



**AUSTRALIAN  
PRESS  
COUNCIL**

# **SUBMISSION**

**August 28, 2009**

Suite 10.02, 117 York Street, Sydney NSW 2000  
Phone: (02) 9261 1930 Fax: (02) 9267 6826

Internet: <http://www.presscouncil.org.au/>  
Email: [info@presscouncil.org.au](mailto:info@presscouncil.org.au)

**Submission of the Australian Press Council to the Senate Standing  
Committee on Legal and Constitutional Affairs  
on its inquiry into the *Anti-Terrorism Laws Reform Bill 2009*.**

**Executive Summary**

Consistent with its long held position that sedition laws are an impediment to freedom of expression and have the potential to have a ‘chilling effect’, the Australian Press Council support the removal of sedition offences in s80.2 of the *Criminal Code Act* in their entirety.

In view of the lack of precision in the definition of a “thing” in s101.4 of the *Criminal Code Act*, the Council is concerned that journalists could be exposed to being charged with a serious offence should they inadvertently come into possession of material in the course undertaking their role. The current provision is unsafe and the Council supports that proposal in the *Bill* that the section be repealed.

Where it is practical to do so, the Council supports the proposed amendments to Division 102 of the *Criminal Code Act* that would bring the processes for proscribing a terrorist organisation in line with the requirements of administrative law. By ensuring publicity, public consultation, consideration of submissions by an independent advisory committee, notice and a right of appeal the proposed amendments increase transparency, public and media scrutiny and enhance the public right to know.

The Council supports proposed amendments to s102.7 of the *Criminal Code Act* to ensure that providing support to a terrorist organisation cannot be construed to apply merely to the publication of view favourable to a proscribed organisation.

Consistent with its earlier submissions, the Council express its concerns that this Division 3 Part III of the *ASIO Act* poses a threat to freedom of speech and has the potential to obstruct the ability of the media to ensure that government agencies are held to public account and that the questioning and detention practices of ASIO do not go beyond what is necessary to facilitate the investigation and prevention of terrorism.

Consistent with its earlier submissions, the Council holds the view that the *National Security Information (Criminal and Civil Proceedings) Act* is a threat to freedom of the press and it potentially oppressive. The Council supports repeal of this legislation as proposed in the *Bill*.

## **Proposed Amendments to the *Criminal Code Act 1995***

### **Sedition offences**

The Bill proposes the repeal of s80.2 the *Criminal Code Act 1995*, which establishes the offences of sedition and proposes consequential changes.

In support of the proposed amendments reference is made to an Australian Law Reform Commission (ALRC) report that recommends repeal of two of five offences of sedition and substantial amendments to the other three offences; and to the position of the Law Council of Australia, which recommends that the laws should be repealed in their entirety because they are unnecessary, lack clarity and precision and have a "chilling effect" on free speech.

In several previous submissions the Press Council has argued against sedition laws or, if there are to be sedition laws, that the offences should be limited. Specific matters raised included:

- that the mere existence of offences of sedition has the effect of making people cautious about publishing material that may potentially be regarded as seditious, i.e. that the laws create a "chilling effect";
- that there should be a media exemption to sedition provisions in order to protect journalists, publishers and broadcasters from prosecution and that such an exemption should also apply to others who engage in expression of opinion;
- that the legislation should not apply to incitement of terrorism but that the offence refer to use of "force and violence";
- that, in relation to urging assistance to an enemy, that sections 80.2(7) and 80.2(8) are "characterised by a broad scope the precise limitations of which are vague and difficult to gauge".

Consistent with its long held position that sedition laws are an impediment to freedom of expression, have the potential to have a "chilling effect", making people more cautious about publishing material that may potentially be regarded as seditious, and have the potential to interfere with the public right to know that the Council supports the removal of sedition offences in s80.2 in their entirety (and consequential amendments) as proposed in the Bill.

In the event that the offences are not repealed in their entirety, that sections 80.2(7) and (8) be repealed as recommended by the ALRC and that any other amendments be made that are consistent with the proposals of the ALRC position.

In the event that the offences are not repealed in their entirety, that a media exemption be introduced and that an exemption also apply to others who engage in expression of opinion. Additionally, if the offences are not repealed in their entirety, the Council would seek to remove the application of "recklessness" as a criterion applied in defining offences, seeing such a standard of proof as having the potential to act as an impediment on free speech.

### **Other proposed amendments to the *Criminal Code Act 1995***

There are a number of other proposed amendments to the *Criminal Code Act* in the Bill. Of those the Council comments on the following:

- Repeal of s101.4 *Possession of a Thing* connected with terrorist acts;
- In Division 102 – terrorist organisations, amendment of the definition of "terrorist organisation" to remove reference to "fostering the doing" of a terrorist act. The Bill also repeals those subsections that set out the procedure for proscribing a terrorist organisation and substitutes new sections that set out an administrative process for the notification of a proposed listing and for an organisation or its members to oppose the proposed listing;
- Amendments to s102.7 Providing support to a terrorist organisation to narrow "support" to "material support".

### *Repeal of s101.4 Possession of a Thing*

In relation to the proposed repeal of s101.4 *Possession of a Thing*, Sen. Ludnam's Second Reading speech points out that a "thing" could be just about any object given the lack of a precise definition and that there is no requirement that the "thing" in question be linked to a terrorist act. The speech points out the need for parameters for what may be included within the scope of "thing". The speech includes an example of what could be reckless possession, e.g. if someone passes along a DVD recommending that the contents be viewed and an example that has been discussed in the courts involving a document on a computer where the case was lost because it was possible to show through forensic evidence the absence of an electronic path and that the document had not been accessed.

Given the examples, reckless possession of a thing could include information received by journalists.

In view of the lack of precision in the definition of a "thing", and that there is no requirement that possession of a "thing" be linked to a terrorist act, the Press Council is concerned that journalists could be exposed to being charged with a serious offence should they inadvertently come into possession of material in the course undertaking their role. The current provision is unsafe and the Council supports that proposal in the Bill that the section be repealed.

In the event that s101.4 is not repealed, then the Council recommends that the section be amended to ensure that "thing" be more precisely defined and that, in order for there to be an offence, possession must be linked to a terrorist act.

### *Division 102 - amendment of the definition of "terrorist organisation"*

In relation to the process for proscribing a terrorist organisation, the Second Reading speech notes that the Sheller Committee report recommended that the process of proscription be reformed to meet the requirements of administrative law and that the new section follows Sheller's recommendations. The power to proscribe remains with the Governor-General on the advice of the Attorney-General.

The proposed amendment provides for:

- notification of when proscription of the organisation is proposed;
- a means and right for the persons or organisations to be heard in opposition;
- the appointment of an advisory committee that is independent to the process to advise of cases that have been submitted for proscription;
- publicity about the advisory committee;
- public consultation and receipt of submissions;
- publicity of proscribed organisations and notice to members of their possible exposure to criminal prosecution;
- merits review by the Administrative Appeals Tribunal of a decision to proscribe;
- standing rules to protect anyone seeking review from automatically finding themselves admitting to criminal offences.

The proposed process would be open to public and media scrutiny.

The Press Council supports the proposed amendments that would bring the processes for proscribing a terrorist organisation in line with the requirements of administrative law. By ensuring publicity, public consultation, consideration of submissions by an independent advisory committee, notice and a right of appeal the proposed amendments increase transparency, public and media scrutiny and enhance the public right to know.

### *Amendment of s102.7 Providing support to a terrorist organisation*

In relation to the offence of providing support to a terrorist organisation, the Bill proposes that the section be amended so that it refers to "material support" and that, in order for there to be an offence, the person must be either reckless or intend that the material support or resources will be used by a terrorist organisation to engage in terrorist activity.

The Second Reading speech points out that the Human Rights and Equal Opportunity Commission has argued, and the Sheller Committee accepted, that under the current legislation "support" could extend to the publication of views that appear to be favourable to a proscribed organisation and its objective and that this would be an unwarranted interference with freedom of expression.

The proposed amendment seeks to ensure that support cannot be construed to extend to the publication of views that appear to be favourable to an organisation and its stated objective. The amendment implements a recommendation of the Parliamentary Joint Committee on Intelligence and Security to ensure that words are not caught by the section and that there is a requisite connection between "support" and a terrorist act.

The Council supports the proposed amendments to s102.7 to ensure that providing support to a terrorist organisation cannot be construed to apply to the publication of view favourable to a proscribed organisation or its objective. By narrowing "support" to "material support", and by ensuring that there is a requisite connection between material support and a terrorist act, the proposed amendment ensures that words are not caught by the provision and thus that the section is not an unwarranted interference with freedom of expression.

### **Proposed Amendments to the *Crimes Act 1914***

The Council has no comments on these proposals.

### **Proposed Amendments to the *Australian Security Intelligence Organisation Act 1979***

**The Bill contains a number of amendments to the ASIO Act:**

- Changes that limit the current continuation of detention without charge beyond the current 168 hours by use of "rolling warrants". The proposed amendment requires that further warrants can only be sought and issued if they relate to different offences arising from different circumstances;
- Amendment to reduce the period of detention from 168 to 24 hours;
- Proposed repeal of the following provisions:
  - o s34K(10) which prohibits the person contact with a lawyer;
  - o s34ZP which provides that a person can be questioned without a lawyer present;
  - o s34ZR which allows for the removal of parents, guardians or other representatives if their conduct is unduly disruptive to questioning;
  - o s34ZS(2) which establishes an offence with a penalty of 5 years if the person discloses operational information and the person has that information as a direct result of the issue of a warrant under Div 3 of Part III or doing anything authorised by or in connection with a warrant within 2 years starting at the end of the warrant. The disclosure must not be a permitted disclosure;
  - o s34ZT that provides that regulations may be made to regulate access to information by lawyers acting in connection with proceedings for remedy relating to a warrant issued to a person or treatment of the person in connection with the warrant.

Repeal of the provisions as proposed and the proposed amendments would protect the person who is subject to the warrant from unduly oppressive treatment and ensure the appropriate other people (lawyer, parent, guardian) can be present to provide advice and support and be witness to the questioning of a person who is subject to a warrant.

The current act however contains provisions to protect secrecy relating to warrant and questioning that would prevent anyone who was present for disclosing information about the questioning and detention of a person who is subject of a warrant:

- s34ZS (1) imposes a five year penalty on a discloser who, before the expiry of a warrant discloses information that indicates that a warrant has been issued or a fact relating to the content of the warrant or to the questioning or detention of a person in conjunction with the warrant, unless the disclosure is a protected disclosure.
- s34ZS (2) imposes a five year penalty on a discloser who discloses, before 2 years after the expiry of a warrant, that a warrant has been issued and discloses operational information, being information that the organisation had, the source of information, the operational capability, method or plan of the organisation unless the disclosure is a protected disclosure.

Consistent with its position in its April 14, 2005 submission to the *Parliamentary Joint Committee on ASIO, ASIS and DSD into Division 3 of Part III of the ASIO Act*, the Press Council express its concerns that this Division 3 Part III of the Act poses a threat to freedom of speech and has the potential to obstruct the ability of the media to ensure that government agencies are held to public account and that the questioning and detention practices of ASIO do not go beyond what is necessary to facilitate the investigation and prevention of terrorism.

The Council supports the repeal of s34K(10), s34ZP, s34ZR, s34ZT so that others may be present to witness and scrutinise the questioning of persons who are subject of warrant and the repeal of s34ZS(2) that creates an offence for disclosure of operational information or information related to the issue of a warrant.

In the event that s34ZS(2) is not repealed, Council proposes that the section be amended to require proof that there is a threat to national security resulting from the disclosure in order to establish an offence.

## **Proposed repeal of the *National Security Information (Criminal and Civil Proceedings) Act 2004.***

The objective of this Act is to prevent the disclosure of information in federal criminal proceedings and civil proceedings where disclosure is likely to prejudice national security.

The Act sets out procedures that apply where information that may prejudice national security could be disclosed by the prosecutor, defendant or other person.

In its submission to the *Australian Senate Legal and Constitutional Committee Inquiry into the National Security Information Legislation Bill 2005* the Council indicated that the Act, as it was at the time, was a threat to freedom of the press in Australia and that amendments to extend the application of the Act to include civil proceeding in addition to criminal proceedings would extend that threat (the Act as it is currently applies to both criminal and civil proceedings).

The Council recommended that, given the long-term potentially oppressive nature of the legislation, that parliament insert a sunset clause into the legislation.

The Council's specific concerns were:

- That the definition of national security is too broad;
- That there is a need to include in the legislation a safeguard that would prevent the Attorney General, when issuing a certificate that describes the information and limits how the potential discloser can disclose such information, must not issue the certificate for improper purposes;
- That the media be given standing to make representations at hearings that determine whether information should be disclosed;
- That mechanisms that have the potential to restrict access to documents should not be made by regulation but only by parliament and therefore there should not be any extension of existing powers to make regulations.

Consistent with its earlier submission, the Press Council holds the view that the *National Security Information (Criminal and Civil Proceedings) Act* remains a threat to freedom of the press and is potentially oppressive. The Council supports repeal of this legislation as proposed in the Bill.

## **The Australian Press Council**

The Australian Press Council is a voluntary association of organisations and persons established on 22 July 1976. The membership of the Council is set out in the attachment.

The objects of the Australian Press Council are to promote freedom of speech through responsible and independent print media, and adherence to high journalistic and editorial standards, by:

- considering and dealing with complaints and concerns about material in newspapers, magazines and journals, published either in print or on the Internet;
- encouraging and supporting initiatives by the print media to address the causes for readers' complaints and concerns;
- keeping under review, and where appropriate, challenging political, legislative, commercial or other developments which may adversely affect the dissemination of information of public interest, and may consequently threaten the public's right to know;
- making representations to governments, public inquiries and other forums as appropriate on matters concerning freedom of speech and access to information;
- undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues;
- promoting an understanding of the Objects, Principles and workings of the Council especially among editors, journalists and journalism schools, through forums and consultations; and encouraging feedback for Council's consideration.



**The Australian Press Council**  
**Members**  
**August 2009**

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Professor Ken McKinnon

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**Alternates**

Gary Hartree  
 Selina Day  
 David Sommerlad  
  
 Leonie Lamont  
  
 Bruce Morgan  
 Sharon Hill

**Panel of Public Members (8 members - 7 attend each meeting)**

Professor H P Lee (Vic)      Vice-Chairman  
 Cheryl Attenborough (Tas)  
 John Fleetwood (SA)  
 Professor Ron Grunstein (NSW)  
 Brenton Holmes (ACT)  
 Katherine Sampson (Vic)  
 Lisa Scaffidi (WA)  
 Melissa Seymour-Dearnness (Qld)

**Panel of Independent Journalist Members (3 members - 2 attend each meeting)**

Bruce Baskett  
 Prue Innes  
 Adrian McGregor

**Journalist Member representing the Media Entertainment and Arts Alliance**

Alan Kennedy

**Panel of Editor Members (2 members of whom 1 attends each meeting)**

Warren Beeby  
 Gary Evans

**Executive Secretary (non voting)**

Jack R Herman

For details and biographies see:

*<http://www.presscouncil.org.au/pcsite/about/members.html>*