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

10 November 2006

Dear Secretary,

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

Thank you for your invitation to make a 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'). The following is a submission made on behalf of Liberty Victoria.

Liberty Victoria submits that the Bill:

- is unjustifiably based on overly broad financing of terrorism offences;
- poses the risk of discrimination based on race, religion and nationality;
- erodes the rule of law;
- undermines privacy; and
- fails to ensure that AUSTRAC CEO is democratically accountable especially in relation to the making of AML/CTF rules and guidelines.

Based on overly broad financing of terrorism offences

If enacted, the Bill will require 'reporting entities' to take a range of measures to deal with the risk of 'financing of terrorism'. Under the Bill, this is defined to include conduct that amounts to

an offence against section 102.6 and Division 103 of the *Criminal Code Act 1995* (‘*Criminal Code’*) as well as conduct that constitutes an offence against sections 20 and 21 of the *Charter of United Nations Act 1945* (Cth).[1]

These offences, in particular, that found in section 102.6 of the *Criminal Code*, are very broad and capture conduct that go far beyond intentional funding of politically or religiously motivated violence.[2] Under section 102.6 of the *Criminal Code*, it is illegal to fund a ‘terrorist organisation’ *regardless* of the use to which the funds are put. For example, giving money to Hamas for the sole purpose of assisting its humanitarian activities is punishable by 25 years if the donor knows that recipient of funds is Hamas.

In the context where all but one of the listed ‘terrorist organisations’ under the *Criminal Code* are self-identified Muslim groups, the *Criminal Code* ‘terrorist organisation’ provisions have resulted in a tangible sense of fear and uncertainty amongst Muslim Australians especially in relation to charity giving. For instance, Waleed Aly, a committee member of the Islamic Council of Victoria has observed in relation to section 102.6 of the *Criminal Code*:

> This level of uncertainty in an offence this serious is deeply worrying. And for Australian Muslims, doubly so. Because charity is one of the five pillars on which Islamic practice is built, Muslims tend to be a charitable people. That is especially true at certain times of the Islamic year when charity is religiously mandated. Countless fund-raising efforts followed the tsunami and the Pakistan earthquake, and even in the normal course of events, Muslim charities regularly provide relief to parts of the Muslim world many other charities forget.[3]

The scope of sections 20 and 21 of the *Charter of United Nations Act 1945* (Cth) is also disturbingly broad. Once an entity is either proscribed by regulation or listed by the Foreign Minister under this statute, the effect of these sections is that it becomes illegal to use or deal with the assets of that entity and to in/directly provide assets to that entity. Both offences are punishable by a maximum of five years’ imprisonment.[4]

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[1] The Bill cl 5.

[2] See Senate Legal and Constitutional Affairs Committee, Provisions of the Anti-Terrorism Bill (No. 2) 2005 (2006) paras 7.46-7.72.

[3] Waleed Aly, ‘Reckless terror law threatens to make charity end at home’, *The Age*, 29 November 2005, 15. See generally Jude McCulloch, Sharon Pickering, Rob McQueen, Joo-Cheong Tham and David Wright-Neville, ‘Suppressing the Financing of Terrorism’ (2004) 16 *Current Issues in Criminal Justice* 71-8; Jude McCulloch and Sharon Pickering, ‘Suppressing the Financing of Terrorism: Proliferating State Crime, Eroding Censure and Extending Neo-colonialism’ (2005) 45 *British Journal of Criminology* 470.

[4] Such conduct is not illegal if authorised by the Foreign Minister: *Charter of the United Nations Act 1945* (Cth) ss 20-1. For an analysis of the constitutional issues relating to this proscription power, see Joo-Cheong Tham, ‘Possible Constitutional Objections to the Powers to Ban ‘Terrorist’ Organisations’ (2004) 27 *University of New South Wales Law Journal* 482, 509-21.

The reach of these offences is well illustrated by the listing of the Liberation Tigers of Tamil Eelam ('LTTE') under this statute. Because this group has been listed under the *Charter of United Nations Act 1945* (Cth), it is a crime to in/directly provide funds to this organisation *regardless* of the purpose to which the funds are put. For instance, donating to the LTTE for the exclusive purpose of assisting reconstruction in the wake of the tsunami disaster is illegal under this Act.

This is of grave concern especially given that the Australian Federal Police has acted upon this listing by raiding Tamil Co-ordinating Committee of Australia in November last year:[5] The effect of these raids has been to generate fear amongst the Sri Lankan Tamil communities in Australia. Speaking at a forum organised by the Equal Opportunity Commission of Victoria in partnership with the Institute for International Law and the Humanities, the University of Melbourne Law School and the Federation of Community Legal Centres, Pratheepan Balasubramaniam, Spokesperson for the Australian-Tamil Rights Council, observed:

> The impact of the (counter-terrorism) laws is very real and reverberated within the community after the November raids and its public reporting. Many Tamils contribute towards their community either through political or humanitarian means . . . There is also a concern that donations for genuine humanitarian and cultural purposes may be caught by the wide 'financing terrorism' laws. Many Tamils in Australia make significant donations to Sri Lankan-registered NGOs, relatives and friends. Funds are raised in Australia for various clearly identified humanitarian projects in Sri Lanka including medical centres and health programs, child sponsorship, nutrition centres, resettlement and livelihood programs undertaken by Sri Lankan-registered NGOs and civil society groups that operate in LTTE-controlled areas. It is well-known that for over 20 years the minority Tamils of Sri Lanka have relied heavily on political support and contributions made by Tamil relatives overseas and humanitarian organisations to survive and meet their daily needs.[6]

The crucial significance of the breadth of the financing of terrorism offences is that the Bill is directed at dealing with *risk* of these offences occurring, for instance, through suspicious matters reporting obligations[7] and anti-money laundering and counter-terrorism financing programs.[8] As a consequence, the risk of Muslims donating to 'terrorist organisations' or Sri Lankan Tamils giving to the LTTE even for purely humanitarian purposes becomes the target of the Bill's provisions. This raises the spectre of Australian Muslims and Australian Tamils being disproportionately subject to suspicious matters reports with their personal financial information

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[5] Selma Milovanovic, Brendan Nicholson and Fergus Shiel, 'Raids target Tamil Tigers links', *The Age*, 24 November 2005, 1; Rachel Kleinman, 'Police search for terror money trail', *The Age*, 25 November 2005, 6; Brendan Nicholson and Rachel Kleinman, 'Police follow money terror trail', *The Age*, 25 November 2005, 6; Fergus Shiel and Rachel Kleinman, 'Local Tamils deny funding secessionist brothers', *The Age*, 25 November 2005, 6.

[6] Pratheepan Balasubramanian, Spokesperson for the Australian-Tamil Rights Council (Presentation delivered at the 'Responding to the Anti-terrorism Legislation – Update and Monitoring' Forum, Law Faculty, University of Melbourne, 27 September 2006 (copy on file with author).

[7] The Bill cl 41(1)(g)-(h).

[8] The Bill, Division 3, Part 7.

being passed onto AUSTRAC and other government agencies. Similarly, such citizens may find that they are required to comply with more stringent procedures before being able to receive a 'designated service'.

Moreover, sections 20-1 of the *Charter of United Nations Act 1945* (Cth) and section 102.6 of the *Criminal Code* by *not* requiring that there be intention or knowledge that funds be used to facilitate acts of violence is at odds with provisions of the *International Convention for the Suppression of the Financing of Terrorism* and the Financial Action Task Force's *Special Recommendations on Terrorist Financing;* provisions that are said to form part of the basis of the Bill.[9] Both these documents, while calling for the criminalisation of the financing of terrorism,[10] define financing of terrorism in a narrower manner than sections 20-1 of the *Charter of United Nations Act 1945* (Cth) and section 102.6 of the *Criminal Code*, by emphasising the need for an intention or knowledge that funds will be used to carry out terrorism.[11]

Unlike the offences in sections 20-1 of the *Charter of United Nations Act 1945* (Cth) and section 102.6 of the *Criminal Code*, those in Division 103 of the *Criminal Code* at least require that the funds have some connection with the engagement of a 'terrorist act. *It is, therefore, recommended that 'financing of terrorism' under the Bill be restricted to conduct that amount to an offence under Division 103 of the Criminal Code.*

Risk of discrimination based on race, religion and nationality

According to a joint communique issued by the Minister for Justice and Customs and representatives of the financial industry. '(t)here was general agreement on the concept that the new system should allow a risk-based approach, with a regulatory framework, which allows the flexible application of obligations'.[12] This approach is expressly recognised in the Draft Consolidated AML/CTF Rules with clause 1.2 declaring a 'risk based approach' to compliance.[13] Accordingly, the draft AML/CTF Rules requires 'appropriate risk based systems and controls' in

[9] The Bill cl 3(3)(a), 3(3)(e).
[10] *International Convention for the Suppression of the Financing of Terrorism* (1999) Article 2; Financial Action Task Force, *Special Recommendations on Terrorist Financing* (2004) Special Recommendation II.
[11] See *International Convention for the Suppression of the Financing of Terrorism* (1999) Article 2(1); Financial Action Task Force, *Interpretive Notes to the Nine Special Recommendations on Terrorist Financing: Interpretative Note to Special Recommendation II* cl 2-3.
[12] Senator Chris Ellison, Minister for Justice and Customs and representatives of the Financial Services Sector, 'Joint Communique: Industry Roundtable on Anti-Money Laundering between the Minister for Justice and Customs, Senator Chris Ellison and representatives of the Financial Services Sector' (Press release, 21 July 2005) (available at http://www.ag.gov.au/agd/WWW/justiceministerHome.nsf/ on 6 June 2006).

relation to customer identification programs,[14] KYC information systems,[15] transaction Monitoring programs,[16] enhanced Customer Due Diligence programs [17]and employee due diligence programs.[18]

This approach will mean that 'reporting entities' will have significant discretion in complying with their AML/CTF obligations. In particular, financial institutions have considerable discretion in constructing the risk profiles of their customers. This discretion carries a serious danger of discrimination based on race, religion and nationality.

The central point is that the task of identifying high-risk customers and, more generally, determining when funds are being used for money-laundering and counter-terrorist financing, is extremely difficult and time-consuming. This stems from the fact that techniques for laundering funds and financing terrorism are also common business techniques. This is especially the case with funds used to finance terrorism. Indeed, the sources of such funds are often legitimate. As an AUSTRAC manual puts it, 'terrorist financing often involves the task of filtering *legitimate funds* into terrorist hands'.[19] For this reason, financing of terrorism is sometimes dubbed 'reverse money-laundering'.[20] This means that in-depth investigation is required 'in determining the potential use of funds in terrorist activity and contemplating the means by which an innocent intermediary might determine this'.[21]

The complexity and laborious nature of this task gives rise to the temptation that 'reporting entities' and their staff will attempt to cut short their efforts by resorting to discriminatory grounds. This is an acute danger for several reasons. The Bill, if enacted, will likely make it legal to collect 'sensitive information' under *Privacy Act 1988* (Cth), that is, information concerning these various attributes.[22] Moreover, inadequate training of staff will increase this temptation.

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[13] AUSTRAC, *Draft Consolidated AML/CTF Rules for Discussion* (4 July 2006) cl 1.2.
[14] Ibid cl 2.2.1 (individuals), 2.3.1 (companies), cl 2.4.1(trustees), cl 2.5.1 (partnerships), 2.6.1 (associations), 2.7.1 (registered co-operatives), 2.8.1 (government entities).
[15] Ibid cl 6.2.
[16] Ibid cl 6.3.2.
[17] Ibid cl 6.4.3.
[18] Ibid cl 8.3.2-8.3.3.
[19] AUSTRAC, *Anti-Money Laundering eLearning Application* (2006), Module 14 (available at http://www.austrac.gov.au/aml_elearning/html_version/html/aml_14.html on 6 June 2006) (emphasis added).
[20] Tan Sin Liang, 'The Threat of Terrorism and Singapore's Legislative Response to Terrorism Financing' (2003) 7 *Journal of Money Laundering Control* 139.
[21] Greg Roder, 'The impact of Australian anti-terrorism legislation on securities legislation and the authority of market regulators' (2004) 17 *Australian Journal of Corporate Law* 233, 237.
[22] *Privacy Act 1988* (Cth) Schedule 3, National Privacy Principles, cl 10.1(b).

Even under the *Financial Transactions Reports Act 1988* (Cth), one commentator has described the money-laundering related training provided by Australian financial institutions to their staff as 'lax'.[23]

The danger of discrimination against Muslim individuals is most serious. There are currently strong perceptions amongst Arab and Muslim Australians that counter-terrorism measures targeted their communities. The most recent review of these laws, the Sheller Review, for instance, concluded that such laws have contributed to these citizens experiencing 'a considerable increase in fear, a growing sense of alienation from the wider community and an increase in distrust of authority'.[24] If enacted, the Bill will exacerbate the situation.

Key to appreciating this is the requirement that 'reporting entities' monitor the risk that a particular customer poses of 'financing of terrorism'; a concept that, as noted above, includes offences against section 102.6 and Division 103 of the *Criminal Code.* In their various ways, these offences criminalise the provision and receipt of funds from 'terrorist organisations' under the *Criminal Code.* As also noted above, 18 of the 19 groups banned as 'terrorist organisations' under the *Criminal Code Act 1995* (Cth) are self-identified Muslim groups.[25] In the context of inadequate training and difficulties in identifying when money is used to fund terrorism, there is a significant risk that this fact is used by staff of 'reporting entities' to construct profiles based their perception of whether or not an individual customer is Muslim.

There is another factor that increases the risk of discrimination against Muslims. At the heart of approach to identifying suspect funds is a commercial model. As an AUSTRAC manual states, '(a)ctivities that make little or no business sense' is a factor for concluding that a transaction is suspect.[26] Under this commercial model, non-commercial financial decisions, for instance, charity giving, is naturally suspect. This is especially a problem for Muslims because of their

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[23] Jackie Johnson, 'Fighting Money Laundering: Are Financial Institutions doing enough?' (June 2000) *Journal of Banking and Financial Services* 8, 8. See also Jackie Johnson, 'A Legal Requirement' (June 2000) *Journal of Banking and Financial Services* 13.

[24] Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) 5. For similar findings, see Human Rights and Equal Opportunity Commission, *Isma – Listen: National Consultations on eliminating prejudice against Arab and Muslim Australians* (2004) 67-9.

[25] See *Criminal Code Regulations 1995* (Cth)

[26] AUSTRAC, *Anti-Money Laundering eLearning Application* (2006), Module 8 (available at http://www.austrac.gov.au/aml_elearning/html_version/html/aml_14.html on 6 June 2006).

religious obligation to perform *zakat*, a type of charity giving.[27] The risk here is that religious observance is characterised as suspicious activity.

The risk of discrimination on prohibited grounds is not fanciful. Indeed, the Australian Bankers' Association implicitly recognised this when it called for a closer consideration of the relationship between the AML/CTF Bill and anti-discrimination laws.[28] Moreover, evidence given by the Australian Friendly Societies Association to the Senate Committee inquiry into the Bill expressly contemplated some customers perceiving that the rejection of their business was due to 'discrimination on the grounds of race'.[29] Two banking and finance lawyers, Beatty and O'Grady, put it more plainly when they observed that:

> Financial institutions are required to comply with the provisions of anti-discrimination legislation. This requirement has the potential to conflict with requirements in AML legislation . . . Any risk-based approach will require financial institutions to more strenuously apply their KYC and reporting obligations when dealing with 'suspect persons or countries'. In this way, certain persons may be subject to more rigorous standards and checks than others, *purely by virtue of their nationality, religion, political beliefs and so on*.[30]

Similarly, the need to discriminate on prohibited grounds has been recognised by the government.[31]

Not only is there a risk of discrimination on prohibited grounds but the Bill *sanctions such discrimination* by providing an immunity from action or suit under any law 'in relation to anything done, or omitted to be done, in good faith' by reporting entity and its officers, employees and agents 'in compliance, or in purported compliance' with provisions of the Act, regulations and AML/CTF rules.[32]

The government's position on this issue is that such discrimination is merely a theoretical possibility. The Explanatory Memorandum to the Bill states in relation to clause 235 which proposes to provide the above immunity:

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[27] Various commentators have noted this point, see, for example, Herbert Morais, 'The War Against Money Laundering, Terrorism, and the Financing of Terrorism' {2002) *LAWASIA Journal* 1, 20.
[28] Australian Bankers' Association, *Submission to the Senate Legal and Constitutional Legislation Committee's Inquiry into the Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005* (March 2006) 25. See also Senate Legal and Constitutional Legislation Committee, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005* (2006) 47.
[29] Senate Legal and Constitutional Legislation Committee, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005* (2006) 43.
[30] Andrea Beatty and Ros Grady, 'Anti-money laundering legislation – the 'big picture' (2005) 21(2) *Australian Banking and Finance Law Bulletin* 27, 29 (emphasis added).
[31] See Andrea Beatty and James Moore, 'Australian anti-money laundering roundtable' (2005) 21(2) *Australian Banking and Finance Law Bulletin* 31, 31.
[32] The Bill cl 235.

> This clause is not intended to override the Racial Discrimination Act. While it is accepted that there is a theoretically possibility that a person acting in good faith could breach the Racial Discrimination Act 1975 the Chief General Counsel of the Australian Government has advised that he considers that the likelihood of a person being able to show good faith in relation to an action otherwise contrary to the Racial Discrimination Act 1975 is likely to be very difficult and exceptional. The Chief General Counsel has also advised that while it may be argued that there is still a basis for concern because a breach of the Racial Discrimination Act 1975 can occur not only through deliberate or knowing conduct, but through behaviour that is found to amount to indirect discrimination because of its effect. Reasonable diligence could have been used but discrimination may still result. He does not consider this to be a likely outcome except in an exceptional case. In the Chief General Counsel's opinion, if reasonable diligence has not been used in the application of the Bill or procedures under it then clause 235 would not excuse a breach of the Racial Discrimination Act 1975. If there has been reasonable diligence a breach of the Racial Discrimination Act is likely to be difficult to establish.[33]

While the details of Chief General Counsel's opinion are not fully provided in the Explanatory Memorandum to the Bill, several points should be made in response. The first is obvious. Statements in explanatory memoranda, while of assistance in interpreting legislation, do not represent statutory provisions. So if it is the intention of the government not to override the *Racial Discrimination Act 1975* (Cth) through clause 235 then the Bill should expressly state that to be the case.

Second, 'reasonable diligence' is *not* a requirement for the application of clause 235. This is obvious from the absence of such a requirement. Indeed, such a requirement was present in the first Exposure Draft of the Bill with the clauses providing protection from liability 'in relation to anything done, or omitted to be done, by the reporting entity, officer, employee, agent or person in good faith *and without negligence'* in compliance with the provisions of the Bill.*[34]* This requirement has been clearly removed prior to publication of the second Exposure Draft and the current Bill.

Third, notions of 'good faith' will be shaped by prevailing practices. In the context where some financial institutions have publicly acknowledged the need to discriminate based on race and religion in order to comply with the provisions of the Bill, such discrimination may very well be compatible with acting in 'good faith'. Moreover, conduct done in good faith may still in breach of anti-discrimination statutes because motive is irrelevant to whether a person discriminates in breach of these statutes.[35] There is then little reason to think that conduct, otherwise in breach of anti-discrimination statutes, will not be protected by clause 235.

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[33] Explanatory Memorandum, Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth) 193.
[34] See, for example, AML/CTF Exposure Draft (13 December 2005) cl 36, 46, 64.
[35] See, for example, *Equal Opportunity Act 1995* (Vic) s 10.

Lastly, as has been recognised by major reviews of Australia's counter-terrorism laws, the discriminatory effects associated with such laws, especially as they impact upon Muslim communities, is a recurrent feature of these laws. Such effects are of singular public importance. Therefore, if the evidence discloses the risk of counter-terrorism laws being applied in a discriminatory manner, as is the case here, concrete measures should be taken to address this risk.

We, therefore, recommend that:

- *the clause providing for protection against liability not include federal and state anti-discrimination statutes;*
- *protection against liability only apply when there is no negligence (as was the case with the first Exposure Draft); and*
- *the policies governing the AML/CTF programs of 'reporting entities' expressly state that prohibited grounds under federal and state anti-discrimination statutes shall not be used as significant determinants of risk of money-laundering or financing of terrorism.*

Eroding the Rule of Law

If the Bill is enacted, it is clear that 'reporting entities' will have greater access to the financial information of citizens. Once it comes into effect, 'reporting entities' will be required institute more demanding and regular customer verification procedures as well as maintain and comply with anti-money laundering and counter-terrorism financing programs. Moreover, 'reporting entities' will be required to keep records made in the process of complying with the provisions of the Bill for seven years.[36] There is also the prospect of 'defensive filing' or over-filing of Suspicious Matters reports by 'reporting entities' anxious to avoid the penalties imposed by the Bill.[37]

The filing of a Suspicious Matters report in relation to an individual will mean that financial information regarding this individual will be available not only to AUSTRAC, the body receiving the report, but also to a range of other Australian and foreign authorities. Under the Bill, officials of the Australian Taxation Office are entitled to access information held by AUSTRAC.[38] Moreover, the AUSTRAC CEO can authorise officials of designated agencies to access such

[36] The Bill Part 10.
[37] Andrea Beatty and Ros Grady, 'Anti-money laundering legislation – the 'big picture' (2005) 21(2) *Australian Banking and Finance Law Bulletin* 27, 27.
[38] The Bill cl 125.

information.[39] Upon application, s/he can also authorise access by non-designated Commonwealth agencies.[40] Once the Bill comes into effect, it is likely that the current access arrangements under the *Financial Transactions Reports Act 1988* (Cth) will continue with various agencies including Australian Federal Police, State and Territory police and ASIO having general access, i.e. on-line access to data governed by memorandums of understanding, and specific access to information through referrals of information instigated by AUSTRAC.[41]

Significantly, information collected by AUSTRAC can be passed on to foreign authorities in various ways. AUSTRAC itself can communicate such information to a foreign authority if the AUSTRAC CEO is satisfied that it is appropriate to communicate such information and appropriate undertakings have been given by the foreign authority protecting the confidentiality and controlling the use of such information.[42] It can be readily expected that AUSTRAC will make regular use of this provision and at least continue the arrangements it has with 41 nations under the *Financial Transactions Reports Act 1988* (Cth) providing them access to AUSTRAC's information.[43]

The Commissioner of the Australian Federal Police[44] and the Chief Executive Officer of the Australian Crime Commission[45] may also communicate information to foreign law enforcement agencies if authorised by the AUSTRAC CEO and if s/he is satisfied that it is appropriate to communicate such information and the requisite undertakings have been given by the foreign law enforcement agency protecting the confidentiality and controlling the use of such information. The Director-General of ASIO can communicate AUSTRAC information to a foreign intelligence agency without the authorisation of the AUSTRAC CEO so long as the Director-General is satisfied that it is appropriate to communicate such information and appropriate undertakings have been given protecting the confidentiality and controlling the use of such information.[46]

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[39] Ibid cl 126.
[40] Ibid cl 129.
[41] See AUSTRAC, 'About AUSTRAC', available at http://www.austrac.gov.au/ about/index.htm (available on 25 May 2006). For details on such access, see AUSTRAC, *Annual Report 2004-05* (2005) 27-33; AUSTRAC, *Annual Report 2005-06* (2006) 52.
[42] The Bill cl 132(1).
[43] AUSTRAC, *Annual Report 2004-05* (2005) 53-4.
[44] The Bill cl 132(2)-(4).
[45] The Bill cl 132(5)-(7).
[46] The Bill cl 133.

What this description highlights is that, if the Bill is enacted, personal information of some citizens will through the conduit of Suspicious Matters reports be available to a broad range of Australian and foreign authorities. Such flows of information are, however, kept secret from the affected persons because of the 'tipping off' offence that generally prohibits disclosure of the fact that a Suspicious Matter report has been filed or the reasons for filing such a report.[47]

It is the secrecy surrounding these flows of information that undermines the rule of law. Citizens subject to a Suspicious Matters report are not in a position to ensure that the 'reporting entity', AUSTRAC or other authorities in possession of his or her personal information are complying with the law. This is simply because s/he would not know such information has been communicated. The rule of law is put under even greater pressure when information flows onto to foreign authorities where there are additional practical difficulties of monitoring the compliance of these foreign authorities with their undertakings.

To address these problems, the Bill should provide for other mechanisms to ensure that practices surrounding the communication of information relating to Suspicious Matters and other reports comply with the law. *It is recommended that the Privacy Commissioner and/or the Human Rights and Equal Opportunity Commission be empowered to conduct regular audits of these practices for the purpose of determining whether they comply with the law.*

Undermining Privacy

The Bill clearly raises privacy issues. As a representative from the Credit Union Industry Association has observed in relation to the first Exposure Draft, '(t)here is a kind of deputisation of the entire financial sector to gather information on people and report information on people to a vast number of federal agencies'.[48]

The privacy implications are all the more serious given that the *Privacy Act 1988* (Cth) will have limited application to the collection, use and disclosure of information under the Bill. This is because many requirements under the *Privacy Act 1988* (Cth) relating to collection, use or disclosure of information do not apply when such collection etc is authorised or required by

[47] The Bill cl 123.
[48] Luke Lawler, Credit Union Industry Association quoted in Senate Legal and Constitutional Legislation Committee, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005* (2006) 61.

law.[49] For instance, under the National Privacy Principle 10, an organisation is typically prohibited from collecting 'sensitive information'[50] that is, information concerning particular attributes of an individual including her or his racial or ethnic origin, political opinions, religious beliefs or affiliations.[51] This prohibition, however, does not apply if the collection of 'sensitive information' is required by law.[52] Arguably, the Bill, if enacted, will authorise the collection of 'sensitive information' given that there is a view that some of these discriminatory grounds are relevant in constructing the risk profiles of customers.[53]

More significantly perhaps, some of the 'reporting entities', notably businesses with less than $3 million annual turnover, will be *wholly* exempt from obligations under the *Privacy Act 1988* (Cth).[54] For example, these businesses, even though authorised and required under the Bill to collect and store a range of personal information, are not legally required to maintain the quality of the data by taking reasonable steps to ensure personal information accurate, complete and up-to-date.[55] Neither are they required to maintain data security by taking reasonable steps to protect personal information from misuse and loss etc.[56]

Another circumstance that heightens the privacy implications of the Bill is the prospect that information collected by businesses under the Bill will be used for secondary purposes, that is, purposes other than combating money laundering and the financing of terrorism. For instance, some commentators have pointed to the commercial opportunities that this larger base of information provides with one calling it 'the greatest business lever'[57] and another suggesting that 'financial institutions can turn their anti-money laundering compliance systems into robust surveillance and identification systems that deliver benefits well beyond the regulatory

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[49] *Privacy Act 1988* (Cth) Schedule 3, National Privacy Principles, cl 2.1(g), cl 6(h), 10.1(b).
[50] Ibid Schedule 3, National Privacy Principles, cl 10.
[51] 'Sensitive information' is defined in ibid s 6.
[52] Ibid Schedule 3, National Privacy Principles, cl10.1(b).
[53] See text above accompanying nn 19-35.
[54] This is due to the fact that the obligations in the Act only apply to 'organisations', a term that does not include 'small business operators', i.e. businesses with turnover of less than $3 million annual turnover: *Privacy Act 1988* (Cth) ss 6C-6D.
[55] *Privacy Act 1988* (Cth) Schedule 3, National Privacy Principles, cl 3.
[56] Ibid Schedule 3, National Privacy Principles, cl 4.
[57] John Broome quoted in Julie Lewis, 'Cleaning up: Anti-money Laundering Laws Need Not Spell Disaster' (March 2006) *Law Society Journal* 22, 22.

requirements'.[58] Such secondary use of information collected under Bill is arguably not a breach of the *Privacy Act 1988* (Cth) provided certain conditions met.[59]

In light of these problems for privacy, *we recommend that:*

- *the government conduct a Privacy Impact Assessment of the Bill as recommended by this Committee;*[60]
- *consideration be given to extending the Privacy Act 1988 (Cth) to businesses with less than $3 million annual turnover.*

Failure to ensure that AUSTRAC CEO is democratically accountable especially in relation to the making of AML/CTF rules and guidelines

Arguably, the central feature of the Bill is the wide power and discretion it confers upon the AUSTRAC CEO. As noted above, the AUSTRAC CEO will determine who has access to AUSTRAC information.[61] Moreover, this officer will have at his or her disposal broad powers to ensure compliance, for example, by ordering external audits[62] and seeking civil and criminal penalties.[63]

Most significantly, the AUSTRAC CEO will be responsible for making AML/CTF rules.[64] Much of the detail of AML/CTF legal provisions is provided by AML/CTF rules. This is the case with the 'applicable customer identification procedure',[65] provisions relating to ongoing customer due diligence,[66] the required details of suspicious matters reports[67] and anti-money laundering and counter-terrorism financing programs.[68]

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[58] Meaghan Leslie, 'Leveraging the Capabilities of Anti-Money Laundering Solutions' (August/September 2004) *Banking and Finance Services Bulletin* 10. See generally Senate Legal and Constitutional Legislation Committee, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005* (2006) 69-70
[59] *Privacy Act 1988* (Cth) Schedule 3, National Privacy Principles, cl 2.1(c).
[60] Senate Legal and Constitutional Legislation Committee, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005* (2006) 70.
[61] See text above accompanying nn 39-46.
[62] The Bill Part 13.
[63] The Bill Part 15.
[64] The Bill cl 229.
[65] The Bill cl 5, 84(3)(b).
[66] The Bill cl 36(1)(b).
[67] The Bill cl 41(3)(b).
[68] The Bill cl 84(2)(b)-(c).

These rules are legislative instruments for the purpose of the *Legislative Instruments Act 2003* (Cth) and are made by AUSTRAC subject to the directions of the responsible Minister.[69] In making these rules, AUSTRAC is also required to consult with representatives of reporting entities and heads of various statutory agencies including the Commissioner of the AFP and the Privacy Commissioner.[70] In addition to these rules, AUSTRAC will also issue guidelines that are 'not legally binding and . . . would be developed by AUSTRAC in consultation with industry'.[71]

This process of law-making is largely based on primary accountability to the responsible Minister and confines the consultation process principally to industry sectors. As stated by the Explanatory Memorandum to the Bill, AML/CTF rules will 'be developed in close consultation with industry'.[72] Other persons and groups likely to be affected by the Bill, for instance, customers and staff of 'reporting entities', are not formally recognised in these procedures. These procedures, in fact, entrench the objectionable practice of failing to adequately consult these groups: As the Committee observed in relation to the first Exposure Draft:

> (there is an) apparent lack of formal consultation with privacy, civil rights and consumer representative groups in the development of the regime to this point . . . this may have resulted in some fundamental privacy, consumer and civil rights issues being overlooked.[73]

These lopsided consultation procedures not only fail the democratic test of adequately consulting all those affected but may also mean that AUSTRAC breaches its obligations under the *Legislative Instruments Act 2003* (Cth) to undertake appropriate consultation.[74]

To make things worse, the government seems to make light of the impact that the Bill will have on the customers of 'reporting entities'. The Explanatory Memorandum to the Bill, for instance, states that '(c)ustomers of reporting entities will be *indirectly affected* by the obligations imposed by the Bill'.[75] It is quite extraordinary to describe a Bill which central thrust is to collect more financial information of such individuals as indirectly affecting them.

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[69] The Bill cl 229.
[70] The Bill cl 212(2).
[71] Attorney-General's Department, *Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Rules – Questions and Answers* (2006) 2 (available at http://www.ag.gov.au/aml on 6 June 2006).
[72] Explanatory Memorandum, Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth) 9.
[73] Senate Legal and Constitutional Legislation Committee, *Exposure Draft of the Anti-Money Laundering and Counter-Terrorism Financing Bill 2005* (2006) 75.
[74] *Legislative Instruments Act 2003* (Cth) s 17.
[75] Explanatory Memorandum, Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth) 11.

The democratic deficit attending the making of AML/CTF rules are especially acute in relation to the provision of 'designated remittance arrangements'.[76] What services come within the scope of this phrase will very much be determined by the AML/CTF rules.[77] What is, however clear from the Explanatory Memorandum[78] and AUSTRAC's documents is that certain non-bank money remitters, in particular, remittance through the Islamic *hawala* system is seen as suspect and, therefore, are being (or will be) targeted in efforts to prevent money-laundering and financing of terrorism.[79] Such targeting of Muslim 'alternative' methods of remittance raises real issues of racial and religious discrimination.

It is imperative to enhance the accountability of the AUSTRAC CEO by augmenting parliamentary review and formally including other affected parties in the process of consultation and law-making to address the above concerns. By doing so, the review of the operation of the Act seven years after its enactment will also be made much more meaningful and informed.[80]

In order to rectify this democratic deficit, *we recommend that:*

- *the functions of AUSTRAC as stated in clause 212(2) of the Bill include a requirement to consult representative groups of the customers and staff of 'reporting entities' including privacy, consumer and civil rights groups as well as trade unions;*[81]
- *the functions of AUSTRAC as stated in clause 212(2) of the Bill include a requirement to consult Muslim organisations when AML/CTF rules and guidelines affect 'designated remittance arrangements';*
- *AML/CTF rules and guidelines be subject to a mandatory two-month period of public exposure and consultation before they take effect;*
- *AML/CTF rules and guidelines that result in significant change be subject to parliamentary review; and*
- *the activities of AUSTRAC and its CEO be subject to annual review by either the Senate Legal and Constitutional Affairs Committee or the Parliamentary Joint Committee on Intelligence and Security.*

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[76] The Bill cl 6, Table 1, items 31-2.
[77] The Bill cl 10(1)(c).
[78] Explanatory Memorandum, Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth) 106.
[79] AUSTRAC, *Anti-Money Laundering eLearning Application* (2006), Modules 3 and 14 (available at http://www.austrac.gov.au/aml_elearning/html_version/html/aml_3.html; http://www.austrac.gov.au/aml_elearning/html_version/html/aml_14.html on 6 June 2006) and
[80] The Bill cl 251.

I trust that this submission has been of assistance to you. If you have any queries, please do not hesitate to contact the author of this submission.

Yours sincerely,

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[81] Adoption of such a recommendation would extend consultation that AUSTRAC presently undertakes with public interest groups. For details, see AUSTRAC, *Annual Report 2005-06* (2006) 63-4, 134.