

**SENATE LEGAL AND CONSTITUTIONAL COMMITTEE  
INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM BILL 2004**

**SUBMISSION**

**By**

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**OBJECTIVES OF THE ANTI TERRORISM BILL 2004**

This Bill seeks to amend existing Commonwealth legislation to address the following:

1. Enacting extraordinary powers for investigation of “persons” (apparently both Australian citizens and non citizens) for a “terrorism offence”.
2. Making provisions for training a “terrorist organization” or receiving training from a “terrorist organization”, and specifying penalties for these offences.
3. Establishing a new category of offence called a ‘foreign indictable offence’ and defining it to include an offence against a law of a foreign country
4. Defining a ‘foreign indictable offence’ to include an offence triable by a military commission established under a specified order of the President of the USA.

**NEED FOR THE ANTI TERRORISM BILL 2004 IN THE CONTEXT OF  
EXISTING LEGISLATION**

First, before going into the legality and constitutionality of the Anti Terrorism Bill 2004, the first issue that can be taken up against the need of for a separate legislation like this is that the amendments to the existing legislation can be done as stand alone amendment legislation, and those amended Acts would then be enough to address the extraordinary situations contemplated by the Anti Terrorism Bill. The Bill seeks to establish an umbrella legislation incorporating new amendments to existing legislation, apparently to apply to existing to extraordinary situations of war or emergencies.

**“PIGGY BACKING” ON EXISTING LEGISLATION**

The Anti Terrorism Bill 2004 seeks to amend the *Crimes Act 1914*, the *Crimes (Foreign Incursions and Recruitment) Act 1978*, *Criminal Code Act 1995* and the *Proceeds of Crime Act 2002*. The attempt of the Anti Terrorism Bill 2004 to “piggy back” onto existing legislation with or without amendments to these legislation would have the

propensity of creating problems of interpretation and application. These problems can give rise to legal challenges and litigation.

## **WAR, EMERGENCY AND THE ANTI TERRORISM BILL 2004**

The parameters of the exigencies of war or emergency [s 51(vi) of the Commonwealth Constitution, the ‘defence power’] to which the provisions of the Anti Terrorism Bill 2004 would apply are not spelt out. This implies that the provisions of the Bill would apply, with the same intensity, on a permanent, continuing basis regardless of whether there is a war or emergency, internal or external, or the intensity of its nature. The jurisprudence of the High Court on the ‘defence power’ of the Commonwealth [as explained for example, in the *Communist Party Case, Australian Communist Party v Commonwealth* (1951) 83 CLR 1] is quite clear – it has a variable scope. It may be that the international and domestic situation has changed since 11 September 2001. But the question would still arise whether the proposed law, the Anti Terrorism Bill would incorporate variable standards to deal with different kinds of exigencies.

Some of the legislation or parts of legislation, like the *Crimes Act* 1914, the *Crimes (Foreign Incursions and Recruitment) Act* 1978, *Criminal Code Act* 1995 and the *Proceeds of Crime Act* 2002, on which the Anti Terrorism Bill 2004 seeks to base itself on, are valid in terms of the ‘external affairs power’ ‘defence power’ and the ‘incidental power’ in ss 51 (xxix), (vi) and (xxxix) respectively. By basing itself on these existing legislation, the Anti Terrorism Bill 2004 would be seeking to legitimize it indirectly on those constitutional provisions. But the overall context of the Anti terrorism Bill 2004 is different. It would be better option for the Bill to incorporate substantive provisions with respect to the matters which the Bill seeks to address, like “terrorism offences”, “training or receiving training” from a “terrorist organization”.

## **OBSCURITIES IN DEFINITIONS**

The cross references to the provisions of the *Criminal Code* relating to the definition of a “terrorist organization” as the basis of enacting provisions in the Anti Terrorism Bill 2004 with respect to a “hostile activity” and training or receiving training from a “terrorist organization” are obscure. These classifications should be defined with more clarity in the Bill itself. The same should be done in relation to the cross references of the Bill to the *Crimes (Foreign Incursions and Recruitment) Act*.

## **EXECUTIVE REGULATION MAKING POWERS**

The powers of the Governor General to make regulations with respect to matters completed by the Bill, including matters relating to “hostile activity” and training or receiving training from a “terrorist organization” can be impugned on grounds of excessive delegation of powers in the absence of more specific guidelines on these matters.

Executive regulation making power which impacts on individual liberties are different from executive regulation making power with respect to, for example, the arbitration power of the Commonwealth under s 51(xxxv). The executive regulation making power under the Anti Terrorism Bill should therefore include some substantive legislative scrutiny and control.

## **LIBERTIES AND SAFEGUARDS DURING INVESTIGATION**

The provisions in the Anti Terrorism Bill for safeguarding the basic liberties of an individual in respect of a period of detention and extension of detention for investigation of a “terrorism offence” are technical and inadequate. The detention period is extensive and scrutiny and control is necessary. The administrative powers of detention, which includes the power to anticipatorily detain a person, and the length of such detention can be impugned as extraordinary powers, the exercise of which would leave a person exclusively at the mercy of the administrative agencies.

## **OFFENCES AGAINST A LAW OF A FOREIGN COUNTRY**

Conceptually, the inclusion in the Anti Terrorism Bill 2004 of provisions relating to offences against a law of a foreign country by a Military Commission established by executive decree is flawed because offences against a law of a foreign country can only be dealt with by the administrative and judicial agencies of that jurisdiction. This general proposition is subject to ad hoc or semi permanent or permanent treaty or memorandum of understanding between the state parties that can establish reciprocal arrangements for trial, sentencing and subsequent serving out a sentence of court.

## **OFFENCES TRIABLE BY US MILITARY COMMISSION**

Provisions of the Bill defines a foreign indictable offence and an “offence against a law of a foreign country” as including “an offence triable by a military commission” established under a specified order/executive fiat/decreed/executive ordinance of the President of the United States of America.

It is an uncontested position and accepted practice that a citizen of another country committing an offence in another country falls to be tried under the law of that country. Australian citizens who may commit the offence of drug trafficking in Malaysia, for example, are tried and sentenced under the relevant law of Malaysia. The Bill however specifies that an “offence against a law of a foreign country” includes an “offence triable by a military commission of the United States of America”. It is further specified in the Bill that this “military commission” is established by a “Military Order” made by the “President of the United States of America”.

## **WAR POWER OF US PRESIDENT: POWER DELEGATED BY CONGRESS**

Even otherwise the “war power” of the President of the USA under Art I, s 8 (read with Art II, s 2) is controversial. Article I, s 8 empowers the US Congress to declare war. For about two centuries of the functioning of the US Constitution the interpretation of the provisions of Art II, s 8 posed difficulties because of the US Supreme Court’s reticence to rule on it, and the acquiescence of Congress of the use of this power by the US President. But since 1973, with the position by the passage of Congressional Regulation in this regard the position has changed, and the Congress has come to exercise a certain degree of control over Presidential powers in this regard. Since 1973 then, the ‘war power’ of the US President can be identified as a ‘delegated power’.

The legal instrument which the Anti Terrorism Bill 2004 has specified is entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”. This is an Order passed by the US President on 13 November 2001.

### **ANTI TERRORISM BILL 2004 AND THE MILITARY ORDER OF US PRESIDENT**

The Anti Terrorism Bill 2004 is therefore seeking to establish an offence which is an offence created by a delegated instrument of an agency of a foreign jurisdiction. The Commonwealth Parliament would be exceeding its powers under the Australian Constitution if it attempts to do so.

The Commonwealth Parliament cannot, as it is attempting by this Bill, pass legislation “establishing/designation/creating” an offence which may apply to an Australian citizen which is/can be an offence in terms of an executive order/fiat/ordinance of a foreign jurisdiction. If done, Parliament would be exceeding its powers under the Commonwealth Constitution.