

# **ADDITIONAL COMMENTS AND POINTS OF DISSENT BY SENATOR NATASHA STOTT DESPOJA ON BEHALF OF THE AUSTRALIAN DEMOCRATS**

1.1 The Democrats oppose this Bill.

1.2 A number of submitters to this inquiry indicated that the classification scheme as presently configured is capable of being applied so as to ban material which advocates terrorism.<sup>1</sup>

1.3 We believe that this Bill as introduced will erode key legal and civil rights and undermine fundamental civil liberties such as freedom of speech, freedom of association and freedom of religion.

1.4 This Bill represents a confrontational approach by the Government to law making. Comments by the Federal Attorney-General to the effect that this legislative change is necessary because of a lack of cooperation from State Governments are commensurate with a power grab and must be resisted.

1.5 The content of the Bill has been appropriately described as unjustified and unrepresentative of community views. Several agencies have requested empirical evidence to show a causative link between accessing 'radical materials' and the risk of terrorism occurring. The Democrats agree that in such an important issue as this, it is imperative that law be made through empirical evidence.

1.6 During this inquiry there has not been a convincing argument made as to why existing classification laws should be extended in this manner or how the vulnerable in the community are to be protected.

**1.7 We believe Recommendation 1 contained in the Chair's report will improve the Bill and lessen the potential for abuses of human rights but provide the following additions:**

## **Democratic Principles & International Law obligations**

1.8 This Bill undermines Australians' right to freedom of speech. It is tantamount to the censorship of ideas.

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<sup>1</sup> Law Council of Australia, *Submission 15*; Uniting Justice Australia, *Submission 3*; Australian Press Council, *Submission 6*; Federation of Community Legal Centres, *Submission 13*; Gilbert + Tobin Centre of Public Law, *Submission 11*; New South Wales Council for Civil Liberties (NSWCCL), *Submission 10*.

1.9 We note reference to two fundamental international Treaties. First, to Article 29(b) of the *Universal Declaration of Human Rights* which states:

...in the exercise of a person's rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of human dignity and the general welfare of a democratic society.<sup>2</sup>

1.10 Second, to the International Covenant on Civil and Political Rights which states that:

...everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, whether orally, in writing or in print, in the form of art, or through any other media of his choice.<sup>3</sup>

This Article is subject to the qualification that it may be restricted where such restrictions are provided for by law and are necessary:

- (a) For the respect of the rights or reputations of others; or
- (b) For the protection of national security or of public order (ordre public) or of public health or morals<sup>4</sup>.

1.11 The Human Rights and Equal Opportunity Commission which is responsible for advising the Commonwealth Government and Parliament on its human rights obligations, recommended that the proposal be reconsidered on the basis that it was not convinced “of the necessity for tighter censorship laws in order to combat incitement and/or glorification of terrorism.”<sup>5</sup> We entirely agree with this sentiment.

### *Recommendation 1*

It is not appropriate to modify classification law in this far-reaching manner.

### **Absence of a Bill of Rights**

1.13 This Bill's dramatic implications for human rights and civil liberties are even more concerning, given Australia does not have a Bill of Rights or Human Rights Act.

1.14 As the only common law country without such protection, the basic human rights of Australians are subject to greater risk than the rights of citizens of these other nations.

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<sup>2</sup> Referred to by Uniting Justice Australia in *Submission 3*, p. 2.

<sup>3</sup> NSWCCCL, *Submission 10*, p. 2.

<sup>4</sup> Referred to in the submission of the Federation of Community Legal Centres (VIC) INC, *Submission 13*, p. 13.

<sup>5</sup> Law Council of Australia, *Submission 15*, p. 7.

1.15 While a number of the provisions contained in this Bill emulate the United Kingdom's laws, it does not contain the UK's accompanying protections for human rights and civil liberties. In this context the Democrats refer to the point made by the NSWCCCL in their submission. The NSWCCCL have quoted Professor Clive Walker, Leeds University, as saying 'the Human Rights Act 1988 limits the UK anti-terrorism legislation's impact on freedom of expression'.<sup>6</sup>

1.16 The *Human Rights Act* and the *European Convention on Human Rights* provide citizens of the United Kingdom with an avenue of appeal and an opportunity for judicial review when their Government infringes on these rights.

1.17 The absence of a Bill of Rights or Human Rights Act exposes needlessly Australians to unjust infringements on their rights and freedoms.

1.18 Currently, provided that the Parliament makes its intention clear, it can pass legislation violating almost any human right, with the exception of the few express rights which are protected by the Constitution including the right to trial by jury and freedom of religion. However, even these express rights are limited, for instance, trial by jury applies only where the Commonwealth has determined that a trial is to be 'on indictment'. In other words, it operates at the discretion of the Commonwealth.

1.19 A Bill of Rights is about protecting people and ensuring that our Government remains accountable for its actions.

1.20 Bills of Rights generally cover rights such as freedom of religion; freedom of peaceful assembly; freedom of association; the right to vote; the right to a fair trial; the right to life, liberty and security of the person; the right not to be arbitrarily detained; the right not to be subjected to cruel and unusual treatment; equality before the law; and, the right not to be discriminated against.

1.21 For example, the New Zealand *Bill of Rights Act* covers a range of civil and political rights. The United Kingdom's *Human Rights Act 1998* incorporates rights set out in the European Convention on Human Rights including the rights to property, education and free elections, and the abolition of the death penalty. Canada's *Charter of Human Rights and Freedoms* includes the right to affirmative action and cultural rights. The *South African Bill of Rights* is striking for its broad coverage of rights. It includes economic and social rights such as access to housing, health care, food, water and security, and rights such as that to a healthy environment and also property rights.

1.22 We also note that the absence of a Bill of Rights in Australia places an obligation on the Government to incorporate consideration of protections for fundamental rights and freedoms. We refer to the submission from the Sydney Centre for International and Global Law which states:

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<sup>6</sup> NSWCCCL, *Submission 10*, p. 4. See *The impact of UK Anti-Terror Laws on Freedom of Expression*, April 2006, available at <http://www.article19.org/pdfs/analysis/terrorism-submission-to-icj-panel.pdf>

...in the absence of any entrenched statutory or constitutional protection of human rights in Australia, it would not be appropriate to modify classification law in this far-reaching manner. The proposed amendments have the potential to unjustifiably and arbitrarily infringe freedom of expression, without showing any proximate connection to a substantial likelihood of imminent unlawful terrorist violence actually occurring.<sup>7</sup>

1.23 The Democrats' *Parliamentary Charter of Rights and Freedoms Bill* is on the Senate Notice Paper and the Democrats will continue to advocate for an Australian Charter of Rights and Freedoms.

#### *Recommendation 2*

That Parliament should enact a *Parliamentary Charter of Rights and Freedoms Bill* to provide Australians with basic protections against which legislation that potential infringes on human rights and civil liberties may be moderated.

### **Constitutional validity of the Bill**

1.25 The Sydney Centre for International and Global Law and the Federation of Community Legal Centres both focused upon possible Constitutional invalidity of the Bill.

1.26 The committee received evidence that specifically mentioned the implied Constitutional Freedom of political communication in *Lange v Australian Broadcasting Corporation*<sup>8</sup> and referred to section 116 of the Australian Constitution which protects freedom of religion. It has been suggested that the proposed classification laws will too narrowly restrict these freedoms.

1.27 The Democrats are persuaded by these arguments and recommend that the Commonwealth should not be legislating in this area on constitutional grounds.

1.28 We also note the point made by the Sydney Centre for International and Global Law that the Constitutional protection limits only Commonwealth laws and does not prevent the States from curtailing freedom of religious expression, which is significant given that State criminal laws primarily enforce classification decisions.<sup>9</sup>

1.29 We also note comments made by the Law Council in its submission that there is a need for classification laws throughout Australia to be uniform in order to be effective.<sup>10</sup>

1.30 The Law Council further warns that Parliament should not jeopardise the cooperative national scheme, by using the Classification Act to circumvent the

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<sup>7</sup> Sydney Centre for International and Global Law, *Submission 3*.

<sup>8</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520

<sup>9</sup> Sydney Centre for International and Global Law, *Submission 14*, pp 3 -5.

<sup>10</sup> Law Council of Australia, *Submission 15*, p. 12.

nationally agreed standards in the Classification Code. In short they state 'the success in Australia's federal system is contingent on jurisdictions not withdrawing their support or simply "going it alone" whenever their preferred view does not prevail'<sup>11</sup>.

1.31 We refer to comments made by the Victorian Attorney-General in a media release dated 24 July 2007. Mr Hulls has stated:

'It is disgraceful that Mr Ruddock has already introduced legislation into Federal Parliament before the matter has even been properly discussed with the states and territories,' Mr Hulls said.

'He is trying to bully the states and territories into accepting laws he hasn't even demonstrated we need. And if they don't, he will break apart the cooperative agreement with the state and territories on film and literature classifications.'<sup>12</sup>

### *Recommendation 3*

That the laws not be passed on constitutional grounds

#### **Definition of a terrorist act**

1.32 The Bill uses a problematic definition of terrorism. In the words of the NSWCCCL 'the Code has too broad a definition of what may constitute terrorist activities. While this broad definition may be suitable for dealing with actual terrorist actions, it is not suitable as a guideline for censorship.'<sup>13</sup>

1.33 The definition of a terrorist act is taken from the Commonwealth Criminal Code.

1.33 Many submitters referred to the problems of adopting the definition of 'advocates' because advocates restricts an organisation from 'directly or indirectly' urging or providing instruction on a terrorist act. Criticism has also been directed at the use of the word 'praising' a terrorist act and 'indirectly counselling' a terrorist act. Uniting Justice Australia has gone so far as saying that the Code's provisions of criminal sanctions for organisations 'advocating a terrorist act have been overzealous'.

1.34 We consider all of these phrases unnecessarily limit freedom of speech and undermine a liberal democracy. Moreover, we agree with the point made by The Sydney Centre for International and Global Law that:

...the new concepts of 'directly' counselling or urging, and directly instructing, are already well covered by the existing test of promoting, inciting or instructing in crime

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<sup>11</sup> Law Council of Australia, *Submission 15*, p. 12.

<sup>12</sup> Victorian Attorney-General, *Media Release*, 'Ruddock Hell-Bent on Going it alone on Censorship' 24 July 2007, [www.dpc.vic.gov.au](http://www.dpc.vic.gov.au)

<sup>13</sup> NSWCCCL, *Submission 10*, p. 5.

or violence. To this extent, the proposed amendment simply introduces unnecessary duplication and complexity – and uncertainty- into classification decisions.<sup>14</sup>

1.35 If this Bill is to become law we will be moving amendments to delete reference to the phrases identified above and replace them with terms which narrow the scope of materials which can be censored and introduce more objective tests.

1.36 We also consider there should be more leeway afforded to the Classification Review Board to label some material in the context of a struggle for liberation or independence rather than a 'terrorist act'. Gilbert and Tobin Centre of Public Law in their submission refer to this Bill as failing to adequately address whether the legitimate actions of a nation on the world stage in accordance with what they perceive as their national interests may amount to terrorism.<sup>15</sup> The Classification Review Board also state that 'usually the Classification Board and the Review Board are given some discretion in the application of tests where a refused Classification is the likely outcome'<sup>16</sup>.

#### *Recommendation 4*

That the definition of 'advocates' be amended by deleting the words 'or indirectly' from paragraphs 9A(2)(a) and (b) and deleting paragraph 9A(2)(c) which deals with praise of terrorist acts and the Explanatory Memorandum of the Bill should be amended to give the Classification Review Board more leeway to balance genuine freedom of political speech with what might be defined as terrorism. Further, the Explanatory Memorandum should refer to an example of what international conflicts may constitute terrorist acts.

#### **Exemption for genuine educational purposes and policy makers**

1.37 This Bill does not address whether academics or policy makers may access banned material for academic or policy research.

1.38 The Democrats know of three incidents which highlight the need to grant academics access to banned materials for study.

1.39 The first incident relates to media reports in October 2006 that Melbourne University intends to challenge the new terrorism laws, which prevent access to some academic books. The challenge has arisen in the context of a university historian and lecturer bringing two books to help his students understand Jihad only to have these books removed from the library shelves.

1.40 The second incident relates to the Australian Federal Police questioning a Melbourne University student named Abraham because he borrowed library books

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<sup>14</sup> The Sydney Centre for International and Global Law *Submission 14*, p. 6.

<sup>15</sup> Gilbert and Tobin Centre of Public Law *Submission 11*, pp 3-4.

<sup>16</sup> Classification Review Board, *Submission 12*, p. 2.

about terrorism and suicide. Quite ironically his studies involved preventing terrorism from occurring.

1.41 The third incident relates to a student studying at the University of Wollongong who was investigated as a result of false allegations that she attended a meeting supporting Hezbollah.

1.42 Educational research into terrorism is under attack from the proposed Classification laws. Academics, Teachers and students, are entitled to read about terrorism without fear of a knock at the door from the Australian Federal Police or ASIO.

1.43 In relation to policy makers, as the NSWCCCL suggests the proposed censorship laws will also limit materials to policy makers. This will severely limit the ability for the leaders of Australia to effectively address any future foreign policy issues arising from this ongoing threat.<sup>17</sup>

1.44 In the same tenor Gilbert and Tobin in their submission state:

Limiting academics' access to books on terrorism will hinder their ability to understand and criticise the ideas expressed in them. This is a problem not only for the academics themselves but also for the community at large, which depends upon quality academic work to better understand the social and security challenges facing the nation.<sup>18</sup>

1.45 The ideology of terrorism versus terrorist operations are distinct and the Bill needs to acknowledge the genuine study of the causes of terrorism. The Democrats oppose the restriction of materials for genuine academic or policy research.

#### *Recommendation 5*

That an exemption be included so that individuals may apply to the Classification Review Board to access potentially banned material for educational purposes. The exemption process should be proscribed and the decision whether or not to grant the request should be reviewable.

#### **Conclusion**

1.46 The Democrats do not believe that sufficient justification has been provided for the extended and unprecedented powers the government is seeking under this legislation.

1.47 In the absence of evidence supporting this Bill as a proportionate response to terrorism, the Democrats consider that the current Classification laws are adequate.

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<sup>17</sup> NSWCCCL, *Submission 10*, pp 6-7.

<sup>18</sup> Gilbert + Tobin Law Centre *Submission 11*, pp 4-5.

1.48 This Bill should not be passed without a balance being struck between the security imperative and the need to preserve civil liberties and safeguard human rights. This Bill should be rejected.

***Senator Natasha Stott Despoja***

Australian Democrats