



Robina Jaffray
Secretary
Standing Committee on Legal Affairs
ACT Legislative Assembly
GPO Box 1020
CANBERRA ACT 2601

20 February 2006

Standing Committee on Legal Affairs: Inquiry into Court Procedures (Protection of Public Participation) Amendment Bill 2005

I am writing on behalf of The Wilderness Society Inc (TWS) to comment on the above bill. The Wilderness Society is one of the largest conservation campaign organisations in Australia with branches in each state, and a national campaign office in Canberra. While our purpose is to protect, promote and restore wilderness and natural processes in Australia, we have a particular interest in this issue because of our recent experience of being sued as a result of our campaign activity.

Enclosed as part of our submission is the draft version of a report, *Gunning for Change: The Need for Public Participation Law Reform*, which we anticipate publishing in the next few weeks. We are providing the draft here because the report clearly identifies the extent of the problem of litigation against community activists and the need for a bill to protect the community's right and ability to participate in political debate and protest. Page 19 of the submission also explicitly considers bills introduced by Greens MPs into various parliaments around the country, including the bill which is the subject of this inquiry.

As you will see, we view the proposed Act as a step forward for the protection of free speech and public participation, but ultimately we believe that the bill does not go far enough and we offer an alternative model which more fully protects the community's rights in this area. In addition to the general critique in the TWS report, specific recommendations are attached below.

We also note that the section of *Gunning for Change* which deals with the bills introduced by the Greens into various state legislatures refers to initiatives on defamation, specifically the removal of rights of all corporations and of individuals (eg. company directors or officers) to sue for comments about corporate behaviour. Given the plethora of defamation cases over the Hindmarsh Island bridge brought by individual company directors over comments about a development company or the practices of the

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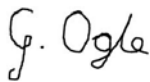
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company, (cases which would have been unaffected by the uniform defamation laws), this is an important and welcome initiative in the bill introduced into the South Australian parliament. We note that those clauses are not included in the ACT bill. This is disappointing in that it limits the usefulness of the uniform defamation laws and the protection offered by the ACT bill, although as noted in *Gunning for Change*, the blanket removal of the corporations' right to sue in defamation was always a blunt instrument. It would be unnecessary if the right of public participation were established as a positive right and protected as per Bover-Parnell draft bill recommended by TWS.

I would be keen to address the Committee in person to expand on these points and our recommendations on this bill, as well as to highlight their particular importance to the people of the ACT. I have made a particular study of the issue and I believe I can offer the committee a unique perspective on both the problem the bill addresses, and on the bill itself.

Thank you for considering this submission. I look forward to hearing from you in the near future.

Yours,

A handwritten signature in dark ink, appearing to read 'G. Ogle'.

Dr Greg Ogle
Legal Coordinator

Specific Comments on the ACT Court Procedures (Protection of Public Participation) Amendment Bill 2005

The context and background to these comments is contained in The Wilderness Society's report, *Gunning for Change: The Need for Public Participation Law Reform*. That report considers the potential of the proposed bill, as well as the *Human Rights Act 2004 (ACT)*, to protect the community's right and ability to participate in public debate and political protest.

As the report argues, there is a clear and growing problem of civil litigation chilling public debate. The *Human Rights Act 2004 (ACT)* does not adequately address the problem because s28 of that Act provides for laws to be made to set "reasonable limits" to free speech. The *Human Rights Act* contains no clear guidance on how this is to be interpreted, and therefore no clear guidance on how the right to freedom of expression recognised in s16 of the Act is to be operationalised or utilised. In this context, **a purpose built Act to protect public participation remains necessary.**

As noted above, The Wilderness Society welcomes this bill, although we see some problems with it, particularly in terms of its framing and definitions.

For the reasons stated in *Gunning for Change* we believe that the Bover-Parnell model is a better model legislation and make the following specific recommendations:

- 1. That the committee endorse the need for a purpose built Act to protect public participation**
- 2. That the committee analyse the Bover-Parnell model in Appendix 1 of *Gunning for Change* and recommend that the current bill be redrafted along the lines suggested in that draft bill.**

If this second recommendation is not accepted, then we recommend the following revisions to the existing bill:

- 3. That s37D be replaced by the definition used in s2 of the Bover-Parnell model in Appendix 1 of *Gunning for Change*.**
- 4. That the bill should be amended to positively establish a right to public participation.**
- 5. That the bill be strengthened by the inclusion of provisions on defamation similar to those put forward in the Protection of Public Participation Bill 2005 as presented to the South Australian parliament (21 September 2005), as per the following excerpt:**

Part 2 Defamation

6 *Defamation*

Public participation constitutes an occasion of qualified privilege and, for that purpose, the communication or conduct that constitutes the public

participation is taken to be of interest to all persons who, directly or indirectly

(a) receive the communication; or

(b) witness the conduct.

7 Corporations not to sue for defamation

(1) No corporation is entitled to sue for a cause of action in defamation, and no person is entitled to sue for a cause of action in defamation in reliance on an imputation arising from a statement made about a corporation.

(2) Subsection(1) does not limit any law relating to the protection of competition.

8 Politician, public servant or public official not to sue for defamation

No politician, public servant or public official is entitled to sue for a cause of action in defamation arising from statements relating to his or her conduct in office or, in the absence of malice, which the plaintiff must prove, fitness for office.

9 Defamation orders

(1) In the absence of malice, which the plaintiff must prove, no general damages may be awarded for defamation.

(2) If a plaintiff succeeds in an action for defamation, the court may make any of the following orders:

(a) an order declaring that the statement complained of was defamatory or untrue;

(b) an order declaring as to the true position as found by the court;

(c) an order requiring the defendant to make a retraction;

(d) an order requiring the defendant to make a correction;

(e) an order compelling the defendant to publish a retraction, correction or any other statement in such form, in such place, and on such terms as the court may consider just in all the circumstances;

(f) an order compensating the plaintiff for any special damages incurred by reason of the defamation.