SUBMISSION OF

THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

TO

THE SENATE
LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE

ON THE

ANTI-MONEY LAUNDERING AND COUNTER-TERRORISM FINANCING BILL 2006

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The Human Rights and Equal Opportunity Commission ('the Commission') makes this submission to the Senate Legal and Constitutional Affairs Committee's ('the Committee') inquiry into the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth) ('the Bill').

1. Summary of the Commission's concerns about the Bill

The Commission is concerned that the Bill will lead to discrimination by financial institutions based on race, religion and nationality.

In this submission the Commission highlights a number of particular concerns with the Bill:

- The risk-based approach in the Draft Consolidated Anti-Money Laundering and Counter-Terrorism Financing Rules ('the Rules') may result in financial institutions adopting discriminatory criteria to determine customer risk profiles.

- By exempting financial institutions and their employees from liability for their actions under Clause 235, there is a real risk that the Bill will result in discrimination based on religion, race or ethnic origin. Such discrimination would contravene Australia's international legal obligations.

- Considered in conjunction with Clause 235, the broad scope of the suspicious matters reporting obligations (Clause 41) are of significant concern. Clause 41 has the potential to be applied arbitrarily by financial institutions in the course of determining customers' money laundering/ terrorist financing ('ML/TF') risk.

The Commission is aware that the Office of the Privacy Commissioner has made a submission to the Committee in relation to the Bill's impact upon the right to privacy. Accordingly, the Commission does not propose to comment on the privacy-related aspects of the Bill. However, the Commission notes its concern at the serious privacy implications of the Bill and urges the Committee to closely scrutinise the Bill's potential impact on the right to privacy, recognised in article 17 of the *International Covenant on Civil and Political Rights.*[1]

2. Risk-based approach in the Rules to customer identification and customer due diligence

2.1 Customer due diligence requirements under the Rules

The Rules require financial institutions to adopt 'appropriate risk based systems and controls' in relation to their customer and agent identification programs,[2] and ongoing customer due diligence programs.[3]

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[1] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

[2] AUSTRAC, *Draft Consolidated AML/ CTF Rules For Discussion* (4 July 2006) **Customers**: clause 2.2 (individuals); clause 2.3 (companies); clause 2.4 (trustees); clause 2.5 (partners); clause 2.6 (associations); clause 2.7 (registered co-operatives) and clause 2.8 (government entities); **Agents**: clause 3.2 (natural persons) and clause 3.3 (non-natural persons).

In particular, financial institutions are required to collect and verify a minimum amount of 'know your customer' ('KYC') information before providing a designated service to that person.

In addition, institutions have a discretion to collect *additional* KYC information and to determine in what circumstances existing KYC information should be updated or verified for ongoing due diligence purposes.[4]

Institutions must also maintain a 'transaction monitoring program' for the purpose of identifying, according to ML/TF risk, 'suspicious transactions'.[5]

In general, the risk based systems and controls adopted by a financial institution will depend on the Money Laundering/ Terrorism Financing ('ML/TF') risk[6] of providing a designated service to a particular customer.

2.2 Determining the ML/TF risk under the Rules

In identifying the ML/TF risk, institutions must consider:

(a) its customer types, including any politically exposed persons;

(b) the types of designated services it provides;

(c) the methods by which it delivers designated services;

(d) the foreign jurisdictions with which it deals; and

(e) the provision of designated services by any permanent establishments of the reporting entity in a foreign country.[7]

2.3 Determining the ML/TF risk in practice

The ML/TF risk-based approach to compliance gives financial institutions significant flexibility in complying with their AML/CTF obligations.

In particular, financial institutions have substantial discretion in determining the risk profiles of their customers.

The Commission is concerned that, in the absence of objective criteria for determining 'risk', institutions will use a person's religion, race, nationality or ethnic origin (or other such attributes) as a proxy for determining the customer risk aspect of the ML/TF risk.

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[3] AUSTRAC, as above note 2, clause 6.2 (KYC information); clause 6.3 (transaction monitoring program) and clause 6.4 (enhanced customer due diligence program).
[4] AUSTRAC, as above note 2, Clause 6.2.
[5] within the meaning of Clause 41 of the Bill.
6 The rules define ML/TF risk as the 'risk that a reporting entity may reasonably face that the provision by the reporting entity of designated services might (whether inadvertently or otherwise) involve or facilitate money laundering or financing of terrorism' (Clause 1.3.1).
[7] AUSTRAC, as above note 2, clause 1.2.2.

The likely effect of institutions adopting discriminatory customer risk profiles will be that people of a particular religion, race or national or ethnic origin will, because of those attributes:

- be required to divulge a significantly greater amount of sensitive information[8] about themselves to institutions, which may be shared between agents and related entities;

- be required to go to correspondingly greater lengths to verify that additional information; and

- have their transactions subject to greater surveillance and scrutiny.

If institutions use discriminatory criteria to identify ML/TF risk in collecting KYC information and verification material, such conduct may constitute unlawful discrimination under the *Racial Discrimination Act 1975* (RDA) or state or territory discrimination legislation.

The Bill seems to anticipate the potential of the Rules' risk-based approach to lead to unlawful discrimination. Accordingly, it exempts institutions and their employees from liability for conduct done in good faith in connection with the AML/TF regime (clause 235). This is discussed further below.

2.4 Recommendation: Objective Criteria

To avoid discrimination in the implementation of the 'risk-based' approach to compliance, there should be objective criteria for determining ML/TF risk, as defined by the Rules.

This would also increase transparency as to the assessment of 'risk', and therefore public confidence that the system is not discriminatory in its implementation.

3. Financial institutions protected from liability when actions done in good faith

3.1 Proposed terms of clause 235

As currently drafted, Clause 235 would protect financial institutions and their employees from liability in relation to anything done (or omitted to be done), in good faith, in the course of their office, employment or agency:

- in carrying out an applicable customer identification procedure under the Bill;

- in fulfilment (or purported fulfilment) of a requirement under the Bill to provide or cease to provide a designated service; or

[8] Within the meaning of section 6 of the *Privacy Act 1988.*

- in compliance (or purported compliance) with any other requirement under the Bill, regulations or Rules.

3.2 The Commission's concerns relating to Clause 235

By exempting financial institutions and their employees from liability for their actions under Clause 235, the systems lack appropriate checks and balances that can prevent and stop discrimination. This risk follows from the following features of the clause:

a) Good faith acts can be discriminatory

The exemption from liability in Clause 235 only applies to acts done in good faith. This limitation is not, however, sufficient to avoid discriminatory acts from being excused by the Clause.

Discrimination, including racial discrimination, can take place unintentionally. It is not necessary that a person has a motive to discriminate.[9]

A person may therefore act in good faith while also discriminating. The Commission is of the view that such conduct should not be exempted from liability.

b) Broad Scope of Clause 235

Clause 235 is very broad. It protects anything done:

- in compliance, or *purported* compliance, with the Bill, regulations or Rules;[10] or

- in fulfilment, or *purported* fulfilment, of a requirement under the Bill to provide or cease to provide a designated service,[11]

c) No onus on financial institutions to avoid non-discriminatory means in determining ML/TF risk

We understand that calculating the ML/TF risk will be a very difficult and complex task for financial institutions. However, by exempting financial institutions from liability under discrimination laws, the Bill provides no incentive for institutions to prevent stereotyped assumptions and perceptions creeping into in the process of determining the customer risk aspect of ML/TF risk. The Bill puts no onus on institutions to find non-discriminatory ways of identifying the customer risk aspect of ML/TF risk.

Given the real risk of discrimination occurring as a result of institutions adopting discriminatory customer risk profiles, we consider that clause 235 should not extend to federal or state or territory discrimination laws.

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[9] In *Australian Medical Council v Wilson* (1996) 68 FCR 46, Sackville J concluded that 'the preponderance of opinion favours the view that s9(1) [of the RDA] does not require an intention or motive to engage in what can be described as discriminatory conduct'.

[10] The Bill, Clause 235(1)(e).

[11] The Bill, Clause 235(1)(d).

d) Breaches Australia's international human rights obligations relating to discrimination

In our view, clause 235 breaches Australia's obligations to provide an effective remedy for discrimination on the basis of religion, race and national or ethnic origin under:

- Article 2(2) of the ICCPR;[12] and
- Article 6 of the *International Convention on the Elimination of all Forms of Racial Discrimination*.[13]

In addition, it is possible that the operation of clause 235 will breach the following articles of ICCPR:

- Article 17 which states:

  1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

  2. Everyone has the right to the protection of the law against such interference or attacks.[14]

- Article 26 which states:

  All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[15]

e) Inconsistent with Security Council Resolution 1624 (2005)

Clause 235 also appears to be inconsistent with Security Council Resolution 1624 (2005) which requires states to ensure that its counter terrorism measures are consistent with international human rights law.[16]

f) Potential further alienation of Australia's Arab and Muslim Communities

In our view, the exemption of financial institutions from discrimination laws will increase the perception by some within Australia's Arab and Muslim communities that they are being unfairly targeted by counter terrorism measures.[17]

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[12] As above, note 1.
[13] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).
[14] As above, note 1.
[15] Ibid.
[16] SC Res 1624, UN SCOR, 5261st meeting, UN Doc S/Res/1624 (2005).
[17] see *Ismε – Listen: National Consultations on eliminating prejudice against Arab and Muslim Australians* (2004), pp 67-9

4. Suspicious matters reporting obligations

Considered in conjunction with Clause 235, the broad scope of the suspicious matters reporting obligations (Clause 41) are of considerable concern to the Commission.

4.1 Broad terms of Clause 41

The expansive scope of Clause 41 means that there is a very low threshold determining what information must be reported by a financial institution to AUSTRAC.

Under this section a 'reporting entity' providing (or proposing to provide) a 'designated service', has an obligation to report suspicious information, where there are reasonable grounds for suspecting that such information:

- ***may be relevant to the investigation or prosecution*** of a person for an evasion (or attempted evasion) of a taxation law, or of a State or Territory law related to taxation;[18] or

- ***may be relevant to the investigation of or prosecution*** of a person for an offence against a law of the Commonwealth, a State or Territory.[19]

We note that the scope of this provision has been significantly expanded since the Second Exposure Draft of the Bill. Previously, the Bill provided that financial institutions have a reporting obligation only where the relevant information may be 'connected with a breach or attempted breach…'[20] of a law.

4.2 Likely impact of Clause 41, operating in conjunction with Clause 235

Given financial institutions' exemption from liability under Clause 235, the Commission is concerned that there is a real risk that institutions will apply Clause 41 arbitrarily to certain groups in the community such that discrimination occurs. We note the submissions of Liberty Victoria which suggest ways in which these provisions may have a discriminatory impact.[21]

As with Clause 235 above, there is no incentive for financial institutions to avoid discriminatory and stereotyped assumptions infiltrating the process of ML/TF risk determination. To the contrary, the scope of the provision lends itself to capricious application.

[18] Bill, Clause 41(1)(f)(i) and (ii).
[19] Bill, Clause 41(1)(f)(iii).
[20] Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth), 2nd Exposure Draft (28/06/2006), Clause 39(1)(f)(iii), (iv) and (v)
[21] See submission 1 to this Inquiry.

5. For the reasons outlined, we recommend that Clause 235 be amended

5.1 Recommendation 1

Objective, non–discriminatory criteria should be developed for determining ML/TF risk.

5.2 Recommendation 2

Clause 235 should not extend to federal and state and territory discrimination laws.

5.3 Recommendation 3

If recommendation 2 is not adopted, at the very least, clause 235 should be narrowed to only apply to acts done in *direct compliance* with the bill, regulations or rules.

Human Rights and Equal Opportunity Commission
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