**MEDIA, ENTERTAINMENT AND ARTS ALLIANCE**

**TO**

**SENATE LEGAL AND CONSTITUTIONAL REFERENCES AND LEGISLATION COMMITTEE**

**INQUIRY INTO THE PROVISIONS OF THE ANTI-TERRORISM (NO. 2) BILL 2005**

**NOVEMBER 2005**

## The Media, Entertainment and Arts Alliance

The Media, Entertainment and Arts Alliance (Alliance) is the industrial and professional organisation representing the people who work in Australia's media and entertainment industries. Its membership includes journalists, artists, photographers, performers, symphony orchestra musicians and film, television and performing arts technicians.

**Introduction**

The Media, Entertainment and Arts Alliance welcomes the opportunity to make a submission to the Inquiry into the provisions of the *Anti-Terrorism Bill (No. 2) 2005* (the Bill).

As the association representing media, entertainment and arts practitioners, we wish to set out strong opposition to several provisions contained in the Bill.

Our comments are restricted to only those sections of the Bill that impinge on freedom of expression and those that will impact adversely on our members. They relate to the following provisions:

- Detention of persons "to preserve evidence of, or relating to, the terrorist act"[1]
- Powers given to the Australian Federal Police to obtain documents that are considered to be of assistance in the investigation of a serious crime[2] and criminalising reporting on the making of preventative detention orders[3]
- Sedition[4]

The Bill is likely to be incompatible with Australia's international legal obligations and incompatible with a number of treaties to which Australia is a party. It exposes Australia to possible violations of the principles set out in the United Nations Universal Declaration on Human Rights and the provisions of the United Nations International Covenant on Civil and Political Rights.

Given the implications of Bill on the future of democracy in Australia, the Alliance recommends that, unless more time is allowed to enable a full and robust debate on its provisions, the Bill amended in the light of that debate, and the issues raised in this submission adequately addressed, the Bill be opposed.

The Alliance is aware of the submission made to the Inquiry by the Gilbert & Tobin Centre of Public Law, the submission made collectively by John Fairfax Holdings Limited, News Limited, West Australian Newspapers Limited, Australian Press Council and AAP and the submission lodged by Arenafilm Pty Limited et al and is supportive of those submissions.

**Preventative Detention Orders**

The Alliance is most concerned about the impact the provisions covering Preventative Detention Orders (Division 105) will have on journalists.

Bruce Wolpe, Fairfax Corporate Affairs Director, as reported in *The Australian* on 10 November 2005, succinctly expressed the concerns of Alliance members:

"It is of grave concern to us that journalists are put at direct risk of imprisonment under this legislation simply for doing their jobs.

"Journalists as a class of professionals are the second largest pool of investigators in the country after the police. By affording them no protection against requests for information that will go to the core of their professional responsibility, ethics and values – their pledge to their sources to protect them against disclosure – this legislation places all journalists in Australia on the front lines of law enforcement efforts in the war on terror.

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[1] See Division 105 – Preventative Detention Orders
[2] See Subdivision C
[3] See Section 105.41(6) and Schedule 5
[4] See Schedule 7

"It is an impossible position and will lead, needlessly, to demands by the authorities to identify sources and turn over notes and documents received in confidence from their sources.

"If this happens, the ability of journalists to do their jobs evaporates and the ability of the press to fulfil its responsibilities in the public interest disappears."[5]

The Australian Security Intelligence Organisation Act (ASIO Act) also has application to persons not involved in terrorism. However, crucially the ASIO Act incorporates protections that are not mirrored in this Bill.

Further, it is noted that the Joint Standing Committee on ASIO, ASIS and DSD is not due to table its report following its review of the operation and effectiveness and implications of Division 3 Part III of the ASIO Act 1979 until 22 January 2006.[6] Consequently, it is likely to be premature to enact new anti-terror legislation before the assessment of existing powers has been completed.

The Alliance is of the view that consideration of new anti-terror legislation should also await the outcome of the Independent Committee review of the use of the *Security Legislation Amendment (Terrorism) Act 2002*, the *Suppression of Financing of Terrorism Act 2002, the Criminal Code Amendment (Suppression of Terrorist Bombings) Act*, the *Border Security Legislation Amendment Act 2002* and the *Telecommunications Interception Legislation Amendment Act 2002* announced by the Attorney-General on 12 October 2005. That Committee is not due to report until the middle of 2006.[7]

In any event, the provisions of Division 105 of the Bill have the potential to compromise the ability of journalists to work professionally and for the media to work in the public interest.

**Power to obtain information and documents and disclosure offences**

In Schedule 6 the Bill adds new sections to the *Crimes Act* that cause considerable concern.

Section 3ZQN allows the Australian Federal Police to require a person to produce documents if an officer "considers on reasonable grounds that a person has documents (including in electronic form) that are relevant to, and will assist, the investigation of a serious terrorism offence".

Section 3ZQO encompasses "the investigation of a serious offence". It is hard to know why, in the context of legislation regarding acts of terrorism, the scope of the Bill has been broadened to capture other offences.

Section 3ZQR does not excuse a person from producing documents under sections 3ZQN or 3ZQO on grounds that to do so "would conravene any other law; or might tend to incriminate the person or otherwise expose the person to a penalty or other liability; or would disclose material that is protected against disclosure by legal professional privilege or any other duty of confidence; or would be otherwise contrary to the public interest."

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[5] *Publishers lobby for changes to terror law*, Mark Day, The Australian, 10 November 2005, page 17.
[6] The Alliance submission can be found at http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/subs/sub65.pdf.
[7] *Independent Committee to Review Security Legislation, Media Release185/2005, The Attorney-General, Philip Ruddock MP, 12 October 2005, available online at http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2005_Fourth_Quarter_12_October_2005_-_Independent_committee_to_review_security_legislation_-_1852005*

The Explanatory Memorandum notes: "Care has been taken to ensure sensitive material can not be obtained under the new notice to produce regime. Sensitive material held by health professionals, layers, counsellors and journalists is clearly not caught by the regime. Such sensitive material might be able to be obtained for the purposes of an investigation through a search warrant." It may have been the intention that journalists not be captured in the new notice to produce regime but that intention is not reflected in the Bill itself.

Section 105.41(6) makes it a criminal offence – penalty: imprisonment for five years – to disclose the fact that a preventative detention order has been made in respect of a detainee or disclose any information relayed by that detainee.

The ASIO Act contains secrecy provisions in respect of questioning, production and detention warrants which are also of concern to the Alliance. However, unlike this Bill, the secrecy provisions in the ASIO Act include a provision – section 34VAA(12) – which says: "This section does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication."

This Bill strikes at the basis of news reporting and the principles of freedom of the press. The Alliance can see no demonstrable benefit to be gained by the provisions that will have the effect of stifling freedom of the press and infringing on freedom of political communication.

Appropriately, Section 105.33 of the Bill affords persons detained under the legislation the right "to be treated with humanity and respect for human dignity" and states that such persons "must not be subjected to cruel, inhuman or degrading treatment." Yet, in the event the rights of such a person are violated, the Bill denies the opportunities for such a violation to be reported in the media. Just as astonishing is the fact that the penalty for an officer who commits an offence under this section is two years' imprisonment, compared with the five years' sentence a journalist could face for disclosing the fact of a preventative detention.

The Alliance recommends that, at the very least, section 3ZQR be amended to read as follows:

"3ZQR Documents must be produced

(1) A person is not excused from producing a document under section 3ZQN or 3ZQO on the ground that to do so:
  (a) would contravene any other law; or
  (b) might tend to incriminate the person or otherwise expose the person to a penalty or other liability; or
  (c) would disclose material that is protected against disclosure by legal professional privilege or any other duty of confidence; or
  (d) would be otherwise contrary to the public interest.

(2) However, neither:
  (a) The production of the document; nor
  (b) Any information, document or thing obtained as a direct or indirect consequence of producing the document;

  is admissable in evidence against the person in proceedings other than proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to this Act.

(3) Despite subsections (1) and (2), a person shall be excused from producing a document under section 3ZQN or 3ZQO on the ground that the production would disclose material that is protected against disclosure by legal professional privilege or any other duty of confidence, including in the case of a journalist, the disclosure of the identity of a confidential source.

(4) A person is not liable to any penalty by reason of his or her producing a document when required to do so under section 3ZQN or 3ZQO."

The Alliance further recommends that, unless otherwise more favourably amended, section 3ZQO be amended by adding a new subsection (5) as follows:

(5) "If the notice specifies that information about the notice must not be disclosed – set out the effect of section 3ZQT (offence for disclosing existence or nature of a notice), provided that any such restriction on disclosure shall not extend beyond 28 days without furthter order of the Court."

**Sedition**

The Alliance considers that sedition laws are outdated and unnecessary in the 21st century. Throughout their history they have been used more to curb freedom of speech than to deter acts of terrorism.

That the provisions on sedition contained in Schedule 7 are revisiting arcane laws has been acknowledged by members of the Government. The Attorney-General is sufficiently concerned about the provisions to announce they would be reviewed after the legislation has been enacted and some Government members, including George Brandis MP and Malcolm Turnbull MP, have called for sedition laws to be abolished.

The Alliance agrees with those Government members opposing the sedition provisions and believes the most appropriate course of action would be to delete Schedule 7 in its entirety and to repeal sedition legislation. To review the provisions after they have been legislated rather than before is an odd way to approach a flawed Bill.

The sedition provisions are also unnecessary as all matters contemplated that might be dealt with under the proposed provisions can be dealt with under other legislation, including the *Crimes Act* and anti-vilification legislation.

During the twentieth century, in western developed countries sedition laws fell all but into disuse with some stand-out exceptions – exceptions that demonstrate why sedition laws should be abolished.

The most obvious example is the use of sedition laws to attack the American arts community and Hollywood in particular during McCarthy period in the 1940s and 1950s.

In 1947, the House Committee on Un-American Activites charged ten writers, directors and producers with contempt of Congress for refusing to answer questions posed by the Committee. To become known as the "Hollywood Ten", the most well-known was novelist and screenwriter, Dalton Trumbo. Convicted, he served eleven months in prison and was blacklisted by the industry. Moving to Mexico, he wrote 30 scripts using a pseudonym including the Oscar winning script for *The Brave One* (writing as Robert Rich). It was the use of a pseudonym that enabled *The Bridge Over the River Kwai* to reach the screens. By the end of the notorious McCarthy era somewhere between 325 and 500 actors, directors, producers and writers were forced to seek work elsewhere. For some, it was the end of their career. Some, like Arthur Miller, were able to continue working, Miller writing scripts in New York (where theatre producers ignored the studios' blacklists). Others, like Charlie Chaplin, left the country and never worked in America again. It was not until 1959 that the first crack in the blacklist came with Otto Preminger's decision to hire Dalton Trumbo to write *Exodus*, following which Kirk Douglas announced he would give Trumbo full credit for *Spartacus*. However, as Trumbo himself said, "the blacklist was a time of such evil, no one survived untouched."

Some of those whom history now records as amongst the most important writers of all time have been charged with or threatened with sedition including Robert Burns, Ben Jonson, Daniel Defoe, William Blake and Molière.

As Robert Manne noted in *The Age* on 5 November, the use of sedition laws in Australia has been political in nature.

"Peter Lalor and his followers at the Eureka Stockade were charged with sedition and the editor of the *Ballarat Times* was found guilty of sedition for praising the revolt and spent three months in prison.

"Australia wheeled out sedition laws to break the Industrial Workers of the World (the Wobblies) in World War I and to imprison communist union officials such as Lance Sharkey after World War II. Sedition charges were even laid in Queensland against anti-Vietnam War demonstrators in the 1960s."[8]

Both the Chifley and Menzies Governments used sedition laws as part of their attack on the Communist Party. The Chifley Government's actions resulted in three members of the Communist Party being convicted (including Lance Sharkey) in cases that reached the High Court in *Burns v Ransley* (1949) 79 CLR 101 and *R v Sharkey* (1949) 79 CLR 121. The last sedition trial in Australia was an unsuccessful prosection by the Menzies Government of a another member of the Communist Party in 1953.

The Alliance recommends that, rather than reviewing the sedition provisions in the Bill, after the Bill has been passed, Schedule 7 be removed from the Bill and considered separately. The Alliance is strongly supportive of the abolition of the sedition laws in their entirety.

In the event that the Bill proceeds, at the very least an exemption needs to be included to cover freedom of expression. The Racial Discrimination Act 1975 includes a provision that serves as a model and could usefully be incorporated in Schedule 7.

**RACIAL DISCRIMINATION ACT 1975 - SECT 18D**

**Exemptions** Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

  (i) a fair and accurate report of any event or matter of public interest; or

  (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

[8] *Sedition: Our cross to bear?* Robert Manne, *The Age*, 5 November 2005 http://www.theage.com.au/news/general/sedition-our-cross-to-bear/2005/11/04/1130823401332.html?page=2