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Australian Press Council submission to the Senate Legal and Constitutional Legislation Committee inquiry into the *Anti-Terrorism Bill (No. 2)* 2005

Executive Summary

The Australian Press Council, which has as one of Objects "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", argues that any Bill that grants new powers to authorities that may impinge on the traditional freedoms of Australians must be drafted to ensure that the granted powers are sufficient to meet the envisaged threat, without going too far in inhibiting rights. The Council's primary concern with the *Anti-Terrorism Bill (No. 2)* is that the proposed sedition laws appear go further than is required and should be reconsidered. It also raises other concerns with the impact that the Bill might have on the ability of the press to report on matters of public concern, and calls on the Parliament to ensure that the newly granted powers are reviewed more frequently than the Bill proposes.

Introduction

The Australian Press Council recognises the circumstances that have led the Commonwealth to introduce legislation to enable authorities properly to deal with threats of terrorism within Australia. It recognises that the legislation has been developed in consultation with state and territory governments, which will introduce complementary legislation. Nonetheless, it is the Council's view that any such legislation needs to be carefully thought through and drafted to ensure that the powers given to the police, security services and others by such legislation is limited to those required to deal with the threat of terrorism. Such powers should not act as an undue impediment to the freedoms traditionally enjoyed by Australians, including freedom of expression, freedom of association and freedom from arrest and detention without due cause.

In the Council's view, the Bill, even in its current, revised form, has the potential to act as an impediment on those freedoms in Australia, particularly freedom of speech, which is a fundamental component of democracy. Where freedom of speech is curtailed democratic processes cannot function. The *Anti-Terrorism Bill (No. 2)*, by making the publication of some comments illegal, and by making publishers hesitant about publishing commentary which might potentially be taken as seditious, has a significant potential to damage Australian democracy.

The Council's concerns centre on two aspects of the legislation that have the greatest potential to impede freedom of speech:

- those sections pertaining to sedition, which it believes should be removed from the Bill at this time; and
- those dealing with disclosure.

The Council also calls for a three-year sunset clause in the legislation, believing that the granting of such sweeping powers to authorities needs to be reviewed by Parliament on a regular basis, taking into account the continuation of any threat of terrorism.

Sedition

A vibrant Australian democratic system has thrived on vigorous debate, and on reports of that debate in the media. Commentary, criticism and satire have always been crucial components in the process. The laws against sedition are antithetical to these activities, and have a significant potential to damage democratic processes in Australia.

Of course, the offence of sedition is not new. Sections 24A to 24E of the *Commonwealth Crimes Act* 1914 deal with sedition. However, no prosecutions under these sections have been attempted since 1953[1], and no one has been convicted for sedition since 1949[2]. Like similarly archaic offences, such as blasphemy, the offence of

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[1] *Sweeny v Chandler*

[2] *Burns v Ransley* (1949) 79 CLR 101, *R v Sharkey* (1949) 79 CLR 121

sedition has been irrelevant for decades. The government has advanced no cogent argument to suggest that this 'moderisation' is required when there are other laws which already criminalise the encouragement of terrorism.

The definitions of sedition set down in the Bill are extremely broad, and encompass behaviour which is presumably outside the scope of what the government intends to prohibit. Sections 80.2(7) and 80.2(8), for example, could apply to prohibit comments which criticise the government's foreign policy or which argue in favour of passive protests against that policy.

A number of commentators have noted that the offences which are intended to be encompassed within the scope of the sedition provisions are already crimes under various sections of the *Crimes Act* and other legislation, particularly provisions prohibiting incitement to commit a crime. Consequently, there is no need for legislation specifically dealing with sedition[3].

A significant distinction between the existing offences in the *Crimes Act* and the proposed new formulation of sedition is the introduction of "recklessness". In order to gain a conviction, the prosecutor is no longer required to prove that the accused had an intention. Thus a journalist or publisher could commit a seditious act without even being aware of it. If a published commentary could be interpreted as encouraging the forceful overthrow of the government that would be *prima facie* evidence of recklessness on the part of the publisher. Any article that criticised the government or advocated a change of government could potentially fall foul of this provision. A publisher who reports on a debate in which one or more of the participants makes seditious remarks may commit an offence. It is plain that any statute which could lead to criminal prosecution for encouraging the overthrow of the government has significant potential to act as obstruction to free speech and an impediment to democratic accountability.

In the Council's view, an offence of sedition should only be included in the Bill if there were a more stringent definition, so that there would only be a breach if there is evidence of a clear intent to foment violence. However, as has been noted elsewhere[4], such an inclusion is unnecessary, as section 11.4(1) of the *Criminal Code Act* 1995 already establishes an offence of inciting the commission of an offence. This would be broad enough to catch any attempt to encourage another person to engage in any form of terrorism.

The utility of retaining an offence of sedition is questionable, as is demonstrated by scarcity of prosecutions for sedition since the 1950s. An attempt by the government to restrict comment and debate by bringing a prosecution for sedition is likely to have an impact contrary to that sought by the government, in that it would stimulate hostility to the government and generate support for the defendants and their cause. In spite of this, the fear of breaching the law of sedition would be likely to cause anticipatory self-censorship on the part of editors, and this would have the effect of curbing political commentary.

The section on sedition in the proposed legislation includes a defence of "good faith" on the part of the offender. A defence based on good faith is inadequate to protect freedom of speech. First, where "recklessness" is a prominent component in constituting the offence, a reliance on the defence of good faith places the onus on defendants to prove their innocence. The onus should be on the prosecution to prove the defendant had an intention to commit the offence. Secondly, it is in practice extremely difficult for defendants to prove that they acted in good faith. Thirdly, the good faith defence in the proposed legislation is too narrow. The narrow range of activity that falls within the scope of the defence includes demonstrating errors on the part of various government institutions with a view to reforming such errors. Arguably, the scope of the defence is no wider than that which would be provided by the implied constitutional guarantee of freedom of political communication. However, the defence does not make provision for artistic activities that make no obvious attempt to achieve reform, such as satire, parody, and ridicule. Nor does the defence make provision for the reproduction by publishers of the views expressed by third parties, which the publisher does not necessarily endorse. The inadequacy of the defence of good faith to address concerns with the sweeping nature of the sedition offences reinforces the need for a rethink of the provisions.

In his Second Reading Speech, Attorney-General Philip Ruddock agreed that the sedition section needs review. If the Bill has to have clauses to punish incitement to terrorism, they must be in a restricted form that does not adversely affect the broader freedom of speech. Mr Ruddock has said that he will introduce revisions next February. If he is going to change the sedition section then, why introduce such sweeping new offences now?

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[3] See, for example, Ben Saul, University of NSW, Faculty of Law, *Briefing on Sedition Offences in the Anti-Terrorism Bill 2005.*

[4] Bret Walker SC, Peter Roney, advice provided to ABC, published on ABC website, 24 October 2005.

The sections on sedition (Schedule 7) should be withdrawn from the Bill now and rethought. If, in February, the government believes that existing laws together with the redrafted Bill do not provide sufficient grounds for dealing with threats of terrorism, it can re-introduce the sedition provisions as a separate Bill and argue for them.

Exemptions

The government has stated that the proposed sedition provisions are not intended to apply to journalists or the media. If this stated position is sincere, and the sedition provisions are retained, it should be made clear by the inclusion in the Bill of a media exemption that would protect editors, publishers and journalists from prosecution for sedition.

An exemption should also be made for the purposes of artistic expression, which would protect satirists, cartoonists, artists, writers, musicians and actors. A large number of artistic endeavours would fall within the scope of the law of sedition as it is framed. This would include, for example, the prominent artist Mike Parr, one of whose recent projects involved having his lips sown together as a comment about the federal government's policy of detaining unlawful non-citizens[5] .

Disclosure

Section 105.38 of the Bill prohibits disclosure of the fact that a person is being detained under the legislation. The section also prohibits disclosure of any information acquired from a detainee. The section therefore prevents the media not only from reporting the detention but also from being informed of the detention. Surprisingly, there is no defence provided in relation to this section. Even in circumstances where a person has been detained illegally or inappropriately, the media are unable to investigate or report upon the detention. If detainees have suffered torture or abuse during their detention, they cannot inform the media of this, and the media are prohibited from reporting the abuse.

There may well be operational reasons for the authorities' preference that the fact of a detention be kept secret. But there are also important public interest reasons for the detention to be a matter of public record. There is a need to balance the competing priorities. Where detention is kept wholly secret, there is a significant scope for abuse of the power of detention. It is important that the media be able to report detention in most instances.

If the prohibition against disclosure is retained, a defence should be formulated to protect journalists and publishers who report detention where it is in the public interest to do so. If a person is detained inappropriately, improperly or where a detainee is suffering abuse at the hands of authorities, the media should be able to publish the circumstances of the detention with impunity. Even where such improper conduct is absent, the media should not be precluded from reporting a detention unless such reporting would jeopardise national security.

Other matters

The Council notes with concern some elements of the proposed Schedule 6, dealing with the power to obtain information and documents. In particular, the Council raises the question of the inclusion in the Bill of Section 3ZQO that deals with power to obtain documents related to serious offences. Other provisions in this section deal specifically with information and documents related to terrorist acts. Why is a section related to 'serious offences', which might adversely impact on the press when authorities seek the surrender of documents they believe to be in a journalist's possession, in a Bill purportedly dealing with terrorism? If such provisions are thought necessary, they should be introduced separately.

A further concern with the proposed sedition offences is the proposal to widen the definition of an unlawful association in section 30A of the *Crimes Act*. On the face of it, a publisher, or editor, could be part of an unlawful association by agreeing to publish the opinions of a third party that has as one of its objects a seditious intention, as very widely defined in the Bill. This would be the case even if there were no intention to provoke any form of violence, disorder or breach of the peace. The use of an 'unlawful association' provision to criminalise publication of contrary opinions would have a chilling effect on the ability of the press fairly to report, and comment on, matters related to political activities. The Council recommends that the definitions of unlawful association in section 30A of the *Crimes Act* should be left as is.

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[5] Other examples would include the lyrics of many of the songs recorded by Midnight Oil, and by Yothu Yindi, especially *Treaty*. In its time, even Helen Palmer's *The Ballad of 1891* might have been considered seditious.

Sunset clause

A 'sunset clause' has been proposed which would come into operation at the end of a period of ten years. Given the profound impact of this legislation on the traditional freedoms enjoyed by Australians, and the justification for its enactment in the light of contemporary threats of terrorism, which might be of a temporary nature, it would be appropriate for a sunset period to be no longer than three years. This would mean that, unless a subsequent Parliament took the view that the conditions requiring legislation that adversely impacts on freedom were still extant, the legislation would lapse. In the Council's view, such legislation should require a decision by each new Parliament to endorse it.

Conclusion

The Australian Press Council urges the Committee to recommend the removal of those sections that unduly threaten freedom of expression in Australia. Adequate public interest defences to the prohibition on disclosure of detention should be inserted. The sections on sedition should be removed from the Bill and, if thought necessary, re-introduced as separate legislation.

Recommendations

- The sedition offences should be removed from the Bill and brought back separately if, after a review, they are thought necessary. Where terrorism and related activity can be prosecuted under existing legislation, there should be no new legislation passed.
- The proposed section 105.38 should be amended by the inclusion of a defence where a detention is disclosed for reasons of public interest or where there is no security risk in the disclosure.
- A further exemption should be made for activities involving artistic expression. Art, drama, poetry, fiction, music, animation, or comedy that uses potentially seditious words or images should be exempt from prosecution where it does so for the purposes of artistic expression.
- Schedule 6 should be amended so that the power to obtain documents relates solely to terrorism offences or terrorist acts.
- The sunset clause should be shortened to a maximum of three years.
- If the Committee believes that the sedition clauses should be retained, the following are the minimum changes required to make that section acceptable:
    - Offences described in the sedition section should place the onus of proof on the prosecution, not on the defence. For this reason "recklessness" should be removed from Schedule 7. The prosecution should be required to prove that the defendant knowingly and deliberately encouraged the relevant conduct.
    - The emphasis in the formulation of the offences should be on the potential for violence rather than on the attacking of government institutions. In order for words or actions to constitute an offence of sedition, it should encourage conduct which not only aims to undermine lawful institutions but which does so by violent means.
    - The good faith defences available for offences of sedition need to be significantly broadened. At the very least, the phrases "with a view to reforming those errors or defects" and "in order to bring about the removal of those matters" should be omitted. A broad public interest defence should be included.
    - The section should include a media exemption. The exemption should enable the media to publish the comments of third parties without risking prosecution. The exemption should also allow the media to report, and comment on, debates concerning politics or religion, and to publish material that satirises government institutions.
    - The definitions of unlawful association in section 30A of the *Crimes Act* should be left as is.

Addendum

The Australian Press Council

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

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:

1. Considering and dealing with complaints and concerns about material in newspapers, magazines and journals, published either in print or on the Internet;
2. Encouraging and supporting initiatives by the print media to address the causes for readers' complaints and concerns;
3. 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;
4. Making representations to governments, public inquiries and other forums as appropriate on matters concerning freedom of speech and access to information;
5. Undertaking research and consultation on developments in public policy affecting freedom of speech, and promoting public awareness of such issues.

The Australian Press Council
Membership
November 2005

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Gary Evans, John Morgan

Executive Secretary (non voting)
Jack R Herman

For details and biographies see: *http://www.presscouncil.org.au/pcsite/about/members.html*