Secretary

Senate Legal and Constitutional Legislation Committee

Parliament House
Canberra ACT 2600

25 June 2004

Dear Secretary

Submission to Inquiry into the provisions of the Anti-Terrorism Bill 2004 (No 2) (Cth)

I am an Associate Lecturer at the School of Law and Legal Studies, La Trobe University.

This letter provides a submission to assist the Senate Legal and Constitutional Legislation Committee ('the Committee') in its inquiry into the Anti-Terrorism Bill (No 2) 2004 (Cth) ('the Bill'). I am also prepared to appear before the Committee to give oral evidence if that should assist the Committee's inquiry.

My submission focuses on the proposal to insert a new offence of 'Associating with Terrorist Organisations' ('terrorist organisation' association offence') into the *Criminal Code Act 1995* (Cth) ('*Criminal Code Act'*). My key contention is that this offence should be rejected. The Committee should do so because this offence:

- imposes guilt by association by criminalising conduct peripherally connected with extreme acts of political/ideological violence;
- is unconstitutionally uncertain because it might infringe an implied freedom of political association;
- will deny 'terrorist organisations' access to legal representation in some circumstances;
- confers broad executive discretion and also risks being discriminatorily applied to Muslim members of the community; and

- is built upon a proscription regime that is enacted on shaky constitutional foundations.

I will deal with these grounds in turn.

Guilt by association by criminalising conduct peripherally connected with extreme acts of political/ideological violence

While the Attorney-General's 2nd Reading Speech is emphatic in denouncing the 'fundamental unacceptability of terrorist organisations as entities',[1] it is important to appreciate that the concept of a 'terrorist organisation' is a statutory notion.

Moreover, it is a statutory notion that embraces organisations that many members of the Australian public will not consider 'terrorist' organisations. This notion, firstly, draws upon the wide definition of a 'terrorist act'[2] which, at its margins, embraces certain forms of industrial action like picketing by nurses.[3] Moreover, it is not restricted to organisations whose key aim is the promotion and engagement of extreme acts of ideological/religious violence. A 'terrorist' organisation can, for example, be an organisation which is predominantly involved in charitable work but is also indirectly involved in a 'terrorist' act.[4]

The breadth of this concept is further amplified because the *Criminal Code Act* confers an *executive* proscription power. This power can be exercised upon the Attorney-General reaching satisfaction that on reasonable grounds, that the organisation is an organisation:

> directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).[5]

The Attorney-General's decision can only be directly challenged through an application for judicial review.[6] Given that such review only tests the legality and not the merits of the Attorney-General's

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[1] Commonwealth, *Parliamentary Debates,* House of Representatives, 17 June 2004, 300063 (Attorney-General, Philip Ruddock). See also Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2004 (Cth) 32.
[2] *Criminal Code Act* s 100.1.
[3] While the definition of a 'terrorist act' excludes 'industrial action' (*Criminal Code Act* s 100.1), this is unlikely to afford any protection to picketing which has been found not to be 'industrial action' under the *Workplace Relations Act 1996* (Cth): *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR, 550, 575 per Wilcox and Cooper JJ (with whom Burchett J agreed at p. 586). For commentary on this case, see John Howe, 'Picketing and the Statutory Definition of 'Industrial Action'' (2000) 13 *Australian Journal of Labour Law* 84-91. The ruling in Davids has subsequently been applied in *Auspine Ltd v CFMEU* (2000) 97 IR 444; (2000) 48 AILR ¶4-282 and *Cadbury Schweppes Pty Ltd v ALHMWU* (2001) 49 AILR ¶4-382.
[4] *Criminal Code Act* s 102.1.
[5] Ibid s 102.1(2).

decision, this power can be legally exercised upon factually wrong but legally unimpeachable grounds. In other words, an executive proscription power, in conjunction with the restricted character of judicial review, has the effect of broadening the range of organisations that can be considered 'terrorist organisations'.

When the true character of a 'terrorist organisation' is appreciated, there is no case for glibly characterising it as fundamentally unacceptable. Recognising the range of organisations that can be legally proscribed as 'terrorist organisations' under the *Criminal Code Act* is also key in evaluating the desirability of any new 'terrorist organisation' offence.

As it stands, the 'terrorist organisation' offences criminalise conduct distantly related to acts like bombings and hijackings. The 'terrorist organisation' training offence vividly illustrates this. As noted above, a 'terrorist' organisation can, for example, be an organisation which is predominantly involved in charitable work but is also indirectly involved in a 'terrorist' act. Moreover, the training element of these offences does not have to be related to a 'terrorist act': it suffices that any training is received or provided to a 'terrorist' organisation.[7] For example, an aid worker providing 'first aid' training in to a predominantly charitable organisation s/he knows has, on a few past occasions, engaged in an extreme act of ideological/religious violence would clearly be committing a training offence. Given that there is knowledge that the organisation is a 'terrorist' organisation, the aid worker presently faces the prospect of 25 years in jail.

The proposed 'terrorist organisation' association offence clearly threatens to expand this dragnet. If the aid worker in the above circumstances were merely providing *emotional* support to a member of a proscribed 'terrorist organisation' for the purpose of providing solace to this member, s/he would arguably be committing this offence. Emotional support is not excluded from the ambit of this proposed offence and the purpose of providing solace to the member could, arguably, be said to intend to assist the organisation continue to exist.

The broad reach of the proposed offence identifies two reasons for rejecting it. First, the necessity for this offence on the ground of preventing extreme acts of political/ideological violence is far

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[6] Such an application can be made at common law, for example, pursuant to section 75(v) of the *Constitution,* or under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

from proven. Second, this offence, by criminalising conduct tenuously connected with extreme acts of political/ideological violence, is a disproportionate measure.

Possible infringement of an implied freedom of political association

While the Bill provides for an exemption in relation to the constitutionally implied freedom of political *communication,*[8] this exemption does not deal with what, perhaps, is the most important constitutional question for the proposed offence: a breach of an implied freedom of political *association.*

While the question whether a freedom of political association should be implied from the *Constitution* has yet to be settled by the High Court.[9] such an implication can be plausibly argued on the basis that it arises from the constitutionally-prescribed system of representative democracy, in particular, sections 7 and 24 of the *Constitution.*[10] McHugh J in *Kruger v Commonweatlh,* for example, stated that:

> the Constitution necessarily implies that "the people" must be free from laws that prevent them from associating with other persons . . . for the purposes of the constitutionally prescribed system of government and referendum procedure.[11]

In a similar vein, Williams has cogently argued that freedom of political association lies within the 'core of representative democracy'. According to this commentator:

> (t)he ability to associate for political purposes is obviously a cornerstone of representative government in Australia. How could the people 'directly choose' their representatives if denied the ability to form political associations and collectively seek political power? The ability to 'choose' must entail the ability to be chosen.[12]

It should be noted that these statements indicate that such a freedom can be implied independently of the implied freedom of political communication.[13]

Assuming that such a freedom is implied from the *Constitution,* the test for validity would be a modified version of the *Lange* test that, in essence, substitutes freedom of political association for freedom of political communication.[14] This test would ask whether:

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[7] *Criminal Code Act* s 102.5.
[8] The Bill, proposed s 102.8(6).
[9] This question might, however, be decided shortly in the case of *Mulholland v Australian Electoral Commission* shortly. For transcripts of the proceedings, see *Mulholland v Australian Electoral Commission* [2004] HCATrans 7-8 (High Court, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 11-2 February 2004).
[10] These sections respectively require that Senators and members of the House of Representatives be 'directly chosen by the people'.
[11] *Kruger v Commonwealth* (1997) 190 CLR 1, 142 per McHugh J.
[12] George Williams, 'Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform' (1996) 20 *Melbourne University Law Review* 848, 861.

- the proposed offence effectively burdens freedom of association about government or political matters either in its terms, operation or effect?
- if it does, is the offence reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people?[15]

The reach of the proposed offence would probably mean an affirmative to the first question. There is then a very live question whether proposed offence is reasonably appropriate and adapted to serve a legitimate end.

Denying 'terrorist organisations' access to legal representation in some circumstances

The Bill provides for exemption for legal advice and representation in connection with criminal proceedings as well as proceedings relating to whether the organisation is a 'terrorist organisation'.[16] This exemption is far too narrow because it does not embrace all non-criminal proceedings. For instance, a 'terrorist organisation' under the *Criminal Code Act* might also be listed as a 'terrorist entity' under the *Charter of United Nations Act 1945* (Cth) by the Foreign Minister. Such listing would mean that it becomes illegal to finance the listed organisation or for the organisation to use or deal with its assets.[17] Such an organisation will, however, be prevented from accessing legal advice and representation for the purpose of challenging its listing under the *Charter of United Nations Act 1945* (Cth), for example, through an application for judicial review. This is because the legal advice and representation exemption does not extend to such proceedings.

Broad executive discretion and discriminatory application to Muslim members of the community

The proposed offence appears to have been modelled upon consorting offences under state criminal law.[18] Like such offences, it is objectionable on the basis that its breadth is likely to mean that the police and prosecution are granted broad discretion whether or not to prosecute.[19]

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[13] The freedom can also be seen as ancillary to the implied freedom of political communication, see *Kruger v Commonwealth* (1997) 190 CLR 1, 120 per Gaudron J.
[14] See *Kruger v Commonwealth* (1997) 190 CLR 1, 128 per Gaudron J.
[15] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567-8.
[16] The Bill, proposed s 102.8(4)(d).
[17] Such conduct is not illegal if authorised by the Foreign Minister: *Charter of the United Nations Act 1945* (Cth) ss 20-1.
[18] See, for example, Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2004 (Cth) 30.

Also, there is a risk such discretion will be selectively exercised. Importantly, there is evidence that the anti-terrorism laws have been disproportionately applied to Muslim members of the Australian community.[20] So far, all persons charged with either a 'terrorist act' or a 'terrorist organisation' offence have been Muslim.[21] Moreover, the overwhelming majority of individuals and organisations proscribed under the *Criminal Code Act* and *Charter of United Nations Act 1945* (Cth) appear to be Muslim.[22] There is then some reason to suspect that this proposed offence, if enacted, will be directed at Muslim individuals and groups.

Built upon a proscription regime enacted on shaky constitutional foundations

The proposed 'terrorist organisation' association offence is built upon the *Criminal Code* proscription regime. Another reason for rejecting this offence is that there is a strong risk that this entire regime is unconstitutional because it gives rise to Bills of Attainder. In this, there is a constitutional prohibition against such Bills arising from the separation of judicial power. A majority of the High Court supported such a prohibition in *Polyukhovich v Commonwealth;*[23] a position that was confirmed by three members of the High Court in *Lim v Minister for Immigration.*[24] Such a prohibition has also been supported by academic commentators including Zines who has characterised the reasoning in *Polyukhovich* as 'unimpeacheable'.[25]

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[19] See generally Alex Steel, 'Consorting in New South Wales: Substantive Offence or Police Power?' (2003) 26(3) *University of New South Wales Law Journal* 567.

[20] This has also been a concern raised by Muslim organisations, see Barney Zwartz, 'Muslims write to MPs about fears on laws', *The Age,* Melbourne, 16 June 2004, 2 and Bilal Cleland, Islamic Council of Victoria quoted in Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] etc* (2002) 27-8.

[21] For details, see Brendan Nicholson, 'Bail for terror accused', *The Age,* 3 June 2004, 1-2.

[22] For organisations proscribed under the *Criminal Code Act,* see *Criminal Code Regulations 2002* (Cth) Schedule 1 & 1A. For persons and entities proscribed under the *Charter of UN Act,* see http://www.dfat.gov.au/icat/persons_entities (accessed on 24 May 2004).

[23] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 539 (Mason CJ); 612 (Deane J); 648 (Dawson J); 686 (Toohey J); 706 (Gaudron J) and 721 (McHugh J). Brennan J did not discuss this question. For a discussion of this case, see James Thomson, 'Is it a Mess? The High Court and the War Crimes Case: External Affairs, Defence, Judicial Power and the Australian Constitution' (1992) 22 *Western Australian Law Review* 197-215; Helen Roberts, 'Retrospective Criminal Laws and the Separation of Judicial Power' (1997) 8 *Public Law Review* 170-85 and Greg Taylor, 'Retrospective Criminal Punishment under the German and Australian Constitutions' (2000) 23(2) *University of New South Wales Law Journal* 196, 203-8. It should be noted that historically, a Bill of Attainder referred to an Act which imposed the death penalty on a specified person/s whereas an Act of this kind which imposed a lesser penalty was referred to as a Bill of Pains and Penalties. For ease of discussion, I shall follow the example of the High Court in *Polyukhovich* and use the term, 'Bill of Attainder' to refer to both types of Acts.

[24] *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 34 (Brennan, Deane and Dawson JJ).

[25] Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166, 169.

The following discusses what is a Bill of Attainder and the reasons why the regulations proscribing 'terrorist organisations' are likely to be Bills of Attainder.

What is a Bill of Attainder?

According to Mason CJ in *Polyukhovich v R:*

> The distinctive characteristic of a bill of attainder . . . is that it is a legislative enactment adjudging a specific person or specific persons guilty of an offence constituted by past conduct and imposing punishment in respect of that offence.[26]

While these statements require that the statute in question proclaim a particular person/s guilty of an offence, the preferable view would be to dispense with such a requirement. If it applied, the prohibition against Bills of Attainder will be largely formalistic as it could be effortlessly avoided merely by omitting to make such proclamation while still imposing a punishment on particular person/s.[27] Moreover, such a formal requirement fits uneasily with statements made by Brennan, Deane and Dawson JJ in *Lim.* In that case, their Honours stated that:

> In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with *substance and not mere form. It would, for example, be beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt.*[28]

The italicised statements would strongly suggest that a formal proclamation of criminal guilt is not an essential element of a Bill of Attainder.

Putting aside the requirement for a formal proclamation of criminal guilt, Mason CJ's statements identify two key elements to a Bill of Attainder. The statute must be directed at a person or group of persons. This could occur either because such person/s are named or because the statute lays down specified characteristics that identify such persons.[29] An example of the latter is when the statute 'designate(s) the persons it seeks to penalize by means of some characteristic (such as membership of an organization) that is independent of and not equivalent to the criminal activity which it is the purpose of the law to prohibit or prevent.'[30] Further, the statute must impose punishment on such person/s.

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[26] Ibid 535 (Mason CJ). See also ibid 612 (Deane J).

[27] See, for example, comments by Zines: Leslie Zines, *The High Court and the Constitution* (1997, 4th ed) 208.

[28] *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (emphasis added).

[29] 'Legislation will amount to a bill of attainder only where it is apparent that the legislature intended the conviction of specific persons for conduct engaged in the past. The law may do that by penalizing specific persons by name or by means of *specific characteristics which, in the circumstances, identify particular persons'*: *Polyukhovich v R* (1991) 172 CLR 501, 647 (Dawson J) (emphasis added). See also ibid 721 (McHugh J). Note that Dawson J merely assumed and did not decide that the separation of judicial power prohibited a bill of attainder.

The Criminal Code proscription power and Bills of Attainder

In the case of *Criminal Code* proscription power, it could not be said that the legislative provisions granting the power constitute a Bill of Attainder: they are not directed at particular person/s nor do they impose punishment on any person/s. The real question is whether proscribing regulations are Bills of Attainder because they are a form of 'disguised legislative punishment'?[31]

This question cannot be answered without comprehending the difference effected by a proscribing regulation in the prosecution of a 'terrorist organisation' offence. In the absence of such a regulation, a successful prosecution of a 'terrorist organisation' offence depends upon proof beyond reasonable doubt that the organisation in question is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)'.[32]

The prosecution is, however, relieved of this burden in relation to proscribed organisations: all that needs to be proven is that the organisation in question is an organisation that has been specified in the *Criminal Code Regulations.* Once that is proved, the organisation is punished because it becomes illegal in many ways to associate with such an organisation.[33] Considered in isolation, a proscribing regulation meets the description of a Bill of Attainder because it will mean that:

> (a) court in applying such a law is in effect confined in its inquiry to the issue of whether or not (the organisation) is one of the (organisation) identified by the law. If (it) is, (its) guilt follows. The proper judicial inquiry as to whether an accused has been guilty of prohibited conduct has thus been usurped by the legislature.[34]

It would, however, be premature to conclude the analysis at this point. This is because the proscribing regulations are made on the basis of ascertainable criteria. In particular, the Attorney-General needs to be satisfied, on reasonable grounds, that the proscribed organisation is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)'.[35] Importantly, this decision is subject to judicial review.[36]

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[30] *Polyukhovich v R* (1991) 172 CLR 501, 647 (Dawson J). See also ibid 536-7 (Mason CJ) and 721 (McHugh J).
[31] Zines, above n 25, 172.
[32] *Criminal Code Act* s 102.1(1).
[33] Ibid ss 102.2-102.7.
[34] *Polyukhovich v R* (1991) 172 CLR 501, 647 (Dawson J). See also ibid 536 (Mason CJ); 706 (Gaudron J) & 721 (McHugh J).
[35] *Criminal Code Act* s 102.1(2).
[36] *Administrative Decisions (Judicial Review) Act 1977* (Cth) and section 75(v) of the *Constitution.*

Does availability of judicial review mean that there is no usurpation of judicial power? This will depend on whether judicial review of the Attorney-General's decisions can be said to be an adequate substitute for judicial determination of whether an organisation is a 'terrorist organisation' in a criminal trial. If such review were an adequate substitute then it cannot be said that the proscribing regulation has 'substituted the judgement of the legislature for that of a court.'[37]

In favour of adequacy is the fact that judicial review is directed at the question whether a proscribed organisation is a 'terrorist organisation'. Despite this, it falls far short of being a proper substitute for judicial determination of this question in a criminal trial. Judicial review is merely concerned with the legality of the Attorney-General's decision. As noted above, this means that factually incorrect decisions will not necessarily be set aside.[38] In a criminal trial, however, there must be proof beyond reasonable doubt that the organisation in question is a 'terrorist organisation'. Moreover, the burden of proof in such trials lies on the prosecution whereas in an application for judicial review, the applicant bears the burden. Summing up, the inadequacy of judicial review means that it is strongly arguable that the regulations proscribing organisations are Bills of Attainder because they impose criminal punishment upon specified groups of persons.

Thank you for reading my submission.

Yours sincerely,

(Joo-Cheong Tham)

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[37] *Polyukhovich v R* (1991) 172 CLR 501, 646 (Dawson J).
[38] See generally Roger Douglas, *Douglas and Jones's Administrative Law* (2002, 4th edition) Chapter 15.