandum to the Bill states that

> A total investigation period of 12 hours, as is currently the case, is not sufficient for complex terrorism investigations. It is proposed that the initial investigation period continue as four hours with a further 20 hours possible if the investigation period is extended (p 3).

However, no evidence is offered to support this claim that the investigation of terrorist offences is sufficiently complex as to warrant a doubling of the total permitted time of detention from 12 to 24 hours. Indeed, given the breadth of the definition of 'terrorism offences', it is difficult to see how such evidence could be produced. The potential subject matters of investigation are simply too varied.

For example, it was explained above that it might be possible to commit a terrorism offence by possessing the minutes of a union meeting. The investigation of this sort of offence does not seem overly complex. Why is a special exception, permitting a doubling of the time of detention of an arrested person, required? Even for those cases in which the offence for which a person has been arrested is closer in nature to such stereotypical terrorist conduct as planning a bombing or a hijacking, there is no reason to think that, in general, the investigation of such offences would be any more complex than the investigation of narcotics importation, white collar fraud or other organised crime.

It is a fundamental principle of the rule of law that no one should be deprived of his or her liberty arbitrarily. This is a principle to which Australia is committed under article 9 of the *International Covenant on Civil and Political Rights*. It would seem highly arbitrary for an arrested individual's liability to detention to turn simply on the chapter of the statute book in which the alleged offence is to be found. But no reason has been given to suggest that terrorism offences would have anything else in common, and distinct from other offences, in virtue of which an extended period of detention would be warranted.

Change to 'dead time' provisions

In addition to increasing the permitted investigation period, the Bill would also introduce a significant change to the 'dead time' provisions that apply to the detention of a person arrested for a terrorism offence.

Currently, subsection 23C (7) of the *Crimes Act 1914* specifies certain periods of time which do not count towards the investigation period, and therefore, in practice, increase the time for which an arrested suspect may be detained. These periods of time include the time required to transfer the arrested person to suitable premises, and any time in which questioning is suspended or delayed to allow the suspect to rest, recuperate or receive medical attention, or to make contact with a lawyer, friend or relative. They also include the time required to make an application for an extension of the investigation period under section 23D, and the time involved in seeking authorisation to carry out, and actually carrying out, certain forensic procedures or identification parades.

The Bill would introduce a new category of 'dead time'. Under proposed paragraph 23CA (8) (m),

> any reasonable period during which the questioning of the person is reasonably suspended or delayed in order to allow the investigating official to obtain information relevant to the investigation from a place outside Australia that is in a different time zone

would not be counted against the duration of the investigation period. This 'dead time' would be capped at an amount equal to the time zone difference, and thus may result in up to an additional 12 hours of detention each time the provision is invoked.

This amendment to the 'dead time' provisions for terrorism suspects would constitute an undesirable departure from the principles on which the current 'dead time' provisions are based. Currently, the periods of time not counted against the investigation period are either: one-off events that are not part of the investigation itself but are necessary preconditions of it, such as conveying the suspect to premises suitable for the carrying out of the investigation, or applying for an extension of the investigation period; time spent on matters that are for the benefit of the suspect, such as rest, medical treatment or the contacting of a lawyer; or time spent on investigative procedures that demand the presence of the suspect, such as identification parades. The amendment would introduce periods of 'dead time' that result directly from investigative activities, but which are not activities requiring the presence of the subject. At present these matters are presumably investigated prior to the arrest of the suspect, or subsequent to their release or remand. No reason has been given as to why this needs to change.

The Explanatory Memorandum states that

> [I]t is possible that during investigations into terrorism offences it will be necessary to halt the questioning of an arrested suspect so that investigators can obtain relevant information from authorities overseas. This is particularly so for investigations into terrorism offences as many of these investigations will have an international aspect (p 3).

Again, this is a proposition for which no evidence is adduced. There is nothing in the definition of the various offences in Part 5.3 of the *Criminal Code* which makes international connections a necessary element of those offences. As was pointed out above, these offences apply to a very broad and varied range of conduct, some of which may include international aspects, but much of which may not. Indeed, there are a number of Commonwealth offences which are not terrorism offences, but which seem equally if not more likely to involve international aspects, such as narcotics importation or money laundering.

This submission does not take a view on whether, in the case of offences involving international aspects, it is or is not appropriate to permit an extension of the period of detention of a suspect in order to allow the relevant international connections to be pursued. But what it does say is that in this respect terrorism offences are not peculiar, and it is therefore undesirable to include a special provision in relation to the international aspects of terrorism offences. It is doubly undesirable to do this by way of the 'dead time' provisions, given the departure from principle that this would involve.

Interaction between amendments to the *Crimes Act 1914*

Currently, the time taken in making an application for an extension to the investigation period under section 23D does not count against the investigation period (paragraph 23C (7) (g)). As only one such application may be made, this component of 'dead time' is limited to a single occurrence. The Bill would permit multiple applications for extension to the investigation period to be made, if a suspect is under arrest for a terrorism offence. The possibility of multiple such applications increases the potential for a significant increase in the time of detention of a suspect, as the time required for each such application counts as 'dead time', and therefore in practice increases the time for which the suspect may be held.

Adequacy of detention powers under the *Australian Security Intelligence Organisation Act 1979*

Under Division 3 of the *Australian Security Intelligence Organisation Act* 1979, ASIO has the power to have the police detain an individual for up to a week, and to compulsorily question that individual for up to 24 hours during that time of detention (or for 48 hours if an interpreter is required). To detain and question an individual, that individual need not be suspected of having committed a terrorism offence; all that is required is that there be 'reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence' (subsection 34D (1)).

Given this extraordinary and extensive power that already exists to detain and question individuals in the course of investigating terrorism offences, a strong case would have to be put to further increase such powers, by amending the *Crimes Act 1914* in the ways proposed by the Bill. No such case has been made. All that the Explanatory Memorandum offers are vague generalities, referring to the complexity of investigating terrorism offences, and the likelihood of such investigations having international aspects. When one actually turns to the terrorism offences in Part 5.3 of the *Criminal Code*, and considers the tremendous range of

activities and conduct that they cover, one sees that such generalities have little basis in the statute itself.

The amendments to the *Crimes Act 1914* should be opposed.

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

Policy underlying the *Crimes (Foreign Incursions and Recruitment) Act 1978*

As stated in the Explanatory Memorandum (p 4), the *Crimes (Foreign Incursions and Recruitment) Act 1978* is designed to prohibit Australian citizens, and those ordinarily resident in Australia, from engaging in hostile activities in a foreign state. The Explanatory Memorandum goes on to say that

> Recognising that there may be instances where Australian citizens, especially those who are dual nationals, wish to join the legitimate armed forces of a foreign state, the Foreign Incursions Act does not apply to actions taken in the course of a person's service with the armed forces of a foreign state (p 4).

An examination of the relevant Hansard shows that the freedom of Australians to join and serve with foreign armed forces was a consideration behind the inclusion of paragraph 6 (4) (a), providing an exemption from liability for those engaged in hostile activity in the course of service with the armed forces of a foreign state. However, it was not the only consideration.

The Crimes (Foreign Incursions and Recruitment) Bill was first introduced into the House of Representatives in March 1977, and after being referred to the Senate Standing Committee on Constitutional and Legal Affairs was eventually reintroduced and passed in 1978. When it was first introduced, the Crimes (Foreign Incursions and Recruitment) Bill did not include paragraph 6 (4) (a). Senator Missen, speaking from the government side when the Crimes (Foreign Incursions and Recruitment) Bill was first introduced, said

> It is impossible to place citizens under an obligation which prevents them from choosing, of their own free will, to serve in some force or to assist some other government. I do not think it is right that we should attempt to do so (Commonwealth, *Parliamentary Debates*, Senate, 31 March 1977, p 705).

The Senate Committee recommended that the offences under section 6 not apply to those serving with the armed forces of a foreign government, as it was not the purpose of the Crimes (Foreign Incursions and Recruitment) Bill to criminalise membership of foreign

armed services (Senate Standing Committee on Constitutional and Legal Affairs, *Report on The Clauses of the Crimes (Foreign Incursions and Recruitment) Bill 1977* (Parliamentary Paper No 67/1977), April 1977, paras 10-12). The government accepted this recommendation when it re-introduced the Crimes (Foreign Incursions and Recruitment) Bill in 1978:

> [I]t was not appropriate to attempt to prohibit enlistment outside Australia or to regulate overseas military activities of Australians – except incursion activities dealt with under clause 6… [T]he legislation will not prevent an Australian from going overseas and enlisting in armed forces in another country. The Government recognises that occasions will arise where persons will wish to enlist and serve in the armed forces of another country because of a deeply-held personal belief. To prohibit this generally would be an infringement of individual freedom (Commonwealth, *Parliamentary Debates*, Senate, 7 March 1978, p 364 (Senator Peter Durack, Attorney-General)).

However, as well as protecting the freedom of Australians to serve in foreign armed forces, the exclusion of liability under paragraph 6 (4) (a) was also seen as consistent with the anti-terrorist policy underlying the Crimes (Foreign Incursions and Recruitment) Bill:

> [W]e are not seeking to stop people from having the right and the freedom to join armed forces of other countries if they wish to do so. The Commonwealth Government is not concerned in this legislation with the activities of such people if, having joined the armed forces of other countries, they find themselves invading a neighbouring country or any other country. That is something for an individual to decide upon for himself. What the Bill is aimed at … is to control Australia's giving support to small groups of terrorists who are making use of Australian soil for training, in particular, and who are entering other countries and engaging in hostile activities there. Putting it on a deeper plane, I think that the basis of the distinction is that conflicts between armed forces of governments are regulated in the modern world by international organisations, by the United Nations, by international agreement and so on. There is a basic legal order. Maybe it breaks down often, but at least it exists and an attempt is made to enforce this basic legal order… We are seeking in this legislation to do something on a much more limited scale and to deal with a situation which we, as a national government, have some ability to control (Commonwealth, *Parliamentary Debates*, Senate, 8 March 1978, p 441 (Senator Peter Durack, Attorney-General)).

These remarks make it clear that the original purpose of the statute was not to implement into domestic law Australia's international obligations to prevent and prosecute war crimes and similar atrocities. Rather, it was to preserve international stability by criminalising the conduct of private 'adventurers' seeking to intervene in foreign states.

Amendment to the 'armed forces' defence in section 6

If passed, the Bill would amend section 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978*, by re-instating liability, in spite of paragraph 6 (4) (a), if the armed force with which an individual is serving is either a proscribed organisation under paragraph (b) of the definition of 'terrorist organisation' in subsection 102.1 (1) of the *Criminal Code*,

or a proscribed organisation under the proposed new section 12 of the *Crimes (Foreign Incursions and Recruitment) Act 1978*, which would permit the government to issue regulations proscribing organisations for the purposes of section 6.

The Explanatory Memorandum offers the following justification for the proposed amendment:

> As events in Afghanistan demonstrate, in today's security environment terrorist organisations may be fighting as part of or alongside the armed forces of a foreign state. In some cases, those foreign forces may even be fighting against our own Defence Forces. In those circumstances, it is not appropriate that the 6(4)(a) defence be available to excuse people from the reach of the Foreign Incursions Act (p 4)…
>
> By providing power to make regulations to list prohibited groups from time to time, the Foreign Incursions Act will outlaw participation with new and emerging terrorist groups from the moment it becomes evident that they pose a threat to Australia's security. In instances where the Australian Defence Force is fighting in an armed conflict overseas, it would be appropriate to quickly list an organisation or group so that Australians fighting with that group against the ADF will not be free from the consequences of their actions. (p 18).

This justification is inadequate, for five reasons.

First, if the purpose of the amendment is to ensure that Australians serving with foreign armed forces engaged in hostilities with the Australian Defence Forces are subject to criminal liability, then the amendment is unnecessary. Section 80.1 of the *Criminal Code* already defines the offence of treason, under which a person commits an offence if he or she

> engages in conduct that assists by any means whatever, with intent to assist:
>
> (i) another country; or
>
> (ii) an organisation;
>
> that is engaged in armed hostilities against the Australian Defence Force.

Division 104 of the *Criminal Code* also creates a number of offences that are committed by engaging in conduct outside of Australia that kills, or seriously harms, an Australian citizen or resident. These provide further protection to Australian Defence Force personnel serving overseas.

In short, it is not the purpose of the *Crimes (Foreign Incursions and Recruitment) Act 1978* to protect the Australian Defence Force from hostile activities overseas; this purpose is served by the *Criminal Code*.

Second, it is already an offence, under Division 102 of the *Criminal Code*, for an Australian to be a member of, train with, direct, or provide support to, an organisation

proscribed under subsection 102.1 (1) of the *Criminal Code*. To serve with such an organisation in the course of its engaging in hostilities in a foreign state would be to commit one or more of these offences. The proposed amendment, exempting proscribed armed forces from the scope of paragraph 6 (4) (a), is therefore unnecessary.

Third, any hostile act undertaken in a foreign state would almost certainly amount to a terrorist act under Australian law. The *Crimes (Foreign Incursions and Recruitment) Act 1978* offers the following definition of 'hostile activity':

> engaging in a hostile activity in a foreign State consists of doing an act with the intention of achieving any one or more of the following objectives (whether or not such an objective is achieved):
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> (a) the overthrow by force or violence of the government of the foreign State or of a part of the foreign State;
>
> (aa) engaging in armed hostilities in the foreign State;
>
> (b) causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury;
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> (c) causing the death of, or bodily injury to, a person who:
>
> (i) is the head of state of the foreign State; or
>
> (ii) holds, or performs any of the duties of, a public office of the foreign State or of a part of the foreign State; or
>
> (d) unlawfully destroying or damaging any real or personal property belonging to the government of the foreign State or of a part of the foreign State.

It is hard to think of instances of such conduct which would not constitute a politically or ideologically motivated act, that is intended to intimidate a government or a section of the public, and that intentionally causes either serious physical harm or death to a person, or serious damage to property, or creates a serious risk to the health and safety of a member of the public (*Criminal Code*, subsection 100.1 (1)). Therefore, any individual engaging in hostile acts in a foreign state would almost certainly be guilty either of committing a terrorist act (*Criminal Code*, section 101.1) or of preparing to commit a terrorist act (*Criminal Code*, section 101.6). Neither of these offences permits as a defence that the individual was serving in a foreign armed force.

Thus, the definition of 'terrorist act' in the *Criminal Code*, and the offences that flow from this definition, have rendered section 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* largely redundant. There is little point in amending that Act to allow the imposition of criminal liability in what would simply be a sub-set of the cases in which the *Criminal Code* already imposes such liability.

Fourth, if what is intended is for the *Crimes (Foreign Incursions and Recruitment) Act 1978* to be brought into line with Australia's international obligations to prohibit and punish war crimes and other criminal conduct committed by Australians serving with foreign armed forces, then the legislation should be amended so as to bring about that result. The proposed amendment does not do this – for example, it does not limit the grounds on which an organisation can be proscribed to those having to do with internationally recognised criminal activity.

It is important to realise that subsections 102.1 (1) and (2) of the *Criminal Code* together give the Government the power to proscribe any armed force engaged in hostilities, whether or not it has committed war crimes or other atrocities, or engaged in action that would conventionally be regarded as 'terrorist'. All armed forces engaged in hostilities are, by their very nature, engaged in the planning of activity that, under Australian law, constitutes terrorist acts. That is because all armed forces which are engaged in hostilities, regardless of the legitimacy or otherwise of their activity, are planning for the use of violence for political reasons to intimidate governments or sections of the public, and this constitutes terrorist activity under subsection 100.1 (1) of the *Criminal Code*.

Fifth, the amendment, if passed, would further entrench an already disturbing feature of Australian anti-terrorism legislation, namely, criminal liability that results from the unfavourable exercise of executive discretion directed at particular organisations, rather than from the legislative prohibition of conduct. The *Acts Interpretation Act 1901* does permit the disallowance of regulations by either house of Parliament. But this does not prevent the regulations having a significant effect during the period they are in force. It also does not alter the underlying feature of this legislation, that rather than prohibiting clearly defined conduct in the traditional manner of the criminal law, it permits the targeting of particular organisations through the unfavourable exercise of discretion.

The Explanatory Memorandum states that

> By providing power to make regulations to list prohibited groups from time to time, the Foreign Incursions Act will outlaw participation with new and emerging terrorist groups from the moment it becomes evident that they pose a threat to Australia's security (p 18).

This is misleading. The proscription power by itself would not outlaw participation with new and emerging terrorist groups. Rather, it would give the government the power, if it so chooses, to proscribe an organisation, and thereby to criminalise those serving with it. Paragraph (b) of the definition of 'terrorist organisation' in subsection 102.1 (1) of the *Criminal Code* gives the Government the power to proscribe organisations falling within the

scope of subsection 102.1 (2), but it does not oblige the Government to proscribe them; and subsection 102.1 (2), in setting out the grounds on which an organisation becomes liable to proscription, does not make any reference to the security of Australia. As for the proscription power which the Bill would introduce into the *Crimes (Foreign Incursions and Recruitment) Act 1978* itself, no constraints on the exercise of executive discretion would be imposed.

The Explanatory Memorandum offers the following defence of the proposed proscription power:

> Providing for the prescription of organisations and groups by regulation also means that cases for listing can be considered on an individual basis rather than trying to fit an organisation or group into a legislative definition which may over time prove inadequate as international relations and the security environment change (p 18).

As has been pointed out above, the Government already has the power, under subsections 102.1 (1) and (2) of the *Criminal Code*, to proscribe any armed force that is engaged in hostilities. Such proscription enlivens the various offences mentioned above, to which service in an armed force is no defence. Therefore, if the intention of the Parliament is to give the government the power to proscribe armed forces, thereby criminalising service with those armed forces, there is no need for new laws. No new conduct is criminalised by exposing individuals serving in proscribed organisations to liability under the *Crimes (Foreign Incursions and Recruitment) Act 1978*.

The only practical effect of the amendment to section 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* would be to introduce a new proscription power, under the *Crimes (Foreign Incursions and Recruitment) Act 1978*, which would permit the government to criminalise Australians serving with an armed force engaged in hostilities in a foreign country, without enlivening the other offences, such as membership, leadership and training, that are incidents of proscription under subsection 102.1 (1) of the *Criminal Code*.

There is a good case to be made that the proscription power under subsection 102.1 (1) of the *Criminal Code*, which gives the government the power, by regulation, to make criminals of people on extremely broad grounds (one must keep in mind the breadth of the definition of 'terrorist act' in Australian law), is not consistent with the rule of law. To vest a further power in the government, so that it may choose the precise manner in which it wishes to criminalise Australians serving with foreign armed forces, would strengthen this case. If the new proscription power was granted, then not only would the government be able to make criminals of Australians fighting with armed forces abroad: it would also be able to choose, in accordance with its perceived foreign policy interests, whether to include within, or exclude from, the net of Australian criminal liability, non-fighters and non-Australians

connected to that armed force. If it wished to bring these others in, it could proscribe under the *Criminal Code*. If it wished to keep them out, it could proscribe under the *Crimes (Foreign Incursions and Recruitment) Act 1978*. It may be true that vesting such a power in the government would enable it to adopt a very flexible approach to its conduct of international relations. However, it is entirely contrary to the rule of law for criminal liability under Australian law to turn on the foreign policy priorities of the government of the day.

The amendment to section 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* should be opposed.

Amendments to the *Criminal Code Act 1995*

Amendment to 'membership' offence under section 102.3 of the *Criminal Code*

The Bill would amend paragraph 102.3 (1) (b) of the *Criminal Code*. Currently it is an offence to be a member of an organisation proscribed under paragraph (b), (c), (d) or (e) of the definition of 'terrorist organisation' in subsection 102.1 (1) of the *Criminal Code*. The amendment would also make it an offence to be a member of a terrorist organisation, even if that organisation has not been proscribed, with the onus being on the prosecution to prove beyond reasonable doubt that the organisation was one that was 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs)' (paragraph (a) of the definition of 'terrorist organisation' in subsection 102.1 (1) of the *Criminal Code*).

As has been pointed out a number of times above, the definition of 'terrorist act' under subsection 100.1 (1) of the *Criminal Code* is very broad. Therefore, the liability of an organisation to be found to be a terrorist organisation is likewise very broad. This liability extends far beyond criminal gangs plotting bombings or hijackings. As was indicated above, a picket of a public hospital by nurses could potentially amount to a terrorist act. From this possibility, it follows that a trade union offering advice to nurses as to how they might go about establishing a picket of a public hospital might well be a terrorist organisation, as it might well be at least indirectly engaged in assisting the doing of a terrorist act.

Another example of a potential terrorist organisation would be any organisation offering support to dissidents in Iran. If those dissidents were intending to confront security forces in public demonstrations, that would quite possibly constitute politically motivated activity,

intended to intimidate a government, and intended to create a serious risk to the health and safety of a section of the public. Thus, the organisation supporting the dissidents would, again, be an organisation at least indirectly engaged in assisting the doing of a terrorist act.

There is no doubt that any organisation providing succour to an overseas resistance movement would constitute a terrorist organisation under Australian law, as any resistance movement is necessarily engaged in politically motivated violence intended to intimidate a government, which under Australian law is classified as terrorist action. In the past, for example, the Australian Anti-Apartheid Movement would have constituted a terrorist organisation, on account of its open support for the African National Congress, which was waging an armed struggle against the apartheid government of South Africa.

When this wide variety of organisations apt to satisfy the legislative definition of 'terrorist organisation' under paragraph (a) of the definition in subsection 102.1 (1) is kept in mind, the implications of extending liability for membership of terrorist organisations can be seen to be very serious. Such an extension of liability has the potential to make criminals of the members of many quite ordinary and fundamentally innocent organisations, such as the ordinary members of trade unions, or the members of organisations offering support to foreign political organisations. Undesirable as the present proscription regime is in many respects – for example, as was stated above, there is doubt as to whether it is consistent with the rule of law – it at least provides a mechanism whereby members of organisations are able to know whether or not they are liable to be prosecuted for that membership. This certainty would be lost under the proposed amendment.

In his Second Reading speech, the only reason offered by the Attorney-General in favour of the amendment was that it would produce uniformity across the offences in Division 102 of the *Criminal Code*:

> This amendment will bring the membership offence provisions in line with the other terrorist organisation offence provisions which apply both in relation to terrorist organisations listed in regulations and organisations found to be terrorist organisations by a court.
>
> The effect of the proposed amendment would be to return the membership offence in division 102 of the Criminal Code to its original form as set out in the Security Legislation Amendment (Terrorism) Bill when it was introduced in 2002.
>
> The inconsistency between the membership offence and other terrorist offences was the result of pressure exerted by the Senate during the passage of that bill.
>
> It does not make sense to have a membership offence which will not apply in circumstances where a court finds that an organisation is a terrorist organisation, and where all other terrorist organisation offences do apply. (Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 2004, p 26475; see also

the Explanatory Memorandum, pp 5, 19-20, where the only reason offered for the amendment is uniformity across the offences in Division 102).

To extend liability in the proposed manner would expose a far greater number of people to criminal liability, on a basis that is very broad, and which goes well beyond what would ordinarily be regarded as membership of a criminal association. A desire for a uniform pattern across a number of distinct offences is not sufficient grounds for such an extensive increase in the incidence of criminal liability (and seems to have been disregarded by the Attorney-General in proposing amendments to section 102.5). This amendment ought therefore to be opposed.

Amendment to 'training' offences under section 102.5 of the *Criminal Code*

The Bill would amend this section of the *Criminal Code* in three respects. First, it would abolish the offence of knowingly training with a terrorist organisation. Second, it would increase the penalty for recklessly training with a terrorist organisation from 15 to 25 years imprisonment. Third, it would introduce a new offence, of training with a terrorist organisation, which (as will be argued below) is best conceived of as a recklessness offence with a reverse onus of proof.

In relation to the first two changes to the section, the *Explanatory Memorandum* is somewhat disingenuous. While it is true to say that the amendment 'replaces section 102.5 of the Criminal Code with modified offences of providing training to or receiving training from a terrorist organisation' (p 20), there is no indication anywhere in the *Explanatory Memorandum* that the sole modification to existing subsection 102.5 (2) is to relabel it as subsection 102.5 (1), and to increase the penalty from 15 to 25 years imprisonment. That this is the case can be easily seen in the following comparison of the existing and of the new provisions:

Existing section 102.5	Amended section 102.5
(1) A person commits an offence if: (a) the person intentionally provides training to, or intentionally receives training from, an organisation; and (b) the organisation is a terrorist organisation; and (c) the person knows the organisation is a terrorist organisation. Penalty: Imprisonment for 25 years.	*No equivalent in amended statute to existing subsection 102.5 (1)*
(2) A person commits an offence if: (a) the person intentionally provides training to, or intentionally receives training from, an organisation; and (b) the organisation is a terrorist organisation; and (c) the person is reckless as to whether the organisation is a terrorist organisation. Penalty: Imprisonment for 15 years.	(1) A person commits an offence if: (a) the person intentionally provides training to, or intentionally receives training from, an organisation; and (b) the organisation is a terrorist organisation; and (c) the person is reckless as to whether the organisation is a terrorist organisation. Penalty: Imprisonment for 25 years.
No equivalent in existing statute to amended subsection 102.5 (2)	(2) A person commits an offence if: (a) the person intentionally provides training to, or intentionally receives training from, an organisation; and (b) the organisation is a terrorist organisation that is covered by paragraph (b), (c), (d) or (e) of the definition of terrorist organisation in subsection 102.1(1). Penalty: Imprisonment for 25 years. (3) Subject to subsection (4), strict liability applies to paragraph (2)(b). (4) Subsection (2) does not apply unless the person is reckless as to the circumstance mentioned in paragraph (2)(b).

To date, only one person has been charged under section 102.5 of the *Criminal Code* (as reported in *The Age*, at http://www.theage.com.au/articles/2004/04/15/1081998300694.html, and citing the Attorney-General), and that matter has not yet come to trial. No reason has been given as to why the existing two offences, one requiring knowledge and the other only recklessness, should be replaced by a single recklessness offence attracting the penalty that previously attached to the knowledge offence. In the absence of such reasons, the amendment should be opposed.

The proposed new offence should also be opposed. The Explanatory Memorandum describes it as a strict liability offence, and while technically true this is, once again, not as informative as it might be. The proposed new offence is best conceived of as a reverse-onus recklessness offence. It differs from the existing recklessness offence in three respects. First, it applies only to an individual who trains with an organisation proscribed under paragraph (b), (c), (d) or (e) of the definition of 'terrorist organisation' in sub section 102.1(1). Second, it carries a more severe penalty (25 years imprisonment rather than 15 years). Third, the effect of proposed subsections 102.5 (3) and (4) is to make the offence, for practical purposes, a reverse-onus recklessness offence according to which the onus is on the accused to establish a reasonable possibility that they were not reckless, before the prosecution then incurs an obligation to prove their recklessness beyond reasonable doubt.

This proposed new offence should be opposed on two grounds. First, no reason has been given as to why the onus of proof with respect to the recklessness of the accused should be reversed in this matter. In his Second Reading speech, the Attorney-General says that

> The effect of this amendment is to place an onus on persons to ensure that they are not involved in training activities with a terrorist organisation.
>
> This amendment will send a clear message to those who would engage in the training activities of terrorist organisations, which could result in an attack of the kind seen in New York or in Bali, that they can expect to be dealt with harshly (Commonwealth, *Parliamentary Debates*, House of Representatives, 31 March 2004, p 26475).

The first of the quoted paragraphs is extremely misleading, exploiting as it does an ambiguity between the law's 'placing an onus' on someone not to perform a certain act, by criminalising such conduct, and the technical sense in which a criminal law may place an onus of proof on either the prosecution or the defence. The law already places a clear onus on persons to ensure that they are not involved in training activities with terrorist organisations, by prohibiting such conduct under section 102.5. And the law already has the capacity to deal harshly with such offenders – as indicated above, the maximum penalty for knowingly training with a terrorist organisation is 25 years (the same penalty as section

268.59 of the *Criminal Code* imposes for the war crime of rape), and the maximum penalty for recklessly training with a terrorist organisation is 15 years.

The effect of the amendment would not be to change the incidence of criminal liability. Rather, it would transfer the onus of proof, obliging the accused to go some way to establish his or her innocence in order to avoid conviction. The accused would be obliged to lead evidence raising a reasonable possibility that he or she was not reckless in training with a proscribed organisation. This does not place any greater onus on anyone to avoid training with terrorist organisations. It simply increases the likelihood of miscarriages of justice, by excusing the prosecution from having to prove one of the elements of the offence in those cases where the accused cannot produce exonerating evidence.

In other cases where the *Criminal Code* imposes strict liability for an element of an offence, typically that element is not one which contributes to the fundamental criminality of the conduct, but rather is an element which brings it under the relevant head of Commonwealth power, thereby permitting the Commonwealth Parliament to legislate for the offence. An example is provided by section 71.2 of the *Criminal Code*. Section 71.2 makes it an offence to murder United Nations personnel. Under subsection 71.2 (2), strict liability applies to the question of whether or not the murdered person was associated with the United Nations. However, the killing itself must still be intentional or reckless (paragraph 71.2 (1) (d)). When one considers this offence, it is obviously the intentional or reckless killing that is at the heart of criminal liability for murder. The question of the victim's identity, of his or her association with the United Nations, is relevant only for bringing the conduct within the scope of the Commonwealth Parliament's legislative power to protect United Nations personnel.

This is manifestly not the case with respect to section 102.5. In general it is not a criminal act to train with an organisation. Thus, the identity of the organisation as a terrorist organisation is not simply a basis for bringing within the scope of Commonwealth legislative power what would in any event be criminal conduct. Rather, the accused's knowledge that, or recklessness towards the possibility that, the organisation was a proscribed one, is crucial to establishing the criminality of his or her conduct. The effect of the proposed amendment would be to presume that the accused has this criminal state of mind, and to shift the onus onto him or her to produce evidence to rebut that presumption.

The presumption of innocence is fundamental to the administration of criminal justice. Australia is committed to this principle under Article 14 (2) of the *International Covenant on Civil and Political Rights*. A law which would undermine the presumption of innocence, by

placing the burden on the accused to produce exonerating evidence if he or she is to avoid conviction for an offence carrying a maximum penalty of 25 years imprisonment, should be opposed.

There is a second reason for opposing the proposed new offence under section 102.5 of the *Criminal Code*. To introduce into the *Criminal Code* a separate offence for training with organisations that are proscribed, rather than proved in court to be engaged in terrorist activity, and to introduce an offence with a reverse onus of proof, would be to introduce anomalies into the statute which might then form the basis of future calls for amendment in order to restore uniformity, as has already taken place with respect to the membership offence under s 102.3 – perhaps a call for uniformity to be restored by establishing a reverse onus for all offences under Part 5.3! The dangerous precedent of a reverse onus offence with a 25 year penalty should not be introduced into Australian law.

Amendments to the *Proceeds of Crime Act 2002*

New definition of 'foreign indictable offence': retrospective confiscation

The Bill would repeal the definition of 'foreign indictable offence' in section 338 of the *Proceeds of Crime Act 2002*, and insert a new section 337A. This would have the effect of making the liability of an individual's property to a restraining order or confiscation order under the Act, in relation to an offence committed against the law of a foreign jurisdiction, depend not upon whether the individual's conduct breached Australian law at the time it was undertaken, but rather upon whether it would breach Australian law, were it undertaken at the time the order under the Act is sought (new section 337A, particularly paragraph (1) (b) in conjunction with subsection (2)).

The *Explanatory Memorandum* states that 'None of these amendments are intended to operate retrospectively' (p 1). In the case of the amendment to the definition of 'foreign indictable offence', this is highly misleading. The *Anti-Terrorism Bill 2004* includes the following example in item 26 of the Schedule:

> X commits an offence against a law of a foreign country at a time when the conduct is not an offence against Australian law. X then derives literary proceeds in relation to the offence and transfers the proceeds to Australia. After the proceeds are transferred, a new Commonwealth offence is created that applies to the type of conduct concerned. An application is then made for a literary proceeds order. For the purposes of the proceedings for that order, the original conduct is treated as having constituted a foreign

> indictable offence at all relevant times and accordingly an order can be made in respect of those proceeds.

In some respects, this example is incomplete – for example, the new definition of 'foreign indictable offence' is not restricted to literary proceeds orders, but applies to other sorts of confiscation orders under the Act, such as forfeiture orders under section 49. Likewise, liability does not turn on the conduct being an offence against a law of the Commonwealth; it is sufficient for the conduct to be punishable under a law of the Commonwealth, of a State or of a Territory by at least 12 months imprisonment.

Nevertheless, the example does highlight the tremendous scope for injustice that would be produced by this amendment. Imagine that X is an Australian medical research scientist who is carrying out research on human embryonic stem cells in a country in Europe, whose laws include a constitutionally enforced right to life. X's research is controversial in that country, although legal in Australia. X is charged with, and convicted of, violating the right to life of the embryos used in her experiments, and upon her conviction is deported to Australia. In Australia, there is also a debate about the limits of legitimate research using embryonic stem cells. Suppose that a State Parliament in Australia passes a law prohibiting the sort of research in which X was engaged in Europe, making it an offence punishable by up to a year in prison. Under the proposed definition of 'foreign indictable offence' X's property is now liable to confiscation orders under the Act. She could find any laboratory equipment she brought back with her from Europe to be liable to forfeiture, as an instrument of the offence. She could find her research income earned in Europe liable to forfeiture, as the proceeds of an offence. She could find income she has made from publishing her account of her experience liable to confiscation under a literary proceeds order, on the grounds that it results from her notoriety.

This example indicates that, in spite of the words of the Explanatory Memorandum, the amendment would open up the door to retrospectivity. In particular, if the amendment is passed, then anyone who has offended against the law of a foreign country would face the prospect of retrospective liability to confiscation orders under the Act, should the criminal law of the Commonwealth, or of any State or Territory, change. Whatever one may think of the morality of X's conduct in the example provided above, it is surely unjust that her property should be liable to confiscation in Australia, when her conduct was not illegal in Australia at the time it was undertaken, and has since been made illegal in only one State.

There is another respect in which the amendments to the *Proceeds of Crime Act 2002* would impose retrospective liability to confiscation orders under the Act. Clause 4 (1) of the Bill applies the amendments to the Act to any application for a confiscation order made

subsequent to those amendments coming into force, even if the criminal conduct occurred prior to those amendments being passed, or if the proceeds were derived, or transferred to Australia, prior to the amendments coming into force. Passing the amendments would therefore permit the imposition, on an individual's assets, of liability to confiscation in respect of conduct that had already taken place at time the amendments were passed, and which at that time did not attract such liability.

To illustrate this possibility, return to the example above, but imagine now that X's conduct and conviction in Europe have already taken place in 2003. Suppose that X transferred her relevant assets to Australia upon her deportation in 2003, believing in good faith that they were not liable to confiscation. After all she had, at that time, done nothing wrong under Australian law, and therefore at that time, under the existing provisions of the *Proceeds of Crime Act* 2002, her assets were not liable to any confiscation order. If Parliament now passes the Bill, her assets would be threatened with liability to confiscation: all that would be required would be for the law relating to stem-cell research to change in at least one Australian jurisdiction. This is not retrospective criminal liability, but it is the imposition of a retrospective liability to have assets confiscated.

Given that this amendment would permit future changes to the criminal law in any Australian jurisdiction to impose retrospective liability to confiscation orders, and furthermore that the amendment would permit the imposition of such liability in respect of conduct that has already taken place, it ought to be opposed.

New definition of ‘literary proceeds’: grounds of notoriety

Currently, ‘literary proceeds’ are defined to include any benefit that a person derives from the commercial exploitation of his or her notoriety resulting from him or her committing an indictable offence or a foreign indictable offence (paragraph 153 (1) (a)). The Bill would amend this definition, to include any benefit that a person derives from the commercial exploitation of his or her notoriety resulting directly or indirectly from him or her committing an indictable offence or a foreign indictable offence.

The Explanatory Memorandum indicates that this is intended,

> [f]or example, . . . to vitiate a claim that a person’s notoriety stems from circumstances related to their commission of an offence, such as their place of incarceration, and not from the actual commission of the offence.

This is not the only effect the amendment would have. It would also vitiate a claim that a person's notoriety stemmed not from the actual commission of the offence, but from the brutality or injustice with which they were treated by the police or legal system as a result of being charged with or convicted of the offence.

Imagine an individual who is arrested for an indictable offence, and in the process of being convicted and serving their sentence is subject to racist treatment by police or prison officers. This is not unheard of in Australia. If, as a result of that experience, the individual acquired notoriety, that notoriety would be an indirect result of their commission of the offence. Therefore, any income the individual earned from writing about his or her experience with the law, from producing music and songs that related that experience, or from a speaking tour dealing with that experience, would be liable to confiscation under a literary proceeds order, being a benefit derived from the commercial exploitation of notoriety which is in turn an indirect result of the commission of an offence.

There are many ways in which the commission of a criminal offence can indirectly result in an individual gaining notoriety. As has been illustrated in the previous paragraph, not all of them are ways of gaining criminal notoriety. Some of them are ways of gaining notoriety as a victim. Or as an advocate for prisoner's rights. Or as an exemplar of the virtues of rehabilitation. Confiscation of literary proceeds should be restricted to commercial exploitation of criminal notoriety. As the Explanatory Memorandum states,

> The intention of the literary proceeds regime is to prevent criminals exploiting their notoriety for commercial purposes (p 5).

This amendment would undermine this goal, by imposing liability to confiscation even though it is not criminal notoriety which has been commercially exploited. It should therefore be opposed.