

**Barbara Hocking, Submission, part B (part A is a pdf document “Barb Hocking”)**

Dear Judge,

My submission to the ICJ's Panel of Eminent Jurists consists of a copy of the submission I made in April 2002 to the Joint Parliamentary Committee on these 'terror laws', being the attachment hereto, together with the further comments I have added in the body of the email. Please accept my apologies for having written my submission before I received your guidelines. If, when I have read them, I find that I have a further submission to make, I ask that you accept it.

Barbara Hocking, retired barrister Melbourne.

Human Rights Medal Australia 1992.

Distinguished Alumni Monash University Inaugural Award 1993.

Visiting Resident Fellow Rockefeller Foundation, Bellagio Study and Conference Centre, Bellagio, Italy, 2002-2003.

**Further Submission together with the attached Submission to the ICJ's Panel of Eminent Jurists.**

I want to emphasize once again the simple basic principle of the danger for a democracy of confusing the roles of the executive, the judicial, and the legislative functions of government.

This system of the separation of powers in a democracy is not a meaningless fiction; it is the foundation of a democratic government. It has a proper balance that, once destroyed by one of the powers - in this case, the executive - at the expense of the other two arms, leads almost inexorably to the 'horror' of a form of tyranny.

In my opinion, the 'terror laws' proposed in Australia clearly destroy the proper balance of the separation of powers in our democracy. In particular, we have the situation at the present time of a virtual rubber-stamp legislature; particularly when there is an executive government majority in both Houses of Parliament. In these circumstances in Australia, the legislative power has long since almost lost its independent function as one balance among the three powers of our democratic government, and the executive has increased its functions accordingly.

Significantly, this increase has recently been accompanied by a campaign by the executive to decrease the power of the judicial arm of government.

These 'terror laws' lead to a further increase of the functions of the executive at the expense of the judicial functions. Indeed and in my opinion improperly, the executive is purporting to exercise some judicial powers. The rule of law as we know it, is adversely affected by this change in the balance of the separation of powers.

Other submissions will draw your attention to inter alia: the loss of civil liberties, the discrimination against certain sections of our community, and further intrusions of the executive into the proper sphere of the judiciary.

This last, in my opinion, is the worst 'horror' of all - for it is not possible for the executive to function judicially. It is a power that can only be exercised politically. Yet, it is claimed that in the case of the military prison at Guantanamo Bay run by the executive arm of the government of the USA, the 'terror laws' allow the judicial functions of imprisonment, prosecution, judgment and penalty, all to be carried out (if at all) by the executive, a non-judicial arm of government. That is not democracy; on the contrary, it is the way of a tyranny - as Lewis Carroll so tellingly wrote: "First the verdict, then the trial"! "Alice in Wonderland" indeed. And, as night follows day, so too has followed the interrogation of such prisoners by methods that amount to torture within the definition of the relevant United Nations Convention.

The provisions enacted here empower the executive to imprison people who may, or even who may not, be suspected of a potential criminal offence, and to do so for an extended period of time, without the laying of any criminal charge and without the normal protection provisions of the criminal law.

It seems to me that this is a first step towards a change in the balance of the separation of powers in our democracy that will end in a similar loss of democratic governance to that set out above. Therefore, it is imperative that any further erosion of the rule of law and the judicial function be prevented in order to preserve a democratic Australia.

I submit that the 'terror laws' pose a grave danger to the proper functioning of our democracy - an imminent danger that is not outweighed by the justification that these measures are protective, and necessary, because our society is at risk of special criminal acts designated 'terrorist'. In fact, because the criminal law is already adequate to deal with offences such as these, we do not have to choose between 'horror' and 'terror'. In my opinion, the immediate danger is the horror of an executive with powers reminiscent of those of the Star Chamber. So, as lawyers who care for the rule of law and its proper balance in our democracy, we must oppose the 'terror laws' and, obviously, should not support them.

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