The Secretary
Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

16 November 2006

Dear Secretary,

Supplementary submission in relation to Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth)

This supplementary submission addresses the questions on notice asked by Senators Murray and Ludwig during the Senate Legal and Constitutional Affairs Committee's ('the Committee') public hearing into the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth) ('the Bill') that was held in Melbourne on 14 November 2006.

Senator Murray's question

The question raised by Senator Murray was whether improved transparency and accountability of not-for-profit entities ('NFP entities') would address some of the risks created by overly broad 'financing of terrorism' offences.

The answer is yes to some extent. Insofar as a person might be reckless as to whether his or her funds will be used to facilitate 'terrorist acts' under the *Criminal Code* and, therefore, commit an offence under Division 103 of that Act, greater accountability on the part of some NFP entities, in particular, transparency in terms of where donations are going,[1] will reduce the chance of such offences being committed. Such transparency will not, however, address the problems

[1] See Senator Andrew Murray, *One Regulator, One System, One Law: The Case for Introducing a New Regulatory System for the Not for Profit Sector* (July 2006) 21-27.

created by the other 'financing of terrorism' offences, notably, section 102.6 of the *Criminal Code* and sections 20-1 of the *Charter of United Nations Act 1945* (Cth). As noted in Liberty Victoria's earlier submission, these offences criminalise some purely humanitarian donations.[2] The problem here is not that donors are in the dark as to where their funds are going but that they are prohibited from making charitable donations.

More generally, the issues raised by Senator Murray and, in particular, the question of uniform regulation of NFP entities and whether there should be a Charities Commission,[3] should be considered together with any measures to tackle the problem of financing of terrorism through NFP entities. The latter is clearly an issue on the agenda. The Financial Action Task Force's Special Recommendation VIII, for instance, states that:

> (c)ountries should review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism. Non-profit organisations are particularly vulnerable . . .

Failure to consider the broader issues raised by Senator Murray when designing counter-terrorism measures in relation to the NFP entities will continue the unfortunate trend of 'piecemeal' regulation of the NFP sector.[4]

Senator Ludwig's questions

Senator Ludwig asked for Liberty Victoria's opinion on the requirement to provide a 'suspicious matters' report under clause 41(1)(f)(iii) of the Bill. This provision requires such a report to be provided when a 'reporting entity' suspects on reasonable grounds that the information it has concerning the provision of a 'designated service':

> may be relevant to the investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a State or Territory.[5]

The fundamental difficulty with this requirement is that it is so broad so as to risk meaninglessness. To be workable, this requirement would require staff of 'reporting entities' not only to aware of the various Commonwealth, State and Territory laws but also to be trained to spot the risk of these offences occurring. In short, this requirement requires such staff to have an encyclopedic knowledge of the law and to have investigative expertise. These are clearly unsound premises.

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[2] See the examples described in Liberty Victoria, *Submission in relation to Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth)* (November 2006) 2-3.
[3] See Senator Andrew Murray, *One Regulator, One System, One Law: The Case for Introducing a New Regulatory System for the Not for Profit Sector* (July 2006) 58.
[4] Mark Lyons quoted in Senator Andrew Murray, *One Regulator, One System, One Law: The Case for Introducing a New Regulatory System for the Not for Profit Sector* (July 2006) 58.

This highlights a more general point regarding the Bill. The broader it casts its net in terms of offences for which it requires 'suspicious matters' reports, the greater the risk of ineffectiveness. Faced with overly broad obligations, staff of 'reporting entities' will 'over-comply' in order to avoid the penalties provided by the Bill and, as a result, flood the system with meaningless and irrelevant information. On the other hand, if the offences subject of the Bill were more specific and focussed, its effectiveness is likely to be enhanced with the possibility of staff of 'reporting entities' being trained to identify the risk of such offences occurring. For these reasons, Liberty Victoria *recommends the removal of clause 41(1)(f)(iii) of the Bill.*

Senator Ludwig also asked for Liberty Victoria to consider the Privacy Impact Assessment by Salinger & Co and the Privacy Impact Statement by the Attorney-General's Department. While time has not permitted a very close analysis of these documents, several points can be made. First, *these documents should be made public by publishing them on-line*.[6] Second, the government is to be congratulated for accepted some of recommendations of the Privacy Impact Assessment, in particular, its recommendation that the 'small business' exemption under the *Privacy Act 1988* (Cth) be removed when an organisation is a 'reporting entity' under the Bill.[7]

Third, several of the recommendations of the Privacy Impact Assessment support those made by Liberty Victoria in its earlier submission. In particular, the assessment calls for anti-discrimination statutes to be specifically exempt from the immunity in Clause 235 of the Bill[8] and a consultation process that formally involves consumer and public interest organisations.[9]

Fourth, the assessment also raised a concern expressed by Senator Ludwig, that is, the use of AML/CTF rules to determine who is (or is not) subject to substantive obligations under the Bill and the substance of these obligations. In the Melbourne public hearings, Senator Ludwig noted clause 42 which allowed for 'reporting entities' to be exempted from the 'suspicious matters' reporting obligations if so specified in the AML/CTF rules. This clause is merely one of the many which allow the AML/CTF rules to determine who is (or is not) subject to the obligations

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[5] The Bill cl 41(1)(f)(iii).
[6] See Salinger & Co, *Privacy impacts of the Anti-Money Laundering and Counter-Terrorism Financing Bill and Rules, 2006: A Privacy Impact Assessment for the Australian Government Attorney-General's Department* (2006) 7 (footnote 1).
[7] *Anti-Money Laundering and Counter-Terrorism Financing (Transitional Provisions and Consequential Amendments) Bill 2006* (Cth) cl 152.
[8] Salinger & Co, *Privacy impacts of the Anti-Money Laundering and Counter-Terrorism Financing Bill and Rules, 2006: A Privacy Impact Assessment for the Australian Government Attorney-General's Department* (2006) 75.
[9] Ibid 95.

under the Bill. Exemptions can also be provided under these rules in relation to identification procedures,[10] threshold transactions obligations,[11] anti-money laundering and counter-terrorism financing programs.[12] Whether or not a remittance arrangement is a 'designated remittance arrangement' under the Bill and, therefore, subject to the obligations of the Bill is also to be determined by such rules.[13]

Clauses of this kind breach principles set out in the Department of Prime Minister and Cabinet's *Legislation Handbook.* This document provides that:

> 1.12 . . . Matters of the following kinds should be implemented only through Acts of Parliament . . .
> (c) rules which have a significant impact on individual rights and liberties;
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> (d) provisions imposing obligations on citizens or organisations to undertake certain activities (for example, *to provide information or submit documentation* . . .
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> . . .
>
> (f) provisions creating offences which impose significant criminal penalties (imprisonment or fines equal to more than 50 penalty units for individuals or more than 250 penalty units for corporations);
> (g) provisions imposing administrative penalties for regulatory offences (administrative penalties enable the executive to receive payment of a monetary sum without determination of the issues by a court).[14]

These principles were echoed by the High Court in the *WorkChoices* decision when it described laws which allowed for substantive obligations to be determined by subordinate legislation as 'undesirable'.[15] In order to comply with these principles, Liberty Victoria recommends that:

- *the recommendations of the Privacy Impact Assessment that requirements for on-going customer due diligence and employee screening to be specifically defined in the Bill rather than in the AML/CTF rules be adopted;*[16] *and*
- *provisions of the Bill in breach of these principles be redrafted.*

Lastly, some of sentiments expressed by Attorney-General's Department's *Privacy Impact Assessment* emphasise the need for robust parliamentary scrutiny of the Bill and its implementation. In this document, it is stated that:

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[10] The Bill cl 39.
[11] The Bill cl 44.
[12] The Bill cl 93.
[13] The Bill cl 10(1)(c).
[14] Department of Prime Minister and Cabinet, *Legislation Handbook* (2000) para 1.12 (emphasis added and footnotes omitted) (available at http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.rtf on 15 November 2006)
[15] *NSW v Commonwealth (WorkChoices Case)* [2006] HCA 52 (Unreported, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, 14 November 2006) para 399. The majority of the High Court were referring to section 356 of the *Workplace Relations Act 1996* (Cth) which allowed the regulations to be made with respect to 'prohibited content'.
[16] Salinger & Co, *Privacy impacts of the Anti-Money Laundering and Counter-Terrorism Financing Bill and Rules, 2006: A Privacy Impact Assessment for the Australian Government Attorney-General's Department* (2006) 42.

> The question of whether privacy impacts of the *AML/CTF legislative package* can be justified as a proportional response to the problems caused by money laundering and terrorist financing in the current climate of heightened criminal and terrorist activity is *a decision for the Australian government.*[17]

This statement, at best, fundamentally misconceives the principles of democratic accountability in Australia's parliamentary system and, at worse, demonstrates a certain conceit. Whether the Bill is a proportionate response is *not*, as this statement would have it, a decision for the government rather it is *a decision for the Commonwealth Parliament*. Equally important, Parliament is to reach its judgment after a democratic process that provides reasoned explanations for legislative changes.[18] This requirement is not met by bald assertions that laws are proportionate. It is crucial in light of these sentiments that arrangements are made to ensure adequate parliamentary oversight.[19]

Should you have any further queries, please do not hesitate to contact the author of this submission.

Yours sincerely,

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[17] Attorney-General's Department, Criminal Justice Division, *Privacy Impact Statement: Anti-Money Laundering and Counter-Terrorism Financing Bill & Rules* (2006) 3 (emphasis added).
[18] For elaboration, see John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (1998); Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (2004).
[19] See the recommendations of Liberty Victoria, *Submission in relation to Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth)* (November 2006) 15.