



Australian Government
Australian Law Reform Commission

Fighting Words

REPORT

A Review of Sedition
Laws in Australia

REPORT 104
July 2006

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Australian Government
Australian Law Reform Commission

The Hon Philip Ruddock MP
Attorney-General of Australia
Suite MF 21
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Canberra ACT 2600

31 July 2006

Dear Attorney-General

Review of Sedition Laws

On 1 March 2006, you issued terms of reference for the Commission to undertake a review of federal sedition laws.

On behalf of the Members of the Commission involved in this Inquiry, including Justice Susan Kenny and Justice Susan Kiefel, and in accordance with the *Australian Law Reform Commission Act 1996*, we are pleased to present you with the final report in this reference, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104, 2006).

Yours sincerely

[signed]

Professor David Weisbrot
President

[signed]

Brian Opeskin
Deputy President

[signed]

Associate Professor Les McCrimmon
Commissioner

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Terms of Reference

REVIEW OF SEDITION LAWS

I, Philip Ruddock, Attorney-General of Australia, having regard to:

- the circumstances in which individuals or organisations intentionally urge others to use force or violence against any group within the community, against Australians overseas, against Australia's forces overseas or in support of an enemy at war with Australia; and
- the practical difficulties involved in proving a specific intention to urge violence or acts of terrorism;

refer to the Australian Law Reform Commission ('the Commission') for inquiry and report, pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996*, the operation of Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* and Part IIA of the *Crimes Act 1914*.

1. In performing its functions in relation to this reference, the Commission will consider:

- (a) whether the amendments in Schedule 7 of the *Anti-Terrorism Act (No 2) 2005*, including the sedition offence and defences in sections 80.2 and 80.3 of the *Criminal Code Act 1995*, effectively address the problem of urging the use of force or violence;
- (b) whether 'sedition' is the appropriate term to identify this conduct;
- (c) whether Part IIA of the *Crimes Act 1914*, as amended, is effective to address the problem of organisations that advocate or encourage the use of force or violence to achieve political objectives; and
- (d) any related matter.

2. The Commission will identify and consult with relevant stakeholders.

3. The Commission is to report no later than 30 May 2006.

Dated 1st March 2006

Philip Ruddock
Attorney-General

List of Participants

Australian Law Reform Commission

Division

The Division of the ALRC constituted under the *Australian Law Reform Commission Act 1996* (Cth) for the purposes of this Inquiry comprises the following:

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Mr Brian Opeskin (Deputy President)
Associate Professor Les McCrimmon (Commissioner)
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Executive Summary

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Introduction

The primary purpose of this Executive Summary is to explain the principles and assumptions that underlie the pattern of law reform recommendations made in this Report. In so doing, the Executive Summary discusses the ALRC’s recommendations for reform of the existing sedition offences in s 80.2 of the *Criminal Code* (Cth) and related matters, including recommendations for reform of the treason offences in s 80.1. The ALRC also recommends the repeal of the unlawful associations provisions contained in Part IIA of the *Crimes Act 1914* (Cth).

The term ‘sedition’

Chapter 2 discusses the historical link between sedition law and the suppression of political dissent. In this historical context, the offence of sedition can be seen as a ‘political’ crime, punishing speech that is critical of the established order. Stakeholders, including politicians across party lines, have expressed concerns that there is potential for sedition law to inhibit freedom of expression and free association.

Australians place a very high premium on freedom of expression and on the importance of robust political debate and commentary. The free exchange of ideas—however unpopular or radical—is generally healthier for a society than the suppression and festering of such ideas.

At the same time, all liberal democratic societies place some limits on the exercise of freedom of expression—as authorised under all international human rights conventions (see Chapters 5 and 6)—for example, through civil defamation laws and prohibitions on obscenity, serious racial vilification or incitement to commit a crime.

Much of the concern about the new offences in s 80.2 of the *Criminal Code* is triggered by the fact that they are still referred to as ‘sedition’ offences. It is not clear why, after modifying the offences substantially, the Australian Government chose to retain the term ‘sedition’ to describe the new offences—especially since one of the new offences deals with urging inter-group violence rather than with the security of the institutions of the Commonwealth.

In this Report, the ALRC makes a range of recommendations to improve the existing law. Some of these represent technical refinements to the drafting. Mainly, however, the recommendations are aimed at ensuring there is a bright line between freedom of expression—even when exercised in a challenging or unpopular manner—and the reach of the criminal law, which should focus on exhortations to the unlawful use of force or violence.

It would be unfortunate, however, if continued use of the term ‘sedition’ were to cast a shadow over the new pattern of offences. The term ‘sedition’ is too closely associated in the public mind with its origins and history as a crime rooted in criticising—or ‘exciting disaffection’ against—the established authority. Consequently, in Chapter 2, the ALRC recommends that the term ‘sedition’ no longer be used in federal criminal law.¹

Review of old *Crimes Act* provisions

In the course of this Inquiry, the ALRC came across a large number of old provisions in Part II of the *Crimes Act* that are related to sedition and treason laws. These include the offences of ‘treachery’ (s 24AA), sabotage (s 24AB), assisting prisoners of war (s 26), unlawful military drills (s 27), interfering with political liberty (s 28), and damaging Commonwealth property (s 29).

All of these provisions are couched in archaic language, and many of them may have been superseded by new and better laws. As discussed in Chapter 3, it is beyond the Inquiry’s Terms of Reference to conduct a systematic review of these provisions. However, the ALRC recommends that the Australian Government initiate a review to

1 Rec 2–1.

determine which of these offences merit retention, modernisation and relocation to the *Criminal Code*, and which should be abolished because they are redundant or otherwise inappropriate.²

State and territory sedition laws

The ALRC's review in Chapter 3 shows that most states and territories still have sedition laws in the old and more objectionable form. In the interests of improving and harmonising the laws in this area across Australia, the ALRC recommends that the Australian Government initiate a process through the Standing Committee of Attorneys-General to remove the term 'sedition' from state and territory laws.³

Unlawful associations

Chapter 4 deals with the unlawful associations provisions in Part IIA of the *Crimes Act*. These provisions were introduced in 1926 to deal with the perceived threat of the Communist Party of Australia and radical trade union activity, but they rarely have been used. Canadian provisions that served as a model for Part IIA were repealed in 1936.

The Terms of Reference for the Inquiry asked the ALRC to consider Part IIA because the declaration of an 'unlawful association' may proceed from a finding that the members of a group share a 'seditious intention', as defined in s 30A of the *Crimes Act*.

Once a body is declared to be an unlawful association, a number of criminal offences may be applicable, including: failure to provide information relating to an unlawful association upon the request of the Attorney-General;⁴ being an officer, member or representative of an unlawful association;⁵ giving contributions of money or goods to, or soliciting donations for, an unlawful association;⁶ printing, publishing or selling material issued by an unlawful association;⁷ and allowing meetings of an unlawful association to be held on property owned or controlled by the defendant.⁸

In 1991, the Gibbs Committee considered the 'little used' unlawful associations provisions, commenting in a discussion paper that it was 'disposed to think that the activities at which these provisions are aimed can best be dealt with by existing laws ... and that there is no need for these provisions'.⁹ In its final report, the Gibbs

2 Rec 3-1.

3 Rec 3-2.

4 *Crimes Act 1914* (Cth) s 30AB.

5 *Ibid* s 30B.

6 *Ibid* s 30D.

7 *Ibid* ss 30E, 30F, 30FA.

8 *Ibid* s 30FC.

9 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [38.2]–[38.9].

Committee noted that all the submissions received in response to the proposal to repeal Part IIA endorsed that view, and the Committee so recommended.¹⁰

In 2002, a comprehensive set of provisions dealing with ‘terrorist organisations’ was introduced into the *Criminal Code* (Division 102). No attempt was made to adapt the unlawful associations provisions for this purpose, but neither were they repealed. The criteria for declaring that a group is a ‘terrorist organisation’ do not rely on the concept of sedition or seditious intention; rather, the group must be directly or indirectly engaged in planning, fostering or advocating ‘terrorist acts’ (as defined in s 100.1).

The ALRC agrees with the Gibbs Committee and the clear view expressed in consultations and submissions that the unlawful associations provisions are anachronistic and unnecessary. There is little point in seeking to modernise these provisions since that work already has been done in developing the terrorist organisations provisions in the *Criminal Code*, which are better suited to contemporary circumstances. Consequently, the ALRC recommends that the unlawful associations provisions of Part IIA of the *Crimes Act* be repealed.¹¹

International framework

Chapter 5 analyses the interaction between Australian sedition law and international law. The chapter considers the two principal applications of international law in this context. These are: Australia’s obligations to respect human rights; and the growing recognition at international law of the need for states to take action to counter the threat of terrorism.

In particular, the chapter assesses the extent to which federal sedition law is compatible with art 19 of the *International Covenant on Civil and Political Rights 1966*.¹² The ALRC concludes that, if the pattern of recommendations in this Report were adopted, this would remedy any inconsistencies (potential or actual) between federal sedition law and the International Covenant.

Glorification of terrorism

Chapter 6 describes the nature and use of sedition laws (or the equivalent) in a range of other countries. Among other things, the chapter considers s 1 of the *Terrorism Act 2006* (UK), which makes it a criminal offence in the United Kingdom to encourage or glorify terrorism.¹³

10 Ibid, [38.8].

11 Rec 4–1.

12 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).

13 Glorification is defined to include ‘any form of praise or celebration, and cognate expressions are to be construed accordingly’: *Terrorism Act 2006* (UK) s 20(2).

This law has been very controversial in the United Kingdom—including in the House of Lords and the Parliament’s Joint Committee on Human Rights—drawing criticism that: the terminology used is too vague and too broad; there is no requirement that the person intends to incite terrorism; and the prohibition improperly intrudes into protected free speech (under art 10 of the European Convention on Human Rights).

In Chapter 6, the ALRC agrees with the clear view that emerges from the consultations and submissions that an offence of ‘encouragement’ or ‘glorification’ of terrorism, along the lines of s 1 of the *Terrorism Act 2006* (UK), should not be introduced into federal law.¹⁴

Freedom of expression

Chapter 7 analyses the interaction between the sedition provisions and freedom of expression in Australian domestic law. The chapter analyses the character and extent of any chilling effect on freedom of expression caused by the sedition provisions and discusses the interaction between the sedition provisions and other domestic legislation that protects human rights.

In Chapter 7, the ALRC recommends that peak arts and media organisations should provide educational programs and material to their members to promote a better understanding of the scope of laws that prohibit the urging of political or inter-group force or violence and any potential impact of these laws on the activities of their members.¹⁵

Urging political or inter-group force or violence

Under the Terms of Reference, the central questions for this Inquiry are whether the new sedition regime (taking together the offences in s 80.2 and the ‘good faith’ defence in s 80.3) is well-articulated as a matter of criminal law, and strikes an acceptable balance in a tolerant society.

While freedom of expression must be respected, it is also well understood that a liberal democratic society legitimately can place some limits on the exercise of free speech (for example, through civil defamation laws and criminal prohibitions on incitement to commit a crime). The test in international human rights law is whether such limits are necessary and reasonably justifiable in a democratic society.

Intention and ulterior intention

In Chapter 8, the ALRC recommends a fundamental change to the operation of the offences in s 80.2(1), (3) and (5). This recommendation is that s 80.2 of the *Criminal*

14 Rec 6–1.

15 Rec 7–1.

Code should be amended to provide that, for a person to be guilty of any of the offences, the person must intend that the urged force or violence will occur.¹⁶

This amendment would help remove from the ambit of the offences any rhetorical statements, parody, artistic expression, reportage and other communications that the person does not intend anyone will act upon, and it would ensure there is a more concrete link between the offences and force or violence. At the same time, this ‘ulterior intention’ falls short of that required to prove incitement—and does not require any connection with the commission of another specific offence.

In addition, the ALRC recommends that the offences in s 80.2(1), (3) and (5) be amended to make it clear the person must *intentionally* urge the use of force or violence.¹⁷ While it is arguably clear that intention is the fault element by virtue of the operation of general criminal responsibility provisions in s 5.6 of the *Criminal Code*, the ALRC considers it would be best for the fault element to be stated expressly in the reframed offences.

Urging political force or violence

In Chapter 9, the ALRC recommends the retention of the basic offences contained in s 80.2(1) (urging the overthrow by force or violence of the Constitution or Government) and s 80.2(3) (urging interference in parliamentary elections by force or violence). The headings of both offences should be amended to refer explicitly to urging the use of ‘force or violence’.¹⁸

In addition to the amendments concerning intention and ulterior intention, s 80.2(3) should be extended to cover urging another to use force or violence to interfere with a constitutional referendum. The similar offence in s 30C of the *Crimes Act* should be repealed as redundant.¹⁹

Urging inter-group force or violence

Chapter 10 considers the offence in s 80.2(5) of urging inter-group force or violence. Section 80.2(5) covers circumstances in which a person urges a group to use force or violence against another group distinguished by race, religion, nationality or political opinion. The rationale for the creation of this offence, the historical link between sedition offences and inter-group violence, and the relationship between s 80.2(5) and anti-vilification laws are discussed.

The ALRC recommends the retention of this offence. In addition to the common amendments concerning intention and ulterior intention, s 80.2(5) should be amended to include ‘national origin’ among the distinguishing features of a group for the

¹⁶ Rec 8–1.

¹⁷ Rec 9–2, 9–5, 10–2.

¹⁸ Rec 9–1, 9–4.

¹⁹ Rec 9–3.

purpose of the offence.²⁰ As with the other offences, the heading should be amended to refer explicitly to urging the use of ‘force or violence’.²¹

In Chapter 10 the ALRC also recommends that the Australian Government consider extending the offence to circumstances in which (a) a person urges another person (as distinct from a group) to use force or violence against a group distinguished by the specified distinguishing characteristics; and (b) a person urges a group that lacks one of the specified distinguishing characteristics to use force or violence against a group in the community that is so distinguished.²²

Assisting the enemy and treason

The ALRC has significant concerns about the offences currently contained in s 80.2(7)–(8), which are discussed in Chapter 11. These two offences do not require the urging of force or violence; rather it is an offence merely to ‘assist’ an enemy at war with Australia or an entity that is engaged in armed hostilities against the Australian Defence Force (ADF). Unlike the three offences considered above, the ‘assisting’ offences were not recommended by the Gibbs Committee.

The ALRC agrees with the run of submissions and commentary that point to the undesirable breadth of the term ‘assists’, which is not defined in the *Criminal Code*. There is an express exemption in s 80.2(9) for providing ‘aid of a humanitarian nature’. However, significant problems remain with the offences as drafted and the ALRC recommends their repeal.²³

Two of the treason offences set out in s 80.1 of the *Criminal Code* are framed in similar terms to the sedition offences in s 80.2(7)–(8) and carry a maximum penalty of life imprisonment. The ALRC cannot recommend repeal of the ‘assisting’ offences in s 80.2, without recommending amendments to remedy the same inadequacies in the parallel treason provisions.

First, a blanket prohibition on conduct that ‘assists’ the enemy may unduly impinge on freedom of expression, to the extent that it captures merely dissenting opinions about government policy. For example, it may be said colloquially that strong criticism of Australia’s recent military interventions in Afghanistan or Iraq ‘gives aid and comfort’ to—and thus ‘assists’—the enemy.

Secondly, there is no requirement to show that the defendant’s conduct assisted the enemy to wage war against Australia or engage in armed hostilities against the ADF; it would be sufficient to prove that the person urged another to assist an enemy that

20 Rec 10–2.

21 Rec 10–1.

22 Rec 10–4.

23 Rec 11–1.

happened to be at war with Australia or an entity happened to engage in armed hostilities against the ADF.

To remedy these concerns, the ALRC recommends that s 80.1(1)(e)–(f) be reframed to make clear that the offences consist of intentionally and *materially* assisting an enemy to wage war on Australia or to engage in armed hostilities against the ADF.²⁴ The addition of the term ‘materially’ is intended to indicate that mere rhetoric or expressions of dissent do not amount to ‘assistance’ for these purposes; rather, the assistance must enable the enemy or entity to wage war or engage in armed hostilities, such as through the provision of funds, troops, armaments or strategic advice or information.

The ALRC also recommends that s 80.1 be amended to require that the accused person be an Australian citizen or resident at the time of the alleged conduct.²⁵ Such a qualification is common in other countries, and consistent with the nature and historical origins of the concept of treason, which has at its centre the violation of a duty of allegiance to one’s country.²⁶ Apart from the value of this change as a matter of principle, it also will help avoid the potential for anomalous cases in practice, given that the offence has extraterritorial application. For example, virtually all enemy combatants who are foreign nationals could be swept up by the existing treason offence, even if they arrived in Australia many years after hostilities have ceased.

The ALRC’s recommendations in Chapter 11 complement recommendations for reform of the treason offences made by the Security Legislation Review Committee (the Sheller Committee), chaired by the Hon Simon Sheller QC, as part of a broader review of security laws.²⁷

However, there are a number of other aspects of the treason offences that, while not related directly to this Inquiry, appear to warrant further attention. For example, some of the language in s 80.1 is archaic, and is inconsistent with the modern terminology and concepts used in the *Criminal Code*. There are also questions about the appropriateness of the good faith defences, which remain applicable to s 80.1; and about the penalty of life imprisonment for accessories after the fact or those guilty of ‘misprision of treason’ (failure to report the matter to a police officer as soon as possible).

24 Rec 11–2.

25 Rec 11–4.

26 There was no citizenship qualification in the old *Crimes Act* provision either. However, the Gibbs Committee observed that the treason offences ‘must obviously be construed so as not to apply to an enemy alien in time of war outside Australia’: see H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), 280.

27 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006).

The ALRC recommends that, in considering the recommendations of the Sheller Committee on the law of treason, the Australian Government should take into account relevant recommendations and commentary in this Report.²⁸

Extraterritorial application

Chapter 11 also deals with the extraterritorial application of the sedition and treason offences. Common law countries traditionally have based criminal jurisdiction on considerations of territorial sovereignty, and have been suspicious of jurisdictional claims that smack of ‘universality’. However, there has been a recent trend towards the extraterritorial application of criminal laws, generated by both: (a) rapid developments in transport and communications technology; and (b) increased concerns over serious crimes that may be perpetrated across borders, such as genocide, people smuggling, child sex tourism, sex slavery, hostage taking and terrorism.

Under s 80.4 of the *Criminal Code*, treason and sedition offences are subject to ‘extended geographical jurisdiction—category D’, which is defined in s 15.4 to mean that the law applies: (a) whether or not the conduct constituting the alleged offence occurs in Australia; and (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.

Government policy is that sedition should be a category D offence because offences may be committed from an external location via the internet or telephone.²⁹ For example, someone overseas could establish a website that urges others to use force or violence to interfere in Australian parliamentary elections, or could send SMS text messages to associates in Australia, urging them to use force or violence against a particular racial or ethnic group. As a practical matter, of course, enforcement will be difficult unless the alleged offender is physically within the jurisdiction to face the Australian courts, which may require instituting extradition proceedings pursuant to a treaty.

The ALRC has no problem in principle with this policy choice in relation to sedition. As noted above, the ALRC can see some anomalies potentially arising in the prosecution of treason offences under s 80.1 of the *Criminal Code* if the provisions are given extraterritorial effect. However, the ALRC recommends that this issue should be addressed in another way, by adding a requirement to s 80.1 that the treason offences only apply to a person who is an Australian citizen or resident at the time of the conduct in question.³⁰

28 Rec 11–3.

29 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

30 Rec 11–4.

Intention and the defences

In considering whether the person intended the urged force or violence to occur, context is critical. In Chapter 12, the ALRC recommends that the trier of fact should be required to have regard to the context in which the conduct occurred, including (where applicable) whether the conduct was done: (a) in the development, performance, exhibition or distribution of an artistic work; (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; (c) in connection with an industrial dispute or an industrial matter; or (d) in the dissemination of news or current affairs.³¹

Given the effect of these changes, the ‘good faith’ defence in s 80.3 is inappropriate to the offences in s 80.2.³² Most submissions and consultations raise serious questions about the nature and application of the existing provisions in s 80.3. There is a strong view that such a defence is inherently illogical: a person would need to point to evidence (which the prosecution would have to negative beyond reasonable doubt) showing that, while he or she intentionally urged another person to use force or violence to overthrow the *Constitution* (for example), this was done ‘in good faith’. The ALRC’s recommendations meet these concerns by building the contextual issues into the required elements of the offences, rather than relying on an affirmative defence.

Requirement of Attorney-General’s consent

Chapter 13 considers the requirement, under s 80.5, for the written consent of the Attorney-General to a prosecution for an offence under Division 80 of the *Criminal Code*. In practice, this provision would be used only in the rare situation where the Director of Public Prosecutions has made a decision that the evidence available and the public interest warrant criminal proceedings, but the Attorney-General believes otherwise.

Although this provision is designed to provide an additional safeguard for a person charged with a sedition offence,³³ concerns have been expressed that s 80.5 could contribute to a perception there may be a political element in the decision whether or not to prosecute. Such concerns are understandable, and contribute to the ALRC’s recommendation that this consent requirement be repealed.³⁴

Moreover, the ALRC believes that a provision such as s 80.5 is unnecessary for four further reasons. First, the independence and apolitical nature of the office of the Director of Public Prosecutions are enshrined by statute. Secondly, a specific

³¹ Rec 12–2.

³² Rec 12–1.

³³ Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), 93.

³⁴ Rec 13–1.

requirement for the Attorney-General to consent to prosecution is most often imposed when an offence has a significant extraterritorial operation. The Attorney-General's consent to prosecution would still be required under s 16.1 of the *Director of Public Prosecutions Act 1983* (Cth), where the alleged conduct occurs wholly in a foreign country and the person charged is not an Australian citizen, resident or body corporate incorporated in Australia. Thirdly, if the ALRC's recommendation to repeal s 80.5 were accepted, s 8 of the *Director of Public Prosecutions Act 1983* (Cth) would still provide another mechanism for the Attorney-General to intervene in prosecutions under s 80.2. Given that this power is subject to parliamentary scrutiny, the ALRC believes it is a preferable alternative to s 80.5. Fourthly, the ALRC is strongly influenced by the fact that the run of new terrorism offences in Part 5.3 of the *Criminal Code* do not require the Attorney-General's consent to a prosecution (unless s 16.1 applies). Logic suggests that the same position apply to the Division 80.2 offences of urging political or inter-group force or violence.

Net effect of the recommendations

A number of major and minor changes are proposed for Division 80 of the *Criminal Code*, on treason and sedition. Appendix 1 of this Report contains the provisions in Division 80 as they currently exist. Appendix 2 sets out these provisions as they would appear if the ALRC's recommendations were implemented, with the changes highlighted. It is recommended that most of Part IIA of the *Crimes Act* (on unlawful associations) be repealed, with two offences (ss 30J and 30K) to be reviewed.

List of Recommendations

The relevant sections of the Criminal Code, amended in accordance with these recommendations, are set out in Appendix 2.

2. Origins and History of Sedition Law

- 2–1 The Australian Government should remove the term ‘sedition’ from federal criminal law. To this end, the headings of Part 5.1 and Division 80 of the *Criminal Code* (Cth) should be changed to ‘Treason and urging political or inter-group force or violence’, and the heading of s 80.2 should be changed to ‘Urging political or inter-group force or violence’.

3. Australian Sedition Laws and Related Provisions

- 3–1 The Australian Government should initiate a review of the remaining offences in Part II of the *Crimes Act 1914* (Cth) to determine which offences merit retention, modernisation and relocation to the *Criminal Code* (Cth), and which offences should be abolished. This review should include the offences in ss 24AA, 24AB and 25–29 of the *Crimes Act*. (See also Recommendation 4–2).
- 3–2 The Australian Government should initiate a process through the Standing Committee of Attorneys-General to remove the term ‘sedition’ from state and territory laws and to modernise and harmonise the relevant laws in keeping with the recommendations in this Report.

4. Unlawful Associations

- 4–1 Sections 30A, 30AA, 30AB, 30B, 30D, 30E, 30F, 30FA, 30FC, 30FD, 30G, 30H and 30R of Part IIA of the *Crimes Act 1914* (Cth), concerning unlawful associations, should be repealed.
- 4–2 The Australian Government should include ss 30J and 30K of the *Crimes Act* in the review of old provisions of the *Crimes Act* called for in Recommendation 3–1.

6. Sedition Laws in Other Countries

- 6–1 An offence of ‘encouragement’ or ‘glorification’ of terrorism, along the lines of s 1 of the *Terrorism Act 2006* (UK), should not be introduced into Australian law.

7. Sedition and Freedom of Expression

7–1 Peak arts and media organisations should provide educational programs and material to their members to promote a better understanding of:

- (a) the scope of federal, state and territory laws that prohibit the urging of political or inter-group force or violence; and
- (b) any potential impact of these laws on the activities of their members.

8. The Sedition Offences

8–1 Section 80.2 of the *Criminal Code* (Cth) should be amended to provide that, for a person to be guilty of any of the offences under s 80.2, the person must intend that the urged force or violence will occur.

9. Urging Political Force or Violence

9–1 The heading of s 80.2(1) of the *Criminal Code* (Cth) should be changed to refer to urging the overthrow by ‘force or violence’ of the Constitution or Government.

9–2 The word ‘intentionally’ should be inserted in s 80.2(1) of the *Criminal Code* before the word ‘urges’ to clarify the fault element applicable to urging the use of force or violence.

9–3 Section 30C of the *Crimes Act 1914* (Cth), concerning ‘advocating or inciting to crime’, should be repealed.

9–4 The heading of s 80.2(3) of the *Criminal Code* should be changed to refer to urging interference in parliamentary elections by ‘force or violence’.

9–5 Section 80.2(3) of the *Criminal Code* should be amended to:

- (a) insert the word ‘intentionally’ before the word ‘urges’ to clarify the fault element applicable to urging the use of force or violence; and
- (b) apply to interference with the lawful processes for a referendum on a proposed law for the alteration of the *Constitution*.

9–6 As a consequence of Recommendation 9–5, s 80.2(4) of the *Criminal Code* should be amended to apply recklessness to the element of the offence under s 80.2(3) that it is the ‘lawful processes for a referendum on a proposed law for the alteration of the *Constitution*’ in respect of which a person has urged interference.

10. Urging Inter-Group Force or Violence

- 10-1 The heading of s 80.2(5) of the *Criminal Code* (Cth) should be changed to refer to urging 'inter-group force or violence'.
- 10-2 Section 80.2(5) of the *Criminal Code* should be amended to:
- (a) insert the word 'intentionally' before the word 'urges' to clarify the fault element applicable to urging the use of force or violence; and
 - (b) add 'national origin' to the distinguishing characteristics of a group for the purposes of the offence.
- 10-3 As a consequence of Recommendation 10-2, s 80.2(6) of the *Criminal Code* should be amended to apply recklessness to the element of the offence under s 80.2(5) that it is a group distinguished by national origin that a person urges another to use force or violence against.
- 10-4 The Australian Government should consider extending the offence in s 80.2(5) of the *Criminal Code* to circumstances in which:
- (a) a person urges another person (as distinct from a group) to use force or violence against a group in the community that is distinguished by race, religion, nationality, national origin or political opinion; and
 - (b) a person urges a group that lacks one of the specified distinguishing characteristics to use force or violence against a group in the community that is distinguished by race, religion, nationality, national origin or political opinion.
- 10-5 The Australian Government should continue to pursue other strategies, such as educational programs, to promote inter-communal harmony and understanding.

11. Assisting the Enemy and Related Treason Offences

- 11-1 Section 80.2(7), (8) and (9) of the *Criminal Code* (Cth), concerning the offences of urging a person to assist the enemy and urging a person to assist those engaged in armed hostilities against the Australian Defence Force, should be repealed.
- 11-2 The treason offences in s 80.1(1)(e)–(f) of the *Criminal Code* should be amended to:
- (a) remove the words 'by any means whatever';

- (b) provide that conduct must ‘materially’ assist an enemy, making it clear in a note to the section that mere rhetoric or expressions of dissent are not sufficient;
 - (c) provide that assistance must enable an enemy ‘to engage in war’ with the Commonwealth or must enable a country, organisation or group ‘to engage in armed hostilities’ against the Australian Defence Force; and
 - (d) provide that the Proclamation under s 80.1(1)(e)(ii) must have been made before the relevant conduct was engaged in.
- 11–3 In considering the recommendations of the Security Legislation Review Committee (the Sheller Committee) on the law of treason, the Australian Government should take into account relevant recommendations and commentary in this Report.
- 11–4 Section 80.1 of the *Criminal Code* should be amended to apply only to a person who, at the time of the alleged offence, is an Australian citizen or resident.
- 12. Defences and Penalties**
- 12–1 Section 80.3 of the *Criminal Code* (Cth) concerning the defence of ‘good faith’ should be amended so that it does not apply to the offences in s 80.2.
- 12–2 Section 80.2 of the *Criminal Code* should be amended to provide that in determining whether a person intends that the urged force or violence will occur for the purposes of s 80.2(7), the trier of fact must have regard to the context in which the conduct occurred, including (where applicable) whether the conduct was done:
 - (a) in the development, 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 connection with an industrial dispute or an industrial matter; or
 - (d) in the dissemination of news or current affairs.
- 12–3 A note should be inserted after each of the offences in s 80.2(1), (3) and (5) of the *Criminal Code* drawing attention to the recommended new provisions regarding proof of intention that the force or violence urged will occur.

13. Consent to Prosecution

- 13-1 Section 80.5 of the *Criminal Code* (Cth), regarding the requirement of the Attorney-General's written consent to a prosecution under Division 80, should be repealed.

1. Introduction to the Inquiry

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Background to the Inquiry

The *Crimes Act* provisions on sedition

1.1 The criminal offence of sedition developed in England in the 17th and 18th centuries, emerging out of the laws against treason and libel, and aimed at shielding the Crown (and its institutions and officers) from criticism that might lessen its standing and authority among its subjects.

1.2 Sedition provisions were found in state criminal law from an earlier date, but the offence entered the federal statute book when ss 24A–24F were inserted into the

Crimes Act 1914 (Cth) in 1920.¹ Section 24A(1) originally defined ‘seditious intention’ as an intention to effect any of the following purposes:

- (a) to bring the Sovereign into hatred or contempt;
- (b) to excite disaffection against the Sovereign or the Government or Constitution of the United Kingdom or against either House of Parliament of the United Kingdom;
- (c) to excite disaffection against the Government or Constitution of any of the King’s Dominions;
- (d) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;
- (e) to excite disaffection against the connexion of the King’s Dominions under the Crown;
- (f) to excite His Majesty’s subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth; or
- (g) to promote feelings of ill-will and hostility between different classes of His Majesty’s subjects so as to endanger the peace, order or good government of the Commonwealth.²

1.3 Sections 24C and 24D created offences for various acts done with a seditious intention, with a maximum penalty of imprisonment for three years. Section 24F created a number of specific defences for acts done in ‘good faith’.

1.4 In 1986, following the recommendations of the Hope Royal Commission, the *Intelligence and Security (Consequential Amendments) Act 1986* (Cth) amended the sedition provisions in the *Crimes Act*: (1) to make clear that the prosecution carried the burden of proving an accused had a ‘seditious intention’ in relation to the offences in ss 24C–24D; and (2) to delete s 24A(b), (c) and (e), which referred to exciting disaffection in the United Kingdom or the King’s Dominions.

The Gibbs Committee

1.5 In 1991, the Committee of Review of Commonwealth Criminal Law chaired by former Chief Justice Sir Harry Gibbs (the Gibbs Committee) considered the sedition provisions in ss 24A–24F of the *Crimes Act*.³ In a preceding discussion paper, the Gibbs Committee had expressed the view that those provisions were couched in

¹ *War Precautions Repeal Act 1920* (Cth) s 12.

² The High Court upheld the validity of these provisions in *R v Sharkey* (1949) 79 CLR 121, with Dixon J dissenting in relation to s 24A(1)(g).

³ H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991).

archaic language and required modernisation and simplification—but should then be retained in the *Crimes Act*.⁴

1.6 In its Fifth Interim Report, the Gibbs Committee confirmed this criticism, noting that the definition of ‘seditious intention’ was ‘expressed in archaic terms and [was] misleadingly wide’.⁵ However, the Committee confirmed its view that Commonwealth law must continue to make it an offence to incite the overthrow or supplanting by force or violence of the Constitution or Government.

1.7 The Gibbs Committee also recognised Australia’s international obligations under art 20 of the *International Covenant on Civil and Political Rights 1966* and art 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination 1966* to prohibit incitement to national, racial and religious hatred (see Chapters 5 and 10).⁶

1.8 Consequently, the Gibbs Committee’s final recommendation was that it should be a crime, punishable by a maximum of seven years’ imprisonment:

to incite by any form of communication:

- (a) the overthrow or supplanting by force or violence of the Constitution or the established Government of the Commonwealth or the lawful authority of that Government in respect of the whole or part of its territory;
- (b) the interference by force or violence with the lawful processes for Parliamentary elections; or
- (c) the use of force or violence by groups within the community, whether distinguished by nationality, race or religion, against other such groups or members thereof.⁷

11 September 2001 and beyond

1.9 Although many textbooks and commentaries on Australian law had pronounced the crime of sedition (and related variations) to be ‘archaic’ and ‘defunct’, more recent concerns about the national and international security environment have literally put the matter back on the front page—particularly in the aftermath of the terrorist attacks in New York and Washington on 11 September 2001, and in Bali (12 October 2002), Madrid (11 March 2004), London (7 July 2005) and Mumbai (11 July 2006). The London attack introduced a new dimension to debates about counter-terrorism: the possible presence in Western countries of ‘home grown’ terrorists and suicide bombers, and the degree to which this might warrant increased domestic surveillance

4 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Offences Relating to the Security and Defence of the Commonwealth*, Discussion Paper No 8 (1988), 17.

5 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [32.13].

6 Ibid, [32.17].

7 Ibid, [32.18].

and police powers, as well as criminal offences specifically tailored to cover these activities.

Special COAG meeting in September 2005

1.10 At the Special Meeting of the Council of Australian Governments (COAG) convened on 27 September 2005 by the Prime Minister, the Hon John Howard MP, the participants were briefed on the international and national security environment by the Directors-General of the Office of National Assessments and the Australian Security Intelligence Organisation (ASIO). After further discussion and consideration of the risks of a terrorist attack occurring in Australia, the federal, state and territory leaders agreed in principle to cooperate in matters of counter-terrorism and to introduce a common package of legislative measures.

1.11 At the end of the meeting a communiqué was issued setting out the agreed outcomes of the discussions.⁸ These included: (a) the development of a National Emergency Protocol; (b) continued high priority to be given to the security of mass passenger transport; (c) the development of a national approach to the use of closed circuit television in support of counter-terrorism arrangements; (d) the development of a National Action Plan to combat intolerance and communal violence; (e) improvements to aviation security; (f) the development of a national identity security strategy to combat identity fraud and theft; (g) improvements to private security arrangements, particularly where these impact on Australia's counter-terrorism arrangements; (h) revision of the first *National Counter-Terrorism Plan* (2003), which sets out the collaborative arrangements in place for preventing, preparing for and responding to terrorist incidents within Australia; (i) emphasising the importance of Australia's current regime of regular counter-terrorism exercises at the national, state and territory levels; (j) promoting public understanding of, and confidence in, the national counter-terrorism arrangements and putting in place arrangements to provide the community, business and the media with timely information during a crisis; and (k) development of a national chemical, biological, radiological and nuclear security strategy focused on prevention, preparedness, response and recovery.

1.12 Another key aspect of the Special Meeting was the discussion about the adequacy of existing counter-terrorism laws. COAG noted 'the evolving security environment in the context of the terrorist attacks in London in July 2005' and agreed there was 'a clear case for Australia's counter-terrorism laws to be strengthened', with the proviso that:

any strengthened counter-terrorism laws must be necessary, effective against terrorism and contain appropriate safeguards against abuse, such as parliamentary and judicial review, and be exercised in a way that is evidence-based, intelligence-led and proportionate.⁹

8 Council of Australian Governments (COAG), *Council of Australian Government's Communiqué—Special Meeting on Counter-Terrorism* (2005) <<http://www.coag.gov.au/meetings/270905/>> at 12 January 2006.

9 Ibid.

1.13 State and territory leaders agreed with the Commonwealth that the *Criminal Code* (Cth) should be amended in a number of respects, including amendments to provide for:

- ‘control orders’ and ‘preventative detention’ for up to 48 hours, to restrict the movement of those thought to pose a terrorist risk to the community;
- the expansion of the Commonwealth’s ability to proscribe terrorist organisations that advocate terrorism; and
- ‘other improvements ... including to the financing of terrorism offence’.¹⁰

1.14 State and territory leaders also noted they would be consulted by the Commonwealth in relation to:

- proposed amendments to Part IIIAAA of the *Defence Act 1903* (Cth) to enhance and clarify the arrangements for calling out the Australian Defence Force to assist civilian authorities; and
- the possible enactment of laws to prevent the use of non-profit or charitable organisations for the ulterior purpose of financing terrorist activities.¹¹

1.15 Apart from the inherent desirability of developing an integrated, national approach to counter-terrorism, one of the underlying reasons for convening the Special Meeting of COAG was that inter-jurisdictional cooperation was needed because most aspects of criminal law and police powers fall to the states and territories under the *Australian Constitution*. For example, because of constitutional constraints, the Commonwealth could not itself enact such measures as: (a) preventative detention of suspected terrorists; and (b) stop, question and search powers in areas such as transport hubs and places of mass gatherings.

1.16 Commonwealth, state and territory leaders also agreed that these new laws would be reviewed after five years, and that the legislation would include 10 year ‘sunset clauses’.¹²

The Anti-Terrorism Bill (No 2) 2005

1.17 The Anti-Terrorism Bill (No 2) 2005 (Cth) was introduced into the Australian Parliament on 3 November 2005. Key features of the Bill included:

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

- expansion of the grounds for the proscription of terrorist organisations to include organisations that ‘advocate’ terrorism (Schedule 1);
- a new offence of financing terrorism (Schedule 3) and increased financial transaction reporting obligations on individuals and businesses (Schedule 9);
- a new regime to allow for the imposition of ‘control orders’ (subject to review after a period of up to one year) that place restrictions on the movements and associations of a person suspected of involvement in terrorist activity, and to authorise their close monitoring (Schedule 4);
- a new preventative detention regime to allow police to detain a person without charge for the purposes of interrogation by ASIO, to prevent a terrorist act or to preserve evidence of such an act—with limited ability to disclose such detention, and severe penalties for unlawful disclosure (Schedule 4);
- expanded police powers for searches and seizures without a warrant in ‘Commonwealth places’ and in ‘prescribed security zones’ (Schedule 5);
- police powers to compel disclosure of commercial and personal information (Schedule 6);
- further expansion of information and intelligence gathering powers available to police forces and to ASIO (Schedules 8 and 10); and
- modernisation of the old sedition offences, as recommended by the Gibbs Committee a decade earlier, by replacing them with a suite of five offences built around the basic concept of prohibiting a person from ‘urging’ others to use ‘force or violence’ in a number of prescribed contexts—and with a specific defence of ‘good faith’ (Schedule 7).

Schedule 7: the new sedition offences

1.18 The recommendations of the Gibbs Committee were expressly acknowledged as influencing the drafting of the new sedition offences in late 2005. The Explanatory Memorandum accompanying the Anti-Terrorism Bill (No 2) 2005 (Cth) noted that:

The inclusion of sedition in the *Criminal Code* is consistent with the general policy of moving serious offences to the new *Criminal Code* when they are updated. These offences have been update[d] in line with a number of recommendations of Sir Harry Gibbs in the Review of Commonwealth Criminal Law, Fifth Interim Report, June 1991 (the Gibbs Report).¹³

¹³ Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), 88.

1.19 Similarly, in his Second Reading Speech, the Attorney-General, the Hon Philip Ruddock MP, noted that ‘the sedition amendments are modernising the language of the provisions and are not a wholesale revision of the sedition offence’.¹⁴

1.20 The Attorney-General also stated that the provisions were the product of extensive consultation with national leaders and senior government officers at all levels through the COAG process, and were needed

to ensure that we have the toughest laws possible to prosecute those responsible should a terrorist attack occur.

Second and of equal importance, the bill ensures we are in the strongest position possible to prevent new and emerging threats, to stop terrorists carrying out their intended acts.¹⁵

1.21 In relation to the sedition provisions in particular, the Attorney-General further noted that:

The bill also addresses those in our community who incite terrorist acts.

It does this by expanding upon the Australian government’s ability to proscribe terrorist organisations that advocate terrorism and also updates the sedition offence.

The updated sedition offence will address problems with those who incite directly against other groups within our community.¹⁶

Senate Legal and Constitutional Legislation Committee report

1.22 On 3 November 2005, the Senate referred the provisions of the Anti-Terrorism Bill (No 2) 2005 to the Senate Legal and Constitutional Legislation Committee (the 2005 Senate Committee inquiry) for inquiry and report by 28 November 2005.

1.23 The 2005 Senate Committee inquiry, chaired by Senator Marise Payne, held three days of public hearings in Sydney in mid-November 2005 and—indicative of the high level of public interest—received nearly 300 written submissions.

1.24 In relation to the security environment, the Senate Committee inquiry noted that it had been advised by the Director-General of ASIO, Mr Paul O’Sullivan, that:

It is a matter of public record that Australian interests are at threat from terrorists. It is also a matter of public record that ASIO has assessed that a terrorist attack in Australia is feasible and could well occur. ... [T]he threat has not abated and we need to continue the work of identifying people intent on doing harm, whether they are already in our community, seeking to come here from overseas or seeking to attack Australian interests overseas. I would also point out that the nature of the threat we face is not static. Just as terrorist organisations and groups learn from past experience

14 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (P Ruddock—Attorney-General), 103.

15 Ibid, 102.

16 Ibid, 103.

and adapt to counter the measures that governments implement, so also do we need to continually revise the way we go about the business of countering terrorist threats. Part of that process involves ensuring that the legislative framework under which we operate is commensurate with the threat we face.¹⁷

1.25 Similarly, the Australian Federal Police argued before the 2005 Senate Committee inquiry that the clandestine nature of terrorism activity and its catastrophic consequences mandated enhanced powers and new tools for police and intelligence agencies.

Together, the proposals for control orders, preventative detention and stop, search and seizure powers represent additional powers for police to deal with situations that are not covered by the existing legal framework. Since the events of 2001, the AFP and other agencies have been in constant dialogue with the government on the appropriateness of the legal framework for preventing and investigating terrorism as our understanding of the terrorist environment has developed. ... The proposals in the bill ... address limitations in that framework which have become apparent recently, in particular the need for the AFP to be able to protect the community where there is not enough evidence to arrest and charge suspected terrorists but law enforcement has a reasonable suspicion that terrorist activities may be imminent or where an act has occurred.¹⁸

1.26 The Committee's report defined its role in the following terms:

No witnesses questioned the responsibility of the government to evaluate national security information and to make a judgment about the actual level of threat to Australia. However, many questioned whether the obligation to protect the community justifies creating a separate system to deal with 'terrorist suspects' who may otherwise be dealt with by the criminal justice system. ... [Submissions] and witnesses urged the committee to consider: whether the current Bill is necessary to combat terrorism; whether existing powers and offences are sufficient to deal with acts of terrorism and related activity; and whether the removal of traditional safeguards is a proportionate response.¹⁹

1.27 The report made 51 recommendations for amendment to the Bill, with a final recommendation to pass the Bill if the Committee's recommendations were taken up by the Government. Most recommendations had substantial cross-party support, although a dissenting report was filed by Greens Senators Bob Brown and Kerry Nettle;²⁰ additional comments were supplied by Labor Senator Linda Kirk;²¹ and additional comments and a partial dissent were supplied by Australian Democrats Senator Natasha Stott Despoja.²²

17 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [2.7].

18 Ibid, [2.9].

19 Ibid, [2.6].

20 Ibid, 195–198.

21 Ibid, 199–201.

22 Ibid, 203–214.

1.28 In relation to Schedule 7, dealing with sedition laws, the Committee made these four recommendations:

Recommendation 27. The committee recommends that Schedule 7 be removed from the Bill in its entirety.²³

Recommendation 28. The committee recommends that the Australian Law Reform Commission conduct a public inquiry into the appropriate legislative vehicle for addressing the issue of incitement to terrorism. This review should examine, among other matters, the need for sedition provisions such as those contained in Schedule 7, as well as the existing offences against the government and Constitution in Part II and Part IIA of the *Crimes Act 1914*.²⁴

Recommendation 29. If the above recommendation to remove Schedule 7 from the Bill is not accepted, the committee recommends that:

- proposed subsections 80.2(7) and 80.2(8) in Schedule 7 be amended to require a link to force or violence and to remove the phrase ‘by any means whatever’;
- all offences in proposed section 80.2 in Schedule 7 be amended to expressly require intentional urging; and
- proposed section 80.3 (the defence for acts done ‘in good faith’) in Schedule 7 be amended to remove the words ‘in good faith’ and extend the defence to include statements for journalistic, educational, artistic, scientific, religious or public interest purposes (along the lines of the defence in section 18D of the *Racial Discrimination Act 1975*).²⁵

Recommendation 30. The committee recommends that the amendments in Schedule 1 of the Bill, relating to advocacy of terrorism, be included in the proposed review by the Australian Law Reform Commission as recommended above in relation to Schedule 7.²⁶

1.29 The Government accepted a significant proportion of the recommendations in the Committee’s report, and these were reflected in the final version of the Bill. The Act was passed into law on 6 December 2005—with only Green and Australian Democrat Senators voting against it—and entered into force on 11 January 2006.

1.30 The Government did not accept Recommendation 27, to remove Schedule 7 from the Bill in its entirety. Instead, some recommended changes were made to the wording of the offences and the defence in Schedule 7, and the Attorney-General confirmed his earlier undertakings that, ‘given the considerable interest in the

23 Ibid, [5.173].

24 Ibid, [5.174].

25 Ibid, [5.176].

26 Ibid, [5.233].

provisions', they would be subject to a review.²⁷ Ultimately, the Attorney-General decided that this independent public inquiry should be conducted by the ALRC.

Terms of Reference

1.31 On 1 March 2006, the Attorney-General signed Terms of Reference asking the ALRC to conduct a review of the operation of Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* (Cth) and Part IIA of the *Crimes Act*, with respect to the recently amended provisions dealing with the offence of sedition and related matters, and to report by 30 May 2006.

1.32 The Terms of Reference, which are reproduced at the front of this Report, direct the ALRC to consider:

- the circumstances in which individuals or organisations intentionally urge others to use force or violence against any group within the community, against Australians overseas, against Australia's forces overseas or in support of an enemy at war with Australia; and
- the practical difficulties involved in proving a specific intention to urge violence or acts of terrorism.

1.33 In performing its functions in relation to this reference, the ALRC is asked to have particular regard to:

- (a) whether the amendments in Schedule 7 of the *Anti-Terrorism Act (No 2) 2005*, including the sedition offence and defences in sections 80.2 and 80.3 of the *Criminal Code*, effectively address the problem of urging the use of force or violence;
- (b) whether 'sedition' is the appropriate term to identify this conduct;
- (c) whether Part IIA of the *Crimes Act*, as amended, is effective to address the problem of organisations that advocate or encourage the use of force or violence to achieve political objectives; and
- (d) any related matter.

1.34 In October 2005, the Security Legislation Review Committee, chaired by the Hon Simon Sheller QC (the Sheller Committee), commenced a broad review of security legislation. This parallel review had some points of connection with the subject matter of the ALRC's Inquiry, notably because the Sheller Committee's brief included review of the terrorist organisations provisions of Division 102 of the

²⁷ Including in his Second Reading Speech: Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (P Ruddock—Attorney-General), 103.

Criminal Code and the treason offences now contained in s 80.1 of the Code. The Sheller Committee released its report in June 2006,²⁸ and its recommendations are referred to in this Report.

Federal criminal law and practice

The reach of federal criminal jurisdiction

1.35 Given the constitutional constraints in Australia, criminal law and procedure are largely, but not entirely, a matter for the states and territories. The great bulk of ‘standard criminal law’—that is, the matters that most members of the community think of as crime: homicide, assault, sexual assault, robbery, break and enter, and so on—is dealt with by state and territory courts applying state and territory law.

1.36 Federal legislative activity in this field generally must be underpinned by one of the specific heads of power provided to the Commonwealth under the *Australian Constitution*—for example, the incidental power (s 51(xxxix)) or the external affairs power (s 51(xxix)). Put simply, federal criminal law tends: (a) to be concerned with harm to Australian government property or officials, or to the revenue (eg, taxation or social security frauds); (b) to have a clear interstate or international dimension (eg, postal and telegraphic offences; or importing/exporting prohibited goods or substances); or (c) to fulfil an obligation pursuant to an international treaty to which Australia is a party (eg, prohibitions on slavery, war crimes and genocide).

1.37 Some areas of activity will give rise to overlapping federal and state or territory jurisdiction. For example, all states and territories have laws prohibiting aspects of the manufacture, possession or distribution of illegal drugs, while there are federal laws prohibiting the import and export of illegal drugs. It is not unusual for there to be joint federal and state police investigations leading to a single trial, with indictments for breach of both federal and state law.

1.38 There are substantial intersections between federal law and state and territory criminal laws in the area covered by the new sedition offences in s 80.2. In particular cases there may be a direct overlap of federal, state or territory sedition laws, or there may be an indirect overlap—for example, where the same facts would satisfy the elements of a federal sedition offence and also would constitute a breach of a state or territory criminal law, such as assault, riot or affray.

1.39 Every jurisdiction except South Australia and the ACT has a law prohibiting sedition, and all jurisdictions have laws against treason. Section 80.6 of the *Criminal Code* expressly provides that it is not the intention of Division 80, covering treason and sedition, to exclude state or territory law.

28 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006).

The development of the *Criminal Code* (Cth)

The Gibbs Committee and MCCOC

1.40 The *Crimes Act* served for a long time as the principal piece of legislation dealing with federal criminal law. Many other federal statutes also proscribe certain conduct and specify a criminal penalty—for example, s 327 of the *Commonwealth Electoral Act 1918* (Cth) prohibits a person from hindering or interfering with the free exercise of any political right or duty relevant to a parliamentary election. As a general rule, the *Crimes Act* contained the more serious and general offences, while the other federal offences created in specific legislation tended to be incidental to the regulation of a particular field (such as customs, environmental protection, corporate compliance and revenue collection). Most, but not all, of the latter offences may be heard summarily, and carry smaller maximum penalties (generally, less than 12 months imprisonment).

1.41 Commencing in 1987, the Gibbs Committee produced five interim reports on a range of matters, including: computer crime (1988); detention before charge (1989); general principles of criminal responsibility (1990); offences against the administration of justice and property crime (1990); and arrest, sentencing, forgery and offences relating to the security and defence of the Commonwealth (1991). A final report was delivered in late 1991. The Gibbs Committee was successful in initiating a number of amendments to the *Crimes Act*, including those dealing with computer crime and police powers of investigation.

1.42 As noted above, the Fifth Interim Report of the Gibbs Committee considered and made recommendations for reform of the *Crimes Act* provisions dealing with treason, sedition and unlawful associations.²⁹

1.43 In July 1990, the Standing Committee of Attorneys-General (SCAG) established the Model Criminal Code Officers Committee (MCCOC), with a brief to modernise and harmonise criminal law across Australia through the development of a Model Criminal Code. The MCCOC process produced a series of discussion papers, final reports and recommended Model Criminal Code chapters over the next decade.

1.44 Although the MCCOC process has not produced a uniform, national Criminal Code (such as applies in the Canadian federation), all Australian states and territories have enacted parts of the Model Code.³⁰

29 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), Chs 31, 32 and 38, respectively.

30 The influence of the Model Code has been most marked in the Commonwealth, New South Wales, the ACT and South Australia. The Model Code has been less influential in jurisdictions that already have a criminal code, based on Sir Samuel Griffith's late 19th century model—Queensland, Western Australia and Tasmania.

The Criminal Code

1.45 The *Criminal Code* was introduced into federal law as a schedule to the *Criminal Code Act 1995* (Cth), and entered into force on 1 January 1997.

1.46 The basic policy of the Australian Government is that the *Criminal Code* is now the principal piece of federal legislation containing serious criminal offences. Substantive criminal provisions contained in other, older pieces of law—including, or perhaps especially, the *Crimes Act*—progressively should be reviewed, and either ‘modernised’ and ‘migrated’ to the *Criminal Code*, or repealed. Ultimately, the *Crimes Act* will be left covering matters of police powers (such as arrest, detention, search and seizure, forensic procedures) and criminal procedure.³¹

1.47 Underlying this process is the desire to keep the federal criminal statute book ‘fresh’—utilising modern drafting techniques, providing greater uniformity of language and concepts, and ensuring that the law keeps abreast of contemporary circumstances, attitudes and concerns.

1.48 This background is important for the current Inquiry because treason was modernised and migrated to the *Criminal Code* in 2002, and sedition in 2005. A comprehensive set of provisions governing ‘terrorist organisations’ was inserted into the *Criminal Code* in 2002, leaving behind the rarely used Part IIA of the *Crimes Act* on ‘unlawful associations’. In essence, the technical side of this Inquiry is to examine the effectiveness of these efforts at modernising these old areas of the criminal law.

Criminal responsibility under the Code

1.49 Another feature of the *Criminal Code* of particular importance for this Inquiry is that Chapter 2 of the Code provides a set of general principles of criminal responsibility that permeate the rest of the Code—and, indeed, must be read together with the criminal provisions in any other piece of federal legislation.

1.50 For example, Chapter 2, Division 5 standardises and defines the fault elements (*mens rea* in common law crime) to be applied to any offence—intention, knowledge, recklessness or negligence. The definition of ‘recklessness’ in s 5.4, for the purposes of determining criminal liability, gives the term a meaning closer to ‘intention’ than to ‘negligence’, requiring that the actor must be aware there is a substantial risk his or her conduct will bring about the prohibited result, and that it is unjustifiable to take that risk in the circumstances.

31 The ALRC recommended that all matters relating to sentencing also be removed from the *Crimes Act*, and collected in a dedicated federal sentencing Act: see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Rec 2–1.

1.51 A large number of the submissions to the 2005 Senate Committee inquiry—and to a significant but lesser extent to this Inquiry—strongly, but incorrectly as a technical matter, objected to the use of a ‘recklessness’ element in the new sedition offences in the *Criminal Code*.³² The concern commonly expressed was that a person should not be liable to be convicted of such a serious offence by blundering into such activities. However, the Code definition makes plain that this could not be the case.

1.52 Chapter 2, Divisions 7–10 of the *Criminal Code* cover the circumstances in which criminal responsibility should *not* be attributed,³³ and Division 11 covers extensions to criminal responsibility, such as attempt (s 11.1), complicity and common purpose (s 11.2), incitement (s 11.4) and conspiracy (s 11.5). Division 13 reinforces the common law position that the prosecution bears the onus of proving every element of an offence beyond reasonable doubt.

Other features of the federal criminal justice system

1.53 A number of other features of the federal criminal justice system are worth highlighting. As noted above, state and territory courts deal with the overwhelming majority of federal criminal matters (whether summarily or upon indictment), and in so doing they normally apply their own practices and procedures. As there are no federal prisons, federal offenders sentenced to a term of imprisonment serve their time in a state or territory-administered custodial institution.³⁴

1.54 Section 80 of the *Australian Constitution* provides that:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes. [Emphasis added]

1.55 Section 80 has two important consequences for persons charged with a federal offence. First, every trial for an indictable offence must be conducted before a jury—whereas state and territory law often provides for the waiver of a jury trial in certain circumstances, with the trial proceeding before a judge alone. Secondly, as interpreted by the High Court, s 80 requires that the jury reach a unanimous verdict³⁵ in a federal criminal trial—whereas some states and territories allow for a majority verdict in certain circumstances.³⁶

³² See *Criminal Code* s 80.2(2), (4), (6).

³³ Such as in the case of a young child (s 7.1); a person suffering from a serious mental impairment (s 7.3); or where a person is acting in self-defence (s 10.4), under duress (s 10.2), in response to a sudden and extraordinary emergency (s 10.3), under a claim of right to property (s 9.5) or is exercising lawful authority (s 10.5).

³⁴ See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), [1.51]–[1.63].

³⁵ *Cheatle v The Queen* (1993) 177 CLR 541, 551–552.

³⁶ *Black v The Queen* (1993) 179 CLR 44.

1.56 The discretion about whether to prosecute serious criminal charges is exercised by the Commonwealth Director of Public Prosecutions (CDPP). The CDPP is a statutory officeholder, with a very high degree of independence afforded to that office by statute³⁷ and by legal culture and tradition. In the normal course of things, the investigating authority (such as the Australian Federal Police or a federal regulator) will provide the CDPP with a brief of evidence, upon which the CDPP will determine—according to its published guidelines³⁸—whether there is sufficient probative evidence to proceed, and whether launching a prosecution would be in the public interest.

1.57 Although the law provides that the Attorney-General may, after proper consultation, issue a guideline or direction to the CDPP—which must be tabled in Parliament and published in the Gazette³⁹—this has not happened to date in relation to a specific criminal proceeding.⁴⁰

1.58 Finally, the CDPP has the power to take over any criminal proceeding (summary or indictable) instituted by another person, and then ‘may decline to carry it on further’.⁴¹ Thus, there is very little risk in practice of a private prosecution for treason or sedition. If the allegations have substance, the CDPP would take over and proceed; if the action is without foundation, is contrary to the public interest, or was instituted to harass or intimidate an accused, then the CDPP could be expected to take over and promptly terminate the proceedings.

Law reform processes

Timeframe

1.59 Most ALRC inquiries take one or more years to complete. In this Inquiry, the ALRC was asked to report within three months. This presents some obvious challenges for the ALRC—mainly in terms of ensuring adequate time for consultation with stakeholders and for conducting the necessary research and writing in-house.

1.60 Notwithstanding the tight timeframe, the ALRC determined to adopt its standard processes, which have been developed over time and build in mechanisms to encourage widespread community engagement with the law reform process and allow for the careful development of public policy. This normally involves the production of two community consultation documents (an Issues Paper and a Discussion Paper) before proceeding to a final Report with recommendations for reform.

37 *Director of Public Prosecutions Act 1983* (Cth).

38 Commonwealth Director of Public Prosecutions, *The Prosecution Policy of the Commonwealth* <www.cdpp.gov.au/Prosecutions/Policy/Default.aspx> at 11 March 2006.

39 *Director of Public Prosecutions Act 1983* (Cth) s 8.

40 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 26 April 2006.

41 *Director of Public Prosecutions Act 1983* (Cth) s 9(5).

1.61 The ALRC respects the Australian Government's expressed desire for prompt advice on the effectiveness or otherwise of the current sedition laws, and has endeavoured to move as quickly as possible. The issues in question here, although difficult and important, are narrower than is the case with most ALRC inquiries. Further, the ALRC has had the benefit of the report of the 2005 Senate Committee inquiry—and the nearly 300 submissions made to that inquiry—which has reduced the typical learning curve.

1.62 To accommodate the need for widespread and meaningful community consultation on a matter of great public interest, the ALRC produced the Discussion Paper after three months.⁴² Allowing appropriate time for written submissions and other feedback to be considered meant that this Report was completed in late July 2006. Despite the relatively abbreviated reporting timeframe, the ALRC is confident that there has been adequate opportunity for community input into the law reform process and that a broad range of voices has been heard and considered.

Matters outside this Inquiry

1.63 The scope of the ALRC's Inquiry was limited both by its formal Terms of Reference and by the practical necessity of demarcating a work program that was coherent and achievable in the limited time available.

1.64 The ALRC did not examine a range of issues that arose in discussions about the contemporary legislative and policy response to matters of national and international security. For the avoidance of doubt, issues not included within the current Terms of Reference include:

- the recent increases in the powers of ASIO and other intelligence and law enforcement authorities to detain suspects and others for questioning in connection with the planning or execution of terrorist activity;
- the powers of intelligence and law enforcement authorities to conduct electronic surveillance or interception, with appropriate approval;
- the new powers to make preventative detention and control orders;
- the handling of classified and security sensitive information by Australian courts and tribunals;⁴³ and
- the use of executive authority to refuse, withdraw or cancel passports or visas, based upon security concerns.

42 Australian Law Reform Commission, *Review of Sedition Laws*, DP 71 (2006).

43 This area was covered in Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004), which the Australian Government has substantially implemented.

Advisory Committee

1.65 It is standard operating procedure for the ALRC to establish a broad-based Advisory Committee to assist with the development of its inquiries.

1.66 Advisory Committees advise and assist the ALRC, and have particular value in helping the ALRC identify the key issues and determine priorities, providing quality assurance in the research, writing and consultation effort, and assisting with the development of proposals and recommendations for reform as the inquiry progresses. However, ultimate responsibility for this Report and its recommendations remains with the Commissioners of the ALRC.

1.67 The membership of the Advisory Committee for this Inquiry was drawn from the bench, the bar, the academy, media organisations, civil liberties groups and human rights and equal opportunity commissioners, and includes a current and former Commonwealth Director of Public Prosecutions. The full membership is detailed in the List of Participants at the front of this publication.

1.68 The Advisory Committee had its first meeting on 11 May 2006, to consider the draft proposals leading up to publication of the Discussion Paper, *Review of Sedition Laws* (DP 71). A second and final meeting was held on 11 July 2006 to consider draft recommendations for reform to be contained in this Report.

Consultation papers

1.69 Issues Paper 30, *Review of Sedition Laws* (IP 30), was released on 20 March 2006 to commence the community consultation process on an informed basis. IP 30 set out 24 key questions that the ALRC identified as arising out of the Terms of Reference. Following further research and consultation, DP 71 was released on 29 May 2006 and contained 25 proposals for reform.

1.70 IP 30 and DP 71 contained a significant amount of background and historical material, and outlined the current state of the federal law on sedition and unlawful associations following the amendments in late 2005, as well as related federal laws and relevant state and territory legislation. The consultation papers surveyed the relevant international law in this area, including United Nations conventions, declarations and resolutions, and also provided some comparative analysis of relevant laws in a number of other countries—especially common law countries with similar systems and traditions, and the European Union, which has developed jurisprudence in this field.

Community consultation

1.71 The Terms of Reference asked the ALRC to ‘identify and consult with relevant stakeholders’. Under the provisions of the *Australian Law Reform Commission Act*

1996 (Cth), the ALRC ‘may inform itself in any way it thinks fit’ for the purposes of reviewing or considering anything that is the subject of an inquiry.⁴⁴

1.72 One of the most important features of ALRC inquiries is the commitment to widespread community consultation.⁴⁵ The nature and extent of this engagement normally will be determined by the subject matter of the reference—particularly whether the topic is regarded as a technical one, of interest largely to specialists in the field, or is a matter of interest and concern to the broader community. The ALRC regarded this particular inquiry as clearly falling in the latter category.

1.73 The ALRC developed a broad consultation strategy for this Inquiry, so far as time permitted, which encouraged participation from a wide spectrum of stakeholders, including: community groups; prosecution and law enforcement agencies; criminal defence lawyers; judges; government lawyers and officials; media organisations and peak associations; legal professional associations; human rights and civil liberties groups; academics; and others.

1.74 The ALRC received 126 written submissions⁴⁶ and conducted 27 consultation meetings (many of them multi-party). Lists of the submissions and consultations are set out in Appendices 3 and 4 of this Report, respectively.

Implementation

1.75 Upon completion, the ALRC’s final Report and recommendations will be presented to the Attorney-General for tabling in the Australian Parliament, at which point the report becomes a public document.⁴⁷

1.76 ALRC reports are not self-executing documents. The ALRC is an advisory body and provides recommendations about the best way to proceed—but implementation is always a matter for others.⁴⁸

1.77 In recent times, the ALRC’s approach to law reform has involved a mix of strategies including: legislation and subordinate regulations, official standards and codes of practice, industry and professional guidelines, education and training programs, and so on. Although the final Report is presented to the Attorney-General, it

44 *Australian Law Reform Commission Act 1996* (Cth) s 38.

45 B Opeskin, ‘Engaging the Public: Community Participation in the Genetic Information Inquiry’ (2002) 80 *Reform* 53; I Davis, ‘Targeted Consultations’ in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2006), Ch 10; R Atkinson, ‘Law Reform and Community Participation’ in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2006), Ch 11.

46 In addition, the ALRC considered nearly 300 submissions made to the 2005 Senate Committee inquiry. The printed version of this document incorrectly states that 128 written submissions were received.

47 The Attorney-General must table the Report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

48 The ALRC has a strong record of having its advice followed. About 59 per cent of the ALRC’s previous reports have been substantially implemented; 27 per cent have been partially implemented; three per cent are currently under consideration; and 11 per cent have not been implemented: Australian Law Reform Commission, *Annual Report 2004–05*, ALRC 101 (2005), 24.

may be that some recommendations will be directed to other government and non-government agencies, associations and institutions for action or consideration.

Organisation of this Report

1.78 This Report is organised into 13 chapters—although recommendations are not spread evenly throughout. Some chapters provide mainly contextual material, while others are focused on the ‘nuts and bolts’ of the law.

1.79 In order to clarify the current and proposed state of the law, Appendix 1 sets out the existing provisions in Division 80 of the *Criminal Code* on treason and sedition. Appendix 2 shows how those provisions will look if the Australian Government adopts the ALRC’s recommendations for reform. As noted above, Appendices 3 and 4 document the public consultation effort, including meetings and written submissions. Appendix 5 provides a list of the common abbreviations used in this Report.

1.80 Chapter 2 provides a history of the law of sedition and related offences, as it evolved from its early origins in England many centuries ago, through to its inclusion in the *Crimes Act* in 1920, and then to more modern formulations and variations. In view of its problematic history, the chapter recommends the abolition of the term ‘sedition’ from the federal statute book.

1.81 Chapter 3 outlines the current state of the law on sedition and unlawful associations in Australia, following the amendments made in November 2005. The chapter also describes related aspects of federal law and highlights some of the gaps and overlaps between sedition and other relevant offences (such as treason, treachery and incitement to crime), as well as considering related state and territory laws. The chapter recommends systematic review of a number of archaic and superseded provisions in Part II of the *Crimes Act* that are related to sedition and treason laws and the initiation of a process through the Standing Committee of Attorneys-General to remove the term ‘sedition’ from state and territory laws.

1.82 Chapter 4 considers the case for reform in relation to the ‘unlawful associations’ provisions in Part IIA of the *Crimes Act*, which have not been used for decades and appear to have been superseded by the more recent provisions on ‘terrorist organisations’ contained in Part 5.3 of the *Criminal Code*.

1.83 Chapter 5 describes the international framework—highlighting Australia’s relevant international human rights obligations under the *International Covenant on Civil and Political Rights 1966* and other United Nations conventions, declarations and resolutions; and considering the extent to which these influence Australian domestic law.

1.84 Chapter 6 offers a comparative view, surveying contemporary sedition laws in a number of other countries—especially common law countries with similar systems and traditions, and the European Union.

1.85 Chapter 7 considers the important matter of the protection of freedom of expression in Australian law, ranging from implied constitutional rights to free political speech in a democratic society, to statutes and cases that bear directly on individual and press freedoms.

1.86 Chapter 8 deals with aspects of the ALRC's recommendations for reframing the three 'urging force or violence' offences in s 80.2(1), (3) and (5) of the *Criminal Code*. The ALRC recommends that these provisions be amended, among other things, to clarify the fault elements of the offences and to impose an additional requirement that for a person to be guilty, the person must intend that the urged force or violence will occur. These changes accord with the serious nature of these crimes and minimise any unwarranted impact on freedom of expression.

1.87 Chapter 9 sets out the ALRC's recommended scheme for reframing the offences of urging the overthrow by force or violence of the Constitution or Government; and urging interference in parliamentary elections by force or violence, contained in s 80.2(1) and (3) of the *Criminal Code*.

1.88 Chapter 10 sets out the ALRC's recommended scheme for reframing the offence of urging inter-group violence, contained in s 80.2(5) of the *Criminal Code*. The chapter also considers other federal, state and territory laws dealing with concepts of racial hatred and racial or religious vilification.

1.89 Chapter 11 discusses the two 'assisting the enemy' offences in s 80.2(7) and (8) of the *Criminal Code*. The ALRC recommends that these offences be repealed and that amendments be made to the similar treason offences in s 80.1. The chapter also considers the extraterritorial application of the sedition and treason offences.

1.90 Chapter 12 looks at the 'good faith' defence to charges of treason and sedition currently provided by s 80.3 of the *Criminal Code*. The chapter also examines the penalties for the various offences in Division 80.

1.91 Finally, Chapter 13 deals with the existing requirement to obtain the Attorney-General's written consent to proceed with a prosecution and recommends that s 80.5 of the *Criminal Code* be repealed, leaving this matter to the independent CDPP.

2. Origins and History of Sedition Law

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Introduction

2.1 This chapter provides an overview of the history of the law of sedition. In particular, it examines the evolution of sedition at common law and outlines its application in Australia in the 20th century.

2.2 The law of sedition prohibits words or conduct deemed to incite discontent or rebellion against the authority of the state. Historically, ‘sedition’ described a number of common law or statutory offences—namely, uttering seditious words, publishing or printing seditious words, undertaking a seditious enterprise, or engaging in a seditious conspiracy.¹ Traditionally, for a word or activity to be seditious it must be said, written or done with a ‘seditious intention’.²

2.3 The classic definition of seditious intention is found in Sir James Fitzjames Stephen’s *Digest of the Criminal Law*, published in 1887:

1 L. Maher, ‘The Use and Abuse of Sedition’ (1992) 14 *Sydney Law Review* 287, fn 3.

2 C. Kyer, ‘Sedition Through the Ages: A Note on Legal Terminology’ (1979) 37 *University of Toronto Faculty of Law Review* 266, 267.

A seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of, Her Majesty, her heirs or successors, or the government and constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt, otherwise than by lawful means, the alteration of any matter in Church or State by law established, or to incite any person to commit any crime in disturbance of the peace, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.³

2.4 The legal elements of sedition offences have traditionally been ill-defined. The vagueness of the language used to describe the notion of seditious intention makes it difficult to demarcate the precise boundaries of sedition offences. In *Boucher v The King*, the Supreme Court of Canada stated that 'probably no crime has been left in such vagueness of definition'.⁴

2.5 Historically, the law of sedition has been used to punish a wide range of behaviour—from satirical comment or mere criticism of authority, to the incitement of violent uprising. The scope and application of the law have fluctuated significantly over time.⁵ In view of this, Professor Eric Barendt observed:

What used to be regarded as a clear case of seditious libel in both England and the United States is now generally considered to be merely the vehement expression of political opinion, and therefore the classic instance of constitutionally protected speech.⁶

2.6 The historical account set out below reveals that the development and use of sedition laws have been influenced strongly by the changing political climate and the degree of public support for existing state institutions; theories about the relationship between citizen and state; and evolving notions of the relationship between action, idea, association and responsibility. It also reveals that there has been a general trend in the common law courts to narrow the scope of sedition offences in accordance with the contemporary emphasis on the importance of freedom of expression and open political debate. A distinction has thus been drawn between the expression of political opinion with reformist aims and the advocacy of revolutionary or violent political action.

2.7 However, as discussed below, an examination of prosecutions in Australia in the 20th century also reveals cases in which the law of sedition has been used to stifle political dissent in a manner that many would consider incompatible with modern democratic processes.

3 J Stephen, *A Digest of the Criminal Law* (1887), 66 (art 93) (footnotes omitted).

4 *Boucher v The King* [1951] 2 DLR 369, 382 (Kellock J).

5 See *Ibid.*

6 E Barendt, *Freedom of Speech* (2nd ed, 2005), 163.

The origins and evolution of common law sedition

Early origins

2.8 The law of sedition derives from the law of treason, which since feudal times has punished acts deemed to constitute a violation of a subject's allegiance to his or her lord or monarch.⁷ Sedition and treason are related conceptually because seditious words or conduct can stir up opposition to the established authority. For this reason, it has been said that sedition 'frequently precedes treason by a short interval'.⁸

2.9 The prohibition of mere criticism of government that does not incite violence reflects an antiquated view of the relationship between the state and society. According to this view, the ruler is the superior of the subject and as such is entitled to be shielded from criticism or censure likely to diminish his or her status or authority.⁹ In the 1704 case of *R v Tutchin*, Holt LCJ explained this view as follows:

If people should not be called to account for possessing the people with an ill opinion of the government, no government can subsist. For it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government, than to endeavour to procure animosities as to the management of it; this has been always looked upon as a crime and no government can be safe without it being punished.¹⁰

2.10 Prior to the early 17th century, offences that would now be classified as sedition offences were prosecuted as treason¹¹ or other felonies¹² (including *scandalum magnatum*),¹³ or prosecuted under martial law.¹⁴

7 See 'Historical Concept of Treason: English and American' (1960) 35 *Indiana Law Journal* 70. The word 'sedition' derives from the Latin *seditio*, meaning uprising or insurrection. In classical Rome and in medieval England, *seditio* referred to offences that, according to modern understanding, would constitute treason (in other words, overt acts of rebellion or insurrection). The contemporary use of the word—denoting behaviour that may incite discontent or rebellion against lawfully constituted authority—did not appear until the 1600s: see C Kyer, 'Sedition Through the Ages: A Note on Legal Terminology' (1979) 37 *University of Toronto Faculty of Law Review* 266, 266–267.

8 *R v Sullivan* (1868) 11 Cox CC 44, 45 (Fitzgerald J).

9 E Barendt, *Freedom of Speech* (2nd ed, 2005), 163.

10 *R v Tutchin* (1704) 14 State Trials (OS) 1096, 1128.

11 The breadth of the law of treason has fluctuated throughout history, at times encompassing the whole of criminal law: 'Historical Concept of Treason: English and American' (1960) 35 *Indiana Law Journal* 70, 70; M Black, 'Five Approaches to Reforming the Law: 650 Years of Treason and Sedition' (Paper presented at Australasian Law Reform Agencies Conference, Sydney, 11 April 2006). The law of treason was first codified in England by the 1351 *Statute of Treasons* (25 Edward III, c 2) during the reign of Edward III. This Act attempted to narrow the scope of the law to three primary offences: imagining or compassing the death of the King; levying war against the King; and aiding the King's enemies. However subsequent monarchs broadened its scope by creating new treason offences. Commentators have noted that these enactments were more a matter of political expediency than principled reform of the law: see Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 6. Given the narrow scope of the 1351 statute, the prosecution of words as treason required a broad judicial interpretation or a statutory extension of the law. For example, in 1534 Henry VIII passed legislation that made it possible to commit treason by words or writing (*Act of Treasons* Henry VIII c 13). See P Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37 *Stanford Law Review* 661; R Manning, 'The Origins of the Doctrine of Sedition' (1980) 12 *Albion* 99.

2.11 Seditious libel emerged as a distinct offence in the early 17th century in the Court of Star Chamber.¹⁵ In *De Libellis Famosis* the defendant was prosecuted for defaming the deceased Archbishop of Canterbury.¹⁶ The Court held that the basis of criminal libel was that it risked a breach of the peace—the truth of the statements did not provide a defence, since the peace was just as likely to be broken whether the statements were true or false.¹⁷

2.12 At the time of this decision, the absolute monarchy was under threat from the rising parliamentarians. The advent of the printing press had prompted a more sustained effort to control expression of ideas critical of the church and state¹⁸—foreshadowing, by several centuries, current concerns about the rapid spread of information through the internet and other forms of modern communications technology. Existing means of prosecuting seditious words and writings were inexpedient, and seditious libel was developed as a more efficient and effective means of securing convictions.¹⁹

Common law development

2.13 Following the demise of the absolute monarchy and the abolition of the Star Chamber by the Long Parliament in 1641, the law of sedition was developed in the common law courts. The substantive law did not change significantly until the late 18th century, and until this time ‘any criticism of public men, laws or institutions was liable to be treated as sedition’.²⁰ During this period, neither the intention of the defendant (or rather, the absence of intention to incite disaffection or violence) nor the truth of the matters communicated affected the finding of guilt.²¹ The courts emphasised that it was the mere tendency of criticism to undermine government that rendered the conduct a criminal offence.²²

12 See P Hamburger, ‘The Development of the Law of Seditious Libel and the Control of the Press’ (1985) 37 *Stanford Law Review* 661, 670–671.

13 *Scandalum magnatum*, first proscribed in the 1275 *Statute of Westminster* (3 Edward I, c 34), stated that ‘from henceforth none be so hardy to tell or publish any false news or Tales, whereby discord, or accession of discord or slander may grow between the King and his people, or the Great Men of the Realm’. See *Ibid*, 668.

14 See R Manning, ‘The Origins of the Doctrine of Sedition’ (1980) 12 *Albion* 99, 106–110.

15 M Head, ‘Sedition—Is the Star Chamber Dead?’ (1979) 3 *Criminal Law Journal* 89, 94. The Court of Star Chamber became renowned for abuse and misuse of power: Civil Liberties Australia, *Submission SED 37*, 10 April 2006.

16 *The Case De Libellis Famosis, or of Scandalous Libels* (1606) 5 Co Rep 125a.

17 *Ibid*, 250.

18 Law Reform Commission (Ireland), *Consultation Paper on the Crime of Libel* (1991), 7; Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 6.

19 See P Hamburger, ‘The Development of the Law of Seditious Libel and the Control of the Press’ (1985) 37 *Stanford Law Review* 661, 759; R Manning, ‘The Origins of the Doctrine of Sedition’ (1980) 12 *Albion* 99, 100.

20 M Head, ‘Sedition—Is the Star Chamber Dead?’ (1979) 3 *Criminal Law Journal* 89, 95.

21 B Shientag, *Moulders of Legal Thought* (1943), 167.

22 See, eg, *R v Tutchin* (1704) 14 State Trials (OS) 1096.

2.14 The breadth of the law of sedition during this period is partly attributable to the functions of the judge and jury in seditious libel trials. Juries in seditious libel trials were entitled to determine only whether a defendant uttered, published or printed the words in question. They were precluded from considering whether the words were in fact ‘seditious’ or whether the defendant intended them to be so.²³ This gave rise to conflicts between judges and juries, particularly when juries were urged by defence counsel to go beyond their formal role and use their verdicts to protest against unjust prosecutions.²⁴

2.15 A notable change to the law occurred with the passage of *Fox’s Libel Act* in 1792,²⁵ which empowered the jury to deliver a general verdict on the entire case and to determine the facts and the application of the law to those facts.²⁶ The practical effect of this reform was the introduction of an intention requirement into the law of sedition.²⁷ In addition, by allowing more of the political context to be taken into account by the jury, it forced the law of sedition to conform to some extent to popular opinion about the right to free speech and political debate.²⁸

2.16 The 19th century saw a significant shift in the definition and use of the sedition offences. In response to the permeation of liberal democratic notions of the relationship between state and society—and, in particular, the growing recognition of a right to freedom of expression in respect of political matters—the law of sedition adapted to allow more criticism of government.²⁹ However, the legal elements of the offences remained far from clear, and authorities differed on the nature of the intention required and whether such intention was to be determined subjectively or objectively.³⁰ It appears that the general trend in the case law was to confine the offence to cases in which the words urged others to commit illegal acts or to create public disturbances.³¹ In addition, the focus of sedition prosecutions began to shift to the seditious effect of the words as distinct from their intrinsically libellous nature.³²

2.17 The increasing difficulty in prosecuting seditious libel and the upsurge of radical activity following the Napoleonic wars led to the development of the offence of ‘seditious conspiracy’. This included ‘every sort of attempt, by violent language either

23 For a discussion of the respective functions of the judge and jury during this period, see B Shientag, *Moulders of Legal Thought* (1943).

24 B Wright, *Submission SED 58*, 19 April 2006.

25 32 Geo III c 60.

26 B Shientag, *Moulders of Legal Thought* (1943), 177–178; B Wright, *Submission SED 58*, 19 April 2006.

27 M Head, ‘Sedition—Is the Star Chamber Dead?’ (1979) 3 *Criminal Law Journal* 89, 95.

28 M Lobban, ‘From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770–1820’ (1990) 10 *Oxford Journal of Legal Studies* 307, 308.

29 See L Maher, ‘The Use and Abuse of Sedition’ (1992) 14 *Sydney Law Review* 287, 291. This shift provided the basis for the good faith defence that was later incorporated into the common law, reflected in the repealed s 24F of the *Crimes Act 1914* (Cth).

30 Law Reform Commission (Ireland), *Consultation Paper on the Crime of Libel* (1991), 60–61.

31 M Head, ‘Sedition—Is the Star Chamber Dead?’ (1979) 3 *Criminal Law Journal* 89, 96–97.

32 M Lobban, ‘From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770–1820’ (1990) 10 *Oxford Journal of Legal Studies* 307, 349.

spoken or written, or by a show of force calculated to produce fear, to effect any public object of an evil character'.³³ Seditious conspiracy bore similarities to the law of unlawful assembly, and was manifested by making speeches, holding meetings or taking steps in concert with others.³⁴

2.18 Prosecutions for seditious conspiracy were brought sporadically throughout the 19th century, notably following the Peterloo massacre of 1819 and in connection with the Chartist disturbances in 1839 and during the latter half of the 19th century.³⁵ Despite the breadth of this offence, it appears that it was prosecuted less often than other public order offences, such as unlawful assembly and riot.³⁶ The changing nature of political activity in the 19th century meant that 'seditious' speech often occurred in the context of protest activities, with authorities using the unlawful assembly laws instead of sedition laws to control protest movements.³⁷

Sedition in the 20th century

2.19 Sedition prosecutions in the United Kingdom tapered off in the first half of the 20th century and fell into disuse in the latter half of the 20th century. The last prosecution initiated in the United Kingdom was in 1947.³⁸

2.20 The legal elements of the common law sedition offences remain uncertain—particularly whether a specific subjective intention is required, or whether a basic intention objectively discerned will suffice.³⁹ However, in *Boucher v The King*, the Supreme Court of Canada held that in order to be guilty of a sedition offence a defendant must intend to incite violence or to create public disturbance or disorder for the purpose of disturbing constituted authority.⁴⁰ In 1991, the Divisional Court in England approved this statement in *Boucher*.⁴¹

33 M Head, 'Sedition—Is the Star Chamber Dead?' (1979) 3 *Criminal Law Journal* 89, 98.

34 L Donohue, 'Terrorist Speech and the Future of Free Expression' (2005) 27 *Cardozo Law Review* 233, 263.

35 See M Lobban, 'From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770–1820' (1990) 10 *Oxford Journal of Legal Studies* 307.

36 L Donohue, 'Terrorist Speech and the Future of Free Expression' (2005) 27 *Cardozo Law Review* 233, 263.

37 See L Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287, 291–292.

38 The defendant was acquitted: *R v Caunt* (Unreported, Birkett J, 1947).

39 D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002), 898. For example, in *R v Burns*, Cave J instructed the jury that in order to establish the requisite *mens rea* there must be a distinct intention, going beyond mere recklessness, to produce disturbances: *R v Burns* (1886) 16 Cox CC 355, 364. However, in *R v Aldred* (1909) 22 Cox CC 1, the court applied an objective test, stating that 'every person must be deemed to intend the consequences which would naturally flow from his conduct': cited in Law Commission of England and Wales, *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), 45.

40 *Boucher v The King* [1951] 2 DLR 369.

41 *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury* [1991] 1 QB 429, 453. This case is considered in greater detail in Ch 6.

Sedition in Australia

Colonial era inheritance

2.21 The Australian states inherited the British common law of sedition.⁴² State prosecutions for sedition were brought at various periods throughout the 19th and early 20th centuries. Notably, sedition laws were used to prosecute:

- John Macarthur, founder of the Australian merino wool industry, for seditious behaviour against Governor Bligh in 1807–08;⁴³
- Governor Darling's political opponents, including critics in the press, in the early 1800s;⁴⁴
- Henry Seekamp, the editor and owner of the *Ballarat Times* at the time of the Eureka Stockade in 1854;⁴⁵
- anti-conscriptionists who opposed Australia's involvement in the First World War;⁴⁶ and
- F W Paterson, the Member for Bowen from 1944–50, for expressing support for the workers' struggle against capitalism at a public meeting in 1930.⁴⁷

2.22 In some common law jurisdictions—including New South Wales—the related offence of treason still applies (in law, if not in policy or prosecutorial practice) to those who would 'compass or imagine' the death of the King, Queen or eldest son and heir; or 'violate the King's companion, or eldest unmarried daughter, or the wife of the eldest son and heir'.⁴⁸

Crimes Act 1914 (Cth)

2.23 Until 1914, criminal law in Australia was almost entirely the province of the states and territories.⁴⁹ Following the commencement of the First World War, judicial

42 Sedition offences were subsequently codified in the code states: *Criminal Code 1924* (Tas) ss 66, 67; *Criminal Code 1913* (WA) ss 44–46; *Criminal Code 1899* (Qld) ss 44–46. The common law continued to operate in the other states: see M Head, 'Sedition—Is the Star Chamber Dead?' (1979) 3 *Criminal Law Journal* 89, 91.

43 R Jordan, *In Good Faith: Sedition Law in Australia* (2006) E-Brief: Parliamentary Library—Parliament of Australia <www.aph.gov.au/library/INTGUIDE/LAW/sedition.htm> at 16 May 2006.

44 D Ash, 'Sedition' (2005) (Summer 2005–2006) *Forbes Flyer* 2, 1; New South Wales Bar Association, *Submission SED 20*, 7 April 2006.

45 M Black, 'Five Approaches to Reforming the Law: 650 Years of Treason and Sedition' (Paper presented at Australasian Law Reform Agencies Conference, Sydney, 11 April 2006); New South Wales Bar Association, *Submission SED 20*, 7 April 2006.

46 S Macintyre, *The Reds* (1998), 17.

47 New South Wales Bar Association, *Submission SED 20*, 7 April 2006.

48 *Crimes Act 1900* (NSW) s 16—which expressly continues the operation of the 1351 *Statute of Treasons* (25 Edward III c 2).

49 The first piece of federal crimes legislation was the *Punishment of Offences Act 1901* (Cth), which provided punishments for infringements of the Commonwealth statutory prohibitions. Subsequently,

doctrine approved a marked expansion in Commonwealth legislative power, resulting in a spate of federal laws to maintain public order.⁵⁰

2.24 The first comprehensive piece of federal crimes legislation was the *Crimes Act 1914* (Cth), which contained a number of offences against the government, including treason and incitement to mutiny.⁵¹ The sedition offences were not included in the *Crimes Act*. However, the *War Precautions Act 1914* (Cth) gave the Governor-General the authority to make regulations designed to suppress discussion of war aims, alliances, and conscription policy and practice.⁵²

2.25 The sedition provisions were inserted into the *Crimes Act* in 1920.⁵³ These provisions repeated in substance the common law definition of the offence,⁵⁴ but were somewhat broader in that they did not require proof of subjective intention and did not require incitement to violence or public disturbance.⁵⁵ Under ss 24C and 24D of the *Crimes Act*, it was an offence to engage in a seditious enterprise with a seditious intention or to write, print, utter or publish seditious words with a seditious intention.

2.26 ‘Seditious intention’ was defined as:

An intention to effect any of the following purposes, that is to say:

- (a) to bring the Sovereign into hatred or contempt;
- (b) to excite disaffection against the Sovereign or the Government or the Constitution of the United Kingdom or against either House of Parliament of the United Kingdom;
- (c) to excite disaffection against the Government or Constitution of any of the King’s Dominions;

several federal offences were created as incidental to particular statutes: G Sawyer, *Australian Federal Politics 1901–1929* (1956), 135.

50 Ibid, 155.

51 The constitutional validity of the *Crimes Act 1914* (Cth) was upheld on the basis of the Commonwealth’s incidental power to protect its operations by creating criminal offences: *R v Kidman* (1915) 20 CLR 425.

52 For example, *War Precautions Act 1914* (Cth) s 4(d) gave the Governor-General power to make regulations in order to ‘prevent the spread of false reports or reports likely to cause disaffection to His Majesty or public alarm, or to interfere with the success of His Majesty’s forces by land or sea, or to prejudice His Majesty’s relations with foreign powers’. See G Sawyer, *Australian Federal Politics 1901–1929* (1956), 141. The Commonwealth could also prohibit the importation of literature with a ‘seditious intent’ pursuant to the *Customs Act 1901* (Cth): see R Douglas, ‘Saving Australia from Sedition: Customs, the Attorney-General’s Department and the Administration of Peacetime Political Censorship’ (2002) 30 *Federal Law Review* 135.

53 *War Precautions Repeal Act 1920* (Cth) s 12. The provisions replicated those found in the *Criminal Code 1899* (Qld), which were based on the British common law as outlined in Stephen’s *Digest of the Criminal Law* extracted earlier in this chapter: Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 1920, 6851 (L Groom).

54 G Sawyer, *Australian Federal Politics 1901–1929* (1956), 195.

55 See, eg, *R v Aldred* (1909) 22 Cox CC 1; *R v Burns* (1886) 16 Cox CC 355. See also L Maher, ‘The Use and Abuse of Sedition’ (1992) 14 *Sydney Law Review* 287, 290.

- (d) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;
- (e) to excite disaffection against the connexion of the King's Dominions under the Crown;
- (f) to excite His Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth; or
- (g) to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order and good government of the Commonwealth.⁵⁶

2.27 The *Crimes Act* was further amended in 1926 to prohibit 'unlawful associations' that advocated or encouraged the doing of any act purporting to have as an object the carrying out of a seditious intention.⁵⁷

Communist Party prosecutions

2.28 The advent of federal sedition offences coincided with the foundation of the Communist Party of Australia (CPA), although this was not alluded to extensively in the parliamentary debates.⁵⁸ It is widely thought that the enactment of the federal sedition provisions was prompted by concerns about the Bolshevik Revolution and its impact on radical socialist activity in Australia.⁵⁹ It also has been suggested that the federal government was motivated to enact such provisions because it did not trust the Labor-controlled states to suppress 'subversive' activities in accordance with its policies.⁶⁰

2.29 It appears that the first federal sedition prosecution occurred in 1948.⁶¹ As noted above, state sedition laws had been used on a number of occasions prior to this time. While state sedition laws were primarily used to prosecute members of the CPA, little

⁵⁶ *Crimes Act 1914* (Cth) s 24A. Paragraphs (b), (c) and (e) were repealed in 1986: see discussion below.

⁵⁷ *Crimes Act 1926* (Cth) s 17. These provisions were further strengthened by the *Crimes Act 1932* (Cth). See the further discussion in Ch 4.

⁵⁸ See S Ricketson, 'Liberal Law in a Repressive Age: Communism and the Law 1920–1950' (1976) 3 *Monash University Law Review* 101, 104.

⁵⁹ L Maher, 'Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case' (1994) 16 *Adelaide Law Review* 1, 12; M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (3rd ed, 1995), 150; S Ricketson, 'Liberal Law in a Repressive Age: Communism and the Law 1920–1950' (1976) 3 *Monash University Law Review* 101, 104.

⁶⁰ Many Labor members had opposed the use of the *War Precautions Acts* to suppress discussion of war aims and alliances: G Sawyer, *Australian Federal Politics 1901–1929* (1956), 166. See R Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth Crimes Act' (2001) 22 *Adelaide Law Review* 259, 260.

⁶¹ R Douglas, 'Saving Australia from Sedition: Customs, the Attorney-General's Department and the Administration of Peacetime Political Censorship' (2002) 30 *Federal Law Review* 135, 138. This case went to the High Court: *Burns v Ransley* (1949) 79 CLR 101.

information is available on the manner or frequency of these prosecutions.⁶² It has been reported that three sedition prosecutions were brought against communists in Queensland in the 1930s, and two in Tasmania and Queensland in the 1940s. One defendant was charged for making pro-Nazi statements and the other, a Jehovah's Witness, was charged for stating that people should not put their faith in the King over faith in God.⁶³ One historian notes that the latter prosecutions received little attention outside the states in which they were brought, and on this basis he concludes that there may have been other similar prosecutions during this period.⁶⁴

2.30 There is evidence that the Australian government sought advice on a number of occasions about whether those who opposed Australia's involvement in the Second World War might be prosecuted for sedition.⁶⁵ It has been suggested that the provisions were not used for this purpose because their scope was unclear and there were doubts about whether juries would convict defendants for anti-war propaganda.⁶⁶

2.31 The first sedition prosecution brought under federal law was against a member of the CPA, Gilbert Burns.⁶⁷ Burns had been asked a hypothetical question at a public debate about the likely attitude of the CPA in the event of a war between the Soviet Union and the western powers. He was convicted and sentenced to six months imprisonment for answering in this way:

If Australia was involved in such a war, it would be between Soviet Russia and American and British Imperialism. It would be a counter-revolutionary war. It would be a reactionary war. We would oppose the war, we would fight on the side of Soviet Russia.⁶⁸

2.32 On appeal, Burns argued that the federal provisions were constitutionally invalid and that his words did not express a seditious intention because they referred to a hypothetical situation. The High Court held that the provisions were constitutionally valid, coming within the 'incidental' head of power in s 51(xxxix) of the *Australian Constitution*. The Court was evenly divided on the question whether the particular words expressed a seditious intention, and the decision of the Chief Justice prevailed. Latham CJ held that, unlike the common law, the statutory provisions did not require incitement to violence or public disorder.⁶⁹ He further considered that the hypothetical nature of the statement did not exclude a finding that the words were seditious:

A statement that the view of the Communist Party is that Russia should be supported as against Australia and the British Sovereign in any war in which Australia, the

62 R Douglas, 'Saving Australia from Sedition: Customs, the Attorney-General's Department and the Administration of Peacetime Political Censorship' (2002) 30 *Federal Law Review* 135, 138.

63 R Douglas, 'Law, War and Liberty: The World War II Subversion Prosecutions' (2003) 27 *Melbourne University Law Review* 65, 75–76.

64 *Ibid.*, 76.

65 *Ibid.*, 76–77.

66 *Ibid.*, 76.

67 *Burns v Ransley* (1949) 79 CLR 101.

68 *Ibid.*, 114.

69 *Ibid.*, 108.

Sovereign, and Russia may be involved is a statement which is presented as a policy to be approved and to be put into effect. Such a statement shows a present intention to excite disaffection against the Sovereign and the Government. ... 'Exciting disaffection' refers to the implanting or arousing or stimulating in the minds of people a feeling or view or opinion that the Sovereign and the Government should not be supported as Sovereign and as Government, but that they should be opposed, and when the statement in question is made in relation to a war it means that they should, if possible, be destroyed. Such advocacy is encouragement of and incitement to active disloyalty.⁷⁰

2.33 A second sedition case came before the High Court in 1949.⁷¹ The General Secretary of the CPA, Lance Sharkey, had prepared the following statement for publication in response to a request by a newspaper journalist:

If Soviet forces in pursuit of aggressors entered Australia, Australian workers would welcome them. Australian workers would welcome Soviet Forces pursuing aggressors as the workers welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis. ... Invasion of Australia by forces of the Soviet Union seems very remote and hypothetical to me. I believe the Soviet Union will go to war only if she is attacked and if she is attacked I cannot see Australia being invaded by Soviet troops. The job of the Communists is to struggle to prevent war and to educate the mass of people against the idea of war. The Communist Party also wants to bring the working class to power but if fascists in Australia use force to prevent the workers gaining that power Communists will advise the workers to meet force with force.⁷²

2.34 Sharkey was convicted of uttering seditious words and sentenced to 13 months' imprisonment. The High Court upheld the conviction on the same basis as *Burns v Ransley*, again holding that the hypothetical nature of the statement did not preclude it from being seditious.

2.35 In both cases the High Court held that the test of seditious intention was objective: that is, the prosecution did not need to prove that the accused subjectively intended to 'incite disaffection'—rather, it needed to prove only that the words objectively could be said to express a seditious intention. Further, the prosecutions were sustained on the basis of an intention inferred from a hypothetical statement made in response to a question about what the defendants might do in a factual scenario that both considered improbable. In neither case was it suggested that the statement actually was intended to incite violence or public disorder.

2.36 The High Court's interpretation of the federal sedition provisions—which, in effect, enabled them to be used to punish expressions of disloyalty—stands in contrast with the common law, which had in the previous century narrowed sedition to words or behaviour that incited violence or public disorder. The Court's interpretation also stands in stark contrast to the approach adopted by the United States Supreme Court,

70 Ibid, 108–109.

71 *R v Sharkey* (1949) 79 CLR 121.

72 Ibid, 138.

which held that behaviour creating a 'clear and present danger of public disorder' could be prosecuted, but 'doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future' could not.⁷³

2.37 The extension of the sedition offences has been explained, at least in part, by reference to the evolving Cold War context and the desire of the Chifley Government to prove to the Australian public and to the United States and British Governments that it was taking measures to combat the internal threat of communism.⁷⁴ This is underscored by the selective manner in which sedition was prosecuted.

The intensity of Australian political debate in the early Cold War period was such that, had the Commonwealth and State authorities enforced the law of sedition consistently, the courts would not have been equipped to cope with the avalanche of sedition prosecutions that would have ensued. ... A cursory reading of the daily newspapers in the years 1947–1949 or the literature produced by all the political parties reveals countless examples of inflammatory speech and expressive conduct which clearly fell within the harsh sedition provisions of the *Crimes Act 1914*. Yet, in an environment in which inflammatory political speech was commonplace, no sedition prosecutions were brought against any of the CPA's equally determined and ruthless opponents on the far right of the political spectrum.⁷⁵

2.38 Although sedition appears not to have been widely prosecuted, there is evidence that the federal investigative authorities frequently sought advice from the Attorney-General's Department in the early 1950s to determine whether it could use sedition laws to prosecute CPA members and activists.⁷⁶ It has been suggested that more sedition prosecutions were not instituted due to uncertainty caused by a pending appeal brought by one CPA member who had been convicted of publishing an article criticising Australia's involvement in the Korean War.⁷⁷

2.39 The most recent Commonwealth sedition prosecution was in 1953, when a member of the CPA was tried unsuccessfully for publishing an article that derided the monarchy.⁷⁸ The most recent sedition prosecution at the state or territory level appears to have been in South Australia in 1960, where a newspaper editor was charged with

73 See, eg, *Schneiderman v United States* 320 US 156 (1942), 157–159. The Supreme Court retreated from this test during the McCarthy era, adopting a stricter approach in order to prosecute Communist Party members: see, eg, *Dennis v United States* 341 US 494 (1951). However, it later reformulated the test in a more liberal manner, holding that the First Amendment to the United States Constitution does not permit the State to proscribe advocacy of the use of force or law violation 'except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action': *Brandenburg v Ohio* 395 US 444 (1969), 447.

74 L Maher, 'Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case' (1994) 16 *Adelaide Law Review* 1, 39.

75 L Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287, 303–304.

76 L Maher, 'Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case' (1994) 16 *Adelaide Law Review* 1, 14.

77 R Douglas, 'The Ambiguity of Sedition: The Trials of William Fardon Burns' (2004) 9 *Australian Journal of Legal History* 227, 246; L Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287, 306.

78 *Sweeny v Chandler* (Unreported, Sydney Court of Petty Sessions, 18 September 1953).

sedition libel for criticising the Royal Commission inquiring into the Stuart murder case.⁷⁹

Recent consideration

2.40 There are suggestions that prosecutions for sedition have been considered on a number of occasions in more recent times. Most notably, in 1976 the Attorney-General's Department was asked for advice about whether the remarks made by former Prime Minister Gough Whitlam in the wake of the dismissal of the Labor Government—to the effect that the Governor-General was 'deceitful' and 'dishonourable'—could amount to sedition.⁸⁰ No prosecution eventuated.

2.41 In the early 1990s there was some discussion in the media about the possibility of sedition offences being used to prosecute opponents to Australia's involvement in the first Gulf War,⁸¹ but there is no evidence of formal consideration being given to this by government officials.

Reform trends: modernise or abolish?

2.42 Law reform commissions in Canada, Ireland and England and Wales have recommended the abolition of existing sedition offences⁸² on the basis that they are:

- unnecessary in light of more modern criminal offences, such as incitement and other public order offences;⁸³
- undesirable in light of their political nature and history;⁸⁴ and
- inappropriate in modern liberal democracies, where it is accepted that it is a fundamental right of citizens to criticise and challenge government structures and processes.⁸⁵

79 See L Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287, 287; K Inglis, *The Stuart Case* (1961), 279–292. Further, in 1961 Brian Cooper was successfully prosecuted in Papua New Guinea pursuant to the sedition provisions of the *Criminal Code 1899* (Qld) for statements he made to indigenous people about potential means—including violent means—for achieving self-determination: *Cooper v The Queen* (1961) 105 CLR 177. For a discussion of this case, see W Stent, 'An Individual vs the State: The Case of BL Cooper' (1980) 79 *Overland* 60.

80 See H Lee, *Emergency Powers* (1984), 92. The opinion of the Attorney-General has never been published.

81 See M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (3rd ed, 1995), 150.

82 Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 45; Law Reform Commission (Ireland), *Report on the Crime of Libel*, LRC 41–1991 (1991), 10; Law Commission of England and Wales, *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), 48.

83 Law Commission of England and Wales, *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), 48; Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 36.

84 Law Reform Commission (Ireland), *Report on the Crime of Libel*, LRC 41–1991 (1991), 10; Law Commission of England and Wales, *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), 48.

85 Law Reform Commission (Ireland), *Report on the Crime of Libel*, LRC 41–1991 (1991), 10; Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 39.

Hope Royal Commission

2.43 In 1984, the Royal Commission on Australia's Security and Intelligence Agencies, chaired by New South Wales Justice Robert Hope (the Hope Commission), examined federal sedition law as part of its review of national security offences relevant to the Australian Security Intelligence Organisation.⁸⁶ The Hope Commission criticised the High Court decisions in *Burns v Ransley*⁸⁷ and *R v Sharkey*,⁸⁸ stating that 'mere rhetoric or statements of political belief should not be a criminal offence, however obnoxious they may be to constituted authority'.⁸⁹

2.44 The Hope Commission recommended that the sedition provisions be amended to include the common law requirement of intention to create violence, public disturbance or disorder.⁹⁰ It also recommended the removal of those provisions referring to seditious intention in relation to 'any of the Queen's dominions', thus narrowing the scope of the offences to seditious words or acts directed against the Australian Government or Constitution.⁹¹ The federal provisions were amended in accordance with the Hope Commission's recommendations in 1986.⁹²

Gibbs Committee

2.45 Australia's federal sedition provisions also were reviewed by the Committee of Review of Commonwealth Criminal Law (the Gibbs Committee) in 1991.⁹³ The Committee criticised the federal provisions for being archaic and excessively wide, and recommended that they be 'rewritten to accord with a modern democratic society'.⁹⁴ The Gibbs Committee considered that a separate offence of sedition should be retained, but limited to inciting violence for the purpose of disturbing or overthrowing constitutional authority.⁹⁵ The Gibbs Committee therefore recommended the replacement of the existing provisions with the following offences:

- inciting the overthrow or supplanting by force or violence of the Constitution or the established Government of the Commonwealth or the lawful authority of that Government in respect of the whole or part of its territory;
- inciting interference by force or violence with the lawful processes for Parliamentary elections; and

86 Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Australian Security Intelligence Organization* (1985).

87 *Burns v Ransley* (1949) 79 CLR 101.

88 *R v Sharkey* (1949) 79 CLR 121.

89 Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Australian Security Intelligence Organization* (1985), [4.101].

90 *Ibid.*, [4.101].

91 *Ibid.*, [4.98].

92 *Intelligence and Security (Consequential Amendments) Act 1986* (Cth) ss 11–14.

93 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991).

94 *Ibid.*, [32.13].

95 *Ibid.*, [32.13]–[32.18].

- inciting the use of force or violence by groups within the community, whether distinguished by nationality, race or religion, against other such groups or members thereof.⁹⁶

Legislative amendments in 2005

2.46 The Gibbs Committee recommendations were not acted upon at the time. However, in September 2005 the Australian Government announced its intention to modernise the federal sedition provisions and adapt them to the counter-terrorism context.⁹⁷ To some extent, the amendments reflected international initiatives to criminalise activity deemed to promote terrorist violence.⁹⁸

2.47 The legislation passed in the Australian Parliament in late 2005 repealed the old sedition offence in s 24A of the *Crimes Act* and replaced it with five new offences, now found in s 80.2 of the *Criminal Code* (Cth). As detailed in Chapter 3, the new offences attempt to shift the focus away from ‘mere speech’ towards ‘urging’ other persons to use ‘force or violence’ in a number of specified contexts.

2.48 The Australian Government stated that some of the amendments to the sedition provisions effected by the *Anti-Terrorism Act (No 2) 2005* (Cth) were in accordance with the Gibbs Committee recommendations.⁹⁹ Prior to this amendment, Australia’s sedition laws—like those in the United Kingdom and Canada—were thought to be suspended somewhere ‘between obsolescence and abolition’.¹⁰⁰

2.49 Despite having fallen out of use in the past 50 years, the Australian Government stated that in the counter-terrorism context, ‘sedition is just as relevant as it ever was’,¹⁰¹ particularly to ‘address problems with those who communicate inciting messages directed against other groups within our community, including against Australia’s forces overseas and in support of Australia’s enemies’.¹⁰²

96 Ibid, [32.18].

97 J Howard (Prime Minister), ‘Counter-Terrorism Laws Strengthened’ (Press Release, 8 September 2005).

98 See, eg, *Council of Europe Convention on the Prevention of Terrorism*, 16 May 2005, CETS 196, (entered into force generally on 16 May 2005) art 5(2), which requires state parties to criminalise public provocation to commit a terrorist offence. See the detailed discussion in Chs 5 and 6.

99 Explanatory Memorandum, *Anti-Terrorism Bill (No 2) 2005* (Cth), 88.

100 L Maher, ‘Dissent, Disloyalty and Disaffection: Australia’s Last Cold War Sedition Case’ (1994) 16 *Adelaide Law Review* 1, 73. See also E Barendt, *Freedom of Speech* (2nd ed, 2005), 163; ARTICLE 19 (Global Campaign for Free Expression), *Memorandum on the Malaysian Sedition Act 1948* (2003) <<http://www.suaram.net/suaram%20A19%20sedition%20memo.pdf>> at 20 January 2006; M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (3rd ed, 1995), 150; Lord Denning, *Landmarks in the Law* (1984), 295; H Lee, *Emergency Powers* (1984), 92.

101 Senate Legal and Constitutional Legislation Committee—Australian Parliament, *Anti-Terrorism Bill (No 2) 2005: Transcript of Public Hearing*, 14 November 2005, 4 (G McDonald).

102 J Howard (Prime Minister), ‘Counter-Terrorism Laws Strengthened’ (Press Release, 8 September 2005).

Do we need the term ‘sedition’?

Characterising the offences in s 80.2

2.50 There is little doubt that, on any dispassionate analysis, the new sedition laws introduced in 2005 are better than the laws they replaced—both in terms of the technical operation of the provisions and their protection of human rights. Three of the new offences contained in s 80.2 of the *Criminal Code* shift the emphasis from speech that is merely critical of the established order to exhortations to use force or violence against established authority, voters or particular groups within the community.¹⁰³ It is very difficult to understand why exhortations to use force or violence should *not* be prohibited by federal law, provided that the offences are properly framed.¹⁰⁴

2.51 Thus, as a result of the amendments to the old Commonwealth sedition provisions in 2005, the offences in s 80.2 are now conceptually closer to the criminal laws of incitement and riot than they are to ‘sedition’, as the term has traditionally been understood.

2.52 Notwithstanding this amendment, a great deal of the debate and media coverage continued to assert that a person could fall foul of the new laws by saying such things as ‘the Government was wrong to send troops to Iraq’, or ‘Australia needs to cut its ties with the British Crown’, or that a university lecturer would be in trouble for asking students of politics or rhetoric to ‘study the speeches of Hitler’.¹⁰⁵ Such analysis of the coverage of the current sedition provisions is wrong in law: the substantive provisions demonstrate that mere criticism of government action—unless it urges force or violence and is outside the parameters of the defence in s 80.3—will not be caught by the main offence provisions.

2.53 As explained earlier in this chapter, the history of sedition prosecutions indicates that, perhaps to a greater extent than any other offence except treason, sedition is a quintessentially ‘political’ crime, in that this offence has been used to criminalise expression that is critical of the established order. This has helped fuel concerns expressed by members of the community, and politicians across party lines, that there is potential for the law to over-reach, and to inhibit freedom of expression and free association.

2.54 Some of the concern expressed by stakeholders and commentators clearly stems from the context in which the new laws emerged. Although the changes made in 2005 largely track the 1991 recommendations of the Gibbs Committee, sedition laws were not modernised as part of a general ‘tidy up’ of federal criminal law. Rather, the new

103 As explained in Ch 11, the other two offences (s 80.2(7) and (8)) are very similar to the existing treason offences in s 80.1(1)(e) and (f).

104 As explained in Chs 5 and 7, freedom of expression has never been considered an absolute right. It has always been subject to limitations, particularly involving the maintenance of public order and the prevention of violence.

105 See, eg, B O’Keefe, ‘Sedition Threatens Uni Debate’, *The Australian* (Sydney), 3 May 2006, 23.

sedition offences were contained in the *Anti-Terrorism Act 2005* (Cth), which also introduced into the *Criminal Code* a range of extraordinary new powers, mechanisms and offences—such as control orders (Div 104) and preventative detention orders (Div 105)—that required a constitutional referral of powers from the states.

2.55 Thus the view of opponents and proponents of the legislation was that, while sedition offences may have been regarded as a ‘dead letter’ in western countries in recent decades, their modernisation and re-enactment in November 2005 signalled that they were now more likely to be used.

Submissions and consultations

2.56 Partly in response to widespread concern over the continued use of the term ‘sedition’ in the *Criminal Code*, with reference to its problematic history, the ALRC asked in Issues Paper 30 whether the term ‘sedition’ should be retained in the Code.¹⁰⁶

2.57 Responses to this question almost uniformly favoured the removal of the term ‘sedition’.¹⁰⁷ The most frequently expressed concerns were that the term did not accurately reflect the nature of the offences, as amended in 2005;¹⁰⁸ and that it was undesirable to maintain a link with the concept of sedition, given its history.¹⁰⁹

2.58 The Attorney-General’s Department (AGD), however, favoured the retention of the term ‘sedition’. At the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005 (Cth) (the 2005 Senate Committee inquiry), the AGD acknowledged that there may have been a trend away from using the term sedition, but said the focus should be on the substance of the relevant offence.¹¹⁰

2.59 The AGD disagreed with both of the reasons, described above, for removing the term ‘sedition’. On the question whether sedition is an accurate label to describe the relevant provisions, the AGD stated:

106 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Question 2.

107 J Pyke, *Submission SED 18*, 10 April 2006; J Goldring, *Submission SED 21*, 5 April 2006; A Steel, *Submission SED 23*, 18 April 2006; Australian Society of Authors, *Submission SED 24*, 18 April 2006; National Association for the Visual Arts, *Submission SED 30*, 11 April 2006; Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006; B Saul, *Submission SED 52*, 14 April 2006; National Legal Aid, *Submission SED 62*, 20 April 2006.

108 J Pyke, *Submission SED 18*, 10 April 2006; J Goldring, *Submission SED 21*, 5 April 2006; A Steel, *Submission SED 23*, 18 April 2006; National Association for the Visual Arts, *Submission SED 30*, 11 April 2006; Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006; B Saul, *Submission SED 52*, 14 April 2006; National Legal Aid, *Submission SED 62*, 20 April 2006.

109 New South Wales Bar Association, *Submission SED 20*, 7 April 2006; Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; R Douglas, *Submission SED 87*, 3 July 2006.

110 Australian Government Attorney-General’s Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005.

[Sedition] is a legal term used by other legal systems to broadly describe conduct which urges violence or the use of force which is aimed at threatening the peace, order and good government of a nation.¹¹¹

2.60 The AGD said that its rationale for retaining the name ‘sedition’ was that ‘it is important that the criminal law uses terms that have a long established meaning’.¹¹² On the link with the historical use of sedition, the AGD stated:

In the past, urging violence against the monarch was a very real attack on the fabric of society and in contemporary society the same is also true of people who do urge violence against groups in a society which is made up of different cultures and religions.¹¹³

2.61 Consistently with the bulk of the views received on this issue, in Discussion Paper 71 (DP 71) the ALRC proposed:

The Australian Government should remove the term ‘sedition’ from federal criminal law. To this end, the headings of Part 5.1 and Division 80 of the *Criminal Code* (Cth) should be changed to ‘Treason and offences against political liberty’, and the heading of s 80.2 should be changed to ‘Offences against political liberty and public order’.¹¹⁴

2.62 The proposal to remove the term ‘sedition’ received near unanimous support from those who have specifically commented on this issue.¹¹⁵ Most also endorsed the alternative phrasing proposed by the ALRC,¹¹⁶ but some suggested alternatives. These alternatives included ‘Advocating Terrorism’ or ‘Incitement to Terrorist Acts’;¹¹⁷ and ‘Offences against constitutional government and public order’.¹¹⁸ Although preferring to retain the term ‘sedition’, the AGD submitted that, if this term were to be discarded, a preferable description would be “urging violence” rather than “Offences against political liberty and public order” as the latter description applies to a much larger group of offences’.¹¹⁹

111 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

112 Ibid.

113 Ibid.

114 Australian Law Reform Commission, *Review of Sedition Laws*, DP 71 (2006), Proposal 2–1. The ALRC also proposed that ‘The Australian Government should initiate a process through the Standing Committee of Attorneys-General to remove the term “sedition” from state and territory laws and to modernise and harmonise the relevant laws in keeping with the proposed changes to federal law’: Proposal 2–2.

115 Arts Law Centre of Australia, *Submission SED 65*, 6 June 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; J Gilman, *Submission SED 78*, 3 July 2006; Australian Screen Directors Association, *Submission SED 85*, 3 July 2006; R Douglas, *Submission SED 87*, 3 July 2006; Sydney PEN, *Submission SED 88*, 3 July 2006; R Connolly and C Connolly, *Submission SED 90*, 3 July 2006; J Pyke, *Submission SED 100*, 3 July 2006; Artsource, *Submission SED 113*, 3 July 2006; Australia Council for the Arts, *Submission SED 114*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; National Tertiary Education Union, *Submission SED 118*, 3 July 2006; National Legal Aid, *Submission SED 124*, 7 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

116 Arts Law Centre of Australia, *Submission SED 65*, 6 June 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006.

117 J Gilman, *Submission SED 78*, 3 July 2006.

118 J Pyke, *Submission SED 100*, 3 July 2006.

119 Australian Government Attorney-General’s Department, *Submission SED 92*, 3 July 2006.

2.63 The NSW Council for Civil Liberties also preferred that the term ‘sedition’ be retained, submitting:

To rename the sedition offences in Chapter 5 of the Criminal Code, ‘Offences against political liberty and public order’ disguises the fact that the true nature of the legislation remains sedition. The offences, in fact, continue to infringe fundamental political liberties, not protect them as the proposed title indicates. CCL opposes this proposal and considers it an attempt to conceal the true nature of the legislation and mislead the public.¹²⁰

ALRC’s views

2.64 The ALRC considers that governments have a right, and in many cases a duty, to legislate to protect the institutions of democracy (responsible government, independent courts, free elections) from attack by force or violence; and similarly to protect the personal integrity of citizens (especially vulnerable or unpopular groups) from attack by force or violence. Indeed, this is recognised in a number of submissions, including those advocating the removal of the term ‘sedition’.¹²¹

2.65 Much of the concern about the new offences in s 80.2 of the *Criminal Code* is triggered by the fact that they are still referred to as ‘sedition’ offences. The question of whether to retain the term ‘sedition’ in the *Criminal Code* matters because it has a bearing on the popular understanding and judicial interpretation of the relevant provisions.

2.66 As a technical matter, the reference to sedition in the headings of Part 5.1 and Division 80 has consequences for the interpretation of the provisions in that Part;¹²² however, the heading of s 80.2 does not form part of the Act.¹²³ As a practical matter, this may not make a great deal of difference. A court faced with interpreting the provisions in Part 5.1 will focus primarily on the plain meaning of the words. The court will have regard to the purpose of the legislation¹²⁴ and may utilise relevant extrinsic material—such as second reading speeches, explanatory memoranda, and the reports of parliamentary committees and law reform commissions—if this aids interpretation.¹²⁵ Further, federal statutes must be construed subject to the *Australian Constitution*—which, as interpreted, contains an implied freedom of political speech¹²⁶—and there is a strong tradition in the common law that provisions imposing criminal liability must be narrowly construed by the courts.

2.67 It is unclear why, after substantially modifying the offences in 2005, the Australian Government chose to retain the term ‘sedition’ to describe the new offences. On the contrary, there are strong reasons not to retain this term. As elaborated below,

120 New South Wales Council for Civil Liberties Inc, *Submission SED 89*, 3 July 2006.

121 See, eg, Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006.

122 *Acts Interpretation Act 1901* (Cth) s 13(1).

123 *Ibid* s 13(3).

124 *Ibid* s 15AA.

125 *Ibid* s 15AB.

126 See Ch 7.

the term ‘sedition’ does not accurately describe the offences in s 80.2; and the continued use of this term is problematic because of the history of sedition as an offence.

‘Sedition’: an inaccurate description

2.68 In light of the amendments in 2005, ‘sedition’ is not an accurate description of the offences in s 80.2. There are several factors at play here. As explained earlier, the crime of sedition traditionally has been used to criminalise expression that is merely critical of government and established authority. By framing the principal offences (other than s 80.2(7) and (8), which are dealt with in Chapter 11) as proscribing the urging of force or violence, the Australian Parliament made a significant change that distinguishes the present offences from the sedition offences of the past.

2.69 Parliament also included a new offence in s 80.2(5)—namely, urging inter-group force or violence. This is a public order offence aimed at punishing and deterring violence between different groups in the Australian community and bears little relationship with historical conceptions of ‘sedition’.

2.70 In addition, sedition is not necessary as a descriptor. Although Part 5.1 and Division 80 of the *Criminal Code* are now headed ‘Treason and sedition’ and s 80.2 is headed ‘Sedition’, no reference is made to ‘sedition’ within any of the substantive provisions of the Code.¹²⁷ A parallel might be drawn here with the United States ‘seditious conspiracy’ offence, which refers to the term only in the title of the offence, but not in the text of the provision itself. It has been suggested that this is because the term ‘sedition’ does not convey a clear legal meaning.¹²⁸

Sedition and its historical baggage

2.71 Another consequence of retaining the term ‘sedition’ goes more to the broad social understanding of the law than to its technical construction. In this report, the ALRC makes a range of recommendations to improve the existing law. Some of these represent technical refinements to the drafting. Mainly, however, the recommendations are aimed at ensuring there is a bright line between freedom of expression—even when exercised in a challenging or unpopular manner—and the reach of the criminal law, which should focus on exhortations to the unlawful use of force or violence.

2.72 The ALRC is confident that these recommendations will achieve the desired aim in terms of technical improvements to the law. It would be unfortunate, however, if continued use of the term ‘sedition’ were to cast a shadow over the new pattern of offences. The term ‘sedition’ is much too closely associated in the public mind with its

¹²⁷ Part IIA of the *Crimes Act 1914* (Cth) on unlawful associations relies on the concept of a ‘seditious intention’, which is defined in s 30A. However, in Rec 4–1 the ALRC calls for repeal of these provisions.

¹²⁸ See J Cohan, ‘Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government’ (2003) 17 *St John’s Journal of Legal Commentary* 199, and the discussion of the US law of sedition in Ch 6.

origins and history as a crime rooted in criticising—or ‘exciting disaffection’ against—the established authority.

2.73 Chapters 5 and 7 consider in some detail the extent to which freedom of expression is guaranteed by international law and by domestic law. Australians place a high premium on freedom of expression and robust debate. We demand that our public institutions be open, transparent and accountable, and we reserve the right to criticise the most senior officials when we believe they have erred. The cultural preference is for challenging unpopular or radical views in the marketplace of ideas, rather than in the criminal courts.

2.74 For these reasons, the ALRC recommends that the term ‘sedition’ no longer be used in federal criminal law. To this end, Part 5.1 and Division 80 of the *Criminal Code* should be renamed ‘Treason and urging political or inter-group force or violence’, and the heading of s 80.2 should be changed to ‘Urging political or inter-group force or violence’.

Recommendation 2–1 The Australian Government should remove the term ‘sedition’ from federal criminal law. To this end, the headings of Part 5.1 and Division 80 of the *Criminal Code* (Cth) should be changed to ‘Treason and urging political or inter-group force or violence’, and the heading of s 80.2 should be changed to ‘Urging political or inter-group force or violence’.

3. Australian Sedition Laws and Related Provisions

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Introduction

3.1 This chapter summarises the current federal sedition provisions and other related aspects of federal law, including the offences of treason, treachery and interfering with elections. These provisions are found in the *Criminal Code* (Cth), the *Crimes Act 1914* (Cth) and other federal legislation. The chapter also considers state and territory laws on sedition, treason and related matters.

3.2 A deeper analysis of the current sedition offences and recommendations for their reform are contained in Chapters 8–11. Chapter 12 considers the defence and penalties relating to these offences.

3.3 The Terms of Reference also ask the ALRC to consider the operation of Part IIA of the *Crimes Act*. Part IIA contains provisions dealing with unlawful associations,

including those that advocate the doing of acts that have as an object the carrying out of a 'seditious intention'.¹ Part IIA is considered in Chapter 4.

New sedition offences in the *Criminal Code*

3.4 The new federal sedition offences were enacted by Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* (Cth) and commenced on 11 January 2006. The Act contains measures designed to respond to the threat of terrorism by criminalising terrorist acts and conferring further powers on law enforcement and intelligence agencies.²

3.5 Schedule 7 repealed the sedition offences found in ss 24A–24F of the *Crimes Act*³ and replaced them with the new offences that are now located in Part 5.1 of the *Criminal Code*. This is in keeping with the Australian Government's policy of shifting updated offences and provisions dealing with criminal responsibility from the *Crimes Act* to the *Criminal Code*, with the former now mainly concerned with matters of practice and procedure.⁴

3.6 The stated purposes of the new sedition provisions are to modernise the language of the offences and to 'address problems with those who incite directly against other groups within the community'.⁵

3.7 Five new offences were created in s 80.2 of the *Criminal Code* under the heading 'Sedition'. The first, under the sub-heading *Urging the overthrow of the Constitution or Government*, provides:

- (1) A person commits an offence if the person urges another person to overthrow by force or violence:
 - (a) the Constitution; or
 - (b) the Government of the Commonwealth, a State or a Territory; or
 - (c) the lawful authority of the Government of the Commonwealth.
- (2) Recklessness applies to the elements of the offence under subsection (1) that it is:
 - (a) the Constitution; or

1 *Crimes Act 1914* (Cth) s 30A(1)(b).

2 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth). See also Ch 1.

3 See Ch 2 for a brief history of the old sedition offences. A new s 30A(3) has been inserted into the *Crimes Act*, defining 'seditious intention'. However, this is applicable only in relation to the offences of 'unlawful association' (see Ch 4).

4 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth). In its Inquiry into the sentencing of federal offenders, the ALRC recommended the repeal of Part IB of the *Crimes Act* and its replacement by a dedicated federal sentencing Act: Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006), Rec 2–1.

5 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 103 (P Ruddock–Attorney-General).

- (b) the Government of the Commonwealth, a State or a Territory; or
- (c) the lawful authority of the Government of the Commonwealth that the first-mentioned person urges the other person to overthrow.

3.8 The second offence, *Urging interference in Parliamentary elections*, in s 80.2(3)–(4), states:

- (3) A person commits an offence if the person urges another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament.
- (4) Recklessness applies to the element of the offence under subsection (3) that it is the lawful processes for an election of a member or members of a House of Parliament that the first-mentioned person urges the other person to interfere with.

3.9 The third offence, *Urging violence within the community*, in s 80.2(5)–(6), states:

- (5) A person commits an offence if:
 - (a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and
 - (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.
- (6) Recklessness applies to the element of the offence under subsection (5) that it is a group or groups that are distinguished by race, religion, nationality or political opinion that the first-mentioned person urges the other person to use force or violence against.

3.10 The fourth offence, *Urging a person to assist the enemy*, in s 80.2(7), states:

- (7) A person commits an offence if:
 - (a) the person urges another person to engage in conduct; and
 - (b) the first-mentioned person intends the conduct to assist an organisation or country; and
 - (c) the organisation or country is:
 - (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
 - (ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth.

3.11 The fifth offence, *Urging a person to assist those engaged in armed hostilities*, in s 80.2(8), states:

- (8) A person commits an offence if:

- (a) the person urges another person to engage in conduct; and
- (b) the first-mentioned person intends the conduct to assist an organisation or country; and
- (c) the organisation or country is engaged in armed hostilities against the Australian Defence Force.

3.12 Each of the five offences carries a maximum penalty of imprisonment for seven years. This is consistent with the recommendation in 1991 of the Committee of Review of Commonwealth Criminal Law (the Gibbs Committee), which argued that ‘the more specific nature of the proposed offence[s]’ warranted an increase from the maximum penalty of imprisonment for three years specified for the old sedition offences under ss 24A–24D of the *Crimes Act*.⁶

Other features of the provisions

Fault elements

3.13 There has been considerable confusion in the public debate over the fault elements required for the new sedition offences. Much of this uncertainty stems from a lack of understanding about how the physical and fault elements work under the *Criminal Code*.⁷

3.14 The fault element for the act of ‘urging’ another person to engage in the relevant conduct is intention.⁸ Three of the new sedition offences expressly contain recklessness as a fault element in relation to some of the physical elements required to constitute the offence—that is, the *circumstances* or *results* arising from the person’s ‘urging’. The application of fault elements to the offences is discussed in detail in Chapter 8.

Extraterritorial application

3.15 The sedition and treason offences under Division 80 of the *Criminal Code* are characterised as ‘Category D’ offences—as are the terrorism offences created in 2002⁹ in Divisions 101–104 of the *Criminal Code*.¹⁰ This designation means that, by virtue of s 15.4 of the *Criminal Code*, the offences apply:

- whether or not the conduct constituting the offence occurs in Australia; and
- whether or not a result of the conduct constituting the alleged offence occurs in Australia.

6 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), 307, [32.19].

7 See Ch 8.

8 *Criminal Code* (Cth) s 5.6.

9 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) sch 1.

10 *Criminal Code* (Cth) ss 101.1(2), 101.2(5), 101.4(4), 101.5(4), 101.6(3), 102.9, 103.1(3), 104.8. See the discussion below.

3.16 The implications of this extraterritorial application are considered in Chapter 11.

Attorney-General's consent

3.17 Under s 80.5 of the *Criminal Code*, proceedings for a sedition offence may not be commenced without the written consent of the Attorney-General. According to the Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2005 (Cth), this provision is designed to provide an additional safeguard to a person charged with a sedition offence.¹¹ This matter is discussed further in Chapter 13.

Defences

3.18 Section 80.3 of the *Criminal Code* provides for specific defences to the treason and sedition offences in Division 80, where the acts in question were done 'in good faith'. The provisions in s 80.3 substantially replicate those in the old s 24F of the *Crimes Act*.

3.19 Under s 80.3, comments made in good faith must, for example, point out mistakes in government policy,¹² urge people lawfully to change laws or policies,¹³ or comment on matters that produce feelings of hostility between groups with a view to bringing about removal of those matters.¹⁴ Section 80.3(1)(f) also allows the publication in good faith of a report or commentary about a matter of public interest.

3.20 In deciding whether an act was done in good faith, the court may look to matters such as whether the act was done: with a purpose intended to be prejudicial to the safety or defence of the Commonwealth;¹⁵ to assist an enemy of Australia;¹⁶ or with the intention of causing violence or creating public disorder or a public disturbance.¹⁷

3.21 Defences and recommendations for reform are discussed in detail in Chapter 12.

Related federal legislation

3.22 The previous sedition offences in the *Crimes Act* were part of a grouping of offences relating to the security and defence of the Commonwealth. In 1991, the Gibbs Committee recommended reform of these provisions to modernise their language, clarify their terms and bring greater consistency to their penalties.¹⁸ However, aside

11 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), 93.

12 *Criminal Code* (Cth) s 80.3(1)(a).

13 *Ibid* s 80.3(1)(c).

14 *Ibid* s 80.3(1)(d).

15 *Ibid* s 80.3(2)(a).

16 *Ibid* s 80.3(2)(b).

17 *Ibid* s 80.3(2)(f).

18 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), Chs 30–37.

from amendments such as removal of the death penalty, many of these offences have remained unaltered since their enactment in 1920. The response to modern terrorist threats against the state has generally been to enact a new set of offences in the *Criminal Code* rather than to rely on these older provisions.¹⁹

3.23 Some submissions and commentary suggested that the sedition provisions in s 80.2 are unnecessary as they overlap with existing federal offences, or may be covered by the offence of incitement to commit an existing offence. Under s 11.4 of the *Criminal Code* it is an offence to urge the commission of another offence. Therefore, some conduct covered by the offences in s 80.2 of the *Criminal Code* could overlap with conduct that constitutes incitement to commit other offences—for example, the terrorism offences under Part 5.3 of the *Criminal Code*.

3.24 This section of the chapter considers those existing offences in the *Criminal Code*, the *Crimes Act* and other federal legislation, and their interaction with the sedition provisions. The relationship between sedition and incitement to other offences is considered in greater detail in Chapter 8.

Criminal Code

Treason

3.25 The offence of treason was moved from the *Crimes Act* into the *Criminal Code* in 2002.²⁰ Section 80.1 of the Code substantially replicates the former treason offence in s 24 of the *Crimes Act*, although some amendments were made in accordance with the recommendations of the Gibbs Committee, and the language was modernised and made consistent with the drafting style of the *Criminal Code*.²¹

3.26 Under s 80.1(1), a person commits treason if he or she:

- causes the death of, harm to, or imprisons or restrains the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or the Prime Minister;
- levies war, or does any act preparatory to levying war, against the Commonwealth;
- engages in conduct that assists, by any means whatever, with intent to assist, an enemy at war with the Commonwealth;

19 Part 5.3 of the *Criminal Code* sets out a raft of terrorism offences. The operation and effectiveness of the counter-terrorism laws have been reviewed recently as a statutory requirement of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth): Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006).

20 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) sch 1.

21 Explanatory Memorandum, *Security Legislation Amendment (Terrorism) Bill 2002* (Cth).

- engages in conduct that assists, by any means whatever, with intent to assist, another country or organisation engaged in armed hostilities against the Australian Defence Force (ADF);
- instigates a person who is not an Australian citizen to make an armed invasion of the Commonwealth or a Territory of the Commonwealth; or
- forms an intention to do any of the above acts and manifests that intention by an overt act.

3.27 The maximum penalty for an act of treason is imprisonment for life. Under s 80.1(1A), the offence of assisting the enemy does not apply where the person engages in the relevant conduct ‘by way of, or for the purposes of, the provision of aid of a humanitarian nature’.²² In common with the sedition offences, the defence of ‘good faith’ is available under s 80.3.

3.28 There is significant overlap between treason in s 80.1 and the sedition offences in s 80.2(7)–(8) of the *Criminal Code*, particularly in relation to the provisions concerning assisting the enemy or those engaged in armed hostilities against the ADF. Under s 80.2(7), it is an offence for a person *to urge another to assist* an organisation or country at war with the Commonwealth, and under s 80.1(1)(e) it is treason *to engage in conduct that assists*, by any means whatever, an enemy at war with the Commonwealth.

3.29 In Chapter 11, the ALRC concludes that the offences in s 80.2(7) and (8) are inappropriately broad and should be repealed. The ALRC also highlights related concerns with aspects of the treason offences, and makes a number of recommendations for reform, which complement the recommendations made by the Security Legislation Review Committee (the Sheller Committee) in its broader review of security laws.²³

Terrorism offences

3.30 Part 5.3 of the *Criminal Code* was enacted in 2002 as part of the Australian Government’s counter-terrorism legislative package.²⁴ The *Criminal Code* was amended to: transfer the offence of treason from the *Crimes Act* to the *Criminal Code* (as mentioned above); introduce a definition of a ‘terrorist act’ to the Code and create specific terrorism offences; and introduce an administrative power to proscribe terrorist organisations.

22 The defendant bears the evidential onus under s 13.3 to raise this matter, after which the prosecution must negate it beyond reasonable doubt.

23 See Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006).

24 *Security Legislation Amendment (Terrorism) Act 2002* (Cth).

3.31 Section 100.1 of the *Criminal Code* defines a ‘terrorist act’ as an action or threat that is made with the intention both of ‘advancing a political, religious or ideological cause’ and ‘coercing, or influencing by intimidation’ a governmental authority in Australia or overseas. Under s 100.1(2), action falls within the definition of a terrorist act where it causes serious physical harm or death to a person, or endangers human life; causes serious damage to property; creates a serious risk to the health and safety of the public; or seriously interferes with, disrupts, or destroys an electronic system. However, s 100.1(3) provides that action does not constitute a terrorist act if the relevant conduct is ‘advocacy, protest, dissent or industrial action’ and does not possess the requisite intent spelt out in s 100.1(3)(b).

3.32 Division 101 creates a number of serious offences, including:

- engaging in a terrorist act;²⁵
- providing or receiving training connected with a terrorist act;²⁶
- possessing things connected with a terrorist act;²⁷
- collecting or making documents likely to facilitate a terrorist act;²⁸ or
- doing other acts in preparation for, or planning, a terrorist act.²⁹

3.33 Urging someone to overthrow the Australian Government by force or violence under s 80.2(1) would cover some of the same conduct required to establish the offence of incitement to commit a terrorist act. However, the practical steps to be taken in proving an offence under s 80.2(1) would be quite different to those under Division 101. Under the sedition offences, there is no need to prove a particular ideological or political intention on the part of the person undertaking the terrorist act. Proving that a person who urges the commission of a terrorism offence is guilty of the offence of incitement under the *Criminal Code* requires evidence that the person intended that the offence incited be committed.³⁰ The offences under s 80.2 currently require only an intention to urge the conduct, not an intention that the crime urged be committed. This distinction is discussed in greater detail in Chapter 8.

Causing harm to public officials

3.34 Sections 147.1–147.2 of the *Criminal Code* make it an offence to harm or threaten to harm a Commonwealth public official. These offences apply where the

25 *Criminal Code* (Cth) s 101.1, punishable by a maximum of life imprisonment.

26 *Ibid* s 101.2, punishable by imprisonment for up to 15 or 25 years, depending upon the circumstances.

27 *Ibid* s 101.4, punishable by imprisonment for up to 10 or 15 years, depending upon the circumstances.

28 *Ibid* s 101.5, punishable by imprisonment for up to 10 or 15 years, depending upon the circumstances.

29 *Ibid* s 101.6, punishable by a maximum of life imprisonment.

30 *Ibid* s 11.4(2).

person threatens or harms the official because of the official's status or because of his or her conduct in an official capacity. Penalties of imprisonment for 10–13 years apply depending on whether the person is a Commonwealth law enforcement officer or another public official. It is also an offence to harm or threaten a former Governor-General, former Minister or a former Parliamentary Secretary.³¹

Crimes Act 1914

3.35 Even after the relocation of the treason and sedition offences to the *Criminal Code*, Part II of the *Crimes Act* retains a number of other serious 'offences against the government', which may be related to sedition.

Treachery

3.36 Under s 24AA, a person commits 'treachery' if he or she acts with intent to overthrow the Constitution by revolution or sabotage, overthrow the government of a state or the Commonwealth by an act of force or violence, or participates in acts of war against proclaimed countries. The maximum penalty is life imprisonment.

3.37 The Gibbs Committee was of the view that, given its similarity to the treason offence, the offence of treachery should be repealed and a new provision created, making it an offence for an Australian citizen or resident to help a state or any armed force against which any part of the ADF is engaged in armed hostilities.³² This wording is now part of the treason and sedition offences in the *Criminal Code*.

Sabotage

3.38 Under s 24AB, a person commits an act of 'sabotage' if he or she destroys, damages or impairs any article used by the ADF or that relates directly to the defence of the Commonwealth, with the intention of prejudicing the safety or defence of the Commonwealth. Sabotage carries a maximum penalty of 15 years imprisonment.

3.39 As with the treachery offence, the Gibbs Committee noted that no prosecution had ever been brought under s 25AB, and that a simplified and narrower version of the offence should be adopted.³³

3.40 In common with the new sedition offences, a prosecution for treachery or sabotage may be instituted only with the written consent of the Attorney-General.³⁴

31 Ibid ss 147.1, 147.1(2), 147.2, 147.2(3).

32 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [30.44]–[30.51].

33 Ibid, [33.10].

34 *Crimes Act 1914* (Cth) s 24AC.

Inciting mutiny

3.41 Section 25 of the *Crimes Act* creates an offence of inciting disaffection with, or attempting to interfere with the operations of, the 'Queen's Forces', including inciting mutiny or 'seducing' any person in the military 'from his duty and allegiance'.³⁵ The maximum penalty is life imprisonment. The Gibbs Committee recommended repeal of this provision on the basis that the *Defence Force Discipline Act 1982* (Cth) already contains offences of mutiny and incitement to mutiny.³⁶

Assisting prisoners of war to escape

3.42 Section 26 makes it an offence, with a maximum penalty of life imprisonment, for a person to assist prisoners of war to escape. The Gibbs Committee noted the severity of the penalty for this offence, and compared it with the five-year penalty for assisting a civilian prisoner to escape under s 46 of the Act. The Committee concluded that this offence should be removed from an Act of general application such as the *Crimes Act*.³⁷

Unlawful drilling

3.43 'Unlawful drilling' involves training or drilling others 'to the use of arms or the practice of military exercises, movements, or evolutions',³⁸ contrary to a proclamation of the Governor-General. No proclamation for the purpose of this section has ever been made. There is some overlap between this provision and offences under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth), which is discussed below.

Intentionally damaging or destroying Commonwealth property

3.44 Under s 29, a person who intentionally destroys or damages any property, whether real or personal, belonging to the Commonwealth or to any Commonwealth public authority is guilty of an offence, punishable by imprisonment for up to 10 years.

Offences under Part IIA of the Crimes Act

3.45 Part IIA of the *Crimes Act* contains a range of provisions concerning unlawful associations. Chapter 4 considers this area of the law in detail, and Chapter 8 deals with s 30C (advocating overthrow of the Constitution), which substantially overlaps with the offence in s 80.2(1).

35 Ibid s 25. The 'Queen's Forces' is defined to mean the Australian Defence Force or 'the armed forces of the United Kingdom or any British possession'.

36 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [34.12].

37 Ibid, [35.7].

38 Military evolutions are training exercises to accustom troops to the different movements required, for example, in defensive or offensive operations.

Electoral offences

3.46 As discussed above, one of the new sedition offences (s 80.2(3) of the *Criminal Code*) involves urging others to interfere by force or violence with parliamentary elections. Under s 28 of the *Crimes Act*, it is also an offence (punishable by imprisonment for three years) where a person ‘by violence or by threats or intimidation of any kind, hinders or interferes with the free exercise or performance, by any other person, of any political right or duty’.

3.47 A related summary offence also exists under s 327(1) of the *Commonwealth Electoral Act 1918* (Cth), which provides that a person ‘shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election under this Act’. The penalty for breach is a fine of \$1,000, or imprisonment for six months, or both. Under the *Referendum (Machinery Provisions) Act 1984* (Cth), a mirror offence provides that a person shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election or referendum.³⁹ These offences are considered in more detail in Chapter 8.

Crimes (Foreign Incursions and Recruitment) Act 1978

3.48 The *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) contains a number of offences preventing persons from recruiting, training or organising people in Australia for armed incursions or operations in another country. It is an offence to:

- enter into a foreign state and engage in hostile activity in that foreign state (s 6);
- enter into a foreign state with the intent to engage in hostile activity in that foreign state (s 6);
- undertake preparation for the above purpose, including training, giving money or goods to any body or association promoting these activities (s 7);
- recruit persons to join organisations engaged in hostile activities against foreign governments (s 8); or
- recruit persons to serve in or with an armed force in a foreign state (s 9).

3.49 ‘Hostile activities’ under the Act include activities done with the intention of: achieving overthrow by force or violence of the government of the foreign state; causing the public of the foreign state to be in fear of suffering death or injury; causing

39 *Referendum (Machinery Provisions) Act 1984* (Cth) s 120.

the death or injury to the head of state or public officials; or damaging the foreign government's property.⁴⁰

3.50 The Act does not apply to acts done in defence of Australia, or in the course of a person's duty to the Commonwealth.⁴¹ An offender must be an Australian citizen, ordinarily resident in Australia, or present in Australia for purposes connected with the offence.⁴² Proceedings under the Act require the Attorney-General's written consent.⁴³

3.51 The offences under s 80.2(7) and (8) of the *Criminal Code* overlap to some extent with these provisions. Under s 9(d) of the *Crimes (Foreign Incursions and Recruitment) Act*, it is an offence to do 'any act or other thing with the intention of facilitating or promoting the recruitment of persons to serve in any capacity in or with such an armed force'. Presumably this could include urging another to assist the enemy or those engaged in armed hostilities with the ADF under s 80.1(1)(e)–(f) or s 80.2(7) and (8).

ALRC's views

3.52 It is outside the Inquiry's Terms of Reference to conduct a full review of all federal law relating to the security of the Commonwealth. Nevertheless, it is clear that, while attention has been given to the modernisation of some of the *Crimes Act* offences, many still languish as 'dead-letter' laws that are never prosecuted. These provisions are couched in archaic language and many of them effectively have been superseded by new provisions in the *Criminal Code* and elsewhere.

3.53 In Discussion Paper 71 (DP 71), the ALRC proposed that these offences be reviewed by the Australian Government to determine which offences merit retention, modernisation and relocation to the *Criminal Code*, and which should be abolished because they are redundant or otherwise inappropriate.⁴⁴ This proposal was supported in a number of submissions.⁴⁵

3.54 Consequently, the ALRC recommends that the Australian Government initiate a review of the remaining offences contained in Part II of the *Crimes Act*. As discussed in Chapter 4, this review should also encompass ss 30J and 30K, located in Part IIA of the *Crimes Act*.

40 *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) s 6(3).

41 *Ibid* s 5.

42 *Ibid* ss 6(2), 7(2).

43 *Ibid* s 10.

44 Australian Law Reform Commission, *Review of Sedition Laws*, DP 71 (2006), Proposal 4–1.

45 Arts Law Centre of Australia, *Submission SED 65*, 6 June 2006; Australian Press Council, *Submission SED 66*, 23 June 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; Sydney PEN, *Submission SED 88*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; National Tertiary Education Union, *Submission SED 118*, 3 July 2006; National Legal Aid, *Submission SED 124*, 7 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

Recommendation 3–1 The Australian Government should initiate a review of the remaining offences in Part II of the *Crimes Act 1914* (Cth) to determine which offences merit retention, modernisation and relocation to the *Criminal Code* (Cth), and which offences should be abolished. This review should include the offences in ss 24AA, 24AB and 25–29 of the *Crimes Act*. (See also Recommendation 4–2).

State and territory sedition laws

3.55 Federal sedition law proscribes, among other things, urging the overthrow by force or violence of ‘the Government of the Commonwealth, a State or a Territory’.⁴⁶ However, the Australian Parliament did not intend to ‘cover the whole field’⁴⁷ in relation to sedition, which would have rendered the relevant state and territory laws inoperative under s 109 of the *Australian Constitution*.⁴⁸

3.56 Section 80.6 of the *Criminal Code* states that the treason and sedition provisions of Division 80 are ‘not to apply to the exclusion of a law of a State or a Territory to the extent that the law is capable of operating concurrently’ with them.

3.57 Commonwealth, state and territory laws define sedition in different terms. For example, some state laws seek to protect the Sovereign, Government and Constitution of the United Kingdom from seditious conduct.⁴⁹ In contrast, the *Criminal Code* provisions apply only to sedition against the Australian Constitution or the Government of the Commonwealth or an Australian state or territory.⁵⁰

3.58 In New South Wales and Victoria, the common law offence of seditious libel remains in effect.⁵¹ In New South Wales, the common law offence is referred to by the *Imperial Acts Application Act 1969* (NSW), which states that following a conviction for seditious libel the court may give an order for the seizure of all copies of the libel. The Act refers to seditious libel as

tending to bring into hatred or contempt the person of Her Majesty, Her heirs or successors, or the government and constitution of the State of New South Wales as by law established, or either House of Parliament, or to excite Her Majesty’s subjects to

46 *Criminal Code* (Cth) s 80.2(1)(b) (emphasis added).

47 See *Viskauskas v Niland* (1983) 153 CLR 280, 291.

48 Section 109 provides that the laws of the Commonwealth shall prevail over those of a state, to the extent of any inconsistency.

49 *Criminal Code 1899* (Qld) s 44(b); *Criminal Code 1913* (WA) s 44; *Criminal Code 1924* (Tas) s 67.

50 *Criminal Code* (Cth) s 80.2(1). See also the references to the states and territories in the good faith defence: s 80.3.

51 See Butterworths, *Halsbury’s Laws of Australia*, vol 21 Human Rights, [130–12080].

attempt the alteration of any matter as by law established, otherwise than by lawful means ...⁵²

3.59 The provision does not appear to codify the law of seditious libel, as it does not establish or define an offence, but simply provides for court orders consequential to a conviction.⁵³

3.60 In Victoria, s 316 of the *Crimes Act 1958* (Vic) makes it an offence to take an oath to, among other things, 'engage in any mutinous or seditious enterprise'. The nature of a seditious enterprise is not defined, leaving this to the common law.

3.61 Queensland, Western Australia, Tasmania and the Northern Territory have statutory seditioffences. The offence provisions, and the relevant defences, are framed in a similar manner to those in the repealed *Crimes Act 1914* (Cth) provisions⁵⁴—which were based on similar provisions in the *Criminal Code* (Qld). However, these state and territory laws do not require an intention to cause violence or disorder to be proved in order for a person to be convicted of sedition.⁵⁵

3.62 In Queensland, sedition offences are contained in the *Criminal Code* (Qld).⁵⁶ The offences concern engaging in a seditious enterprise or publishing seditious words, and are punishable by imprisonment for a maximum of three years (or seven years if previously convicted).⁵⁷ The definition of 'seditious intention' refers to sedition directed at the Sovereign, Government or Constitution of the United Kingdom or of Queensland, or against the Parliaments of the United Kingdom or Queensland, or against the administration of justice.⁵⁸

3.63 In Western Australia, the *Criminal Code* (WA) provides for the offences of conspiring to carry into execution a seditious enterprise and publishing seditious words.⁵⁹ The offences are punishable by imprisonment for a maximum of three years.⁶⁰ The definition of 'seditious intention' refers to sedition directed against the Sovereign or the Constitution or Government of the United Kingdom, the Commonwealth or Western Australia; the Parliament of the United Kingdom, the Commonwealth or Western Australia; or against the administration of justice.⁶¹

52 *Imperial Acts Application Act 1969* (NSW) s 35(1).

53 For more on the interpretation of s 35, see G Griffith, *Sedition, Incitement and Vilification: Issues in the Current Debate: Briefing Paper No 1/06* (2006) NSW Parliamentary Library Research Service, 18.

54 *Crimes Act 1914* (Cth) ss 24A–24D, 24F.

55 See Butterworths, *Halsbury's Laws of Australia*, vol 21 Human Rights, [130–12075], citing *Cooper v The Queen* (1961) 105 CLR 177.

56 *Criminal Code 1899* (Qld) s 52.

57 *Ibid* s 52(1)–(2).

58 *Ibid* s 44(b).

59 *Criminal Code 1913* (WA) s 52.

60 *Ibid* s 52.

61 *Ibid* s 44.

3.64 In Tasmania, the *Criminal Code* (Tas) provides for the offences of carrying into execution a seditious intention and publishing words or writing expressive of a seditious intention.⁶² The definition of ‘seditious intention’ refers to sedition directed against the Sovereign or the Constitution or Government of the United Kingdom, the Commonwealth or Tasmania; or against the United Kingdom, Commonwealth or Tasmanian Parliaments; or against the administration of justice in the United Kingdom, the Commonwealth or Tasmania.⁶³

3.65 In addition, Chapter V of the Tasmanian legislation, dealing with treason,⁶⁴ includes an offence directed to ‘inciting traitorous conduct’, which may best be characterised as a sedition provision. It applies to any person who ‘advisedly attempts’:

- (a) to seduce any person serving in His Majesty’s forces by sea or land from his duty and allegiance to His Majesty;
- (b) to incite any such person to commit an act of mutiny or any traitorous or mutinous act; or
- (c) to incite any such person to make or endeavour to make a mutinous assembly, or to commit any traitorous or mutinous practice whatever ...⁶⁵

3.66 Northern Territory legislation provides for offences in relation to engaging in a seditious enterprise or publishing seditious words.⁶⁶ Both offences are punishable by imprisonment for a maximum of three years.⁶⁷ The definition of ‘seditious intention’ refers to sedition directed at the Northern Territory government or legislative assembly, or at the administration of justice in the Territory—but there is no reference to the Sovereign.⁶⁸

3.67 South Australia abolished the common law offence of seditious libel in 1992, along with a number of other common law offences.⁶⁹ The ACT abolished the common law offence of seditious libel in 1996 as part of a measure intended to remove ‘outdated common law rules’.⁷⁰

3.68 The abolition of seditious libel in the ACT was a by-product of defamation law reform.⁷¹ In 1995, the Community Law Reform Committee of the ACT recommended

62 *Criminal Code* 1924 (Tas) s 67.

63 Ibid s 66(1)(b). Section 68 of the Code also creates an offence in relation to libels on foreign powers where any person, without lawful justification, publishes writing tending to degrade, revile, or expose to hatred or contempt the people or government of any foreign State, or any officer or representative thereof.

64 Ibid ch V: ‘Treason and Other Crimes Against the Sovereign’s Person or Authority’.

65 Ibid s 62.

66 *Criminal Code* 1993 (NT) ss 45–46.

67 Ibid s 24E.

68 Ibid s 44. Compare *Crimes Act* 1914 (Cth) s 24A.

69 *Criminal Law Consolidation Act* 1935 (SA) sch 11.

70 *Law Reform (Abolitions and Repeals) Act* 1996 (ACT) s 4.

71 Explanatory Memorandum, *Law Reform (Abolition and Repeals) Bill* 1995 (ACT).

abolition of seditious libel—along with the other common law misdemeanours of criminal, blasphemous and obscene libel—in the course of its defamation inquiry. The Committee considered that these offences were ‘no longer appropriate in the ACT’.⁷²

ALRC’s views

3.69 In Chapter 2, the ALRC recommends that the term ‘sedition’ be removed from the federal statute book.⁷³ The historical association of the term with suppression of political dissent gives rise to serious concerns within the community that the law might inhibit freedom of expression and freedom of association. In consultations in this Inquiry it appeared that much of the concern about the new offences emanates from the fact they are still referred to as ‘sedition’ offences.

3.70 Consideration of state and territory sedition laws indicates that they are as contentious as—or in many cases more contentious than—the original federal *Crimes Act* provisions. The fact that these sedition provisions have not occasioned any public outcry is likely to be because they have not been ‘updated’—and few people are aware of their existence. Nonetheless, the reasoning that supports the ALRC’s recommendation to remove of the term sedition from federal legislation applies equally to the state and territory provisions. Removal of the term from state and territory laws was widely supported in submissions to the Inquiry.⁷⁴

3.71 The ALRC therefore recommends that, in the interests of improving and harmonising the laws in this area across Australia, the Australian Government should initiate a process through the Standing Committee of Attorneys-General to remove the term ‘sedition’ from state and territory laws.

Recommendation 3–2 The Australian Government should initiate a process through the Standing Committee of Attorneys-General to remove the term ‘sedition’ from state and territory laws and to modernise and harmonise the relevant laws in keeping with the recommendations in this Report.

⁷² Community Law Reform Committee of the Australian Capital Territory, *Defamation*, CLRC 10 (1995), 17.

⁷³ Rec 2–1.

⁷⁴ Arts Law Centre of Australia, *Submission SED 65*, 6 June 2006; Australian Press Council, *Submission SED 66*, 23 June 2006; A Levy, *Submission SED 72*, 29 June 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; Sydney PEN, *Submission SED 88*, 3 July 2006; The Arts Industry Council of South Australia, *Submission SED 112*, 3 July 2006; Australia Council for the Arts, *Submission SED 114*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; National Tertiary Education Union, *Submission SED 118*, 3 July 2006; National Legal Aid, *Submission SED 124*, 7 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

4. Unlawful Associations

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Introduction

4.1 The Terms of Reference direct the ALRC to consider the operation of Part IIA of the *Crimes Act 1914* (Cth) dealing with unlawful associations.

4.2 Part IIA contains 16 sections (ss 30A–30R) and was inserted into the *Crimes Act* in 1926, apparently in response to federal government concerns about radical trade unionism, the rise of communism and the potential for revolutionary activity.¹ Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* (Cth) amended s 30A of the *Crimes Act* to insert a definition of ‘seditious intention’ into the sections, following the repeal of the sedition provisions in s 24A.

4.3 As the changes to Part IIA were consequential rather than substantive, they have not attracted the same attention or criticism as the sedition provisions. Despite being

¹ See R Douglas, ‘Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth Crimes Act’ (2001) 22 *Adelaide Law Review* 259. See also Ch 2. Sections 30L–30Q were repealed in 1973 as part of a number of technical amendments.

invoked only rarely, these provisions have not been without controversy—and in 1991 the Committee of Review of Commonwealth Criminal Law (the Gibbs Committee) recommended their repeal.²

4.4 This chapter considers the unlawful associations provisions as they currently stand and the new definition of ‘seditious intention’ inserted into s 30A. It compares their operation with the terrorist organisation offences added to the *Criminal Code* (Cth) in 2002 and concludes that the unlawful associations provisions have been superseded and should be repealed. The chapter then considers the three stand alone offences in Part IIA that are not directly linked to unlawful associations, and recommends that they be subject to repeal or review, in line with the recommendation made in Chapter 3 for a review of certain offences in the *Crimes Act*.

Unlawful associations provisions

4.5 Section 30A of the *Crimes Act* declares as ‘unlawful associations’:

- (1) (a) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages:
 - (i) the overthrow of the Constitution of the Commonwealth by revolution or sabotage;
 - (ii) the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilized country or of organized government; or
 - (iii) the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States;
 or which is, or purports to be, affiliated with any organization which advocates or encourages any of the doctrines or practices specified in this paragraph;
- (b) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a seditious intention.
- (2) Any branch or committee of an unlawful association, and any institution or school conducted by or under the authority or apparent authority of an unlawful association, shall, for all the purposes of this Act, be deemed to be an unlawful association.

4.6 Under s 30A(1A) a body is an unlawful association if it is so declared by the Federal Court of Australia, following a ‘show cause’ application by the Attorney-General pursuant to s 30AA. An earlier version of this provision was introduced in 1932 to address the uncertainty that might arise if a body that had, by virtue of its attributes, become an unlawful association but had subsequently changed its policies

2 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [38.2]–[38.9].

and activities in relevant ways, and thus should no longer be deemed to be an unlawful association.³

4.7 Following the relocation of the sedition provisions from the *Crimes Act* to the *Criminal Code*, a new definition of ‘seditious intention’ was inserted as s 30A(3) of the *Crimes Act*. This definition is the ‘modernised’ version of s 24A of the *Crimes Act* that was recommended by the Gibbs Committee.⁴

4.8 Section 30A(3) of the *Crimes Act* provides that:

seditious intention means an intention to use force or violence to effect any of the following purposes:

- (a) to bring the Sovereign into hatred or contempt;
- (b) to urge disaffection against the following:
 - (i) the Constitution;
 - (ii) the Government of the Commonwealth;
 - (iii) either House of the Parliament;
- (c) to urge another person to attempt to procure a change, otherwise than by lawful means, to any matter established by law of the Commonwealth;
- (d) to promote feelings of ill-will or hostility between different groups so as to threaten the peace, order and good government of the Commonwealth.

4.9 If a body is an unlawful association, whether by virtue of s 30A(1), (1A) or (2), a number of criminal offences may apply, as specified in ss 30AB–30FC. These offences include:

- failure to provide information relating to an unlawful association upon the request of the Attorney-General;⁵
- being an officer, member or representative of an unlawful association;⁶
- giving contributions of money or goods to, or soliciting donations for, an unlawful association;⁷
- printing, publishing or selling material issued by an unlawful association;⁸ or

3 R Douglas, ‘Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth Crimes Act’ (2001) 22 *Adelaide Law Review* 259, 263.

4 See discussion in Ch 3.

5 *Crimes Act 1914* (Cth) s 30AB, with a maximum penalty of imprisonment for six months.

6 *Ibid* s 30B, imprisonment for up to one year; and see s 30H regarding proof of membership.

7 *Ibid* s 30D, imprisonment for up to six months.

8 *Ibid* ss 30E, 30F, 30FA, imprisonment for up to six months.

- allowing meetings of an unlawful association to be held on property owned or controlled by a person.⁹

History of the unlawful associations provisions

4.10 The unlawful associations provisions arose in the context of government concern about radical trade unionism and revolutionary politics. Following the Australia-wide strike by the seamen's union in 1925, the Bruce-Page Government sought to introduce a number of legislative measures designed to regulate trade unions and their leaders in Australia.¹⁰

4.11 The unlawful associations legislation was based on a similar Canadian model, although the penalties in Australia were considerably lighter. The Canadian legislation was repealed in 1936.¹¹ Some amendments were made to Part IIA in 2001, in part to bring some of the language into line with the concepts and terminology used in the *Criminal Code*.¹²

4.12 Only one person has ever been convicted in Australia of an offence under the unlawful associations provisions—and that conviction was overturned on appeal.¹³ Roger Douglas notes that it was largely the threat of prosecution that was used to discourage people from making premises and public halls available to communists for public meetings:

Between 1932–37, Part IIA was used to discourage the renting of meeting halls to communists, and, more importantly, as the basis of banning the postal transmission of communist publications. Between 1935–37, the Commonwealth made a half-hearted attempt to seek a declaration banning the Friends of the Soviet Union (and, almost incidentally, the Communist Party of Australia). But, with the settlement of that litigation, governments largely lost interest in the Act, and never again were any attempts made to enforce the unlawful associations provisions of Part IIA.¹⁴

⁹ Ibid s 30FC, imprisonment for up to six months.

¹⁰ R Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth Crimes Act' (2001) 22 *Adelaide Law Review* 259, 260.

¹¹ Ibid, 260. Similar provisions in other countries have also been repealed or limited, based on the right of freedom of association. For example, the United States *Subversive Activities Control Act* (1950) was repealed after the fall of the Soviet Union: L Donahue, 'Terrorist Speech and the Future of Free Expression' (2005) 27 *Cardozo Law Review* 233, 246. India's *Unlawful Activities (Prevention) Act* (1967) was modernised in 2004 to apply to terrorist offences: C Kumar, 'Human Rights Implications of National Security Laws: Combating Terrorism While Preserving Civil Liberties' (2005) 33 *Denver Journal of International Law and Policy* 195, 209.

¹² Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences: Civil Penalties and Enforcement Powers* (2004) sch 10.

¹³ *R v Hush; Ex parte Devanny* (1932) 48 CLR 487: see R Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth Crimes Act' (2001) 22 *Adelaide Law Review* 259, 261.

¹⁴ R Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth Crimes Act' (2001) 22 *Adelaide Law Review* 259, 261.

4.13 Douglas notes that even after the *Communist Party Dissolution Act 1950* (Cth) was invalidated on constitutional grounds in the High Court,¹⁵ no attempt was made to use the unlawful associations provisions to prosecute communists.¹⁶

Criticisms of the unlawful associations provisions

4.14 In 1991, the Gibbs Committee recommended the repeal of Part IIA of the *Crimes Act* in its entirety since the unlawful associations provisions had been ‘little used since their introduction in 1926’. In its Discussion Paper, the Gibbs Committee stated that it was

disposed to think that the activities at which these provisions are aimed can best be dealt with by existing laws creating such offences as murder, assault, abduction, damage to property and conspiracy and that there is no need for these provisions.¹⁷

4.15 In the final report, the Committee noted that all the submissions received in response to the proposal to repeal Part IIA endorsed that view.¹⁸ A separate recommendation was made in relation to ss 30J and 30K of the *Crimes Act*, which is discussed below.

4.16 A comprehensive survey of the history and use of the Part IIA provisions on unlawful associations by Douglas concluded that the case for retention is weak.¹⁹ Although drafted to be of general application, Part IIA was designed to deal with the threat posed by bodies such as the Communist Party of Australia (CPA)—‘centrally co-ordinated bodies with authoritative programs, proud of their revolutionary credentials’.²⁰ However, these laws were not even effective against the CPA after it ‘abandoned hopes of imminent revolution’.²¹

It is therefore hard to see how Part IIA could be used against a movement less formally committed to modernist norms such as consistency, coherence, rationality or against a movement lacking the highly bureaucratised structure of the Communist Party.²²

4.17 Douglas suggests that prosecutions may not have been attempted under Part IIA because of the likely political backlash and the difficulty of proving an offence. For example, he argues that the wording ‘by revolution or sabotage’ is unclear (without any

15 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

16 R Douglas, ‘Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth Crimes Act’ (2001) 22 *Adelaide Law Review* 259, 261.

17 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [38.2]–[38.9].

18 *Ibid.*, [38.8]

19 R Douglas, ‘Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth Crimes Act’ (2001) 22 *Adelaide Law Review* 259.

20 *Ibid.*, 261, 295.

21 *Ibid.*, 261, 295.

22 *Ibid.*, 261, 295.

need to link to *violent* revolution). In the case of the CPA, the difficulty could arise as to whether a body was advocating revolution when its doctrine was that revolution could not happen until a state of affairs existed that had not yet arisen.²³ There is also the need for the organisation to have indicated its unlawful purposes via its constitution or propaganda. Douglas suggests that without a clear constitution, the prosecution may have difficulty proving that the particular body sought to be banned produced the propaganda.²⁴

4.18 There is a distinction between the unlawful associations provisions and the sedition offences (both the former ones under the *Crimes Act* and those under s 80.2 of the *Criminal Code*). Sedition offences traditionally have required that the defendant possesses a seditious intention and that the acts not be done in good faith. No comparable defence of good faith is available to a body or person prosecuted under Part IIA.²⁵

4.19 Similar concerns were expressed about the unlawful associations provisions during the course of the 2005 Senate Committee inquiry into the Anti-Terrorism Bill (No 2) 2005 (the 2005 Senate Committee inquiry). It was said, for example, that:

The ability to ban ‘unlawful associations’ is linked to an archaic definition of ‘seditious intention’ that covers practically all forms of moderate civil disobedience and objection (including boycotts and peaceful marches).²⁶

4.20 It also was pointed out that retaining the concept of ‘seditious intention’ for the purposes of declaring associations unlawful under the *Crimes Act* ‘results in two inconsistent meanings of sedition in federal law (one in the *Crimes Act*, and another in the *Criminal Code*)’.²⁷

4.21 During the 2005 Senate Committee inquiry, the Attorney-General’s Department indicated that the amendment to s 30A was merely a consequential one, was not intended to reinvigorate the use of the provision, and that ‘the Government has not fully considered the need for the retention of section 30A of the *Crimes Act*’.²⁸

4.22 In Discussion Paper 71 (DP 71), it was noted that the use of the concept of ‘seditious intention’ was criticised by almost every submission that referred to the

23 Ibid, 265. This issue was discussed in the only case on Part IIA: *R v Hush; Ex parte Devanny* (1932) 48 CLR 487, 517–518.

24 Ibid, 290.

25 Ibid, 263.

26 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.160], citing C Connolly, *Submission 56 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 7 November 2005.

27 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.159], citing Gilbert & Tobin Centre of Public Law, *Submission 80 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 10 November 2005.

28 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.164]–[5.166].

issue.²⁹ For example, the New South Wales Council for Civil Liberties argued that the re-enactment of the old definition of seditious intention is out of step with the new offence created under s 80.2.³⁰

4.23 Victoria Legal Aid criticised the retention of the unlawful associations provisions as contrary to the principle of freedom of association under art 22 of the *International Covenant on Civil and Political Rights 1966*. Victoria Legal Aid agreed with the 2005 Senate Committee inquiry and the Gibbs Committee that Part IIA of the *Crimes Act* should be repealed.³¹

4.24 ARTICLE 19 also submitted that proscribing an organisation on the basis of ‘seditious intention’ is antithetical to modern criminal law provisions and inconsistent with standards under international law for the protection of the right to freedom of expression and the right of freedom of association.³²

Terrorist organisations under the *Criminal Code*

4.25 The Terms of Reference ask the ALRC to consider whether Part IIA, as amended, is effective to address the problem of organisations that advocate or encourage the use of force or violence to achieve political objectives—particularly when the acts covered by the unlawful associations provisions are now dealt with by the offences banning terrorist organisations under the *Criminal Code*.

Terrorist acts

4.26 Section 100.1 of the *Criminal Code* defines a ‘terrorist act’ as an action or threat made with the intention of both ‘advancing a political, religious or ideological cause’ and ‘coercing, or influencing by intimidation’ a governmental authority in Australia or overseas. The section then spells out what falls within the definition of a terrorist act, this being action that:

- causes serious physical harm to a person, causes death or endangers human life;
- causes serious damage to property;
- creates a serious risk to the health and safety of the public or a section of the public;

29 Australian Law Reform Commission, *Review of Sedition Laws*, DP 71 (2006), [11.24]–[11.29].

30 New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006.

31 Victoria Legal Aid, *Submission SED 43*, 13 April 2006. See also National Association for the Visual Arts, *Submission SED 30*, 11 April 2006; B Saul, *Submission SED 52*, 14 April 2006.

32 ARTICLE 19, *Submission SED 14*, 10 April 2006.

- seriously interferes with, seriously disrupts, or destroys, an electronic system; and
- is not ‘advocacy, protest, dissent or industrial action’, and is not intended to have these consequences.³³

4.27 Division 101 of the *Criminal Code* creates a number of serious associated offences, including:

- engaging in a terrorist act;³⁴
- providing or receiving training connected with terrorist acts;³⁵
- possessing things connected with terrorist acts;³⁶
- collecting or making documents likely to facilitate terrorist acts;³⁷ and
- doing other acts in preparation for, or planning, terrorist acts.³⁸

Terrorist organisations

4.28 Division 102 of the *Criminal Code* contains a regime for the Attorney-General to proscribe organisations that have a specified terrorist connection or that have endangered, or are likely to endanger, the security or integrity of the Commonwealth, and to make membership or other specified links with such organisations an offence.

4.29 There are two ways in which a group can be identified formally as a ‘terrorist organisation’ under Division 102. First, a group may be declared a terrorist organisation by a court, in connection with a conviction for a terrorist offence. Second, a group may be ‘listed’ as a terrorist organisation in a regulation promulgated by the Governor-General. Before an organisation can be listed, the responsible Minister (currently the Attorney-General) must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).³⁹

4.30 The *Anti-Terrorism Act (No 2) 2005* added an additional criterion by which the Attorney-General can find that an organisation is a terrorist organisation, namely, where the organisation *advocates* the doing of a terrorist act (whether or not a terrorist

33 *Criminal Code* (Cth) s 100.1(2), (3).

34 Ibid s 101.1, punishable by a maximum of life imprisonment.

35 Ibid s 101.2, punishable by imprisonment for up to 15 or 25 years, depending upon the circumstances.

36 Ibid s 101.4, punishable by imprisonment for up to 10 or 15 years, depending upon the circumstances.

37 Ibid s 101.5, punishable by imprisonment for up to 10 or 15 years, depending upon the circumstances.

38 Ibid s 101.6, punishable by a maximum of life imprisonment.

39 Ibid s 102.1(2).

act has occurred or will occur). ‘Advocating a terrorist act’ is defined as directly or indirectly counselling or urging the doing of a terrorist act; directly or indirectly providing instruction on the doing of a terrorist act; or directly praising the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person to engage in a terrorist act.⁴⁰

4.31 Regulations listing an organisation cease to have effect two years after their commencement—or earlier if the regulation is repealed or if the Minister is no longer satisfied that the organisation is directly or indirectly engaged in terrorism.⁴¹ An organisation may be re-listed after the initial two-year period by making a new regulation.⁴² Since 2004, regulations are also subject to review by the Parliamentary Joint Committee on Intelligence and Security, which may recommend disallowance.⁴³ There are currently 19 organisations officially listed as terrorist organisations.⁴⁴

4.32 After an organisation is designated a ‘terrorist organisation’, it becomes an offence:

- to direct the activities of the organisation;⁴⁵
- intentionally to be a member of the organisation;⁴⁶
- to recruit persons to the organisation;⁴⁷
- to receive training from, or provide training to, the organisation;⁴⁸
- to receive funds from, or provide funds to, the organisation;⁴⁹
- to provide support or resources to the organisation;⁵⁰ or
- on two or more occasions, intentionally to associate with the terrorist organisation, or its members or leadership, with the intention that the association will assist the organisation to expand or to continue to exist.⁵¹

40 Ibid s 102.1(1A).

41 Ibid s 102.1(3)–(4).

42 Ibid s 102.1(3)(c).

43 Ibid s 102.1A.

44 The full list may be found at Australian Government Attorney-General’s Department, *Listing of Terrorist Organisations* <www.ema.gov.au/agd/www/nationalsecurity.nsf> at 26 July 2006.

45 *Criminal Code* (Cth) s 102.2, punishable by imprisonment for up to 10 or 15 years, depending upon the circumstances.

46 Ibid s 102.3, punishable by imprisonment for up to 10 years.

47 Ibid s 102.4, punishable by imprisonment for up to 15 or 25 years, depending upon the circumstances.

48 Ibid s 102.5, punishable by imprisonment for up to 25 years.

49 Ibid s 102.6, punishable by imprisonment for up to 15 or 25 years, depending upon the circumstances.

50 Ibid s 102.7, punishable by imprisonment for up to 15 or 25 years, depending upon the circumstances.

51 Ibid s 102.8, punishable by imprisonment for up to three years.

Unlawful associations and terrorist organisations compared

Conceptual basis

4.33 The terrorist organisations and unlawful associations provisions are premised on different underlying concepts.⁵² Under s 103(1), a terrorist organisation is an ‘organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur)’ or an organisation that has been listed, as described above.

4.34 The definition of a terrorist act under s 100.1(1) is an action or threat made with the intention both of ‘advancing a political, religious or ideological cause’ and ‘coercing, or influencing by intimidation’ a governmental authority in Australia or overseas.

4.35 As discussed above, an unlawful association is a body of persons that advocates or encourages overthrow of the Government, or advocates or encourages the doing of any act having or purporting to have as an object, the carrying out of a seditious intention. Unlike a terrorist organisation, an unlawful association does not need to act in advancement of a particular cause or with the intention to coerce or influence by intimidation a government, country or section of the community.

Listing

4.36 Section 30A(1A) requires a body to be declared an unlawful association by the Federal Court following a ‘show cause’ application by the Attorney-General under s 30AA.

4.37 Prior to the amendments to Division 102 made by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth), an organisation could be listed as a terrorist organisation only if it already had been formally declared as such by the United Nations Security Council, or if a dedicated piece of legislation had been passed by the Australian Parliament in the relevant case.

4.38 The Australian Government argued that this mechanism was too restrictive and cumbersome to meet Australia’s particular security needs. For example, the Security Council might be slow to act in the case of an organisation that mainly posed a regional, rather than an international, threat; or the Security Council might be influenced by political considerations that are not shared by Australia. As noted above, listing now proceeds through the making of a regulation, and no longer relies on prior Security Council resolutions.

4.39 Before these changes, it could have been argued that there was a need to retain the unlawful associations provisions in the *Crimes Act*, since the high bar of

52 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

identification as a ‘terrorist organisation’ by the Security Council made listing difficult, and therefore left gaps in the law which terrorists could exploit. However, the new listing procedures are not subject to the same constraints.

Sheller Committee

4.40 The Security Legislation Review Committee (the Sheller Committee), chaired by the Hon Simon Sheller AO, conducted a review of the operation and effectiveness of the counter-terrorism laws, including Divisions 101 and 102.⁵³ The review was a statutory requirement of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), and concluded in June 2006.⁵⁴

4.41 The Sheller Committee—which comprised, among others, the Commonwealth Ombudsman, the Human Rights Commissioner and the Privacy Commissioner—looked in detail at the proscription of terrorist organisations and the associated offences. It found that—while to date there was no evidence of excessive or improper use of the provisions—some parts of the *Criminal Code* should be repealed or changed because of their potential impact on human rights.⁵⁵

4.42 In particular, the Sheller Committee considered that the process by which an organisation is listed does not allow members of an organisation to know or answer in advance the allegations against the group. Given that, once an organisation is proscribed, its members are liable to serious criminal penalties, the Committee recommended that a fairer and more transparent process should be adopted. Some members of the Committee supported a judicial process (which would be similar to the process under the unlawful association provisions), whereby an application is made to the court. Other members considered that the process should remain an executive one, however, with the Attorney-General being advised about whether an organisation should be proscribed by an independent committee that would conduct public hearings and receive submissions.⁵⁶

4.43 Other relevant recommendations were that:

- consideration should be given to amending the Code so that proscription is the only method by which an organisation may be declared a terrorist organisation;⁵⁷

53 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006).

54 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) s 4(1).

55 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), 4. For a discussion of the recommendations of the Committee in relation to the treason offences, see Ch 11.

56 *Ibid*, Recs 3 and 4.

57 *Ibid*, Rec 10.

- s 102.8, which creates an offence of ‘associating with terrorist organisations’, should be repealed;⁵⁸ and
- s 102.7 should be amended so that ‘providing support to a terrorist organisation’ cannot be construed in any way to extend to the publication of views that appear to be favourable to the proscribed organisation and its stated objective.⁵⁹

Submissions and consultations

4.44 In response to Issues Paper 30 (IP 30), a number of submissions shared the view that the terrorist organisation offences rendered the unlawful associations provisions unnecessary. The Australian Federal Police indicated that, in practice, they had not used the unlawful associations provisions, and expressed satisfaction with the framing of the terrorist organisation offences.⁶⁰ The Commonwealth Director of Public Prosecutions agreed that the definition of a terrorist organisation was likely to be sufficiently broad to cover effectively the activities of any group that previously would have been considered for designation as an unlawful association.⁶¹

4.45 Victoria Legal Aid agreed that there is no longer any need to retain these provisions, ‘given that Division 102 now provides a simple procedure for protecting the safety of Australians—by proscribing terrorist organisations and criminalising specific conduct in relation to those organisations’.⁶²

4.46 The New South Wales Council for Civil Liberties submitted that Part IIA of the *Crimes Act* now seems redundant given the powers enacted under the anti-terrorism legislation in the *Criminal Code* in recent years with regard to the proscribing of terrorist organisations.⁶³ This view was shared by a number of other lawyers and commentators with whom the Inquiry consulted.⁶⁴

4.47 ARTICLE 19 noted that:

While we have a number of concerns with the provisions relating to the proscription of ‘terrorist’ organisations introduced in 2002, we consider that these provisions [need] to be at least more causally linked to proscribing on the basis that an association may pose a threat to national security.

Furthermore, the scope of the unlawful association provisions have been progressively eroded by context-specific legislation which supersedes the latter’s

58 Ibid, Rec 15.

59 Ibid, Rec 14.

60 Australian Federal Police, *Consultation*, Canberra, 26 April 2006.

61 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 26 April 2006.

62 Victoria Legal Aid, *Submission SED 43*, 13 April 2006.

63 New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006.

64 R Connolly and C Connolly, *Consultation*, Melbourne, 5 April 2006; Human Rights Lawyers, *Consultation*, Sydney, 29 March 2006; D Neal, *Consultation*, Melbourne, 4 April 2006; M Weinberg, *Consultation*, Melbourne, 3 April 2006; B Saul, *Submission SED 52*, 14 April 2006.

application, including the *Workplace Relations Act 1996* (Cth) and the counter-terrorism amendments to the *Criminal Code* in 2002.⁶⁵

4.48 The Attorney-General's Department noted that 'circumstances have changed dramatically since the enactment of Part IIA. The terrorism provisions address contemporary threats to the Australian community'.⁶⁶

4.49 In DP 71, the ALRC proposed that the unlawful association provisions should be repealed.⁶⁷ Significant support was expressed for this proposal,⁶⁸ and no dissenting or alternative view was expressed to the ALRC.

ALRC's views

4.50 The ALRC concludes that the unlawful associations provisions are unnecessary and should be repealed. It is difficult to imagine a practical circumstance in which a group advocating the overthrow of the Constitution or the established government does not have an accompanying intention to advance a particular cause or coerce or influence a governmental authority. If such a case should arise, the ALRC agrees with the Gibbs Committee that existing criminal laws covering murder, assault, abduction, damage to property or conspiracy—or incitement to any of the above activities—would be sufficient to deal appropriately with offenders.⁶⁹

4.51 In Chapter 2, the ALRC recommends that, due to its historical connotations, the term 'sedition' should be removed from the federal statute book. There is no sound reason to preserve an anachronistic definition of seditious intention in Part IIA of the *Crimes Act*.

4.52 Repeal of the unlawful associations provisions will not leave a gap in federal criminal law. Both the definition of a 'terrorist act' and a 'terrorist organisation' under the *Criminal Code* are sufficiently broad to cover the types of organisations that advocate or urge politically motivated violence. As outlined above, the Sheller Committee has made a number of recommendations to amend the terrorist organisation provisions of the *Criminal Code* to allow greater procedural fairness in the listing process and to limit the scope of the offences so it is clear that only persons who

⁶⁵ ARTICLE 19, *Submission SED 14*, 10 April 2006.

⁶⁶ Australian Government Attorney-General's Department, *Submission SED 31*, 12 April 2006.

⁶⁷ Australian Law Reform Commission, *Review of Sedition Laws*, DP 71 (2006), Proposal 11–1.

⁶⁸ Support for the proposal was received from Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; National Tertiary Education Union, *Submission SED 118*, 3 July 2006; R Douglas, *Submission SED 87*, 3 July 2006; Sydney PEN, *Submission SED 88*, 3 July 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; Australian Press Council, *Submission SED 66*, 23 June 2006; Arts Law Centre of Australia, *Submission SED 65*, 6 June 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

⁶⁹ H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Offences Relating to the Security and Defence of the Commonwealth*, Discussion Paper No 8 (1988), [10.2].

provide actual ‘support’ to an organisation are guilty of an offence.⁷⁰ Whether or not these recommendations are taken up by the Australian Government, the terrorist organisations provisions are a more modern and appropriate way to deal with organisations that advocate politically motivated violence, rather than the outdated definitions found under Part IIA.

Recommendation 4–1 Sections 30A, 30AA, 30AB, 30B, 30D, 30E, 30F, 30FA, 30FC, 30FD, 30G, 30H and 30R of Part IIA of the *Crimes Act 1914* (Cth), concerning unlawful associations, should be repealed.

Other offences under Part IIA

4.53 Part IIA also contains three other offences that do not directly rely on the concept of an unlawful association.

Section 30C

4.54 Section 30C is another sedition-type provision, which makes it an offence punishable by imprisonment for up to two years for any person, ‘who by speech or writing advocates or encourages’:

- (a) the overthrow of the Constitution of the Commonwealth by revolution or sabotage;
- (b) the overthrow by force or violence of an established government of the Commonwealth or of a State or of any other civilized country or of organized government; or
- (c) the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States.

4.55 This provision is effectively another version of the sedition offence found in s 80.2(1) of the *Criminal Code*—albeit with a lesser penalty. In Chapter 9, the ALRC suggests that s 30C is redundant and recommends that it be repealed.⁷¹

Sections 30J and 30K

4.56 Sections 30J and 30K are more closely related to emergency or industrial powers than to the banning of unlawful associations. Reflecting the origins of Part IIA in the seamen’s union strike, s 30J provides that in the event of a ‘serious industrial disturbance prejudicing or threatening trade and commerce with other countries or among the States’, the Governor-General may issue a proclamation prohibiting persons from taking part in, inciting, urging, aiding or continuing, a strike or lock-out in relation to:

⁷⁰ See also the discussion in Ch 11.

⁷¹ Rec 9–3.

- employment in or connection with, the transport of goods or the conveyance of passengers in trade or commerce with other countries or among the states;⁷²
- employment in, or in connection with, the provision of any public service by the Commonwealth or by any Department or public authority under the Commonwealth.⁷³

4.57 It appears that such a proclamation only has been made once in Australia, in 1951.⁷⁴

4.58 Section 30K deals with threats or boycotts affecting public services. A person who by violence, threats, intimidation or boycotts obstructs or hinders the performance of public services or hinders trade or commerce between the states or other countries is guilty of an offence. The maximum penalty for an offence under s 30K is imprisonment for one year.

4.59 The justification for ss 30J and 30K at the time of enactment was that the sanctions were needed ‘to prevent the dislocation of interstate and overseas trade and commerce and the working of Commonwealth services and authorities’.⁷⁵ H P Lee notes that, unlike the state governments, the Commonwealth—largely for constitutional reasons—does not have comprehensive ‘emergency powers’ type legislation.⁷⁶

4.60 The Gibbs Committee noted that the question of the appropriate wording and operation of ss 30J and 30K should be considered in the context of industrial relations legislation, rather than a review of the *Crimes Act*. The Committee also noted that ‘it may be convenient to remove sub-sections 30J and 30K from the *Crimes Act* and to include any amended substitution for them in legislation dealing with industrial relations’.⁷⁷

4.61 In a modern context, serious industrial disputes of this nature almost certainly would be handled under the *Workplace Relations Act 1996* (Cth), rather than the *Crimes Act*. The Australian Government’s amendments to the *Workplace Relations Act*, as part of the WorkChoices legislation introduced in 2005,⁷⁸ include provisions under which industrial action may be terminated in certain circumstances. For

72 *Crimes Act 1914* (Cth) s 30J(2)(a).

73 *Ibid* s 30J(2)(b).

74 *Government Gazettes* 1951, 623 and 802.

75 E Sykes and H Glasbeek *Labour Law in Australia* (1972), 541, cited in H Lee, *Emergency Powers* (1984), 166.

76 *Ibid*, 166.

77 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Offences Relating to the Security and Defence of the Commonwealth*, Discussion Paper No 8 (1988), 29.

78 *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth).

example, under s 498 of the Act, the Minister may make a declaration terminating access to protected industrial action during a bargaining period if, for example, the industrial action threatens the life, personal safety or health, or the welfare of the population or is causing serious damage to the Australian economy. If a person contravenes such an order, a civil penalty may be imposed.⁷⁹

4.62 However, there is no direct equivalent of these emergency powers within the existing industrial relations laws, nor any criminal penalties for incitement of an illegal strike or lockout. The necessity of criminal sanctions in this context and the appropriate prohibitions on serious industrial action fall outside the Terms of Reference for this Inquiry.

4.63 In Chapter 3, the ALRC recommends that the Australian Government initiate a review of a range of offences in the *Crimes Act* to determine which warrant retention, relocation to the *Criminal Code*, or repeal.⁸⁰ In DP 71, the ALRC proposed that ss 30J and 30K should be included in this process.⁸¹ This proposal was supported in a number of submissions to the Inquiry,⁸² and the ALRC remains of the view that these two sections should be included in the broader review called for in Chapter 3 of this Report.

Recommendation 4–2 The Australian Government should include ss 30J and 30K of the *Crimes Act* in the review of old provisions of the *Crimes Act* called for in Recommendation 3–1.

79 The penalty cannot be more than 300 penalty units for a body corporate or 60 penalty units in any other case: *Workplace Relations Act 1996* (Cth) s 499(7).

80 Rec 3–1.

81 Australian Law Reform Commission, *Review of Sedition Laws*, DP 71 (2006), Proposal 11–2.

82 Australian Press Council, *Submission SED 66*, 23 June 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; R Douglas, *Submission SED 87*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

5. International Framework

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Introduction

5.1 International law is relevant to an analysis of Australian sedition laws in two seemingly contradictory ways. First, international law sets out a number of requirements with which Australia is obliged to comply to protect the human rights of people subject to Australian law. Secondly, international law increasingly recognises the need for states to take action to counter the threat of terrorism.

5.2 Any measures taken by the Australian Government—such as the enactment of sedition laws—must be compatible with Australia's obligations under international law to respect human rights, including freedom of expression.

5.3 This chapter considers the status of international law and its interaction with Australian domestic law. The chapter then goes on to consider the interaction between international law and Australia's sedition provisions.

Status of international law

5.4 The status of international law, and the intersection of international law with Australian domestic law, are explained in detail in Issues Paper 30 (IP 30).¹ However, the following essential points should be noted:

- In Australian law, international treaties are not self-executing.² This means that Australia's ratification of a treaty does not automatically make it part of Australian domestic law. Rather, the provisions of the treaty become part of Australian law only to the extent that they are implemented by Australian legislation.³
- The *International Covenant on Civil and Political Rights 1966* (ICCPR)⁴ is an example of a treaty that has been ratified by Australia but has not been fully implemented into Australian law.
- Australian courts cannot refuse to recognise or apply an Australian statutory provision merely because the provision is inconsistent with a principle of international law, or an international treaty to which Australia is a party.⁵
- Australia's international law obligations are relevant to the interpretation of Australian statutes,⁶ particularly where the meaning of the statutory provision is ambiguous, obscure or where the ordinary process of construction would give rise to 'a result that is manifestly absurd or ... unreasonable'.⁷ International obligations are also relevant to the development of the common law.
- Australian courts generally will interpret legislation to reach a result that is inconsistent with Australia's international law obligations only if there is 'a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment'.⁸
- An inconsistency between an Australian statutory provision and Australia's international obligations may have consequences at the international level. It

1 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), [5.3]–[5.11].

2 This contrasts with some countries, such as the United States: see *United States Constitution* art II, s 2.

3 *Dietrich v The Queen* (1992) 177 CLR 292, 305.

4 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).

5 *Polites v Commonwealth* (1945) 70 CLR 60, 69; *Horta v Commonwealth* (1994) 181 CLR 183, 195.

6 For a detailed exposition of the influence of international law (and especially international human rights law) on Australian municipal law, see R Piotrowicz and S Kaye, *Human Rights in International and Australian Law* (2000).

7 *Acts Interpretation Act 1901* (Cth) s 15AB. See also *Lim v Minister for Immigration* (1992) 176 CLR 1, 38.

8 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [30] (Gleeson CJ).

may, for instance, lead to proceedings being commenced against Australia in a United Nations (UN) tribunal or committee.

International law and terrorism

United Nations response to the threat of terrorism

5.5 Since the terrorist attacks in New York and Washington DC on 11 September 2001, there has been an increasing focus on the threat of terrorism in international law and international relations. The UN Security Council has called on all UN member states to take anti-terrorism measures, some of which are relevant to sedition.

5.6 Security Council *Resolution 1456* states that all UN Members ‘must take urgent action to prevent and suppress all active and passive support of terrorism’.⁹ On 14 September 2005, the Security Council issued *Resolution 1624*:

Condemning in the strongest terms all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security, and *reaffirming* the primary responsibility of the Security Council for the maintenance of international peace and security under the Charter of the United Nations,

Condemning also in the strongest terms the incitement of terrorist acts and *repudiating* attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts,

Deeply concerned that incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights, threatens the social and economic development of all States, undermines global stability and prosperity, and must be addressed urgently and proactively by the United Nations and all States, and *emphasizing* the need to take all necessary and appropriate measures in accordance with international law at the national and international level to protect the right to life.¹⁰

5.7 In the same resolution, the Security Council called on all States to

adopt such measures as may be necessary and appropriate and in accordance with their obligations under international law to:

- (a) Prohibit by law incitement to commit a terrorist act or acts;
- (b) Prevent such conduct;
- (c) Deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct.¹¹

⁹ United Nations Security Council, *Resolution 1456*, UN SC, 4688th mtg, UN Doc S/Res/1456 (2003), [1].

¹⁰ United Nations Security Council, *Resolution 1624*, UN SC, 5261st mtg, UN Doc S/Res/1624 (2005).

¹¹ *Ibid.*, [1].

5.8 Decisions of the UN Security Council are binding on Australia as a member state of the UN.¹² Therefore, one possible effect of these resolutions may be to provide additional constitutional justification—if this is needed—for the enactment of legislation dealing with sedition. In other words, in the unlikely event that the Commonwealth Parliament is not otherwise empowered to enact certain of the sedition provisions, the Commonwealth could rely on the ‘external affairs’ power in s 51(xxix) of the *Australian Constitution* to the extent that those laws implement Australia’s obligations under international law.¹³

5.9 However, these developments do not give Parliament *carte blanche* to legislate in any way it sees fit in responding to the threat of terrorism. Neither *Resolution 1456* nor *Resolution 1624*, in its terms, provides justification for breaching existing international norms.¹⁴ *Resolution 1456* provides:

States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law ...¹⁵

5.10 The Security Council likewise makes clear that any measures taken by states in furtherance of *Resolution 1624* must be ‘in accordance with their obligations under international law’. The Resolution also explicitly notes ‘the right of freedom of expression’ in art 19 of the *Universal Declaration of Human Rights 1948* and art 19 of the ICCPR, and states that ‘any restrictions thereon shall only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR’.¹⁶

5.11 Similarly, the UN General Assembly and the UN Commission on Human Rights (UNCHR) have passed a number of resolutions stating that anti-terrorism measures must not violate human rights.¹⁷ For instance, the UNCHR has urged states

to fulfil their obligations under the Charter of the United Nations in strict conformity with international law, including human rights standards and obligations and

12 *Charter of the United Nations*, 26 June 1945, [1945] ATS 1, (entered into force generally on 1 November 1945) art 25. For a discussion of the nature and effect of Security Council resolutions, see B Simma, *The Charter of the United Nations: A Commentary* (2nd ed, 2002), vol 1, 453–460.

13 Given that the earlier statutory offence of sedition was found to be within the Commonwealth’s legislative power (see *R v Sharkey* (1949) 79 CLR 121), it is unlikely that the amended sedition offences would be found to be unconstitutional.

14 This is also consistent with international law more generally: see L Lasry and K Eastman, *Memorandum of Advice to Australian Capital Territory Chief Solicitor*, (undated), citing United Nations Secretary-General, *Protecting Human Rights and Fundamental Freedoms while Countering Terrorism*, UNGA, 60th session, UN Doc A/60/374 (2005); *Ireland v United Kingdom* (1978) 2 EHRR 25.

15 United Nations Security Council, *Resolution 1456*, UN SC, 4688th mtg, UN Doc S/Res/1456 (2003), [6].

16 United Nations Security Council, *Resolution 1624*, UN SC, 5261st mtg, UN Doc S/Res/1624 (2005).

17 See, eg, United Nations General Assembly, *Resolution 58/174*, UNGA, 77th plenary mtg, UN Doc A/Res/58/174 (2004); United Nations Commission on Human Rights, *Resolution 2003/37*, 58th mtg, UN Doc Res/2003/37 (2003); United Nations Commission on Human Rights, *Resolution 2003/68*, 62nd mtg, UN Doc Res/2003/68 (2003).

international humanitarian law, to prevent, combat and eliminate terrorism in all its forms and manifestations, wherever, whenever and by whomever committed, and calls upon States to strengthen, where appropriate, their legislation to combat terrorism in all its forms and manifestations ...¹⁸

Balancing anti-terrorism measures with human rights

5.12 The ALRC recognises the importance of balancing the need for measures to reduce the risk of terrorism with the need to protect human rights in accordance with Australia's obligations at international law. This is highlighted in the material discussed above, and by participants in this Inquiry. For instance, a non-government organisation, ARTICLE 19, stated in its submission that:

Enacting legislation in order to protect national security requires a careful balancing act between legitimate security measures and maintaining international obligations for the protection of human rights.¹⁹

5.13 The balancing process is also an accepted part of Australian law. In *Alister v The Queen*, Brennan J described the balance as follows:

It is of the essence of a free society that a balance is struck between the security that is desirable to protect society as a whole and the safeguards that are necessary to ensure individual liberty. But in the long run the safety of a democracy rests upon the common commitment of its citizens to the safeguarding of each man's liberty, and the balance must tilt that way ...²⁰

5.14 This balance is reflected in the approach the ALRC has taken to reform of sedition laws in this Inquiry, and particularly in the recommendations that affect the right to freedom of expression.

Incitement to violence: article 20 of the ICCPR

5.15 Article 20 of the ICCPR states:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

5.16 In its submission to this Inquiry, and to the Senate Legal and Constitutional Legislation Committee inquiry on the provisions of the Anti-Terrorism Bill (No 2) 2005 (the 2005 Senate Committee inquiry), the Attorney-General's Department (AGD) asserted that some of the sedition provisions—and especially the new offence in

18 United Nations Commission on Human Rights, *Resolution 2003/37*, 58th mtg, UN Doc Res/2003/37 (2003), [5].

19 ARTICLE 19, *Submission SED 14*, 10 April 2006.

20 *Alister v The Queen* (1984) 154 CLR 404, 456.

s 80.2(5) of the *Criminal Code*—fall within the ambit of art 20.²¹ The AGD further stated that ‘in any case [s 80.2(5)] is not contrary to Australia’s international obligations’.²²

5.17 The 1991 Committee of Review of Commonwealth Criminal Law (the Gibbs Committee) noted that art 20 of the ICCPR requires the Commonwealth to prohibit ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’ and the offence it proposed was framed to reflect this.²³ Section 80.2(5) is substantially similar to the offence proposed by the Gibbs Committee.

5.18 In its submission to the 2005 Senate Committee inquiry, Australian Lawyers for Human Rights (ALHR) accepted that if ‘the Government’s purpose is to limit speech or conduct capable of inciting violence’, this would be ‘legitimate’ and ‘consistent with Australia’s obligations under Article 20(2) of the ICCPR’.²⁴ However, it implied that only the ‘urging’ offence in s 80.2(5) can be justified by reference to art 20 of the ICCPR. The other ‘new sedition powers do not achieve that aim in a way which has the minimal effect on human rights particularly freedom of speech’.²⁵

5.19 A different criticism of s 80.2(5) is that it does not go far enough in implementing art 20(2) of the ICCPR. Section 80.2(5) operates only to protect ‘groups’, thereby excluding ‘incitements aimed to provoke individuals, or groups not mentioned in the legislation’.²⁶ Moreover, as explained in Chapter 10, the requirement that the conduct must ‘threaten the peace, order and good government of the Commonwealth’ (s 80.2(5)(b)) might not cover ‘sporadic or isolated incitements to violence’ and is not supported by the Gibbs Committee recommendation or by international law.

Derogation from human rights: article 4 of the ICCPR

5.20 In certain emergency situations, a state may suspend its obligation to give full protection to certain rights recognised by the ICCPR. The purpose of this ‘derogation’ has been explained as follows:

21 Australian Government Attorney-General’s Department, *Submission SED 92*, 3 July 2006; Australian Government Attorney-General’s Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005.

22 Australian Government Attorney-General’s Department, *Submission SED 92*, 3 July 2006.

23 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [32.17]–[32.18].

24 Australian Lawyers for Human Rights, *Submission 139 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005. See also Gilbert & Tobin Centre of Public Law, *Submission 80 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 10 November 2005.

25 Australian Lawyers for Human Rights, *Submission 139 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005.

26 B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 877.

In a society subject to the rule of law, a state of emergency proclaimed under existing law enables the government to resort to measures of an exceptional and temporary nature in order to protect the essential fabric of that society.²⁷

5.21 The power to derogate is subject to several qualifications and exceptions, and international law requires a state to follow an established procedure, set out in art 4, if it wishes to derogate from its obligations under the ICCPR.²⁸

5.22 The issue of derogation from human rights obligations arose in testimony before and submissions to the 2005 Senate Committee inquiry.²⁹ The AGD's submission to that inquiry expressly disclaimed any need or intention for the Government to rely on the derogation provisions in art 4 to justify any restrictions contained in the Anti-Terrorism Bill (No 2) 2005.³⁰ Nor have the pre-conditions to the application of art 4 been undertaken: no public emergency within art 4(1) has been officially proclaimed; nor has Australia given notice to the UN under art 4(3). Rather, the AGD submitted that:

A number of rights under the International Covenant on Civil and Political Rights may be restricted on the basis of national security. The Government is satisfied that, to the extent that any rights are restricted by the Bill, their restriction is justified on the basis of national security and, accordingly, is permitted under the ICCPR ...

The Government has not derogated from its ICCPR obligations. It is not necessary for there to exist an 'emergency which threatens the life of the nation' in order to justify the restriction of certain ICCPR rights on the basis of national security. The United Nations Human Rights Committee has stated that: 'Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant'.³¹

Freedom of expression: article 19 of the ICCPR

5.23 This part of the chapter considers the interaction between the sedition provisions and art 19 of the ICCPR, which protects freedom of expression. Analysis is also made of the equivalent provision in the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms 1950* (commonly referred to as the European Convention on Human Rights or the ECHR).³²

²⁷ N Jayawickrama, *The Judicial Application of Human Rights Law* (2002), 202.

²⁸ See C Michaelsen, 'International Human Rights on Trial—The United Kingdom's and Australia's Legal Response to 9/11' (2003) 25 *Sydney Law Review* 275, 288–292.

²⁹ Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [2.26]–[2.31].

³⁰ Australian Government Attorney-General's Department, *Submission 290B to Senate Inquiry into Anti-Terrorism Bill (No 3) 2005*, 24 November 2005.

³¹ Ibid.

³² *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222, (entered into force generally on 3 September 1953).

Explanation of article 19 of the ICCPR

5.24 Concern has been expressed that the new sedition offences might be inconsistent with art 19 of the ICCPR. Article 19 states:

1. Everyone shall have the right to hold opinions without interference.
2. 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, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

5.25 Under art 19, a restriction on a person's right to express himself or herself freely is permissible only if that restriction is 'provided by law' and satisfies the test of necessity in art 19(3).

5.26 The test of necessity is crucial. In the case of sedition, the restrictions on the right to freedom of expression must be necessary 'for the protection of national security or of public order ... or of public health or morals' within the meaning of art 19(3)(b).

5.27 The UN Human Rights Committee (UNHRC) considered art 19(3) and stated:

Paragraph 3 expressly stresses that the exercise of the right to freedom of expression carries with it special duties and responsibilities and for this reason certain restrictions on the right are permitted which may relate either to the interests of other persons or to those of the community as a whole. However, when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed ...³³

5.28 The question whether the sedition provisions satisfy the test of necessity in art 19(3)(b) determines whether they are inconsistent with the right of freedom of expression as recognised at international law. There seems to be general agreement that this is the appropriate question—both by those supporting and by those opposing the current sedition provisions in Australia.³⁴ The Human Rights and Equal Opportunity

33 United Nations Human Rights Committee, *General Comment 10: Article 19*, 19th session, UN Doc HRI/GEN/1/Rev1 (1983), [4].

34 Australian Government Attorney-General's Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005; Australian Lawyers for Human Rights, *Submission 139 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005; Gilbert & Tobin Centre of

Commission (HREOC), in its submission to the 2005 Senate Committee inquiry, framed the question as follows:

The sedition provisions will ... only constitute a permissible restriction on freedom of expression to the extent that they can be said to be necessary for the purposes of protecting public order or national security. The word 'necessary' imports the principle of proportionality, which requires that any restriction must be proportionate to the legitimate ends sought to be achieved ... [T]he restriction must represent the least restrictive means of achieving the relevant purpose. This is to ensure that the restriction does not jeopardise the right itself.³⁵

Comparison with article 10 of the ECHR

5.29 In asking whether the sedition provisions satisfy the test of necessity in art 19(3)(b) of the ICCPR, it is useful to refer to the well-developed jurisprudence that considers art 10 of the ECHR, which is materially similar.

5.30 Article 10 of the ECHR states:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

5.31 In Europe, sedition (along with the crimes of treason and espionage) is viewed as a political crime. This means that the crime is 'directed at the security and structure of the state or the regime in official power'.³⁶ To constitute the offence of sedition there must be a connection between the defendant's conduct and the intention or effect of jeopardising the security or integrity of the state. For this reason, sedition is best characterised as a public order offence.

Public Law, *Submission 80 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 10 November 2005; Castan Centre for Human Rights Law, *Submission 114 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005; Australian Capital Territory Human Rights Office, *Letter of Advice to Chief Minister and Attorney-General of the Australian Capital Territory*, 19 October 2005; L Lasry and K Eastman, *Memorandum of Advice to Australian Capital Territory Chief Solicitor*, (undated).

35 Human Rights and Equal Opportunity Commission, *Submission 158 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005.

36 P Lansing and J Bailey, 'The Farmbelt Fuehrer: Consequences of Transnational Communication of Political and Racist Speech' (1997) 76 *Nebraska Law Review* 653, 667–668.

5.32 There has been no direct challenge to the legitimacy of domestic sedition legislation under the ECHR in either the European Court of Human Rights or the European Commission of Human Rights.³⁷ However, the case of *Piermont v France* raised indirectly the issue of the interaction between domestic sedition provisions and the freedom of expression guarantees in art 10.³⁸ The approach of the European Commission of Human Rights in this case indicates that a domestic sedition offence will not infringe art 10 if it makes sedition a public order offence and ensures that only people threatening public order are prosecuted.³⁹

5.33 Although there are no European cases directly on point, the principles derived from other cases dealing with substantively similar issues provide some assistance in analysing the interaction between art 10 of the ECHR (and, by implication, art 19 of the ICCPR) and sedition provisions. On the whole, the national security and public safety exceptions to the operation of art 10 have been interpreted narrowly. However, the context is critical: where the provision in question limits expression of a political nature, the provision is more likely to fall foul of art 10 than other forms of expression.⁴⁰

5.34 A number of decisions of the European Court of Human Rights have been particularly protective of political speech.⁴¹ For example, *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria* involved the refusal by the Austrian military to authorise the distribution of a publication, aimed at Austrian soldiers, which often included items critical of military life.⁴² The authorities claimed that the publication was prejudicial to national security. However, the European Court of Human Rights held that the publication did not prejudice national security and thus Austria was unable to avail itself of the exception in art 10(2).⁴³

5.35 In contrast to the protection afforded to political expression, domestic legislation proscribing racial hatred is much less likely to fall foul of art 10. It has been noted that

37 E Barendt, *Freedom of Speech* (revised ed, 1996), 158. Barendt states that the position of the European Commission of Human Rights, as expressed in *Arrowsmith v United Kingdom* (1981) 3 EHRR 218, 'strongly suggest[s] that such laws [as sedition] would be upheld as necessary restrictions to protect national security and public safety, or to prevent disorder and crime'.

38 *Piermont v France* (1993) 15 EHRR 76. The issue was raised indirectly because the applicant did not argue that the sedition provision was incompatible with art 10 of the ECHR, but rather that her impugned statements were 'not in any way seditious and could not by themselves constitute a serious threat to public order'.

39 Ibid, 76.

40 D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002), 754.

41 See, eg, *Lingens v Austria* (1986) 8 EHRR 407; *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria* (1995) 20 EHRR 56; *Vogt v Germany* (1995) 21 EHRR 205 (criticism of candidates for elective office); *Open Door Counselling and Dublin Well Woman Centre v Ireland* (1992) 15 EHRR 244 (publication of information in Ireland about abortion services available in foreign jurisdictions).

42 *Vereinigung Demokratischer Soldaten Österreichs and Gubi v Austria* (1995) 20 EHRR 56.

43 For further discussion, see Ch 7.

the ‘weakest protection of all is accorded [by art 10] to racist expression and the promulgation of racial hatred’.⁴⁴

5.36 On the whole, states have been able to use art 10(2) to criminalise the expression of racist views and hate speech, so long as the tests of legality, necessity and proportionality are satisfied.⁴⁵ For example, it is an offence in a number of European countries to publish material denying that the Nazi Holocaust took place.⁴⁶ The European Court of Human Rights has indicated that legislation that prohibits a person from denying the Holocaust will not contravene art 10 if it satisfies the test of proportionality.⁴⁷

The test of necessity

5.37 Of the participants in the 2005 Senate Committee inquiry who commented on this issue, only the AGD expressed the view that all of the sedition provisions satisfy the test of necessity in art 19 of the ICCPR.⁴⁸ Many participants who commented on this issue expressed concern, often in strong terms, that the new sedition offences might be inconsistent with art 19.⁴⁹ IP 30 contains a summary of the views of those who argued before the 2005 Senate Committee inquiry that the sedition provisions (as they appeared in Schedule 7 of the Anti-Terrorism Bill (No 2) 2005 (Cth) at the time of that inquiry) were inconsistent with art 19.⁵⁰

5.38 The Senate Committee did not itself express an opinion on this question in its report but, in recommending that Schedule 7 of the Bill be removed in its entirety, the

44 D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002), 760. See also E Barendt, *Freedom of Speech* (2nd ed, 2005), 171–172.

45 See *Jersild v Denmark* (1994) 19 EHRR 1.

46 See, eg, the relevant German legislation: *Penal Code* s 130(3). This must be read in conjunction with *Basic Law* art 1. See also France’s ‘Loi Gayssot’, which makes it an offence to contest the existence of certain crimes against humanity on the basis of which Nazi leaders were tried and convicted by the International Military Tribunal at Nuremberg. The Loi Gayssot is discussed in Human Rights and Equal Opportunity Commission, *Human Rights Brief No 4: Lawful Limits on Fundamental Freedoms* (2001) <http://www.hreoc.gov.au/Human_Rights/briefs/brief_4.html> at 14 March 2006.

47 See A Marshall Williams and J Cooper, ‘Hate Speech, Holocaust Denial and International Human Rights Law’ (1999) 6 *European Human Rights Law Review* 593, 603–609.

48 Australian Government Attorney-General’s Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005; Australian Government Attorney-General’s Department, *Submission 290B to Senate Inquiry into Anti-Terrorism Bill (No 3) 2005*, 24 November 2005.

49 Human Rights and Equal Opportunity Commission, *Submission 158 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005; Australian Lawyers for Human Rights, *Submission 139 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005; Law Council of Australia, *Submission 140 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005; Sydney Centre for International and Global Law, *Submission 188 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 17 November 2005; Castan Centre for Human Rights Law, *Submission 114 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005; Australian Capital Territory Human Rights Office, *Letter of Advice to Chief Minister and Attorney-General of the Australian Capital Territory*, 19 October 2005.

50 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), [5.35]–[5.39].

Committee acknowledged concerns about the related issue of the ‘potential impact of the sedition provisions on freedom of speech in Australia’.⁵¹

5.39 Given these concerns, the ALRC asked in IP 30 whether ss 80.2 and 80.3 of the *Criminal Code* are necessary for the protection of national security or public order within the meaning of art 19(3).⁵²

Submissions and consultations

5.40 As with the response to the 2005 Senate Committee inquiry, the vast majority of stakeholders who commented on this issue in this Inquiry expressed concern that the sedition provisions are inconsistent with art 19.⁵³

5.41 Only the AGD disagreed. Its initial response stated simply that ‘the Government is satisfied that sections 80.2 and 80.3 of the *Criminal Code* are consistent with its obligations under international law’.⁵⁴ The AGD, in its second submission, elaborated on this by submitting that the provisions strike an appropriate balance:

The sedition offences should be designed to ensure there are adequate safeguards in the legislation to ensure that these offences operate when it is necessary to do so to protect national security or public order—either because of a direct threat to Australia’s security or to the peaceful and effective functioning of society. This is outlined in the Discussion Paper (paragraph 10.68) as the elements of the offence, which need to be proven to the criminal standard, are such that a court must determine whether there is intention to urge violence, which requires consideration of each individual’s intention and will ensure that his or her freedom of speech is not compromised except when necessary.⁵⁵

5.42 A number of submissions simply stated that the provisions—either in part or whole—fail the test of necessity.⁵⁶ Other participants in this Inquiry offered a more

51 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.169].

52 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Question 22.

53 ARTICLE 19, *Submission SED 14*, 10 April 2006; J Goldring, *Submission SED 21*, 5 April 2006; Pax Christi, *Submission SED 16*, 9 April 2006; Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; New South Wales Young Lawyers Human Rights Committee, *Submission SED 38*, 10 April 2006; Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006; J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006; Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006; Combined Community Legal Centres Group (NSW) Inc, *Submission SED 50*, 13 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006.

54 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

55 Australian Government Attorney-General’s Department, *Submission SED 92*, 3 July 2006.

56 Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; J Gilman, *Submission SED 78*, 3 July 2006. See also J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006, who stated that the sedition offences would be incompatible with the *Human Rights Act 2004* (ACT). As the relevant provisions of that Act are materially the same as the ICCPR, his reasoning in this regard is also relevant to the question whether the sedition provisions fail the test of necessity under art 19 of the ICCPR. His reasoning is summarised in Ch 7.

detailed critique. As summarised below, the criticism falls into three main categories: that there is an insufficient link between the offences in s 80.2 and violence; that the offences are insufficiently clear; and that the existing offences are sufficient.

Insufficient link with violence

5.43 In their submissions, ALHR, the Federation of Community Legal Centres and the New South Wales Young Lawyers Human Rights Committee argued that the problem lies in the fact that the offences do not require a direct connection between the offending conduct and actual terrorist activity or actual violence.⁵⁷

5.44 Stakeholders submitted that further guidance might be gleaned from the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (the Johannesburg Principles).⁵⁸ These principles, like other international instruments, can be relevant in statutory construction.⁵⁹ However, the AGD urged some caution in the use of this document, stating:

The Department notes that this is a declaratory, non-binding document, which while persuasive, should not guide a nation state's decisions as to what constitutes a threat to national security and how a Government should deal with such threats.⁶⁰

5.45 For present purposes, the most applicable provision of the Johannesburg Principles is Principle 6. It states that, subject to Principles 15 and 16 (neither of which is relevant here):

Expression may be punished as a threat to national security only if a government can demonstrate that:

- (a) the expression is intended to incite imminent violence;
- (b) it is likely to incite such violence; and
- (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

57 Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; New South Wales Young Lawyers Human Rights Committee, *Submission SED 38*, 10 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

58 Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006; B Saul, *Submission SED 52*, 14 April 2006; ARTICLE 19, *Submission SED 14*, 10 April 2006, citing the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (1995) <<http://www.article19.org/pdfs/standards/joburgprinciples.pdf>> at 20 April 2006. The Johannesburg Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights.

59 *Acts Interpretation Act 1901* (Cth) s 15AB(1) (which addresses situations in which a statutory provision is 'ambiguous', 'obscure' or would give rise to 'a result that is manifestly absurd or ... unreasonable'); *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, [42] (Brennan J); D Williams, 'Recognising Universal Rights in Australia' (2001) 24 *University of New South Wales Law Journal* 771, 773.

60 Australian Government Attorney-General's Department, *Submission SED 92*, 3 July 2006.

5.46 ALHR submitted that the offences in s 80.2 fail the test of necessity, as coloured by Principle 6, in that s 80.2 contains ‘no requirement that the prosecution prove that the “urging” was likely to incite violence’ that is ‘imminent’, and there is no ‘requirement for proof of a “direct and immediate connection between the expression and the likelihood or occurrence of such violence”’.⁶¹ The non-government organisation, ARTICLE 19, made a similar argument.⁶² Instead, the s 80.2 offences ‘apply to expression which, viewed objectively, presents no threat whatsoever to the Australian population’. ALHR submitted that the offences should be redrafted in order to accord with the requirements in the Johannesburg Principles.⁶³

5.47 ALHR was particularly concerned about s 80.2(7)–(8). It argued that these provisions fall foul of art 19 of the ICCPR because they are worded so broadly that conduct such as sending ‘stationery supplies’ or “urging” others to engage in verbal support of an organisation or country’ conceivably could fall within the ambit of the provisions. Moreover, the provisions fall outside the art 19(3) exception because they do not require proof of ‘any direct or indirect connection with violence whether generally or specific’.⁶⁴

Lack of clarity

5.48 ARTICLE 19 expressed concern about the vagueness of the sedition offences. It submitted that the statement in art 19(3) that any lawful restriction on freedom of expression must be ‘provided by law’ requires ‘substantially more than simply enacting a legislative provision’. Instead, it imports two critical requirements:

In particular, the legislative provision must also meet certain standards of clarity and precision, to enable citizens to foresee the consequences of their conduct on the basis of the law. This also entails not permitting excessive discretion by public officials in determining whether the provision has been breached.⁶⁵

5.49 ARTICLE 19 submitted that the term ‘assist’ in s 80.2(7)–(8) is particularly problematic in that it is so ‘vague’ as ‘potentially [to] prohibit a wide raft of legitimate speech’.⁶⁶

Existing powers sufficient

5.50 Victoria Legal Aid also submitted that the provisions fail the test of necessity because ‘existing powers and offences are sufficient to deal with relevant conduct’.⁶⁷ The Chief Minister for the ACT made a similar point, stating that the ‘existing offences

⁶¹ Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

⁶² ARTICLE 19, *Submission SED 14*, 10 April 2006.

⁶³ Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

⁶⁴ *Ibid.*

⁶⁵ ARTICLE 19, *Submission SED 14*, 10 April 2006.

⁶⁶ *Ibid.*

⁶⁷ Victoria Legal Aid, *Submission SED 43*, 13 April 2006. See also Law Institute of Victoria, *Submission SED 70*, 28 June 2006.

... adequately address incitements to violence and to the extent that the sedition laws go further they cannot be justified'.⁶⁸

ALRC's views

5.51 Any analysis of whether a particular statutory provision falls foul of art 19 of the ICCPR requires a balancing of competing interests. Even if a statutory provision is *prima facie* inconsistent with art 19(1) and (2), it is necessary to check this preliminary judgment against the considerations of art 19(3). However, this is not the only balancing exercise that needs to be undertaken. It is also necessary to take account of the following principles:

- the ICCPR should not be interpreted in such a way as to elevate certain rights so as to permit the 'destruction' of any of the other rights and freedoms in the ICCPR;⁶⁹
- any restriction on freedom of expression must not jeopardise the right itself;⁷⁰ and
- the 'exceptions [in art 19(3)] are to be construed strictly and narrowly'.⁷¹

5.52 The ALRC's concerns about the compatibility of the sedition provisions with art 19 may be divided into two categories. The first relates to the offences in s 80.2(1), (3) and (5); and the second relates to the offences in s 80.2(7)–(8).

Offences in section 80.2(1), (3) and (5)

5.53 The ALRC is of the view that the wording of the offences in s 80.2(1), (3) and (5) contributes to a lack of clarity on the issue of intention, in that these offences may be interpreted to apply to conduct where the defendant does not in fact intend force or violence to occur. This lack of clarity causes friction with the requirement in art 19(3) that any restriction on freedom of expression be 'provided by law'. In *Sunday Times v United Kingdom*, the expression 'provided by law' was considered in the context of art 10(2) of the ECHR, which is the equivalent of art 19(3) of the ICCPR.⁷² The European Court of Human Rights stated:

In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. First, the law must be adequately accessible: the

⁶⁸ J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006.

⁶⁹ *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 5(1).

⁷⁰ United Nations Human Rights Committee, *General Comment 10: Article 19*, 19th session, UN Doc HRI/GEN/1/Rev1 (1983), [4].

⁷¹ *Coleman v Power* (2004) 220 CLR 1, 93.

⁷² *Sunday Times v United Kingdom* (1979) 2 EHRR 245. See also ARTICLE 19, *Submission SED 14*, 10 April 2006.

citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able—if need be with appropriate advice—to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.⁷³

5.54 The ALRC has addressed this concern in Recommendations 8–1, 9–2, 9–5 and 10–2. In particular, Recommendations 9–2 and 9–5, if adopted, would have the effect of amending the offences in s 80.2(1), (3) and (5) to reinforce that the proscribed 'urging' must be intentional. This would have the benefit of removing the risk that a broader interpretation may be adopted.⁷⁴

Offences in section 80.2(7)–(8)

5.55 The ALRC is also concerned that the use of the term 'assist' in s 80.2(7)–(8) may result in the offences being interpreted so broadly as to encompass non-violent criticism of the Australian Government and others. Such an interpretation would run a significant risk of falling foul of art 19 of the ICCPR. As stated earlier, the restrictions on freedom of expression permitted by art 19(3) are narrow. The equivalent jurisprudence relating to art 10 of the ECHR emphasises that any restriction on freedom of expression must be proportionate to the legitimate objective that the legislature is seeking to achieve. An anti-terrorism measure must not, for instance, jeopardise the jurisdiction's fundamental democratic principles.⁷⁵ Similarly, in the Australian context, it has been stated that in 'reconciling the interests of national security and the freedom of the individual' it is necessary to recognise 'freedom of legitimate political dissent' as one of the 'essential requirements of democracy'.⁷⁶

5.56 This is particularly so if the impugned expression were found to constitute political speech. Kirby J has stated that while prohibition of incitement to crime or violence falls within an exception to art 19(2) of the ICCPR, 'expression characterised as political expression is clearly protected by art 19 of the ICCPR'.⁷⁷

5.57 This concern is one of the factors underlying the ALRC's recommendations to repeal s 80.2(7)–(8), and to modify the equivalent provisions in s 80.1(1)(e)–(f).⁷⁸

5.58 Many of the arguments raised in the critique of s 80.2(7)–(8) also may be made in respect of the treason offences in s 80.1(1)(e)–(f). Consequently, the amendment suggested to the offence of treason in Recommendation 11–2 would have the effect of clarifying that only *material* assistance is intended to be captured by these offences (as

73 *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271.

74 For further explanation of these recommendations, see Chs 8, 9, 10.

75 *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Handyside v United Kingdom* (1976) 1 EHRR 737. See also the analysis of the jurisprudence on the ECHR earlier in this chapter.

76 H Lee, P Hanks and V Morabito, *In the Name of National Security: The Legal Dimensions* (1995), 15.

77 *Coleman v Power* (2004) 220 CLR 1, 92–93.

78 See Recs 11–1, 11–2.

amended). This would go some way to alleviating concerns that the offences may be used to prosecute legitimate expression of views that are not themselves encouragements to commit violence. Moreover, the addition of this element also responds to the concern expressed by a number of the participants in this Inquiry—and fortified by Principle 6 of the Johannesburg Principles—that these offences may be used in circumstances where there is no genuine threat of force or violence.

6. Sedition Laws in Other Countries

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Introduction

6.1 This chapter adopts a comparative law approach, which stresses that useful lessons can be drawn from studying how other jurisdictions approach common problems.¹ It examines how other jurisdictions seek to reconcile the need to proscribe conduct that might be described as seditious with the requirements of international law.² This chapter also considers, and rejects, the idea of Australia enacting an offence of ‘glorifying’ or ‘encouraging’ terrorism.

6.2 Submissions to the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005 (Cth) (the 2005 Senate Committee inquiry) expressed concern that Australia was out-of-step with other jurisdictions in re-invigorating its sedition provisions.³ While there is some evidence

1 M Glendon, W Gordon and C Osakwe, *Comparative Legal Traditions* (2nd ed, 1994), 10.

2 This is consistent with the method suggested in K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd ed, 1998), 34–35.

3 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.32]–[5.42].

for this, the Attorney-General's Department (AGD) argued that it was necessary to add the caveat that even if a number of jurisdictions no longer have an offence named 'sedition', it is still common to proscribe conduct that is, in substance, seditious.⁴

United Kingdom

Common law sedition offences

6.3 The United Kingdom does not have a statutory offence of sedition. However, as discussed in Chapter 2, it has several common law sedition offences, such as the offence of uttering seditious words.

6.4 The common law sedition offences are generally considered to require an incitement to cause violence or disorder.⁵ According to Professor David Feldman,⁶ this gives these offences 'a public-order aspect', which means that they are probably compatible with art 10 of the European Convention on Human Rights (ECHR).⁷ However, a public order offence that detracts from freedom of expression must be 'strictly necessary' to avoid contravening art 10.⁸

6.5 In 1977, the Law Commission of England and Wales concluded that there was no need for an offence of sedition in the criminal code because conduct that would fall within its ambit would be caught by offences of incitement or conspiracy to commit the relevant offence.⁹ Further, the Law Commission stated:

[I]t is better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is 'political'.¹⁰

6.6 There have been relatively few prosecutions of sedition offences in the United Kingdom during the 20th century—fewer even than in Australia.¹¹ It has been argued

4 Australian Government Attorney-General's Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005.

5 See, eg, Law Commission of England and Wales, *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), [70]; J Boasberg, 'Seditious Libel v Incitement to Mutiny: Britain Teaches Hand and Holmes a Lesson' (1990) 10 *Oxford Journal of Legal Studies* 106, 107; H Fenwick, *Civil Liberties* (1994), 184.

6 D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002), 898.

7 That is, the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222, (entered into force generally on 3 September 1953). Article 10 is discussed in detail in Ch 5.

8 See, eg, *Percy v Director of Public Prosecutions* [2002] Crim LR 835, 835.

9 Law Commission of England and Wales, *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), [77]–[78]. A similar view was expressed in L Leigh, 'Law Reform and the Law of Treason and Sedition' (1977) *Public Law* 128, 147.

10 Law Commission of England and Wales, *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), [78].

11 L Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287, 294. See also E Barendt, *Freedom of Speech* (2nd ed, 2005), 162.

that sedition offences have been ‘superseded by public-order legislation, including the statutory crime of inciting racial hatred’.¹²

6.7 The most recent sedition case in the United Kingdom was *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury*.¹³ In this case the applicant applied for summonses against the author and publisher of the book, *The Satanic Verses*, for the common law offence of seditious libel. The applicant argued that by publishing and distributing the book the defendants caused widespread discontent and disaffection among Her Majesty’s subjects, provoking acts of violence particularly between Muslim and non-Muslim people. The Divisional Court dismissed the application for judicial review of the magistrate’s refusal to issue the summonses. Watkins LJ, on behalf of the Court, held:

Proof of an intention to promote feelings of ill will and hostility between different classes of subjects does not alone establish a seditious intention. Not only must there be proof of an incitement to violence in this connection, but it must be violence or resistance or defiance for the purpose of disturbing ... some person or body holding office or discharging some public function of the state.¹⁴

Encouragement or glorification of terrorism offence

Background to the new UK offence

6.8 While there is no statutory offence of sedition in the United Kingdom, in April 2006 legislation came into force making it an offence to encourage or glorify terrorism.¹⁵ There has not yet been a prosecution under this new provision.

6.9 Part of the impetus for the enactment of this offence came from the Council of Europe’s *Convention on the Prevention of Terrorism* (the European Convention on Terrorism), adopted in 2005.¹⁶ Article 5 of the Convention requires State parties to establish an offence of ‘public provocation to commit a terrorist offence’,¹⁷ which is defined as

the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.¹⁸

¹² D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002), 899.

¹³ *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury* [1991] 1 QB 429.

¹⁴ *Ibid*, 453.

¹⁵ *Terrorism Act 2006* (UK).

¹⁶ *Council of Europe Convention on the Prevention of Terrorism*, 16 May 2005, CETS 196, (entered into force generally on 16 May 2005).

¹⁷ *Ibid* art 5(2).

¹⁸ *Ibid* art 5(1).

6.10 Article 5(2) provides that public provocation to commit a terrorist offence is itself an offence only when committed ‘unlawfully and intentionally’. There are currently 31 signatories to the European Convention on Terrorism.

6.11 The Explanatory Report on the Convention provides examples of conduct that may amount to the indirect incitement of terrorism so as to fall within the ambit of art 5. These include ‘the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding for terrorist organisations or other similar behaviour’ and ‘presenting a terrorist offence as necessary and justified’.¹⁹

Consideration of the UK’s new offence

6.12 Section 1 of the *Terrorism Act 2006* (UK) states:

1 Encouragement of terrorism

- (1) This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.
- (2) A person commits an offence if—
 - (a) he publishes a statement to which this section applies or causes another to publish such a statement; and
 - (b) at the time he publishes it or causes it to be published, he—
 - (i) intends members of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences; or
 - (ii) is reckless as to whether members of the public will be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate such acts or offences.
- (3) For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which—
 - (a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and
 - (b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances.
- (4) For the purposes of this section the questions how a statement is likely to be understood and what members of the public could reasonably be expected to infer from it must be determined having regard both—

¹⁹ Committee of Ministers of the Council of Europe, *Explanatory Report on Council of Europe Convention on the Prevention of Terrorism*, adopted at 925th Meeting (2005), [95], [98].

- (a) to the contents of the statement as a whole; and
 - (b) to the circumstances and manner of its publication.
- (5) It is irrelevant for the purposes of subsections (1) to (3)—
- (a) whether anything mentioned in those subsections relates to the commission, preparation or instigation of one or more particular acts of terrorism or Convention offences, of acts of terrorism or Convention offences of a particular description or of acts of terrorism or Convention offences generally; and,
 - (b) whether any person is in fact encouraged or induced by the statement to commit, prepare or instigate any such act or offence.
- (6) In proceedings for an offence under this section against a person in whose case it is not proved that he intended the statement directly or indirectly to encourage or otherwise induce the commission, preparation or instigation of acts of terrorism or Convention offences, it is a defence for him to show—
- (a) that the statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and
 - (b) that it was clear, in all the circumstances of the statement's publication, that it did not express his views and (apart from the possibility of his having been given and failed to comply with a notice under subsection (3) of that section) did not have his endorsement.
- (7) A person guilty of an offence under this section shall be liable—
- (a) on conviction on indictment, to imprisonment for a term not exceeding 7 years or to a fine, or to both;
 - (b) on summary conviction in England and Wales, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum, or to both; ...

6.13 Glorification is defined to include 'any form of praise or celebration, and cognate expressions are to be construed accordingly'.²⁰ Section 2 of the Act creates a separate offence of 'dissemination of terrorist publications', which also relies on the concept of glorification.²¹

6.14 The creation of an offence of encouraging or glorifying terrorism was controversial.²² An offence of condoning or glorifying terrorism was initially included in the Racial and Religious Hatred Bill 2005 (UK). However, it was heavily criticised²³

²⁰ *Terrorism Act 2006* (UK) s 20(2).

²¹ There are also other references to 'glorification'. See *Ibid* ss 3, 21.

²² See, eg, Amnesty International, *UK: Human Rights: A Broken Promise*, 23 February 2006 (2006) <<http://web.amnesty.org/library/Index/ENGEUR450042006?open&of=ENG-GBR>> at 1 March 2006.

²³ See B Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28 *University of New South Wales Law Journal* 868, 870–871; E Barendt, 'Threats to Freedom of Speech in the United Kingdom' (2005) 28 *University of New South Wales Law Journal* 895.

and abandoned prior to enactment.²⁴ A similar offence, referring to encouragement or glorification of terrorism, was then introduced in a narrower form in the Bill that became the *Terrorism Act 2006* (UK).²⁵ This Bill was initially rejected by the House of Lords on 28 February 2006 (by a majority of 160 to 156) and was the subject of vigorous debate in both Houses of Parliament. Although the European Convention on Terrorism provided some impetus for offences prohibiting the encouragement of terrorism, s 1(5)(a) of the *Terrorism Act 2006* makes it clear that it is not limited by the scope of this Convention.

6.15 The primary criticism of this new offence is that it impacts too heavily on freedom of expression. During parliamentary debates about the offence, Ralf Dahrendorf, a member of the House of Lords, stated that ‘rants should be rejected with argument, not with police and prisons’.²⁶

6.16 The United Kingdom Parliament’s Joint Committee on Human Rights expressed concern that the new offence of ‘encouragement’ of terrorism was not sufficiently certain to satisfy art 10 of the ECHR, which requires interferences with freedom of expression to be ‘prescribed by law’. The Committee expressed concern about the following factors:

- (i) the vagueness of the glorification requirement, (ii) the breadth of the definition of ‘terrorism’ and (iii) the lack of any requirement of intent to incite terrorism or likelihood of such offences being caused as ingredients of the offence.²⁷

6.17 Professor Eric Barendt has stated that an offence of glorification of terrorism would make the government ‘the judge of acceptable history’ and could blur the line ‘between extremist political speech ... and criminal speech’.²⁸

Submissions and consultations

6.18 In this Inquiry, the ALRC asked whether there was a need in Australia for an offence dealing directly with ‘glorification or encouragement’ of terrorism along the lines of the new UK offence.²⁹ Those stakeholders who commented on this issue unanimously opposed the introduction of a new offence of encouraging or glorifying terrorism in Australia.

24 See *Racial and Religious Hatred Act 2006* (UK).

25 B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 871.

26 R Dahrendorf, *Free Speech on Trial* (2005) Project Syndicate <<http://www.project-syndicate.org/commentary/dahrendorf45>> at 27 February 2006.

27 House of Lords and House of Commons Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters*, Third Report of Session 2005–06 (2005), 3.

28 E Barendt, ‘Threats to Freedom of Speech in the United Kingdom’ (2005) 28 *University of New South Wales Law Journal* 895, 896–897.

29 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Question 9.

6.19 The AGD informed the ALRC that it had no intention of enacting such an offence.³⁰ It submitted that:

A number of alternatives to the words ‘advocates’ and ‘praise’ were considered during development of the [*Anti-Terrorism Act (No 2) 2005* (Cth)], including ‘glorify’ or ‘condone’. It was considered that these terms were less precise than ‘praise’ and could generate difficulties of proof, particularly in the context of a criminal prosecution, where it must be proved beyond a reasonable doubt. It is likely that, given its ordinary meaning, ‘glorify’ would be read down in a way that would be more restrictive than ‘praise’, while condone could include implications and may be too broad.³¹

6.20 A non-government organisation, ARTICLE 19, submitted that criminalising the glorification of terrorism violates the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (Johannesburg Principles) because ‘there is an insufficient connection between the speech and a likelihood of imminent violence’.³² In addition, it stated:

The UK offences of ‘glorification’ and ‘encouragement’ are both vaguely worded and broad in scope, failing to meet the ‘provided by law’ test. ... The concept of ‘glorification’ also removes the requirement of mens rea, a fundamental component of a society governed by the rule of law.³³

6.21 The Australian Muslim Civil Rights Advocacy Network also opposed the introduction of such an offence and noted that concerns had been expressed in the United Kingdom that such an offence would disproportionately target Muslims,³⁴ while another stakeholder submitted that introducing a glorification offence would be particularly undesirable ‘in the absence of any entrenched protection of human rights in Australia’.³⁵

ALRC’s views

6.22 The ALRC is firmly of the view that an offence of ‘glorification’ or ‘encouragement’ of terrorism should not be introduced into Australian law. There are two particular problems with introducing such an offence in the Australian context.

6.23 The first problem is that the term ‘glorification’ is vague and is not used elsewhere in the *Criminal Code*. The *Criminal Code* does enable an organisation to be listed as a terrorist organisation if it ‘directly praises’ the doing of a terrorist act where

30 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006; Australian Government Attorney-General’s Department, *Consultation*, Canberra, 26 April 2006.

31 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

32 ARTICLE 19, *Submission SED 14*, 10 April 2006. The Johannesburg Principles are discussed in Ch 5.

33 Ibid.

34 Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

35 B Saul, *Submission SED 52*, 14 April 2006.

there is a risk that such praise might lead a person to engage in a terrorist act.³⁶ However, although the word ‘praise’ is similar to the word ‘glorify’, it is used in a provision designed to assist the Attorney-General to determine whether or not an organisation is a terrorist organisation.³⁷ It is not used in a provision that imposes criminal liability on an individual or organisation for praising terrorist acts. Accordingly, there is no precedent in Australia for the offence of glorifying terrorism, and the *Criminal Code* provisions that refer to the praising of terrorism would provide limited assistance in determining the meaning of any offence of glorification of terrorism.

6.24 The second and more significant problem with introducing an offence of glorification of terrorism is that it could represent an unwarranted incursion into freedom of expression and the constitutionally protected freedom of political discourse.³⁸ In the United Kingdom, courts must interpret statutory provisions so that they are consistent with the human rights protections in the ECHR.³⁹ Thus, a crucial safeguard against an overly broad interpretation of an offence of glorification of terrorism would be absent if such an offence were enacted in Australia.

6.25 In Discussion Paper 71 (DP 71), the ALRC agreed with those who had submitted that there is no present need to introduce into Australian law an offence of encouragement or glorification of terrorism along the lines of s 1 of the *Terrorism Act 2006* (UK).⁴⁰

6.26 Submissions received and consultations undertaken in response to DP 71 have (with one exception) remained uniformly opposed to the enactment of a glorification or encouragement of terrorism offence.⁴¹ The exception was the Executive Council of Australian Jewry, which stated that the inclusion of such an offence ‘would address serious problems which Jewish communities throughout the world are increasingly encountering’.⁴² The ALRC notes these concerns but feels that they are better addressed through other legislative means, such as the offence of urging inter-group violence in s 80.2(5) of the *Criminal Code*, and anti-discrimination legislation.

6.27 The near unanimity of opposition to the introduction of a glorification offence fortifies the ALRC’s preliminary view that such an amendment would be undesirable. In light of this, the ALRC recommends that no such offence be enacted.

36 *Criminal Code* (Cth) s 102.1(1A)(c).

37 See especially *Ibid* s 102.1(2).

38 Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006. See also Ch 7.

39 *Human Rights Act 1998* (UK) s 3.

40 Australian Law Reform Commission, *Review of Sedition Laws*, DP 71 (2006), Proposal 6–1.

41 See, eg, Law Institute of Victoria, *Submission SED 70*, 28 June 2006; Queensland Council for Civil Liberties, *Submission SED 101*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; National Tertiary Education Union, *Submission SED 118*, 3 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

42 Executive Council of Australian Jewry, *Submission SED 116*, 3 July 2006.

Recommendation 6–1 An offence of ‘encouragement’ or ‘glorification’ of terrorism, along the lines of s 1 of the *Terrorism Act 2006* (UK), should not be introduced into Australian law.

United States of America

Background

6.28 The *Sedition Act* of 1798 was the first piece of legislation proscribing sedition in the United States.⁴³ Since the passage of this Act, the offence of sedition has been removed from the statute books and re-introduced from time to time, and it has also fallen into disuse at other times.⁴⁴ Sedition prosecutions were common in the United States during World War I and immediately following World War II.⁴⁵ However, ‘modern-day sedition trials are almost unheard of’ in the United States.⁴⁶

6.29 The critical issue in determining the validity of United States sedition laws has been whether or not they are compatible with the First Amendment to the *United States Constitution*.⁴⁷ The First Amendment provides strong protection to a broad spectrum of expression, for which there is no direct parallel in the *Australian Constitution*.⁴⁸ As Douglas J explained in the United States Supreme Court, even expression that is designed to undermine the government is protected by the First Amendment.

The word ‘revolution’ has of course acquired a subversive connotation in modern times. But it has roots that are eminently respectable in American history. This country is the product of revolution. Our very being emphasizes that when grievances pile high and there are no political remedies, the exercise of sovereign powers reverts to the people. Teaching and espousing revolution—as distinguished from indulging in overt acts—are therefore obviously within the range of the First Amendment.⁴⁹

6.30 In *Keyishian v Board of Regents*, the United States Supreme Court held that an offence of uttering seditious words was so broad that the ‘the possible scope of

43 H Keehn, ‘Terroristic Religious Speech: Giving the Devil the Benefit of the First Amendment Free Exercise and Free Speech Clauses’ (1998) 28 *Seton Hall Law Review* 1230, 1240.

44 For detailed accounts of the history of United States sedition legislation, see *Ibid*, 1241–1245; Z Chafee, *Free Speech in the United States* (2nd ed, 1954); J Rudanko, *The Forging of Freedom of Speech: Essays on Argumentation in Congressional Debates on the Bill of Rights and on the Sedition Act* (2003).

45 J Cohan, ‘Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government’ (2003) 17 *St John’s Journal of Legal Commentary* 199, 202.

46 *Ibid*, 202.

47 The First Amendment states: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances’.

48 The *Australian Constitution* contains an implied protection of political communication but this is much more confined than the First Amendment. See Ch 7.

49 *WEB Du Bois Clubs v Clark* 389 US 309 (1967), 315–316.

“seditious” utterances or acts has virtually no limit’. Accordingly, the provision fell foul of the First Amendment protection of free speech.⁵⁰ Brennan J held that the provision cast ‘a pall of orthodoxy’,⁵¹ enabling selective prosecution of people who articulated views critical of the government. This has been described in the United States literature as ‘viewpoint discrimination’.⁵²

6.31 The most recent Supreme Court case dealing with the constitutionality of sedition law is *Brandenburg v Ohio* in 1969.⁵³ In this case, the Court refined and clarified earlier tests of constitutionality. It held that three elements were required before a law criminalising the advocacy of illegal conduct could be valid: there must be express advocacy of law violation; the advocacy must call for immediate law violation; and the law violation must be likely to occur.⁵⁴ More generally, the United States Supreme Court has tended to invalidate criminal laws that detract from freedom of expression—and especially political expression—unless they criminalise conduct that is ‘inherently likely to cause violent reaction’.⁵⁵

Current US sedition offence

6.32 There is a federal offence of ‘seditious conspiracy’ in the *United States Code*, § 2384, which provides:

Seditious conspiracy

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.⁵⁶

6.33 There are three principal elements to the offence. First, there must be a ‘conspiracy’ involving two or more persons occurring within United States territory or jurisdiction. Secondly, the conspiracy must oppose the United States government or threaten its laws or property. Thirdly, the use of force must be part of the conspiracy plot. The term ‘seditious’ is only referred to in the title and not in the text of § 2384.

50 *Keyishian v Board of Regents* 385 US 589 (1967), 598–599 (Brennan J).

51 *Ibid*, 603.

52 See I Hare, ‘Method and Objectivity in Free Speech Adjudication: Lessons from America’ (2005) 54 *International and Comparative Law Quarterly* 49, 57.

53 *Brandenburg v Ohio* 395 US 444 (1969).

54 B Schwartz, ‘Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action’ (1994) *Supreme Court Review* 209, 240; H Keehn, ‘Terroristic Religious Speech: Giving the Devil the Benefit of the First Amendment Free Exercise and Free Speech Clauses’ (1998) 28 *Seton Hall Law Review* 1230, 1245.

55 See, eg, *Cohen v California* 403 US 15 (1971), 20.

56 *Crimes and Criminal Procedure Code of 1948* (1994) 18 USC § 2384.

This may be ‘because the word “seditious” in and of itself does not sufficiently convey what conduct it forbids’.⁵⁷

6.34 In *United States v Rahman* a radical Islamic cleric, Sheik Omar Abdel Rahman, and a number of other defendants were convicted of seditious conspiracy pursuant to § 2384 of the *United States Code*. Rahman was said to have incited members of his group during his sermons to undertake subversive activities, such as plotting to blow up the headquarters of the United Nations and other buildings in New York City. In his sermons, Rahman told his followers to, among other things, ‘do jihad with the sword, with the cannon, with the grenades, with the missile ... against God’s enemies’.⁵⁸ Further, he stated that ‘being called terrorists was fine, so long as they were terrorizing the enemies of Islam, the foremost of which was the United States and its allies’.⁵⁹

6.35 Rahman’s sentence and the constitutionality of § 2384 were affirmed by the Court of Appeals for the Second Circuit.⁶⁰ The Court held that the fact that his speech or conduct was ‘religious’ did not immunise him from prosecution under generally applicable criminal statutes.⁶¹

6.36 One commentator has predicted that ‘prosecutions of seditious conspiracy are more likely to occur in a climate of society’s heightened apprehension about terrorist plots against the nation’.⁶²

The Smith Act

6.37 The *Alien Registration Act* of 1940, or ‘Smith Act’,⁶³ has been described as the ‘companion statute’ to the law on seditious conspiracy.⁶⁴ While the Smith Act does not use the term ‘sedition’, it creates an offence of advocating the overthrow of government. The relevant provision states:

Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government; or

57 J Cohan, ‘Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government’ (2003) 17 *St John’s Journal of Legal Commentary* 199, 208.

58 *United States v Rahman* 189 F 3d 88 (1999), 104.

59 *Ibid*, 107.

60 *Ibid*.

61 *Ibid*, 117.

62 J Cohan, ‘Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government’ (2003) 17 *St John’s Journal of Legal Commentary* 199, 203.

63 Named after Representative Howard W Smith of Virginia.

64 J Cohan, ‘Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government’ (2003) 17 *St John’s Journal of Legal Commentary* 199, 230–231.

Whoever, with intent to cause the overthrow or destruction of any such government, prints, publishes, edits, issues, circulates, sells, distributes, or publicly displays any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or attempts to do so; or

Whoever organizes or helps or attempts to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence; or becomes or is a member of, or affiliates with, any such society, group, or assembly of persons, knowing the purposes thereof—

Shall be fined under this title or imprisoned not more than twenty years, or both, and shall be ineligible for employment by the United States or any department or agency thereof, for the five years next following his conviction.⁶⁵

6.38 The relevant provisions of the Smith Act have been interpreted in a similar manner to the seditious conspiracy provisions, such that they apply ‘only to concrete violent action as distinguished from the teaching of abstract principles related to the forcible overthrow of the government’.⁶⁶ Purely ‘academic discussion’ is not enough to support a prosecution.⁶⁷

6.39 However, the Smith Act does not appear to require proof to the same level of specificity as is required to prosecute under § 2384. Rather, it catches ‘the mere teaching or advocacy of the violent overthrow of the government’.⁶⁸ The constitutionality of the Smith Act was affirmed by the United States Supreme Court in 1951.⁶⁹ The Court later refined the meaning of advocacy to require that ‘those to whom the advocacy is addressed must be urged to do something, now or in the future, rather than merely to believe in something’.⁷⁰

6.40 The Australian sedition offences in s 80.2 of the *Criminal Code*—with their primary focus on the urging of force or violence—thus seem to resemble the US Smith Act provisions more closely than the offence provision in § 2384, notwithstanding that the Smith Act does not mention the term ‘sedition’. Nevertheless, the recent prosecution history discussed later in this chapter shows that § 2384 remains actively enforced in respect of offences involving advocacy of unlawful violence, whereas the Smith Act seems to have fallen into disuse. This may be an example of the phenomenon identified by Professor Chafee, namely, that the operation of sedition laws is unpredictable.

⁶⁵ *Crimes and Criminal Procedure Code of 1948* (1994) 18 USC § 2385.

⁶⁶ J Cohan, ‘Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government’ (2003) 17 *St John’s Journal of Legal Commentary* 199, 231.

⁶⁷ *Ibid.*, 235.

⁶⁸ *Ibid.*, 231.

⁶⁹ *Dennis v United States* 341 US 494 (1951).

⁷⁰ *Yates v United States* 354 US 298 (1957), 325.

It is an outstanding feature of every sedition act that the way it is enforced differs from the way it looks in print as much as a gypsy moth differs from the worm from which it has grown.⁷¹

Hong Kong

6.41 As part of the transitional arrangements that followed China's resumption of sovereignty over Hong Kong on 30 June 1997, a statute entitled the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 1997* (the Basic Law) was enacted. Its effect was to retain the existing legal edifice for at least 50 years (art 5) subject to certain qualifications, including that Hong Kong's law must be amended to conform to the Basic Law itself (art 8). Article 23 of the Basic Law provides:

The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

6.42 In September 2002, the Hong Kong government published its proposals to implement art 23. On 25 February 2003, these proposals were included in the National Security (Legislative Provisions) Bill. The reaction to this Bill was 'deafening and swift', with 500,000 people marching against the Bill on 1 July 2003⁷²—'the largest protest march ever held against the Hong Kong government'.⁷³ Ultimately, the Bill was withdrawn from the Legislative Council.

6.43 Accordingly, Hong Kong retains colonial era offences of sedition, which criminalise any seditious act, seditious words or dealings with a seditious publication.⁷⁴ The term 'seditious intention' is defined in s 9(1) as follows:

A seditious intention is an intention—

- (a) to bring into hatred or contempt or to excite disaffection against the person of Her Majesty, or Her Heirs or Successors, or against the Government of Hong Kong, or the government of any other part of Her Majesty's dominions or of any territory under Her Majesty's protection as by law established;

⁷¹ Z Chafee, *Free Speech in the United States* (2nd ed, 1954), 459.

⁷² R Wacks, 'National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny—A Review' (2006) *Public Law* 180, 181. See also T Kellogg, 'Legislating Rights: Basic Law Article 23, National Security, and Human Rights in Hong Kong' (2004) 17 *Columbia Journal of Asian Law* 307, 308.

⁷³ C Petersen, 'Introduction' in F Hualing, C Petersen and S Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (2005) 1, 3.

⁷⁴ *Crimes Ordinance* (HK) s 10(1), (2).

- (b) to excite Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Hong Kong as by law established; or
- (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Hong Kong; or
- (d) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Hong Kong; or
- (e) to promote feelings of ill-will and enmity between different classes of the population of Hong Kong; or
- (f) to incite persons to violence; or
- (g) to counsel disobedience to law or to any lawful order.

6.44 The colonial authority used this offence to suppress internal dissent.⁷⁵ It has been described as 'archaic', out of step with the approach of most other jurisdictions,⁷⁶ and 'draconian'.⁷⁷ It is also said to have a 'chilling effect on free speech'.⁷⁸ The offence was used in the 1960s, but rarely thereafter.⁷⁹

6.45 It has been observed that unlike most statutes dealing with sedition, the Hong Kong law does not require proof of an intention to incite violence, and thus presents a relatively low bar to prosecution.⁸⁰ The Bill that was proposed to implement art 23 of the Basic Law did not incorporate a requirement of an intention to incite violence—a factor contributing to the disquiet that led to its abandonment.⁸¹

Canada

6.46 In a 1986 working paper, the Law Reform Commission of Canada (LRCC) described the offence of sedition as 'an outdated and unprincipled law', asking 'is it not odd that our *Criminal Code* still contains the offence of sedition which has as its very object the suppression of [freedom of political expression]?'⁸²

75 See F Hualing, 'Past and Future Offences of Sedition in Hong Kong' in F Hualing, C Petersen and S Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (2005) 217, 226–228.

76 T Kellogg, 'Legislating Rights: Basic Law Article 23, National Security, and Human Rights in Hong Kong' (2004) 17 *Columbia Journal of Asian Law* 307, 325.

77 Yan Mei Ning on behalf of the Hong Kong News Executives' Association, *On Sedition, Police Investigation Power and Misprision of Treason [Legal Opinion]*, 1 December 2001, [7].

78 Ibid, [7].

79 F Hualing, 'Past and Future Offences of Sedition in Hong Kong' in F Hualing, C Petersen and S Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (2005) 217, 229.

80 T Kellogg, 'Legislating Rights: Basic Law Article 23, National Security, and Human Rights in Hong Kong' (2004) 17 *Columbia Journal of Asian Law* 307, 327; F Hualing, 'Past and Future Offences of Sedition in Hong Kong' in F Hualing, C Petersen and S Young (eds), *National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny* (2005) 217, 248.

81 T Kellogg, 'Legislating Rights: Basic Law Article 23, National Security, and Human Rights in Hong Kong' (2004) 17 *Columbia Journal of Asian Law* 307, 328.

82 Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 35–36.

6.47 Sedition law is particularly problematic given that s 2(b) of the Canadian *Charter of Rights and Freedoms* recognises the ‘fundamental ... freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication’. The LRCC went on to note that the leading Canadian authority on sedition, *Boucher v The Queen*,⁸³ construed the relevant provisions narrowly. As a result, the LRCC concluded:

Applying [the Supreme Court of Canada’s] narrow definition, there no longer seems to be a need for a separate offence of sedition, because the only conduct that would be proscribed by it could just as well be dealt with as incitement ... , conspiracy ... , contempt of court, or hate propaganda Clearly, *legislative* revision is in order.⁸⁴

6.48 Nevertheless, sedition remains a part of Canadian criminal law,⁸⁵ although there does not appear to have been a prosecution for sedition in Canada since the 1950s. This may be due, at least in part, to the Supreme Court of Canada’s finding that the sedition provisions do not have any reach beyond those allied offences noted by the LRCC.

Survey of contemporary use of sedition in other jurisdictions

6.49 Prosecutions for sedition are relatively rare. However, they still occur from time to time in other countries. The following is a brief overview of some recent attempts to prosecute sedition in certain other countries. The account below focuses on prosecutions for offences defined as sedition offences—as opposed to other offences that may fall within the legal definition of sedition, such as incitement to violence.

New Zealand

6.50 As stated earlier, there have been no recent prosecutions for sedition in Australia, and none since the sedition provisions were amended in the *Anti-Terrorism Act (No 2) 2005* (Cth). Until recently, the same was true of New Zealand, where sedition had not been prosecuted since 1942.⁸⁶

6.51 However, on 8 June 2006, Timothy Selwyn was found guilty of sedition in the Auckland District Court. His conviction arose from the following circumstances: Selwyn admitted to conspiring to commit wilful damage when an axe was embedded in the Prime Minister’s electoral office window in November 2004. He also admitted to being involved in two separate statements—one of which was found to be seditious—claiming responsibility for the axe attack and calling for others to commit acts of civil disobedience. The statement in question constituted a bundle of pamphlets left on a roadside powerbox on the night of the axe attack. It was designed as a press release and

⁸³ *Boucher v The King* [1951] 2 DLR 369.

⁸⁴ Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 36.

⁸⁵ *Criminal Code* 1985 (Canada) ss 59–61.

⁸⁶ D Cheng, ‘Sedition Verdict Harms “Free Speech”’, *New Zealand Herald* (online), 9 June 2006, <www.nzherald.co.nz>.

called for 'like minded New Zealanders to take similar action of their own'. His actions were in protest against the government's foreshore and seabed legislation, which he said was being rushed through Parliament at the time.⁸⁷ On 18 July 2006, Selwyn was sentenced to two months' imprisonment in respect of the charges of sedition and wilful damage.⁸⁸

Asia

6.52 In Asia, a number of countries possess sedition laws inherited from the United Kingdom. In Malaysia in early 2006, a government minister with responsibility for legal matters threatened to prosecute for sedition a number of non-Muslim authors of articles written about Islam.⁸⁹ Any such prosecution would be based on Malaysia's *Sedition Act 1948*, in which the definition of sedition is based on the common law definition of 'seditious libel'.

6.53 Article 139 of the Philippines *Criminal Code* contains an offence of sedition, which is committed when a person rises 'publicly and tumultuously in order to obtain by force, intimidation, or by other means outside legal methods' certain political objectives. There is a related offence of incitement to sedition (art 142) and this is more closely analogous to the Australian sedition offences that are the subject of this Inquiry.⁹⁰

6.54 These offences were used recently against Filipino journalists during the state of emergency declared by the Arroyo administration between 24 February and 3 March 2006. For example, Professor Randy David and Argee Guevarra were arrested on 24 February 2006 for inciting sedition after leading a demonstration march on the day that the state of emergency was declared. They were released on the same day and the charges were dropped.⁹¹ However, the following day police raided the offices of *The Daily Tribune*. The newspaper's editor and two columnists were charged under art 142 of the *Criminal Code* with incitement to sedition. Those charges are currently being challenged on the basis of a decision by the Philippines High Tribunal that the presidential proclamation authorising the raid on *The Daily Tribune* was unlawful.⁹²

87 Ibid.

88 'Jail for Axe Attack on PM's Office', *New Zealand Herald* (online), 18 July 2006, <www.nzherald.co.nz>.

89 See 'Jail Threatened Over Islam Insults', *The Australian* (online), 21 March 2006, <www.theaustralian.news.com.au>.

90 Related offences include inciting rebellion or insurrection (art 138) and publishing false news that may endanger public order, or cause damage to the interest or credit of the State (art 154).

91 H Bryant, L Macale and N Lee, "'No" to the Dark Days', *Philippine Journalism Review Reports*, March 2006, 10.

92 G Mabutas, 'Publisher Wants Charge Dismissed', *Manila Bulletin Online* (online), 10 May 2006, <<http://www.mb.com.ph/issues/2006/05/10/MTNN2006051063599.html>>.

Europe and the Middle East

6.55 While terrorism in Europe remains an important concern, the current tendency in European states is not to use sedition offences to prosecute conduct that might be considered seditious. For instance, in Spain, 14 men were remanded in custody pending trial for recruiting fighters for the Iraqi insurgency.⁹³ The case concerns, in part, ‘radical speeches’ by Imam Mohamed Samadi ‘in which he requested prayer for mujahideens, or for people who had given their lives for the jihad’.⁹⁴ Significantly, however, the defendants were charged with belonging to a terrorist group, and not with sedition.⁹⁵

6.56 Article 301 of the Turkish *Penal Code* was enacted on 1 June 2005. It criminalises the public denigration of Turkishness, the Republic or the Grand National Assembly of Turkey, the judicial institutions of Turkey, and Turkey’s military or security structures. It further provides that where the denigration of Turkishness is committed by a Turkish citizen in another country the punishment shall be increased by one third. However, ‘expressions of thought intended to criticize shall not constitute a crime’.⁹⁶

6.57 It has been reported that at least 29 journalists have been charged under art 301,⁹⁷ along with authors, professors, publishers, activists and artists. Prominent author Orhan Pamuk was charged after he said in an interview with a Swiss newspaper that ‘30,000 Kurds and a million Armenians were murdered. Hardly anyone dares mention it, so I do. And that’s why I’m hated’. The charges against Pamuk were eventually dropped because the interview occurred before art 301 was enacted. Others charged under art 301 include two members of the Turkish Human Rights Advisory Board, for their role in the publication of a report on minority and cultural rights in Turkey.⁹⁸ However, in May 2006, a judge acquitted the defendants of the sedition charges after a prosecutor acknowledged that the two men had used their right to free speech in the report.

93 ‘Spain Files Preliminary Charges against Seven More Suspects Accused of Recruiting for Iraq Insurgency’, *Associated Press Newswires* (online), 15 January 2006, <www.ap.org>.

94 ‘Spain’s High Court Remands 14 Suspected Militants’, *Reuters News* (online), 15 January 2006, <www.reuters.com>.

95 ‘Spain Holds Seven Suspected of Recruiting Fighters in Iraq’, *Agence France Presse* (online), 15 January 2006, <www.afp.com/english/home>.

96 Amnesty International, *Turkey: Article 301: How the Law on ‘Denigrating Turkishness’ is an Insult to Freedom of Expression* (2006) <http://web.amnesty.org/library/Index/ENG EUR440032006?open&of=ENG-TUR> at 24 April 2006.

97 R Mahoney, *Nationalism and the Press —As Turkish Nationalists Resist European Tilt, Freedom of Expression is a Victim* (2006) Committee to Protect Journalists <http://www.cpj.org/Briefings/2006/turkey_3-06/turkey_3-06.html> at 24 April 2006.

98 Amnesty International, *Turkey: Article 301: How the Law on ‘Denigrating Turkishness’ is an Insult to Freedom of Expression* (2006) <http://web.amnesty.org/library/Index/ENG EUR440032006?open&of=ENG-TUR> at 24 April 2006.

North America

6.58 There have been few recent reported cases of sedition in North America: a small number in the United States and none in Canada.

6.59 Since the terrorist attacks on 11 September 2001, the US Government has initiated relatively few prosecutions for sedition-type offences in comparison with its rate of prosecution for other offences, such as the offence of providing material support to terrorist organisations, which has emerged as a favoured weapon in the war on terror.⁹⁹ The Smith Act has not been revived in recent prosecutions of terrorist suspects.¹⁰⁰ Prosecutors have used the seditious conspiracy statute;¹⁰¹ however, in recent prosecutions, the Government has supplemented evidence of defendants' general support of levying war against the Government with evidence of their involvement in planning specific violent attacks.

6.60 In 2003, Patrice Lumumba Ford and Jeffrey Battle pleaded guilty to seditious conspiracy after their fellow conspirators pleaded guilty to other charges.¹⁰² The defendants were alleged to have been involved in training to prepare to fight violent Jihad in Afghanistan.¹⁰³

6.61 In 2004, the US Government combined the basic offence of inducing criminal action with seditious conspiracy and successfully prosecuted a Muslim cleric, Sheik Al-Timimi, for 'inducing conspiracy to levy war'.¹⁰⁴ In *US v Al-Timimi*, as in the earlier case of *US v Rahman*, it was alleged that the sheik spoke publicly about the duty of Muslims to join Jihad.¹⁰⁵ The prosecution also cited Al-Timimi's private meetings with a group of Muslim men in which he encouraged them to engage in Jihad against American troops in Afghanistan and provided them with directions to a training camp

99 J Cohan, 'Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government' (2003) 17 *St John's Journal of Legal Commentary* 199, 202; 'Broader law sought against 'material support' for terrorism' *The Associated Press*, 6 May 2004. Andrew McCarthy, lead prosecutor in *US v Rahman*, testified before Congress that material support statutes 'have become the backbone of antiterrorism enforcement since they were enacted in 1996': A McCarthy, *Testimony before the United States Senate Judiciary Committee Subcommittee on Terrorism, Technology and Homeland Security: 20 April 2005* (2005) Senator Jon Kyl Website <kyl.senate.gov/legis_center/subcom.cfm> at 4 July 2006.

100 J Cohan, 'Seditious Conspiracy, the Smith Act, and Prosecution for Religious Speech Advocating the Violent Overthrow of the Government' (2003) 17 *St John's Journal of Legal Commentary* 199, 206.

101 See *Crimes and Criminal Procedure Code of 1948* (1994) 18 USC § 2384.

102 S Akram and M Karmely, 'Immigration and Constitutional Consequences of Post 9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?' (2005) 38 *University of California Davis Law Review* 609, 684.

103 US Department of Justice, 'Department of Justice Examples of Terrorism Convictions Since September 11, 2001' (Press Release, 23 June 2006).

104 *US v Al-Timimi [Superseding Indictment]* (Unreported, US District Court, Eastern District of Virginia, Brinkema J, 1 February 2005).

105 *United States v Rahman* 854 F Supp 254 (1994), 104; *US v Al-Timimi [Superseding Indictment]* (Unreported, US District Court, Eastern District of Virginia, Brinkema J, 1 February 2005).

in Pakistan.¹⁰⁶ Al-Timimi was convicted of 10 counts of terrorism-related crimes, including inducing seditious conspiracy.¹⁰⁷ Al-Timimi sought and was granted leave to appeal, partly on constitutional grounds,¹⁰⁸ and his case is now pending.¹⁰⁹ Masoud Khan, one of the four young men to whom Al-Timimi allegedly gave directions to the Jihad training camp, was also convicted of seditious conspiracy, among other crimes.¹¹⁰ Khan was sentenced to life imprisonment in June 2004.¹¹¹

6.62 Since 2004, seditious conspiracy charges have been laid in prosecutions involving targeted attacks on synagogues in the Los Angeles area and the Sears Tower in Chicago, Illinois.¹¹² Preliminary evidence released by the prosecution described how defendants preached that attack on the US was justified, but also took action to further a conspiracy to levy war.¹¹³ For example, the prosecution submitted evidence of a 'protocol' clandestinely distributed to inmate members of an Islamic extremist group along with evidence of armed robberies of petrol stations committed by members of the group to fund weapons purchases.¹¹⁴ Thus, while there has been some recent prosecution for seditious conspiracy, analysis of the case law reveals a tendency for such prosecutions to be brought where there is a combination of seditious speech and conduct forming part of a violent plot against the US.

6.63 There is also some evidence that sedition is now viewed as an outdated and inappropriate offence, as demonstrated by a recent trend to pardon those convicted of sedition. For example, on 11 August 1999, President Clinton granted clemency to eleven members of the Armed Forces of Puerto Rican National Liberation who had been convicted of, among other things, seditious conspiracy and sentenced to a maximum of 90 years in prison.¹¹⁵ Similarly, on 3 May 2006, 78 people of German

106 *US v Al-Timimi [Superseding Indictment]* (Unreported, US District Court, Eastern District of Virginia, Brinkema J, 1 February 2005).

107 *US v Al-Timimi [Criminal Docket]* (Unreported, US District Court, Eastern District of Virginia, Brinkema J, 3 July 2006); J Markon, 'Jurors Convict Muslim Leader in Terrorism Case', *The Washington Post* (online), 27 April 2005, <www.washingtonpost.com>.

108 *US v Al-Timimi [Criminal Docket]* (Unreported, US District Court, Eastern District of Virginia, Brinkema J, 3 July 2006); E Lichtblau, 'Cleric Wins Appeal Ruling Over Wiretaps', *New York Times* (online), 26 April 2006, <www.nytimes.com>.

109 *Ibid.*

110 *US v Khan* 309 F Supp 2d 789 (US District Court, Eastern District Virginia, 2004), 820-821.

111 US Department of Justice, 'Department of Justice Examples of Terrorism Convictions Since September 11, 2001' (Press Release, 23 June 2006).

112 *US v James [Indictment]* (Unreported, US District Court, Central District of California, 1 October 2004); *US v Batiste [Indictment]* (Unreported, US District Court, Southern District of Florida, Lenard and Klein JJ, 22 June 2004).

113 *Ibid.*

114 *Ibid.*

115 *Executive Grant of Clemency*, issued by President William J Clinton, 11 August 1999; US Department of Justice, Office of the Pardon Attorney 'News Advisory' (Press Release, 11 August 1999). Many opposed these grants of clemency on grounds that the 11 members were dangerous criminals: see H Krent, 'Conditioning the President's Conditional Pardon Power' (2001) 89 *California Law Review* 1665, 1667.

descent convicted of sedition during World War I in the United States state of Montana were posthumously pardoned.¹¹⁶

Africa

6.64 A number of countries in Africa still possess sedition offences that remain in operation. These offences tend to be based on, or derived from, British colonial-era sedition laws.¹¹⁷ On the whole, they more closely resemble the relatively strict provisions in jurisdictions such as Hong Kong,¹¹⁸ than Australia's updated offences in s 80.2 of the *Criminal Code*.

6.65 Nevertheless, people continue to be prosecuted for sedition in African countries. For instance, in November 2005 it was reported that the Ugandan Government had brought 13 charges of sedition against a journalist, Andrew Mwenda. The charges related to comments he made on 10 August 2005 regarding a helicopter crash that killed Sudanese Vice-President, John Garang; the national holiday that was granted in honour of the victims; and threats by President Yoweri Museveni to shut any news outlet that 'plays around with regional security'. The prosecution alleged that the comments intended 'to bring into hatred or contempt and excite disaffection against the person of the president and the government as by law established' and that the comments 'were likely to create despondency ... , raise discontent and promote feelings of hostility' among certain ethnic groups.¹¹⁹

6.66 In Nigeria, two reporters were charged in mid-2006 with sedition for allegedly revealing that technical problems with the aeroplane of Nigerian President, Olusegun Obasanjo, forced it to make an emergency landing within weeks of going into service.¹²⁰

116 For an analysis of this decision and the Montana wartime sedition law, see J Robbins, 'Pardons Granted 88 Years After Crimes of Sedition', *New York Times* (online), 3 May 2006, <www.nytimes.com>.

117 See Ch 2.

118 See the discussion earlier in this Chapter.

119 S Muyita, 'Govt Slaps 13 More Charges on Mwenda', *Daily Monitor* (online), 2 November 2005, <www.monitor.co.ug>.

120 'Journalists' Wings Clipped for Expose on Luxury Jet', *Calgary Herald* (online), 2 July 2006, <www.canada.com/calgaryherald>.

7. Sedition and Freedom of Expression

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Introduction

7.1 This chapter analyses the interaction between the sedition provisions and freedom of expression in Australian domestic law. The chapter analyses the character and extent of any 'chilling effect' on freedom of expression caused by the sedition provisions and discusses the interaction between the sedition provisions and other domestic legislation that protects human rights.

7.2 Almost all other comparable foreign jurisdictions incorporate a general right to freedom of expression in a statutory or constitutional bill of rights.¹ As discussed later in this chapter, no Australian jurisdiction except the Australian Capital Territory (ACT) and Victoria currently possess bills of rights—and so (except in these jurisdictions)

1 The term 'bill of rights' is used here as a shorthand expression to describe any legislative or constitutional instrument that purports to give legal protection to basic human rights.

there are no formal, legislative guarantees of protection for freedom of expression in Australia.

7.3 Freedom of expression is nevertheless given some limited forms of protection in Australian law—particularly under the *Australian Constitution*, which is discussed below. The common law, and some federal, state and territory legislation, also provide limited protection to certain categories of expression.² For instance, all Australian jurisdictions are subject to at least one ‘Freedom of Information’ regime, the objectives of which include fostering public debate and discussion.³

7.4 Also relevant is the common law principle that the law permits everything except that which is expressly forbidden.⁴ This means that, unless explicitly prohibited by laws (such as those proscribing defamation, offensive behaviour, obscenity or sedition), individuals are allowed to say what they want.

7.5 Strong concern has been voiced since November 2005 about the impact of the sedition provisions on freedom of expression. This criticism falls within a number of broad categories:

- The sedition provisions are, in whole or in part, inconsistent with the *Australian Constitution*.
- There is insufficient statutory protection of human rights at the federal level and, as a result, there are inadequate safeguards to prevent an overly broad interpretation of the offence provisions.
- There is a risk that the sedition offences will be applied unfairly or in a discriminatory manner against certain groups in the Australian community.
- The sedition laws have the potential to restrict the expression of views that ought to be permitted in a liberal democracy such as Australia. This criticism may be linked to the more specific concern that the drafting of some or all of the offences is open to differing constructions. The offences may be interpreted broadly, with the consequence that they may impinge unduly on freedom of expression.

2 See M Chesterman, *Freedom of Speech in Australia: A Delicate Plant* (2000), 7–13.

3 *Freedom of Information Act 1982* (Cth); *Freedom of Information Act 1989* (ACT); *Freedom of Information Act 1989* (NSW); *Information Act 2002* (NT); *Freedom of Information Act 1992* (Qld); *Freedom of Information Act 1991* (SA); *Freedom of Information Act 1991* (Tas); *Freedom of Information Act 1982* (Vic); *Freedom of Information Act 1992* (WA).

4 *Clough v Leahy* (1904) 2 CLR 139, 157; *Malone v Metropolitan Police Commissioner* [1979] Ch 344, 357.

- The sedition provisions give inadequate protection to established media organisations in carrying out their functions of news reporting and the dissemination of bona fide comment on matters of public interest.
- The sedition provisions are likely to ‘chill’ free artistic expression by forcing artists and authors to engage in self-censorship or risk facing prosecution. A related fear is that the scope of the sedition provisions is uncertain and, if interpreted broadly, may cover satire and ridicule, which ought not to be proscribed. Similarly, there is concern that visual artists, whose work is inevitably open to multiple interpretations, could risk prosecution.

7.6 Some of these concerns are interrelated. All are addressed in this chapter, along with consideration of some of the ALRC’s recommendations for reform.

Freedom of expression and the *Constitution*

7.7 The *Constitution* gives express recognition to a limited number of human rights, though none expressly mentions freedom of expression. It has been argued that some provisions—especially s 116, which relates to religious freedom⁵—have the potential to provide some direct protection to freedom of expression.⁶ However, the courts have not interpreted s 116 in this way.

7.8 Of greater constitutional significance is the protection given to political expression. Notwithstanding the absence of explicit constitutional protection for free speech, in a series of cases culminating in *Lange v Australian Broadcasting Corporation*, the High Court has held that the *Constitution* must be read as impliedly protecting a particular category of expression—namely, political communication.⁷ The test for constitutionality was said to involve two limbs:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the *Constitution* to the informed decision of the people.⁸

5 *Australian Constitution* s 116 states: ‘The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth’.

6 The suggestion was made that s 80.2(5) of the *Criminal Code* (Cth) might be inconsistent with s 116 of the *Constitution*: Gilbert & Tobin Centre of Public Law, *Submission 80 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 10 November 2005.

7 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

8 *Ibid.*, 567.

7.9 As was pointed out in *Coleman v Power*, the *Lange* test should be applied such that ‘if the first [question] is answered “Yes”, and the second “No”, the law is invalid’.⁹ In other words, to the extent that a statutory provision under challenge fails to meet these requirements, it will be invalid under the *Constitution*.

7.10 Some stakeholders expressed concern in this Inquiry that the sedition provisions may be unconstitutional. The joint submission of Fairfax, News Ltd and AAP, with which the Australian Broadcasting Corporation (ABC) agreed,¹⁰ argued that ‘there can be no question but that the provisions burden such [political] discourse; the real question is whether they are reasonably adapted to serve a legitimate end’.¹¹

7.11 The submission argued that the provisions are unconstitutional on the following basis:

Given the burden which these offence provisions would appear to impose on discussion in the media of matters necessary and desirable to the effective exercise of their franchise by electors, as required by the Constitutional principle of responsible and representative government, the relevant provisions of the Act appear to exceed what is reasonably required, and not to be reasonably adapted, to serve the legitimate end (anti-terrorism) which the Act seeks to achieve.¹²

7.12 Some other stakeholders express more muted concern about the constitutionality of the sedition offences.¹³

ALRC’s views

7.13 In considering the scope of the constitutional protection of freedom of expression, it is important to bear in mind two propositions. The first is that the constitutional protection given to freedom of political communication is not absolute or unqualified; it extends only to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*.¹⁴ In the specific context of the sedition provisions, the limited nature of the constitutional protection of freedom of expression was acknowledged in the Senate Legal and Constitutional Legislation Committee inquiry into the Anti-Terrorism Bill (No 2) 2005 (the 2005 Senate Committee inquiry).¹⁵

⁹ *Coleman v Power* (2004) 220 CLR 1, 78.

¹⁰ Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006.

¹¹ John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006. See also Australian National University Academics, *Consultation*, Canberra, 27 April 2006; Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006.

¹² John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

¹³ See, eg, ARTICLE 19, *Submission SED 14*, 10 April 2006.

¹⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561; *Langer v Commonwealth* (1996) 186 CLR 302; *Coleman v Power* (2004) 220 CLR 1, 77; M Chesterman, *Freedom of Speech in Australia: A Delicate Plant* (2000), 25.

¹⁵ Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.75].

7.14 The second proposition is that the implied constitutional right encompasses the right (technically vested in people possessing the right to vote in Australian elections) to engage in public criticism of the official conduct of elected representatives.¹⁶

7.15 For a legislative provision to be unconstitutional, it is necessary to show something more than that it merely burdens a broad notion of freedom of political communication. Rather, it would be necessary to demonstrate that the provision infringes the constitutional right to engage in public criticism of the government or government action. The ALRC considers that the sedition provisions cannot reasonably be construed in this way, whether viewed in their current form or in the amended form recommended by the ALRC.

7.16 In the absence of Australian case law since the 1950s dealing with sedition, let alone cases considering the updated sedition offences in s 80.2 of the *Criminal Code* (Cth), it is difficult to assess with complete certainty the scope of operation of the sedition provisions. It is necessary, therefore, to apply the normal processes of statutory interpretation to the relevant offences.

The offences in section 80.2(1), (3) and (5)

7.17 The offences in s 80.2(1), (3) and (5) each purport to criminalise the urging of conduct by ‘force or violence’. This is quite different from the kind of criticism of government that the cases on the constitutional protection of freedom of political communication aim to protect. As McHugh J stated in *Coleman v Power*:

Regulating political statements for the purpose of preventing breaches of the peace by those provoked by the statements is an end that is compatible with the system of representative government established by the Constitution.¹⁷

7.18 The sedition offences appear to fit comfortably within McHugh J’s statement. However, should there be any ambiguity in this regard, a court could look to extrinsic materials.¹⁸ In statements made after the enactment of the *Anti-Terrorism Act (No 2) 2005* (Cth)—which would not strictly be relevant for the purposes of statutory interpretation¹⁹—the Attorney-General’s Department (AGD) and the Attorney-General

16 *Nationwide News v Wills* (1992) 177 CLR 1, 75; *Australian Capital Television v Commonwealth* (1992) 177 CLR 106, 138–139; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 130; M Chesterman, *Freedom of Speech in Australia: A Delicate Plant* (2000), 23.

17 *Coleman v Power* (2004) 220 CLR 1, 53.

18 *Acts Interpretation Act 1901* (Cth) s 15AB, which provides a non-exhaustive list of extrinsic material to which a court may have regard in construing legislation.

19 This is because a court is permitted to have regard only to such explanatory material as is produced prior to the enactment of the statutory provisions that the court is construing: *Ibid* s 15AB(2).

of Australia have sought to make clear that it was not the intention to criminalise mere criticism of the government.²⁰

7.19 There is also some evidence for this in material that would be relevant for the purposes of s 15AB of the *Acts Interpretation Act 1901* (Cth). For instance, the Supplementary Explanatory Memorandum, in explaining the amendment made to the defence to be inserted in s 80.3 of the *Criminal Code* following the 2005 Senate Committee inquiry, stated that this change was designed to ‘reassure those who publish reports or commentaries about matters of public interest’ that they ‘are not caught by the [sedition] provision, provided the publication is done in good faith’.²¹ In the 2005 Senate Committee inquiry, the AGD also suggested that the offence provisions were designed in such a way as to ensure that ‘people who make comments without seeking to incite violence or hatred will not be deprived of the freedom of speech’.²²

7.20 The ALRC considers that the offences in s 80.2(1), (3) and (5) cannot properly be construed in such a way as to capture mere criticism of government action. Consequently, these provisions are unlikely to breach the constitutional protection of freedom of political communication, as it has been articulated by the High Court. However, even if the Crown advocated a contrary interpretation in the prosecution of one or more of these offence provisions, the court would be obliged to ‘read down’ the provision in question so that it remains consistent with the *Constitution*.²³

The offences in section 80.2(7)–(8)

7.21 The ALRC is also of the view that the offences in s 80.2(7)–(8) are unlikely to infringe the *Constitution*.²⁴ The threshold question (that is, the first limb of the *Lange* test) is whether each offence purports to cover ‘communication about government or political matters either in its terms, operation or effect’. If a court took a broad view of the word ‘assist’ in s 80.2(7)–(8), some forms of assistance to an enemy of Australia or to those engaged in armed hostilities against Australia may also fall within the ambit of constitutionally protected political discourse.

7.22 However, even if the first limb of *Lange* were satisfied, the more important question is whether the provisions satisfy the second limb of the *Lange* test, since these offences do not expressly state that the proscribed assistance must relate to ‘force or violence’.

20 Australian Government Attorney-General’s Department, *Consultation*, Canberra, 26 April 2006; P Ruddock, ‘Opening Address’ (Paper presented at Security In Government Conference, Canberra, 9 May 2006), [78].

21 Supplementary Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth).

22 Australian Government Attorney-General’s Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, Attachment A.

23 *Acts Interpretation Act 1901* (Cth) s 15A.

24 In Ch 11, the ALRC recommends, for other reasons, that s 80.2(7) and (8) be repealed. See, Rec 11–1.

7.23 The High Court decision in *Coleman v Power* is relevant to this determination.²⁵ That case dealt with s 7(1)(d) of the *Vagrants, Gaming and Other Offences Act 1931* (Qld), which made it an offence if a person, in a public place, ‘uses any threatening, abusive, or insulting words to any person’.²⁶ Gummow and Hayne JJ addressed the United States ‘fighting words’ cases—namely, the line of authority holding that the First Amendment to the *United States Constitution* does not protect expression that has the purpose or effect of inciting violence. They then said:

The Australian constitutional and legal context is different from that of the United States. The United States decisions about so-called ‘fighting words’ find no direct application here.²⁷

7.24 Gummow and Hayne JJ, with whom Kirby J agreed, assumed (but did not decide) that s 7(1)(d) of the Queensland Act ‘may, in some cases, burden a communication about government or political matters’.²⁸ They then considered whether the provision, so construed, satisfied the second limb of the test in *Lange*. They held that, by construing the term ‘insulting words’ in s 7(1)(d) so as to apply only to ‘words intended, or reasonably likely, to provoke unlawful physical retaliation’, the provision was ‘reasonably appropriate and adapted to serve the legitimate public end of keeping public places free of violence’.²⁹

7.25 The ALRC considers that the burden on political expression caused by s 80.2(7)–(8) of the *Criminal Code* is likely to arise only in a relatively small number of situations, if at all. However, to the extent that it arises, the ALRC believes that these provisions either would not fall foul of the second limb in the *Lange* test or would be construed in such a way as to prevent prosecution in respect of non-violent urging that is ‘disproportionate’³⁰ to serving a legitimate end in the *Lange* sense.

Conclusion on the question of constitutionality

7.26 The principal concern about the constitutionality of the offences in s 80.2 is the risk that they may be used in circumstances where the impugned conduct consists of ‘political speech’ that, in substance, neither incites violence nor directly threatens the institutions of government in Australia or the Australian Defence Force. This risk is most pronounced in relation to the offences in s 80.2(7)–(8). Putting to one side the

²⁵ *Coleman v Power* (2004) 220 CLR 1.

²⁶ The Queensland Parliament amended this provision in 2003, prior to the High Court’s decision in *Coleman v Power*.

²⁷ *Coleman v Power* (2004) 220 CLR 1, 76.

²⁸ *Ibid*, 78 (Gummow and Hayne JJ), 89 (Kirby J).

²⁹ *Ibid*, 77–78 (Gummow and Hayne JJ), 98 (Kirby J).

³⁰ This is the term preferred by Kirby J in *Ibid*, 90.

disincentives to prosecute an offence of this nature,³¹ such a situation is at least theoretically conceivable.

7.27 It is possible to imagine a person being prosecuted under s 80.2(7)–(8) for providing political advice to a country at war with Australia. However, the approach of the High Court in *Coleman v Power* demonstrates that, if an attempt were made to use these provisions to prosecute what might be described as protected political speech by a constitutionally impermissible means, a court would simply adopt a narrower construction of the offence provision. The result would not be invalidity; rather it would be a construction that makes clear that the scope of the provision is too narrow to permit such a prosecution.³²

7.28 The High Court might, at some later stage, expand the constitutional protection to freedom of expression beyond the principles in *Lange*. However, the current state of the law makes it unlikely that a constitutional challenge to the validity of the sedition provisions would be successful. Consequently, the ALRC makes no recommendation to amend the sedition provisions specifically to avoid constitutional invalidity.

7.29 The ALRC does have other concerns about the framing, breadth and potential application of s 80.2(7)–(8), and their overlap with the similar provisions in s 80.1(1)(e)–(f) of the *Criminal Code* concerning treason. In Chapter 11, the ALRC recommends the repeal of s 80.2(7)–(8), and the reform of the treason offences.

Sedition and domestic protection of human rights

7.30 In Issues Paper 30 (IP 30), the ALRC asked whether any aspects of ss 80.2 to 80.6 of the *Criminal Code* were inconsistent with domestic legislation protecting human rights.³³ The ALRC's preliminary view, expressed in Discussion Paper 71 (DP 71), was that there was no relevant substantive inconsistency.³⁴

7.31 As summarised in DP 71, responses to this question indicated no great concern about inconsistency between the sedition provisions and domestic human rights legislation.³⁵ The ALRC did not receive any responses to DP 71 expressing a contrary position.

7.32 The Human Rights and Equal Opportunity Commission (HREOC) noted that there may be some inconsistency between these provisions and the *Human Rights Act 2004* (ACT). However, the fact that the offences in s 80.2 are, in essence, public order

31 See the discussion in Ch 13 on the discretion of the Commonwealth Director of Public Prosecutions to refuse to prosecute.

32 See *Coleman v Power* (2004) 220 CLR 1, 53–56 (McHugh J), 78–79 (Gummow and Hayne JJ).

33 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Question 23.

34 Australian Law Reform Commission, *Review of Sedition Laws*, DP 71 (2006), [7.33].

35 See: *Ibid*, [7.31]–[7.32]; Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 31 March 2006; New South Wales Young Lawyers Human Rights Committee, *Submission SED 38*, 10 April 2006.

offences of general application means that there is no substantive inconsistency with federal human rights legislation.³⁶

7.33 The AGD rejected any suggestion that the sedition provisions are inconsistent with domestic protections of human rights, stating that any inconsistency could only arise if the sedition provisions ‘authorised behaviour that is currently unlawful’ under anti-discrimination legislation. Moreover, the AGD stated:

The Government is satisfied that sections 80.2 to 80.6 of the *Criminal Code* are consistent with domestic human rights legislation and there has been no rolling back of any of Australia’s domestic human rights legislation.³⁷

ALRC’s views

7.34 The ALRC concludes that there is no substantive inconsistency between the sedition provisions and domestic human rights legislation. This view applies with reference to the sedition provisions in their current form, and as they would appear if the amendments recommended by the ALRC were adopted.

7.35 In forming this view, it is necessary to put to one side the question whether the sedition provisions are compatible with the *International Covenant on Civil and Political Rights 1966* (ICCPR)—an issue that is discussed in detail in Chapter 5.

Risk of unfair or discriminatory application of sedition laws

7.36 At an earlier stage of the Inquiry, the ALRC noted that concerns have been raised that some of the new offences may be applied disproportionately or unfairly to the disadvantage of particular groups within the Australian community. The ALRC asked whether this was a problem and, if so, what legal or administrative steps should be taken to address it.³⁸

7.37 Australian law prohibits many forms of direct and indirect discrimination. At the federal level, the most important Acts are the *Racial Discrimination Act 1975* (Cth) (RDA), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth). Protections are also afforded by other federal laws dealing with discrimination in particular circumstances,³⁹ and by state and territory anti-discrimination laws.⁴⁰

36 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 31 March 2006.

37 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

38 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Question 24.

39 See, eg, *Human Rights and Equal Opportunity Commission Act 1986* (Cth); *Workplace Relations Act 1996* (Cth) s 222.

40 See, especially, *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Racial Vilification Act 1996* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 1995* (Vic); *Racial and Religious Tolerance Act 2001* (Vic); *Equal Opportunity Act 1984* (WA); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1992* (NT).

7.38 Importantly for present purposes, s 9 of the RDA prohibits both direct and indirect discrimination ‘based on race, colour, descent or national or ethnic origin’. Taking the example of racial discrimination, the difference between direct and indirect discrimination is as follows. Direct discrimination occurs where the rights of a person, X, are impaired because of conduct that distinguishes, excludes, restricts or prefers another person on the basis of certain grounds, such as X’s national origin.⁴¹ Indirect discrimination occurs where X cannot comply with a particular requirement or condition (which has the purpose or effect of impairing X’s rights), but a higher proportion of people that do not have X’s national origin could comply, and the condition is unreasonable in all the circumstances.⁴²

7.39 There are two ways in which unlawful discrimination might arise. The first is where the legislation in question is directly or indirectly discriminatory. In this situation, the solution would be to amend the legislation. The second is where the legislation itself is neither directly nor indirectly discriminatory; however, those responsible for enforcing it may be doing so in a discriminatory manner. To take a hypothetical example: the offence of tax fraud is not itself discriminatory; nevertheless if it were apparent that the authorities were targeting only members of a particular racial group, this would give rise to discrimination against that group. The solution would not be to amend the legislation (unquestionably, there should be an offence of tax fraud). Rather, it would be necessary to direct attention to those who enforce the law, and to take steps to prevent them from enforcing the law unequally.

Submissions and consultations

7.40 Submissions to the Inquiry demonstrated a concern that the sedition provisions, in their application, could have an unfair or indirectly discriminatory impact on certain groups within the Australian community, particularly those who are already disadvantaged or marginalised.⁴³ The AGD did not share this view, stating that the offences do not ‘expressly or impliedly discriminate against any racial, ethnic or religious groups’ and that they ‘apply equally to any group or groups’.⁴⁴

7.41 Some of those critical of the provisions argued that this is an inevitable incident of the legislative framework. For example, the Federation of Community Legal Centres (Vic) (Federation of CLCs) submitted:

⁴¹ *Racial Discrimination Act 1975* (Cth) s 9(1).

⁴² *Ibid* s 9(1A).

⁴³ Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; New South Wales Young Lawyers Human Rights Committee, *Submission SED 38*, 10 April 2006; E Nekvapil, *Submission SED 45*, 13 April 2006; Arts Law Centre of Australia, *Submission SED 46*, 13 April 2006; Combined Community Legal Centres Group (NSW) Inc, *Submission SED 50*, 13 April 2006; B Saul, *Submission SED 52*, 14 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006; G Zdenkowski, *Submission SED 64*, 3 May 2006.

⁴⁴ Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

This potential for politicised and discriminatory prosecution is not simply an unintended by-product of the sedition laws. In our view it is the very nature of the laws, insofar as they are intended to prosecute political speech, that they be prosecuted in a politicised manner.⁴⁵

7.42 A similar point was made by the New South Wales Young Lawyers Human Rights Committee, and others, who pointed to the fact that public order offences, and particularly those directed ‘against publicly insulting or offensive speech’, historically have been disproportionately and unfairly enforced.⁴⁶

7.43 A number of stakeholders asserted that there has been disproportionate ‘targeting’ of individuals of Muslim faith or those of Middle Eastern origin.⁴⁷ The Australian Muslim Civil Rights Advocacy Network (AMCRAN) described this as a form of ‘social exclusion’.⁴⁸ The Federation of CLCs submitted:

The current climate of institutionalised ‘Islamophobia’ and the widely held perception of a link between Islam and terrorism creates a grave risk that Muslim individuals may be disproportionately prosecuted with sedition offences (as it would seem Communist Party members were in the past). Statements made by Muslims before a Muslim audience may be more readily regarded as seditious than similar such statements made by other community members. The statements of Muslim community members may be perceived through the lens of the highly politicised concept of ‘extremism’ and as a result assessed as ‘terrorist’ or seditious.⁴⁹

7.44 The Public Interest Advocacy Centre (PIAC) stated that the establishment of a permanent police taskforce to work in Muslim communities in southwest Sydney has caused greater scrutiny of this section of the broader community. PIAC submitted that this, coupled with the fact that s 80.2 of the *Criminal Code* requires the Attorney-General to give consent only to the prosecution of a sedition offence (with no such requirement in respect of arrest, detention or charge), ‘leads to a very real risk that action will be taken against members of this community by police in reliance on the provisions even if there is limited likelihood of a prosecution being approved by the Attorney-General’.⁵⁰

⁴⁵ Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006.

⁴⁶ New South Wales Young Lawyers Human Rights Committee, *Submission SED 38*, 10 April 2006. See also E Nekvapil, *Submission SED 45*, 13 April 2006.

⁴⁷ Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; New South Wales Young Lawyers Human Rights Committee, *Submission SED 38*, 10 April 2006; Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006; E Nekvapil, *Submission SED 45*, 13 April 2006; Combined Community Legal Centres Group (NSW) Inc, *Submission SED 50*, 13 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006; P Emerton, *Submission SED 108*, 3 July 2006.

⁴⁸ Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

⁴⁹ Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006. See also E Nekvapil, *Submission SED 45*, 13 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

⁵⁰ Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

7.45 The Combined Community Legal Centres Group (NSW) Inc cited the concluding observations of the Committee on the Elimination of Racial Discrimination in 2005, as relevant to Australia:

The Committee notes with concern reports that prejudice against Arabs and Muslims in Australia has increased and that the enforcement of counter-terrorism legislation may have an indirect discriminatory effect against Arab and Muslim Australians.

The Committee ... recommends that the State party increase its efforts to eliminate such prejudice and ensure that enforcement of counter-terrorism legislation does not disproportionately impact on specific ethnic groups and people of other national origins.⁵¹

7.46 AMCRAN expressed its concern about the undesirable eventuality of ‘the criminalisation of statements made by Muslims as “incitement” where there may otherwise be no evidence of violent acts which threaten the safety of the public’.⁵²

Suggestions for reform

7.47 Suggestions were made to counteract the threat of unfair enforcement of the sedition offences. These fall into two categories: education and external monitoring.

7.48 In relation to the former, it was suggested that education programs should be developed to inform the Muslim community of ‘what may be covered by the legislation and what the legal rights of those affected are’,⁵³ and that law enforcement authorities be given more cross-cultural training.⁵⁴ Emrys Nekvapil submitted that these provisions are likely to hamper inter-community dialogue, stating that ‘creating self-censorship around opinions in support of an enemy can only inhibit exactly that dialogue which is required at all levels to bring about understanding and the peaceful resolution of differences’.⁵⁵

7.49 The AGD also recognised that education and communication in this area represents an ‘important aspect of ensuring that this legislation is applied fairly’. The AGD pointed to the establishment of the following program:

The Australian Federal Police delivers a cultural diversity program to all new recruits and provides a booklet on Cultural Diversity as a ready reference to different cultures. This booklet, *A Practical Reference to Religious Diversity for Operational Police and Emergency Services*, is produced by the Australasian Police Multicultural Advisory Bureau. In furtherance to this, a program focusing on Islamic culture will be delivered

51 Combined Community Legal Centres Group (NSW) Inc, *Submission SED 50*, 13 April 2006 citing Committee on the Elimination of Racial Discrimination, *Concluding Observations*, UN Doc CERD/C/AUS/CO/14 (2005), [13].

52 Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006. See also P Emerton, *Submission SED 108*, 3 July 2006.

53 E Nekvapil, *Submission SED 45*, 13 April 2006.

54 B Saul, *Submission SED 52*, 14 April 2006.

55 E Nekvapil, *Submission SED 45*, 13 April 2006.

across the organisation to all employees, with the first of many courses commencing this financial year.⁵⁶

7.50 Some people expressed doubt about whether education would be effective in this area. Patrick Emerton supported ‘community education to improve inter-communal harmony’ but he was ‘not certain that the political impact of such education will be as great as the impact that the passage of this legislation already has had’.⁵⁷ The Queensland Council for Civil Liberties doubted that education would be an effective means ‘significantly [to] diminish the possibility that this legislation will be used in a discriminatory fashion’. It drew a parallel with other education programs, which it did not believe were effective:

When one looks for example, at the misuse of powers such as move-on powers, recently granted to Police in State jurisdictions, it seems clear that despite relevant education programs these powers are overwhelmingly used against particular groups in society, namely the young, indigenous, disadvantaged and homeless.⁵⁸

7.51 In relation to monitoring, PIAC submitted that the government should ‘monitor the impact of these provisions through collection of statistics on who is being subject to these measures and whether they are being abused’.⁵⁹ Similarly, Emrys Nekvapil suggested the establishment of ‘accessible complaint mechanisms for people targeted by these laws’ and ‘a comprehensive system of reporting and recording all incidents, investigations and crimes under the new sedition legislation’.⁶⁰

7.52 The AGD noted that a person who feels they have suffered indirect discrimination in contravention of the RDA may complain to HREOC or initiate action in the courts.⁶¹ It also would be possible to take a complaint to the Commonwealth Ombudsman or to seek disciplinary action against an Australian Federal Police officer.

ALRC’s views

7.53 One concern of the ALRC is the risk that the decision about whom to prosecute for a sedition offence may be tainted by political considerations—either in appearance or in reality. As outlined in Chapter 2, the law of sedition was used in earlier times to criminalise political dissent in a manner that seems incompatible with contemporary notions of free speech in a liberal democracy.

7.54 The recommendations in this Report deal with this risk in two ways. First, in Chapter 2 the ALRC recommends that term ‘sedition’ should be removed from the

56 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

57 P Emerton, *Submission SED 108*, 3 July 2006.

58 Queensland Council for Civil Liberties, *Submission SED 101*, 3 July 2006.

59 Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

60 E Nekvapil, *Submission SED 45*, 13 April 2006.

61 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

statute book, thereby severing the tie with the old jurisprudence, which pays insufficient regard to freedom of expression and freedom of association.⁶² Secondly, in Chapter 13 the ALRC recommends that the current provisions dealing with the Attorney-General's consent for prosecution should be repealed.⁶³ The ALRC endorses the independent role of the Commonwealth Director of Public Prosecutions (CDPP) in making prosecutorial decisions and considers that, in the particular context of these offences, the requirement for the Attorney-General to consent to prosecution should be removed in order to avoid any perception that there may be a political element in the decision whether or not to prosecute.

7.55 The ALRC is of the view that the sedition provisions are themselves neither directly nor indirectly discriminatory. As Gummow, Hayne and Heydon JJ stated in *Purvis v New South Wales*, a 'central purpose' of the RDA is 'to require that people not be treated differently' on the grounds prescribed in the Act.⁶⁴ It cannot reasonably be said that the statutory provisions promote an object, or tend towards consequences, inconsistent with the operative purpose of the RDA. Although the sedition offences are not structured in such a way as to promote unlawful discrimination, this is not to say that discrimination in this area is impossible. On one level, *any* offence may be applied in a discriminatory manner to target particular groups. Again, if that occurs, there are avenues of redress through HREOC and the federal courts.

7.56 The ALRC is conscious of the genuinely held concern that the sedition offences may operate unfairly, particularly against people of the Muslim faith or those from a Middle Eastern background. However, as explained below, the ALRC considers that the most appropriate way to deal with the risk of unfair application of the sedition provisions is through a prosecutorial system free of political interference and through education and related strategies. For this reason, the ALRC recommends that the Australian Government continue to pursue strategies, such as educational programs, to promote inter-communal harmony and understanding.⁶⁵

Absence of bills of rights in Australia

7.57 As previously noted, the ACT and Victoria are the only Australian jurisdictions that currently possess bills of rights.⁶⁶ Section 16 of the *Human Rights Act 2004* (ACT) specifically recognises freedom of expression, stating that:

- (1) Everyone has the right to hold opinions without interference.
- (2) Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, whether orally, in writing or in print, by way of art, or in another way chosen by him or her.

62 See Rec 2–1.

63 See Rec 13–1 and accompanying text.

64 *Purvis v New South Wales* (2003) 217 CLR 92, 153–154.

65 See Rec 10–5.

66 *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

7.58 The Chief Minister of the ACT submitted that the sedition provisions, ‘if passed locally [ie in the ACT], would be inconsistent with the *Human Rights Act 2004*’. In his view, they would fail the test of proportionality by the following chain of reasoning. First, while it is legitimate for government to attempt to stop the spread of terrorism, it is ‘not legitimate to suppress mere commentary, even radical commentary, on such issues’. Secondly, there is no ‘rational connection between the offences and the legitimate objective of preventing the spread of terrorist activities’. Thirdly, the provisions do not represent the least restrictive means possible of achieving the legitimate aim of preventing terrorism because they are too vague and, potentially, too broad. In particular, the offences should contain a requirement that a person charged with a sedition offence must ‘intend that the conduct urged be in fact carried out’. Moreover, ‘assist’ in s 80.2(7)–(8) ‘is too wide and too imprecise’. Fourthly, the defences do not provide adequate protection for legitimate expression.⁶⁷

7.59 The Victorian Government has indicated its intention to enact a Charter of Human Rights and Responsibilities. A Bill for this purpose was introduced in the Victorian Legislative Assembly on 2 May 2006 and was enacted and assented to on 25 July 2006.⁶⁸ The Explanatory Memorandum stated that the Bill was designed to ‘establish a framework for the protection and promotion of human rights’, based on those contained in the ICCPR.⁶⁹ The Act contains a provision recognising freedom of expression in a manner similar to art 19 of the ICCPR:

- (1) Every person has the right to hold an opinion without interference.
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—
 - (a) orally; or
 - (b) in writing; or
 - (c) in print; or
 - (d) by way of art; or
 - (e) in another medium chosen by him or her.
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—
 - (a) to respect the rights and reputation of other persons; or

⁶⁷ J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006.

⁶⁸ Charter of Human Rights and Responsibilities Act 2006 (Vic).

⁶⁹ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic).

- (b) for the protection of national security, public order, public health or public morality.⁷⁰

7.60 Governments in Tasmania, Western Australia and New South Wales also have indicated that they may consider the introduction of bills or charters of rights.⁷¹ However, recent news reports suggest that the current Australian Government intends to oppose—possibly, by way of legal challenge—any attempt by a state to introduce its own bill of rights.⁷²

7.61 In most comparable foreign jurisdictions, freedom of expression is protected in a statutory or constitutional bill of rights. Some jurisdictions—including the United States, Canada,⁷³ Germany⁷⁴ and South Africa⁷⁵—provide constitutional protection to freedom of expression. The archetypal constitutional articulation of freedom of expression is the First Amendment to the *United States Constitution*, which states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

7.62 Other jurisdictions such as the United Kingdom⁷⁶ and New Zealand⁷⁷ recognise freedom of expression in statutory bills of rights. Irrespective of whether it is protected by a constitutional or a statutory bill of rights, freedom of expression tends to be conceived, and protected, in a manner that is broadly consistent with the approach taken in art 19 of the ICCPR.⁷⁸ In other words, freedom of expression is regarded as a human right of fundamental importance—though in certain circumstances this right must be reconciled with other competing rights or interests.

7.63 Submissions and consultations expressed a concern that the sedition provisions are made more problematic by the absence of a federal bill of rights in Australia.⁷⁹ Some expressed this concern in general terms, with the argument essentially being that a bill of rights would provide an important counter-balance to any undesirable

⁷⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15.

⁷¹ E Hannan, 'Minister Joins Bill of Rights Backers', *The Australian*, 20 March 2006, 15; M Farr, 'PM Will Fight States' Push for Bill of Rights', *The Daily Telegraph* (Sydney), 27 March 2006, 13.

⁷² See, eg, M Farr, 'PM Will Fight States' Push for Bill of Rights', *The Daily Telegraph* (Sydney), 27 March 2006, 13; M Farr, 'State Rights Push Wrong', *The Daily Telegraph* (Sydney), 7 April 2006, 17.

⁷³ *Canadian Charter of Rights and Freedoms* s 2(b).

⁷⁴ *Basic Law* art 5(1).

⁷⁵ *Constitution of the Republic of South Africa 1996* s 16.

⁷⁶ *Human Rights Act 1998* (UK) ss 12–13, which should be read in conjunction with the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222, (entered into force generally on 3 September 1953) art 10.

⁷⁷ *New Zealand Bill of Rights Act 1990* (NZ) ss 13–14.

⁷⁸ *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976). See Ch 5 for an analysis of art 19 of the ICCPR.

⁷⁹ E Nekvapil, *Submission SED 45*, 13 April 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006; Media and Arts Organisations, *Consultation*, Sydney, 29 March 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 89*, 3 July 2006.

incursions that the sedition provisions might make on people's human rights.⁸⁰ Others expressed a concern that it is inappropriate to justify Australia's sedition legislation on the basis that other jurisdictions have similar legislation because those jurisdictions (most notably, the United Kingdom) do possess a bill of rights.⁸¹

ALRC's views

7.64 An Australian bill of rights, if there were one, might well provide safeguards against the unwarranted and undesirable incursion of sedition laws into individuals' human rights. However, the question whether Australia should enact a bill of rights falls well outside the Terms of Reference of this Inquiry.

7.65 Nevertheless, two points should be made. First, the fact that a jurisdiction has a bill of rights does not prevent that jurisdiction from taking robust anti-terrorism measures. This is evidenced by recent legislative amendments in the United States, the United Kingdom and elsewhere.⁸² This demonstrates that governments bound by constitutional or statutory bills of rights nevertheless consider it is possible to reconcile vigorous responses to terrorism with formal, enforceable requirements to respect an individual's freedom of expression.

7.66 Secondly, the absence of a bill of rights at the federal level in Australia does not remove or lessen the importance of measuring the sedition provisions against accepted human rights standards. On the contrary, it means that a safeguard that exists in some other jurisdictions to prevent legislation from breaching human rights is not present in Australia. This in turn heightens the need for legislation that has the potential to impact on human rights to be carefully considered—both prior to enactment in Parliament and when the law is subject to later review—in order to ensure that it does not breach fundamental human rights, as recognised, for instance, in the ICCPR.

Sedition and freedom of expression generally

7.67 The sedition offences unquestionably involve some dilution of an absolute notion of freedom of expression. In criminalising certain categories of expression, the relevant statutory provisions must necessarily reduce the scope of lawful expression.

7.68 As a general proposition, this is neither unique nor illegitimate. The law in Australia and elsewhere has always imposed legal restrictions on certain forms of expression—for instance, where it is defamatory (civil liability), or indecent or obscene (criminal liability). The Privy Council, hearing an appeal from the High Court of Australia in 1936, observed:

80 See, eg, Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 89*, 3 July 2006.

81 E Nekvapil, *Submission SED 45*, 13 April 2006.

82 See, in particular, the discussion in Ch 6.

Free speech does not mean free speech; it means speech hedged in by all the laws against defamation, blasphemy, sedition and so forth; it means freedom governed by law ...⁸³

7.69 The question is whether the current sedition offences impose an unwarranted or unlawful burden on freedom of expression. Particular concern has been expressed that the sedition offences will impact negatively on members of the media and the arts. However, other groups who are said to be at particular risk include academics,⁸⁴ political activists, religious leaders and dissidents generally.

Submissions and consultations

7.70 Many stakeholders argued that the offences, taken as a whole, are likely to chill free speech within the community in a manner inconsistent with Australia's status as a liberal democracy.⁸⁵ This criticism was often linked to the more specific concern that the offences may be interpreted broadly, and unduly infringe upon freedom of expression.⁸⁶

83 *James v Commonwealth* (1936) 55 CLR 1, 56.

84 See Australian Vice-Chancellors' Committee, *Submission SED 60*, 25 April 2006; National Tertiary Education Union, *Submission SED 118*, 3 July 2006.

85 S Smith, *Submission SED 04*, 24 March 2006; B Ho, *Submission SED 07*, 9 March 2006; A Spathis, *Submission SED 17*, 10 April 2006; Law Society of Western Australia, *Submission SED 19*, 28 March 2006; letter accompanying National Tertiary Education Union, *Submission SED 25*, 10 April 2006; Australian Writers' Guild, *Submission SED 29*, 11 April 2006; Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; Screen Producers Association of Australia, *Submission SED 35*, 11 April 2006; Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006; Australian Press Council, *Submission SED 48*, 13 April 2006; Australian Screen Directors Association, *Submission SED 51*, 10 April 2006; B Saul, *Submission SED 52*, 14 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006, which was endorsed in Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006; B Wright, *Submission SED 58*, 19 April 2006; National Legal Aid, *Submission SED 62*, 20 April 2006; Australian Vice-Chancellors' Committee, *Submission SED 60*, 25 April 2006; Media and Arts Organisations, *Consultation*, Sydney, 29 March 2006; Media Organisations, *Consultation*, Sydney, 28 March 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006.

86 Australian Society of Authors, *Submission SED 24*, 18 April 2006; letter accompanying National Tertiary Education Union, *Submission SED 25*, 10 April 2006; Professor JM Coetzee, Tom Keneally and David Williamson on behalf of Sydney PEN, Sydney PEN, *Submission SED 27*, 10 April 2006; Australian Writers' Guild, *Submission SED 29*, 11 April 2006; National Association for the Visual Arts, *Submission SED 30*, 11 April 2006; Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; Australia Council for the Arts, *Submission SED 34*, 11 April 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006; J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006; Arts Law Centre of Australia, *Submission SED 46*, 13 April 2006; Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006; Combined Community Legal Centres Group (NSW) Inc, *Submission SED 50*, 13 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006, which was endorsed in Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006; Australian Vice-Chancellors' Committee, *Submission SED 60*, 25 April 2006; Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 31 March 2006; Human Rights Lawyers, *Consultation*,

7.71 AMCRAN submitted that ‘the sedition offences lead to a significant chilling effect on the Muslim community in expressing legitimate support for self-determination struggles around the world’.⁸⁷ AMCRAN observed:

The offences have a particular effect on Muslim community groups who may wish to express solidarity with Muslims who live under oppressive regimes or various kinds of occupying forces. This is particularly the case as the law makes no distinction between legitimate liberation and independence movements and terrorism.⁸⁸

7.72 There was particular concern about s 80.2(7)–(8), with a number of people arguing that these provisions are too broad, inhibiting freedom of expression to an unwarranted degree.⁸⁹ The National Association for the Visual Arts (NAVA) submitted:

Organizers and speakers at the huge protest marches and gatherings of thousands of Australian citizens which took place immediately prior to the commitment by the Australian government to join the ‘Coalition of the Willing’ in sending troops to Iraq, could now be regarded as urging conduct which assists a country at war with Australia and therefore seditious under this law.⁹⁰

7.73 The New South Wales Council for Civil Liberties and the Fitzroy Legal Service offered similar examples,⁹¹ and argued that criminalising such activity would be fundamentally anti-democratic.

7.74 A pragmatic argument for not criminalising expression that might be considered seditious is that the presence of strong legislation might in fact be counter-productive.⁹² Associate Professor Roger Douglas stated:

First, calls for violence may be an emotional substitute for actual violence ... Second, violent rhetoric may sometimes best be left alone. Prosecutions may inflate the importance of defendants, and give them status among those who share their alienation ... Third, violent rhetoric may constitute a useful sign that something is wrong. No doubt it will assist security, which will be alerted to the need to investigate what underlies the rhetoric. It may also be an invitation to examine grievances. Fourth, governments may conclude that prosecutions for violent rhetoric are likely to

Sydney, 29 March 2006; Media Organisations, *Consultation*, Sydney, 28 March 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006.

87 Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

88 Ibid.

89 National Association for the Visual Arts, *Submission SED 30*, 11 April 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006; Arts Law Centre of Australia, *Submission SED 46*, 13 April 2006; Australian Press Council, *Submission SED 48*, 13 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006, which was endorsed in Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006.

90 National Association for the Visual Arts, *Submission SED 30*, 11 April 2006.

91 New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006; Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006.

92 See, eg, New South Wales Council for Civil Liberties Inc, *Submission SED 89*, 3 July 2006; R Douglas, *Submission SED 87*, 3 July 2006.

have political costs. These include criticisms to the effect that the government is persecuting its enemies, and the risk that the prosecution will fail, in which case the government will appear to have suffered a defeat.⁹³

7.75 Most critics of s 80.2(7)–(8) argued for repeal.⁹⁴ Others put as their preferred position⁹⁵—or as a second preference if repeal were unavailable⁹⁶—that these provisions be amended to ensure they only capture conduct intended to lead to violence.

7.76 In response, the AGD provided its own hypothetical examples, drawing the following distinction:

Where someone places a notice on the internet calling for a more restrictive immigration policy in relation to young people from certain countries, it might enrage many young people from those countries, but it would not amount to sedition if it was genuinely about immigration policy. Therefore people who are merely criticising government policy or urging a change to the law have a defence available to them.⁹⁷

ALRC's views

7.77 Among the provisions that are the subject of this Inquiry, s 80.2(7)–(8) of the *Criminal Code* have the greatest potential to cause incursions into the right to freedom of expression. The ALRC shares the concern that these provisions do not draw a clear enough distinction between legitimate dissent—speech that ought not to be interfered with in a liberal democracy—and expression whose purpose or effect is to cause the use of force or violence within the state. Lee, Hanks and Morabito make the point in the following terms:

A distinction has to be made between, on the one hand, those who wish to overthrow the democratic system or use violence or threats of violence to violate democratic procedures and, on the other hand, those who seek radical change in the social, economic or political arrangements within the democratic system. Such a distinction must not be abandoned, even though difficulty may arise in particular cases.⁹⁸

7.78 For the reasons discussed in Chapter 11, the ALRC recommends the repeal of s 80.2(7)–(8). Further, the ALRC recommends that the similar treason offences in s 80.1(1)(e)–(f) be modified to make it clear that mere rhetoric or expressions of dissent are not caught. The prosecution should have to prove beyond reasonable doubt

93 R Douglas, *Submission SED 87*, 3 July 2006.

94 See, eg, New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006; Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006.

95 Australian Major Performing Arts Group, *Submission SED 61*, 16 April 2006; N Roxon MP Shadow Attorney-General, *Submission SED 63*, 28 April 2006.

96 New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; Australian Press Council, *Submission SED 48*, 13 April 2006; Australian Screen Directors Association, *Submission SED 51*, 10 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006, which was endorsed in Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006.

97 Australian Government Attorney-General's Department, *Submission SED 31*, 12 April 2006.

98 H Lee, P Hanks and V Morabito, *In the Name of National Security: The Legal Dimensions* (1995), 17.

that the defendant has *materially* assisted an enemy to wage war—for instance, through the provision of funds, troops, armaments or strategic information.⁹⁹

7.79 As discussed in detail in Chapters 8–10, the ALRC also recommends reframing the elements required for liability under s 80.2(1), (3) and (5) of the *Criminal Code*. In recognition of the need for clear protection for freedom of expression, the ALRC recommends that the prosecution should be required to prove that the person intended that the force or violence urged will occur (Recommendation 8–1).

7.80 Under Recommendation 12–2, the trier of fact, in considering this element of the offence, would be required to consider the context—that is, whether the conduct in question was done: in the development, performance, exhibition or distribution of an artistic work; or 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 in connection with an industrial dispute or an industrial matter; or in the dissemination of news or current affairs.

7.81 Finally, Recommendation 4–1 calls for the repeal of the provisions in Part IIA of the *Crimes Act* concerning unlawful associations, which should answer the concerns of universities, theatre owners, art galleries and others that they might be prosecuted for hosting conduct by others that has an underlying ‘seditious intention’.

Journalism and the arts

7.82 Particular concerns have been expressed to the Inquiry that the sedition offences may impact negatively on the right to freedom of expression enjoyed by journalists and their publishers, as well as people engaging in or facilitating artistic expression—all of whom may be exposed to restrictions on freedom of expression because their role often involves reporting or reflecting unpopular or dissenting viewpoints.

7.83 One particular suggestion was for the *Criminal Code* to be amended specifically to provide that the offences currently located in s 80.2 would not apply to journalists, the media and artists. Such an exemption is often referred to as a ‘carve-out’ and would render the relevant offences inoperable as against a specified class of persons.

7.84 This suggestion is considered, but rejected, in Chapter 12. There are three problems with such a provision. First, its scope—in terms of the people to whom the exemption would apply—is difficult to determine and involves a high degree of subjectivity. Secondly, it would be anomalous in the context of the criminal law for journalists and artists to be permitted to engage in conduct that would be criminal if

99 See Recs 11–1 and 11–2, and accompanying text. Aid of a humanitarian nature is already exempt under s 80.1(1A).

committed by someone else. Thirdly, there is a concern that a person, who is in fact engaging in dangerous conduct that ought to be criminalised, might be able to take advantage of such a provision to escape prosecution.

Journalists

7.85 Submissions to the Inquiry identified particular concern that the sedition provisions could leave the established media organisations liable to prosecution for carrying out their functions of news reporting and the dissemination of bona fide comment on matters of public interest or importance.¹⁰⁰ The general concern, as expressed in the joint submission of Fairfax, News Ltd and AAP, is that there is ‘a real risk’ that

a comment made, letter or advertisement published, wire service story or interview reproduced, factual report carried, video-tape footage published, editorial opinion expressed, or feature film or documentary screened could by reason of its subject matter, prominence, content, tone, wording, manner of promotion and ultimate authorship be thought capable of being held by a jury to amount to ‘urging’ of a proscribed kind ... particularly if it were perceived to form part of an ongoing campaign.¹⁰¹

7.86 Several specific concerns also were identified. First, the provisions could lead to self-censorship because media organisations are uncertain about how broadly the provisions will be interpreted. Essentially, the concern seems to be that ‘fear of inadvertently breaching the law is likely to impact on the willingness of many in the community to publicly express their views and their opposition to government actions and programs’.¹⁰² The Media, Entertainment and Arts Alliance (MEAA) submitted:

Part of the uncertainty stems from the wording, including the offences of ‘urging’ others to use ‘force or violence’ and the question of intent. It is hard to control or predetermine how individuals will interpret the various layers of meaning that comprise an actor’s performance or a playwright/screenwriter’s script.¹⁰³

7.87 Another concern relates to the potential breadth of the ‘urging’ offences in s 80.2 of the *Criminal Code*. The MEAA asked whether journalists ‘who directly quote

100 Media Entertainment and Arts Alliance, *Submission SED 28*, 10 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; Australian Screen Directors Association, *Submission SED 51*, 10 April 2006; B Saul, *Submission SED 52*, 14 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006, which was endorsed in Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006; Free TV Australia, *Submission SED 59*, 19 April 2006; Australian Vice-Chancellors’ Committee, *Submission SED 60*, 25 April 2006; N Roxon MP Shadow Attorney-General, *Submission SED 63*, 28 April 2006; Media Organisations, *Consultation*, Sydney, 28 March 2006; Human Rights Lawyers, *Consultation*, Sydney, 29 March 2006.

101 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006. Agreement with this position was expressed in Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006. See also Free TV Australia, *Submission SED 59*, 19 April 2006.

102 Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

103 Media Entertainment and Arts Alliance, *Submission SED 28*, 10 April 2006. See also, Victoria Legal Aid, *Submission SED 43*, 13 April 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

other people in their stories' are likely to commit an urging offence, albeit 'unwittingly'.¹⁰⁴ Fairfax, News Ltd and AAP expressed a similar fear, noting that it might become increasingly difficult for the media lawfully to 'facilitate or contribute to debate on the topic of "terrorism"'.¹⁰⁵

7.88 Thirdly, the offences of assisting the enemy in s 80.2(7)–(8) are potentially so broad as to capture conduct that should not be criminalised. The MEAA hypothesised as follows:

A play sympathetic to Iraqi Insurgents; an article celebrating the Eureka Stockade that draws parallels with the current workplace struggles; cartoonists and commentators giving drawn, written or verbal support or encouragement to groups deemed to be 'enemies' of the Commonwealth ... could all conceivably be caught by this offence. Of major concern is that the 'enemy' does not have to be an organisation or a country with which a state of war has been declared. It can be one 'specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth'.¹⁰⁶

7.89 The AGD rejected criticism that the sedition provisions unduly infringe upon the ability of the media to operate freely:

Given that the sedition offences always involve intentionally urging violence (either directly or indirectly by assisting an enemy), it is unlikely that the conduct of journalists and media organisations would be captured within these offences.¹⁰⁷

7.90 The AGD's submission also pointed out that, in any event, under existing law 'the defence of good faith would protect journalists and media organisations that act in good faith'.¹⁰⁸

The arts

7.91 A number of stakeholders expressed the concern that the sedition provisions are likely to 'chill' free artistic expression by encouraging artists and authors to engage in self-censorship or risk facing prosecution.¹⁰⁹ There was a concern that the offences may be interpreted so as to criminalise certain forms of satire, parody and ridicule.¹¹⁰

¹⁰⁴ Media Entertainment and Arts Alliance, *Submission SED 28*, 10 April 2006. See also Free TV Australia, *Submission SED 59*, 19 April 2006.

¹⁰⁵ John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006, which was endorsed in Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006.

¹⁰⁶ Media Entertainment and Arts Alliance, *Submission SED 28*, 10 April 2006. See also John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006, which was endorsed in Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006. A similar concern is expressed by Free TV Australia, *Submission SED 59*, 19 April 2006.

¹⁰⁷ Australian Government Attorney-General's Department, *Submission SED 31*, 12 April 2006.

¹⁰⁸ Ibid.

¹⁰⁹ Confidential, *Submission SED 12*, 4 April 2006; Australian Society of Authors, *Submission SED 24*, 18 April 2006; Media Entertainment and Arts Alliance, *Submission SED 28*, 10 April 2006; Australian Writers' Guild, *Submission SED 29*, 11 April 2006; Centre for Media and Communications Law,

7.92 The Australian Writers' Guild submitted that the chilling effect of the sedition provisions will lead to self-censorship, which will have the following effect:

If writers know that their works have little chance of being produced as they may be perceived as risky, seditious or confrontational, there is less likelihood of writers creating such works and of striving only to meet the requirements of broadcasters and publishers. Stories will remain untold. Voices will remain unheard. Audiences will not be challenged, ideas will not be thrust forward. Life will become increasingly unexamined. And Australia will not only lose a richness and diversity in terms of the kinds of films, television programmes, theatre and interactive content available to them, there is the real chance that we will also lose a vast amount of skills.¹¹¹

7.93 The Arts Law Centre of Australia submitted that the sedition provisions might impact disproportionately on impecunious artists because they will be 'unwilling to risk incurring fees for legal advice, let alone defending actions'.¹¹²

7.94 A further risk—one that NAVA submitted is already a reality—is that those who facilitate the exhibition and performance of artistic works (such as gallery owners and theatre companies) will refuse to deal with certain works if they are fearful that they may be interpreted as being seditious.¹¹³

7.95 During consultations, a number of hypothetical scenarios were raised. Some stakeholders expressed the fear that mere discussion of certain matters related to terrorism could be caught by the new sedition provisions. NAVA offered the following hypothetical example:

An artist might represent the events of September 11 intending this to be critical of what happened. However, a viewer may think that the artist is in support of the perpetrators. The artist could be accused of being responsible for urging another person to commit similar offences, as a result of the viewer interpreting their artwork in an unintended way.¹¹⁴

Submission SED 32, 12 April 2006; Screen Producers Association of Australia, *Submission SED 35*, 11 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006; Arts Law Centre of Australia, *Submission SED 46*, 13 April 2006; Australian Press Council, *Submission SED 48*, 13 April 2006; Australian Screen Directors Association, *Submission SED 51*, 10 April 2006; Media and Arts Organisations, *Consultation*, Sydney, 29 March 2006; Independent Producers Initiative Inc, *Submission SED 76*, 3 July 2006.

110 Media and Arts Organisations, *Consultation*, Sydney, 29 March 2006; Cameron Creswell Agency Pty Ltd, *Submission SED 26*, 10 April 2006; Media Entertainment and Arts Alliance, *Submission SED 28*, 10 April 2006; Australian Writers' Guild, *Submission SED 29*, 11 April 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006; N Roxon MP Shadow Attorney-General, *Submission SED 63*, 28 April 2006; Independent Producers Initiative Inc, *Submission SED 76*, 3 July 2006.

111 Australian Writers' Guild, *Submission SED 29*, 11 April 2006. A similar point is made in Australian Press Council, *Submission SED 48*, 13 April 2006.

112 Arts Law Centre of Australia, *Submission SED 46*, 13 April 2006.

113 National Association for the Visual Arts, *Submission SED 30*, 11 April 2006. NAVA gives the example of the difficulty faced by two artists in finding a venue to exhibit their performance, which was 'much like a school chemistry lesson and demonstrated how to make chemical explosives including fire bottles, Molotov cocktails, light-bulb bombs, etc'.

114 Ibid.

7.96 The Cameron Creswell Agency Pty Ltd was concerned that ‘a telemovie about the recent events on Palm Island that contained a (possibly fictional, possibly real) character who called for the overthrow of the government’ or ‘a film like *Syriana* with its sympathetic portrayal of Islamic suicide bombers’ might fall foul of the sedition provisions.¹¹⁵

7.97 NAVA gave the following example from recent events:

In late December 2005 NAVA learned of an incident where an invited video artist visiting from overseas was taking documentary video footage in public places. Twice in 10 days the artist was told that his/her name would be sent for possible inclusion in a terrorist watch list. In the first instance, despite previously having been given official authorisation, the artist was apprehended by a security official who took his/her ID details. Some of the video footage had to be deleted. The second time the same artist was baled up by the police while videoing road signs in a regional town in NSW and the same threat made.¹¹⁶

7.98 A number of submissions noted that the effect of the sedition offences on chilling free expression would likely be much greater than the risk of actual prosecutions and convictions.¹¹⁷

Suggestions for reform

7.99 A number of stakeholders proposed legislative reform to dilute the potential negative impact of the sedition provisions. NAVA favoured repealing the offences in s 80.2 of the *Criminal Code* but argued in the alternative for an amendment to these provisions to make clear that ‘urging’ for the purposes of s 80.2 means ‘intentional urging or inciting politically motivated violence’.¹¹⁸

7.100 NAVA also proposed a program of education and policy to augment legislative reform in this area, stating:

The Federal Government should provide authoritative guidelines and an education campaign to inform the police, security staff and community interest groups and institutions about what is the appropriate course of action when a complaint is made by members of the community about an artwork.¹¹⁹

115 Cameron Creswell Agency Pty Ltd, *Submission SED 26*, 10 April 2006. See also Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

116 National Association for the Visual Arts, *Submission SED 30*, 11 April 2006.

117 Arts Law Centre of Australia, *Submission SED 46*, 13 April 2006; Australian Screen Directors Association, *Submission SED 51*, 10 April 2006.

118 National Association for the Visual Arts, *Submission SED 30*, 11 April 2006.

119 Ibid.

ALRC's views

7.101 Sedition laws historically have been used in Australia and elsewhere in a manner that did not pay due regard to the modern conception of freedom of expression. In order to sever this historical connection, the ALRC recommends removal of the term 'sedition' from Australian criminal law.¹²⁰ Moreover, as explained in Chapter 2, the ALRC considers that 'sedition' is no longer an accurate description of the offences in s 80.2 of the *Criminal Code*, particularly in view of the statutory refinements recommended in this Report. Chapters 8–10 contain several recommendations aimed at tightening the elements and interpretation of the 'urging force or violence' offences in order to minimise any adverse impact on freedom of expression. Specific recognition is given to the nature of the work of journalists, artists, academics, social critics and others.

7.102 As explained in later chapters, the ALRC recommends amendments to s 80.2 that will require the prosecution to prove that the defendant intended that the urged force or violence will occur. In considering this matter, the trier of fact must take into account the context in which the statements were made, including whether this was in connection with media reporting or commentary, or expressed through visual or dramatic art.¹²¹ Recommendation 11–2 makes clear that the treason offences relating to 'assisting the enemy' deal with the provision of *material* assistance (such as guns, funds and intelligence) rather than with the mere expression or reporting of dissenting views.

7.103 This general pattern of recommendations, which was set out in DP 71, was strongly supported in submissions—by arts organisations and performers,¹²² and by the media and news reporting organisations.¹²³

7.104 The ALRC's recommendations, if adopted, will significantly reform federal sedition laws, further protecting freedom of expression. Nevertheless, artists and members of the media will not enjoy the full benefit of this reform if they do not properly understand the nature of the offences as amended—particularly given the risk of self-censorship discussed earlier in this chapter.

7.105 In response to this concern, it was suggested that, if the ALRC's recommendations were adopted, Australia's peak arts and media organisations should participate in the education process by informing their members of the nature and

120 See Rec 2–1 and accompanying text.

121 Rec 12–2.

122 See, eg, Australian Screen Directors Association, *Submission SED 85*, 3 July 2006; Australian Film Commission, *Submission SED 86*, 20 July 2006; M Carter, *Submission SED 93*, 3 July 2006; Music Council of Australia, *Submission SED 95*, 3 July 2006.

123 See, eg, John Fairfax Holdings Ltd and others, *Submission SED 91*, 3 July 2006.

effect of the amendments to the relevant law.¹²⁴ The ALRC endorses this suggestion and therefore makes the following recommendation.

Recommendation 7–1 Peak arts and media organisations should provide educational programs and material to their members to promote a better understanding of:

- (a) the scope of federal, state and territory laws that prohibit the urging of political or inter-group force or violence; and
- (b) any potential impact of these laws on the activities of their members.

124 Media and Arts Representatives, *Consultation*, Sydney, 14 June 2006.

8. The Sedition Offences

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Introduction

8.1 This chapter and the following three chapters present the ALRC's recommendations for reform of the existing sedition offences, which were inserted in s 80.2 of the *Criminal Code* (Cth) by Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* (Cth).¹ These offences are:

- urging another person to overthrow the *Constitution* or Government by force or violence (s 80.2(1));
- urging another person to interfere with parliamentary elections by force or violence (s 80.2(3));
- urging another person to engage in inter-group violence (s 80.2(5));
- urging another person to assist an enemy at war with Australia (s 80.2(7)); and

¹ The relevant sections of the *Criminal Code* (Cth) are set out in full in Appendix 1. The relevant sections of the Code, amended as recommended in this Report, are set out in Appendix 2.

- urging another person to assist those engaged in armed hostilities against the Australian Defence Force (ADF) (s 80.2(8)).

8.2 As discussed in Chapter 2, the ALRC considers that it is not appropriate for the offences set out in s 80.2 to be described as ‘sedition’. Rather, to the extent that the offences should be retained, they should be characterised as offences of urging political or inter-group force or violence.

8.3 The ALRC recommends the retention, in modified form, of the present offences dealing with urging force or violence to overthrow the Constitution or Government and urging the use of force or violence to interfere in parliamentary elections.² The reform of these offences is discussed in Chapter 9. The ALRC also recommends the retention, in modified form, of the present offence dealing with inter-group violence.³ This offence, and its relationship with anti-vilification laws, is discussed in Chapter 10.

8.4 In Chapter 11, the ALRC recommends the repeal of the offences of urging a person to assist the enemy or those engaged in armed hostilities with the ADF.⁴ In connection with this reform, the ALRC recommends amendments to the crime of treason set out in s 80.1 of the *Criminal Code*. Chapter 11 also examines the extraterritorial application of the offences in ss 80.1 and 80.2.

8.5 This chapter considers a number of matters that are common to several of the offences in s 80.2. These matters relate to the physical and fault elements of the offences and include: the distinction between the offences under review and the offence of incitement; the role of intention and recklessness as fault elements; and the interpretation of certain common terms used in the offence provisions.

Incitement and the sedition offences

8.6 Much conduct covered by the offences in s 80.2 of the *Criminal Code* will also constitute incitement to commit other offences. Some of the relevant offences under Commonwealth law that most closely relate to the offences in s 80.2 are set out in detail in Chapter 3. These include:

- the offence of treason under s 80.1 of the *Criminal Code*;
- terrorism offences under Part 5.3 of the *Criminal Code*;
- the offences of causing harm to Commonwealth officials under Part 7.8 of the *Criminal Code*;

2 *Criminal Code* (Cth) s 80.2(1), (3).

3 *Ibid* s 80.2(5).

4 *Ibid* s 80.2(7), (8).

- offences against the government under Part II of the *Crimes Act 1914* (Cth);
- offences concerning the protection of the Constitution and public services under Part IIA of the *Crimes Act*;
- offences under the *Commonwealth Electoral Act 1918* (Cth);
- offences under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth); and
- ordinary criminal offences prohibiting harm, or threats of harm, against persons or property.

8.7 Part 2.4 of the *Criminal Code* extends criminal responsibility, including in relation to attempt, conspiracy and incitement of criminal offences. Incitement is set out in s 11.4 of the *Criminal Code*, which provides that:

- (1) A person who urges the commission of an offence is guilty of the offence of incitement.
- (2) For the person to be guilty, the person must intend that the offence incited be committed.

8.8 The relationship between sedition and the incitement of other offences is examined in detail below. This relationship is important in two ways. First, it has been suggested that, because the conduct covered by the sedition offences may constitute incitement to commit other offences, the sedition offences themselves are unnecessary.⁵ Secondly, it has been suggested that, to the extent the sedition offences extend criminal responsibility beyond incitement, the offences are too broad and should be wound back.⁶

Incitement and ulterior intention

8.9 The requirement under s 11.4(2) that the person ‘must intend that the offence incited be committed’ is sometimes referred to as a ‘specific intention’ or an ‘ulterior intention’—that is, engaging in conduct with the intention to achieve some further objective or result.⁷ The requirement that the prosecution prove an ulterior intention arguably is equivalent to a requirement of proof of purpose.⁸ In the context of incitement to commit an offence, the requirement of an ulterior intention requires proof

5 J Goldring, *Submission SED 21*, 5 April 2006; Law Council of Australia, *Submission SED 126*, 19 July 2006.

6 ARTICLE 19, *Submission SED 14*, 10 April 2006.

7 I Leader-Elliot, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney-General’s Department and Australian Institute of Judicial Administration, 1 March 2002, 61.

8 *Ibid.*, 61, referring to *Chew v The Queen* (1991) 173 CLR 626.

beyond reasonable doubt that it was the offender's object to induce commission of the offence in question.⁹

8.10 In contrast, the current sedition offences do not require an ulterior intention that the conduct urged be committed.¹⁰ This key difference between the ancillary offence of incitement to commit an offence and the sedition offences can be examined using terrorism offences under Part 5.3 of the *Criminal Code* as examples.

8.11 Under s 101.6(1) of the *Criminal Code*, a person commits an offence if the person 'does any act in preparation for, or planning, a terrorist act'. 'Terrorist act' is defined in s 100.1 and covers any action that: (a) causes serious physical harm or death to a person, endangers a person's life, or creates a serious health or safety risk;¹¹ and (b) is done with the intention of advancing a political, religious or ideological cause and of coercing or influencing a government by intimidation. Importantly, under s 101.6(2), a person may commit the preparatory terrorist offence even if a terrorist act does not occur; or the person's act is not done in preparation for, or planning, a specific terrorist act; or is done in preparation for, or planning, more than one terrorist act.

8.12 A person is guilty of the offence of incitement, under s 11.4, if he or she urges another person to prepare or plan a terrorist act and intends that the offence of preparing or planning a terrorist act be committed. A person may be found guilty of incitement even if committing the offence incited is impossible.¹²

8.13 Some conduct that urges another person to overthrow the government by force or violence, in terms of the sedition offence in s 80.2(1), also could constitute incitement to plan a terrorist act. For example, a person may indicate to a gathering of other individuals (who share a political, religious or ideological cause) that they should prepare to bomb the Australian Parliament on ANZAC Day in order to intimidate or overthrow the Australian Government.

8.14 However, it is less clear that incitement to plan a terrorist act would cover conduct that amounts to a more generalised call to action—for example, to prepare to use force against the Australian Government in order to intimidate or overthrow it. Even in the case of the broadly framed terrorism offences,¹³ incitement requires a

9 I Leader-Elliot, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney-General's Department and Australian Institute of Judicial Administration, 1 March 2002, 273.

10 This also contrasts with the repealed sedition offences, which required the person to engage in a seditious enterprise or publish seditious words 'with the intention of causing violence or creating public disorder or a public nuisance': *Crimes Act 1914* (Cth) ss 24C–24D.

11 *Criminal Code* (Cth) s 100.1(2).

12 *Ibid* s 11.4(3). For example, where the person urged to commit the offence is an undercover police officer who would never actually carry out the plan; or where the building that is to be attacked has burned down already.

13 In relation to the terrorism offences, courts have recognised the 'clear intention of Parliament to create offences where [a principal] offender has not decided precisely what he or she intends to do': *Lodhi v The Queen* [2006] NSWCCA 121, [66].

connection to a specific substantive offence. That is, because it must be shown that the person intended ‘the offence incited’ be committed, the person must have a particular offence in mind.¹⁴

8.15 The terrorism offences under Part 5.3 of the *Criminal Code* extend to a range of specific acts that ordinarily might be expected to be covered by extensions of criminal responsibility applying to more general substantive offences. That is, offences such as possessing things connected with terrorist acts;¹⁵ making documents likely to facilitate terrorist acts;¹⁶ or doing any acts in preparation or planning for terrorist acts;¹⁷ are the kinds of conduct that, in other contexts, would be caught by attempt, complicity and common purpose, incitement or conspiracy.¹⁸

Connection with a specific offence

8.16 It has been said that the framing of the new sedition offences was aimed at overcoming the obstacle posed by the requirement to show a connection to a terrorist act or a particular terrorist organisation, in order to prove incitement to commit a terrorism offence.¹⁹

8.17 The Attorney-General’s Department (AGD) has stated that there was ‘absolutely no doubt’ that the new sedition offences would be easier to establish than incitement to commit an offence, and that this was justified because ‘in this case the urging of the use of force and violence is in its own right dangerous and should be prohibited as a separate offence’.²⁰

8.18 In its submission to this Inquiry, the AGD confirmed this perspective and stated:

In the context of terrorism, proving that a person who urges or encourages the commission of a terrorism offence is guilty of the offence of ‘incitement’ under the *Criminal Code* would require proof that the person intended that the offence incited be committed. That would require proof of a connection to a ‘terrorist act’.

A significant difference with the new sedition offence, as opposed to relying on incitement under section 11.4 of the *Criminal Code*, is that the requirement to prove a connection to a terrorist act or a particular terrorist organisation is removed. The

14 It is, however, clear that incitement can be directed to the world at large: *R v Most* (1881) 7 QBD 244; for example, in a speech to a crowd: *Pankhurst v Kiernan* (1917) 24 CLR 120.

15 *Criminal Code* (Cth) s 101.4.

16 *Ibid* s 101.5.

17 *Ibid* s 101.6.

18 Under *Ibid* Part 2.4.

19 Office of the Australian Attorney-General, *New Counter-Terrorism Measures: Incitement of Terrorism (Question and Answer Brief 17 October 2005)* (2005) ABC Television <www.abc.net.au/mediawatch/img/2005/ep33/tpsedition.pdf> at 12 March 2006.

20 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.61]; Australian Government Attorney-General’s Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, 3.

rationale is that while it may not be possible to show that a person intends that the relevant offence be committed, to communicate such ideas is dangerous as it can be taken up by the naïve and impressionable to cause harm to the community.²¹

8.19 One commentator stated that incitement under the *Criminal Code*

is largely consistent with the meaning of incitement (or instigation) in international criminal law, which requires direct and explicit encouragement, along with a direct intent to provoke the offence (or an awareness of the likelihood that the crime would result). The incitement must aim to cause a specific offence, and vague or indirect suggestions are not sufficient. There must be a 'definite causation' between the incitement and a specific offence.²²

8.20 It is not clear exactly how specific an intention that an offence be committed needs to be, in order to constitute incitement. The ALRC has found little guidance in Australian case law, perhaps because incitement to commit offences is not often prosecuted.²³ The *Prosecution Policy of the Commonwealth*, prepared by the Commonwealth Director of Public Prosecutions (CDPP), states that whenever possible substantive charges should be laid in preference to ancillary charges such as incitement or conspiracy.²⁴

8.21 Incitement can be seen as analogous to aiding and abetting in the sense that both forms of liability depend upon doing an act in furtherance of a crime.²⁵ In aiding and abetting cases it has been held sufficient for the Crown to establish that a defendant contemplated the *kind or type* of crime committed by the principal offender.²⁶

8.22 In *R v Bainbridge*, the English Court of Criminal Appeal held that it would not be enough to show that the defendant contemplated that the oxyacetylene equipment he provided was going to be used to dispose of stolen property, when it was in fact used for breaking into a bank.²⁷

8.23 At common law, it is unclear whether the broad qualification in *Bainbridge* applies to intention as well as to knowledge; that is, whether it is sufficient that 'the accessory intended to assist or encourage the commission of a crime of the same type as that which is actually committed by the perpetrator'.²⁸ In the *Criminal Code*, the complicity and common purpose provisions expressly state that the person must have

21 Australian Government Attorney-General's Department, *Submission SED 31*, 12 April 2006.

22 B Saul, *Submission SED 52*, 14 April 2006.

23 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 26 April 2006.

24 Commonwealth Director of Public Prosecutions, *The Prosecution Policy of the Commonwealth* <www.cdpp.gov.au/Prosecutions/Policy/Default.aspx> at 11 March 2006, [2.24].

25 S Bronitt and B McSherry, *Principles of Criminal Law* (2005), 433.

26 *Ancuta v The Queen* (1990) 49 A Crim R 307, following *R v Bainbridge* [1960] 1 QB 129. See D Brown and others, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Materials and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006), [11.4.4.2].

27 *R v Bainbridge* [1960] 1 QB 129, 133.

28 S Bronitt and B McSherry, *Principles of Criminal Law* (2005), 363. The decision of the High Court in *Giorgianni v The Queen* (1985) 156 CLR 473 may support such a proposition.

intended that his or her conduct would aid, abet, counsel or procure the commission of any offence *of the type* the other person committed.²⁹

8.24 In cases of incitement it may be harder to determine whether the intention that an offence be committed is sufficiently specific. Contrary to the position in the law of complicity—where the person ‘aids, abets, counsels or procures’ the commission of an offence³⁰—with incitement it is not necessary that the substantive offence be committed.³¹ Therefore, there may be no conduct (beyond the incitement itself) that may be referred to in making this determination.

8.25 A related issue is whether the sedition offences should require a closer connection between urging and the commission of another offence. This issue was highlighted by the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005 (Cth) (the 2005 Senate Committee inquiry). For example, the Gilbert and Tobin Centre of Public Law argued that the absence of a requirement of ulterior intention in the sedition offences criminalises ‘indirect incitement or generalised expressions of support for terrorism, without any specific intention to encourage violence or any connection to a particular offence’. The Centre submitted that ‘only incitements which have a direct and close connection to the commission of a specific crime are justifiable restrictions on speech’.³²

8.26 Submissions to this Inquiry made similar points.³³ Judge John Goldring submitted that incitement, conspiracy,³⁴ and the extended application of complicity,³⁵ would cover all of the possible conduct that should be proscribed. He considered that the requirement that incitement be specific and intentional should apply to all Commonwealth offences.³⁶ Fairfax, News Ltd and AAP submitted that the sedition

29 *Criminal Code* (Cth) s 11.2(3).

30 *Ibid* s 11.2.

31 A person may, however, be convicted of incitement where the principal offence has been committed. In practice, ‘incitement which succeeds in its object will usually result in conviction for the principal offence as an accomplice’: I Leader-Elliot, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney-General’s Department and Australian Institute of Judicial Administration, 1 March 2002, 271.

32 Gilbert & Tobin Centre of Public Law, *Submission 80 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 10 November 2005. Other submissions made similar criticisms: Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.105]–[5.106]. See also B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 881.

33 J Goldring, *Submission SED 21*, 5 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006; Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006; J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006.

34 *Criminal Code* (Cth) s 11.5.

35 *Ibid* s 11.2.

36 J Goldring, *Submission SED 21*, 5 April 2006.

offences should include a ‘rider’, similar to that in s 11.4(2) of the *Criminal Code* quoted earlier in this chapter.³⁷

ALRC’s views

8.27 The ALRC is of the view that, despite the many alternative substantive offences, the ancillary offence of incitement cannot cover all conduct proscribed by the existing sedition offences because incitement requires an ulterior intention that the offence incited be committed. The sedition offences cannot, therefore, be considered unnecessary simply because much of the conduct proscribed by them constitutes incitement to commit other offences.

8.28 There was a deliberate policy decision to distinguish between incitement and ‘urging’ for the purposes of the sedition offences. The new sedition offences were framed to avoid any need for a connection between urging and a specific terrorist act or other crime.³⁸ A central rationale for the sedition offences is that this particular form of ‘urging’ presents such serious risks to public safety and the body politic that it should be punishable without the need to prove an intention that a specific offence be committed by another.

8.29 The harm addressed relates to the creation of an environment in which the likelihood of force or violence being used for the proscribed purposes is increased. Calls to ‘use whatever force or violence it takes to bring down the Government’, for example, may be hard to prosecute as incitement to commit a specific offence. The view is that an intention to urge force or violence in these circumstances should be sufficient, without the need for further proof of intention to urge the commission of a specific offence.

8.30 This justification for the sedition offences relies on their coverage of general exhortations to use force or violence for broadly political or anti-social ends. The ALRC does not, therefore, consider that the offences should require proof that the defendant intended to urge that a specific offence to be committed by another person.

8.31 However, while the operation of the offences in s 80.2 should be less constrained than in the case of incitement, the ALRC considers that there should be a more concrete link between the offences in s 80.2 and the use of force or violence. In Discussion Paper 71 (DP 71) the ALRC proposed that s 80.2 of the *Criminal Code* be amended to provide that, for a person to be guilty of any of the offences under s 80.2, the person must intend that the urged force or violence will occur.³⁹

37 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006. See also Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006.

38 In this respect they are the same as the repealed sedition offences in the *Crimes Act*.

39 Australian Law Reform Commission, *Review of Sedition Laws*, DP 70 (2006), Proposal 8–1. Other provisions in the *Criminal Code* require an ulterior intention to be shown: eg, *Criminal Code* (Cth) s 474.18 (improper use of emergency call service—intention of inducing a false belief that an emergency

8.32 This proposal received support in submissions.⁴⁰ However, Patrick Emerton suggested that introducing the ulterior intention requirement may not sufficiently ‘tighten the nexus between criminal speech and the threat of harm’.⁴¹

8.33 The AGD and the CDPP opposed the proposal for the opposite reason, arguing that it would significantly limit the effective operation of the offences by adding an extra element that may be difficult for the prosecution to prove.⁴² The AGD stated that the requirement that a person must intend that the urged force or violence will occur has the effect of

excluding the urging of dangerous ideas, where intent that the urged force or violence will occur cannot be proven, from the ambit of these offences. The proposal will exclude from prosecution a range of conduct that would otherwise be captured by these offences.⁴³

8.34 The CDPP noted that it may be difficult to obtain evidence proving that the accused had turned his or her mind to whether people would respond to their urging and that the accused would not necessarily have to give evidence on this issue for a trier of fact to find that a reasonable doubt exists.⁴⁴

8.35 The ALRC observes that the offences in s 80.2 are serious offences, with a maximum penalty of imprisonment for seven years. In the prosecution of serious offences the Crown is often obliged to prove the state of mind of the defendant. Evidence can be marshalled from the nature of the defendant’s conduct, including the words used by the defendant (and the repetition or emphasis of these words); admissions; reasoning back from the outcomes (if any) of the urging of force or violence; and so on.

8.36 Notwithstanding concerns about proof, the ALRC considers it desirable to include a requirement that the person intend that the urged force or violence will occur. The meaning of intention in this context will be determined by ordinary usage and the

exists); s 474.29A (using a carriage service for suicide related material—intention that material be used to counsel or incite suicide).

40 Arts Law Centre of Australia, *Submission SED 65*, 6 June 2006; Australian Press Council, *Submission SED 66*, 23 June 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 89*, 3 July 2006; R Connolly and C Connolly, *Submission SED 90*, 3 July 2006; Live Performance Australia, *Submission SED 109*, 3 July 2006; Australia Council for the Arts, *Submission SED 114*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; Australian Lawyers for Human Rights, *Submission SED 120*, 4 July 2006; National Legal Aid, *Submission SED 124*, 7 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

41 P Emerton, *Submission SED 108*, 3 July 2006.

42 Australian Government Attorney-General’s Department, *Submission SED 92*, 3 July 2006; Commonwealth Director of Public Prosecutions, *Submission SED 84*, 3 July 2006.

43 Australian Government Attorney-General’s Department, *Submission SED 92*, 3 July 2006.

44 Commonwealth Director of Public Prosecutions, *Submission SED 84*, 3 July 2006.

common law.⁴⁵ As discussed in Chapter 7, the offences place significant constraints on freedom of expression. It is essential that a clear distinction be drawn between legitimate dissent and speech that constitutes a criminal offence. The requirement of an ulterior intention helps in this regard by removing from the ambit of the offences rhetorical statements that the person does not intend anyone will act upon, as well as expression in artistic, academic, scientific and media contexts.⁴⁶ At the same time, the recommended ‘ulterior intention’ falls short of that required to prove incitement—and does not require any connection with the commission of another specific offence.

Recommendation 8–1 Section 80.2 of the *Criminal Code* (Cth) should be amended to provide that, for a person to be guilty of any of the offences under s 80.2, the person must intend that the urged force or violence will occur.

(The relevant sections of the Criminal Code, amended as recommended, are set out in Appendix 2.)

Fault elements

8.37 There has been considerable confusion over the fault elements required under the sedition provisions. Much of this confusion appears to stem from a misunderstanding of the construction of criminal responsibility under the *Criminal Code*.⁴⁷ The 2005 Senate Committee inquiry recommended that ‘all offences in proposed section 80.2 should be amended to expressly require intentional urging’.⁴⁸

Fault elements under the *Criminal Code*

8.38 Under the *Criminal Code*, an offence consists of physical elements and fault elements.⁴⁹ In order for a person to be found guilty of committing an offence, each of the following must be proved by the prosecution beyond reasonable doubt:

- (a) the existence of such physical elements as are, under the law creating the offence, relevant to establishing guilt;
- (b) in respect of each such physical element for which a fault element is required, one of the fault elements for the physical element.⁵⁰

45 I Leader-Elliot, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney-General’s Department and Australian Institute of Judicial Administration, 1 March 2002, 61.

46 See also Ch 12 and Rec 12–2.

47 See Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), [3.21], [3.30]–[3.31].

48 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.176], rec 29.

49 *Criminal Code* (Cth) s 3.1.

50 *Ibid* s 3.1.

8.39 Under s 5.1(1) of the *Criminal Code*, the possible fault elements ‘may be intention, knowledge, recklessness or negligence’. The policy behind the provision is to standardise, to the extent possible, the fault elements used in federal criminal law.

8.40 Section 5.2 of the *Criminal Code* defines ‘intention’ as follows:

- (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

8.41 Section 5.4 of the *Criminal Code* defines ‘recklessness’ as follows:

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
 - (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

8.42 It is important to note that ‘recklessness’ under the *Criminal Code* has a precise meaning—and one that differs from its use in common parlance, where it is roughly interchangeable with ‘negligence’ or perhaps ‘serious negligence’. In federal criminal law, recklessness is much closer to intentionality, requiring that the person be aware of a substantial risk and circumstances that make it unjustifiable to take the risk and nevertheless proceed with the conduct.

8.43 Under the *Criminal Code*, if the legislation creating an offence makes no reference to fault when specifying a physical element of an offence, then either intention or recklessness (depending on the circumstances) will apply by default. Section 5.6 of the *Criminal Code* provides that (emphasis added):

- (1) If the law creating the offence does not specify a fault element for a physical element that *consists only of conduct*, intention is the fault element for that physical element.

- (2) If the law creating the offence does not specify a fault element for a physical element that *consists of a circumstance or a result*, recklessness is the fault element for that physical element.

Fault elements and the sedition offences

8.44 It can be difficult in practice to separate the physical elements of an offence into ‘conduct’ on the one hand, and a ‘circumstance’ or ‘result’ on the other.⁵¹ In the case of the sedition offences, questions arise about whether the physical elements of the offence comprise ‘conduct’ only, or ‘conduct’ plus one or more ‘circumstances’ or ‘results’.

8.45 The construction given to these provisions by the AGD appears to be that the physical elements of the sedition offences (except for those to which recklessness is expressly applied)⁵² comprise conduct only—and, therefore, intention is the fault element.⁵³

8.46 However, as confirmed by submissions to the Inquiry, it is plausible to view the physical elements of the sedition offences as divisible into conduct and one or more circumstances or results.⁵⁴ If the physical elements are divisible, a person need only be reckless as to whether the conduct (the urging) occurs in particular circumstances or leads to particular results (for example, the use of force or violence).

8.47 For example, the elements in s 80.2(1) can be expressed as comprising either:

- urging another person / to overthrow by force or violence / the Constitution; *or*
- urging another person to overthrow by force or violence / the Constitution.

8.48 In the case of the former division, the first physical element can be seen as consisting only of conduct and, therefore, intention is implied as the fault element by virtue of s 5.6(1).⁵⁵ However, in the case of the latter division, the first physical element can be seen as consisting of conduct plus a result or circumstance and, therefore, recklessness is implied as the fault element by virtue of s 5.6(2). Consequently, it can be argued that:

51 See I Leader-Elliot, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney-General’s Department and Australian Institute of Judicial Administration, 1 March 2002, 97–115.

52 That is, under *Criminal Code* (Cth) s 80.2(2), (4) and (6).

53 Australian Government Attorney-General’s Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005. See also Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.107]–[5.112].

54 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006; Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006; A Steel, *Submission SED 23*, 18 April 2006; B Saul, *Submission SED 52*, 14 April 2006.

55 The other two elements consist of a circumstance or a result and, therefore, recklessness is implied (to the extent recklessness is not specified already by s 80.2(4)).

Absent judicial pronouncement there is no clear and sure way to determine what the elements of an offence are. Traditionally, nothing has hinged on precise or binding elaboration of elements. As a result offences have been seen to be constituted by differing numbers of elements at different times and in different judgments.⁵⁶

8.49 Three of the seditious offences expressly contain recklessness as a fault element, but only in relation to some of the physical elements required to constitute the offence, namely, the circumstances or results arising from the person's 'urging'. Those circumstances or results are: (a) the fact that it is the Constitution or Government that others have been urged to overthrow;⁵⁷ (b) the fact that it is the lawful processes of a parliamentary election with which others have been urged to interfere;⁵⁸ and (c) the fact that it is a group distinguished by race, religion, nationality or political opinion against which others have been urged to use force or violence.⁵⁹

8.50 Some submissions also criticised the express application of recklessness as the fault element for some elements of the seditious offences.⁶⁰ In particular, it was argued that it is hard to understand how a person could intend to urge a person, for example, to overthrow the Government by force or violence, but only be reckless as to whether the entity to be overthrown was, in fact, the Government.⁶¹

8.51 The application of recklessness also was criticised for being inconsistent with recommendations of the Model Criminal Code Officers Committee (MCCOC), which expressed concern in 1992 that 'recklessness in incitement was too great a threat to free speech'.⁶²

ALRC's views

8.52 The ALRC considers that the technical construction given to the offences in s 80.2(1), (3) and (5) by the AGD is correct.⁶³ The ALRC also recognises that the

56 A Steel, *Submission SED 23*, 18 April 2006. Steel suggested five possible variations in dividing the elements of the offences for the purposes of s 5.6 of the *Criminal Code* (Cth).

57 *Criminal Code* (Cth) s 80.2(2).

58 *Ibid* s 80.2(4).

59 *Ibid* s 80.2(6).

60 J Pyke, *Submission SED 18*, 10 April 2006; J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; J Pyke, *Submission SED 100*, 3 July 2006.

61 J Pyke, *Submission SED 18*, 10 April 2006.

62 J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006. See Model Criminal Code Officers' Committee, *Model Criminal Code: Chapters 1 and 2: General Principles of Criminal Responsibility* (1992), 97.

63 No similar issue arises in the case of the offences in s 80.2(7) and (8). These provisions do not refer to urging force or violence, but simply to urging another person to 'engage in conduct'—to which intention will clearly apply as the fault element: *Criminal Code* (Cth) s 80.2(7)(a); 80.2(8)(a); and state expressly that the person 'intends the conduct to assist an organisation or country': *Criminal Code* (Cth) s 80.2(7)(b); 80.2(8)(b) (emphasis added).

overall drafting policy of the *Criminal Code* in relation to fault elements is to rely, where possible, on the default provisions of s 5.6.

8.53 In DP 71, the ALRC proposed putting the fault elements beyond doubt by an amendment stating that all of the offences involve intentional urging of the use of force or violence.⁶⁴ The suggestion that the application of the fault elements in s 80.2(1), (3) and (5) should be clarified received broad support in submissions.⁶⁵ The AGD reasserted its view that the proposal is not necessary because s 5.6 operates automatically to ensure that intention is a fault element of the offences.⁶⁶

8.54 Even assuming that the application of the general principles of criminal responsibility in the *Criminal Code* to the sedition offences is reasonably clear, there are arguments that the applicable fault elements should be stated expressly in any new offences drafted to replace them.

8.55 As discussed elsewhere in this Report, where interests in freedom of expression are constrained by criminal sanctions, community perceptions about what the law is and how it operates are especially important. Submissions to the Inquiry emphasised the importance of clarity in promoting community understanding of the law in order to avoid any chilling effect on freedom of expression.⁶⁷

8.56 It would not be inconsistent with the drafting of many other offences in the *Criminal Code* if an amendment were made to make it clear that a person commits an offence if he or she ‘*intentionally* urges’ the conduct referred to in s 80.2.

8.57 For example, a person commits an offence if the person ‘*intentionally*’: delivers, places, discharges, or detonates an explosive or lethal device (s 72.3(1) of the *Criminal Code*); directs the activities of a terrorist organisation (s 102.2(1)); is a member of a terrorist organisation (s 102.3(1)); recruits a person to join a terrorist organisation (s 102.4(1)); or provides training for terrorism (s 102.5(1)).

64 Australian Law Reform Commission, *Review of Sedition Laws*, DP 70 (2006), Proposals 8–3, 8–6, 9–2.
 65 Human Rights Lawyers, *Consultation*, Sydney, 29 March 2006; National Association for the Visual Arts, *Submission SED 30*, 11 April 2006; National Legal Aid, *Submission SED 62*, 20 April 2006; Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; Australian Press Council, *Submission SED 66*, 23 June 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; National Association for the Visual Arts, *Submission SED 75*, 3 July 2006; J Gilman, *Submission SED 78*, 3 July 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; Australian Film Commission, *Submission SED 86*, 20 July 2006; R Douglas, *Submission SED 87*, 3 July 2006; Sydney PEN, *Submission SED 88*, 3 July 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 89*, 3 July 2006; R Connolly and C Connolly, *Submission SED 90*, 3 July 2006; Australia Council for the Arts, *Submission SED 114*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; National Legal Aid, *Submission SED 124*, 7 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006; Law Council of Australia, *Submission SED 126*, 19 July 2006.

66 Australian Government Attorney-General’s Department, *Submission SED 92*, 3 July 2006.

67 Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; N Roxon MP Shadow Attorney-General, *Submission SED 63*, 28 April 2006.

8.58 There are many other offence provisions in the Code that follow this model,⁶⁸ including those where, arguably, it is clear that intention is the fault element by operation of s 5.6. The ALRC therefore remains of the view that the word ‘intentionally’ should be inserted in s 80.2(1), (3) and (5) of the *Criminal Code* before the word ‘urges’ to clarify the fault element applicable to urging the use of force or violence.⁶⁹ These recommendations are made as part of proposed amendments to these offences, as discussed in Chapters 9 and 10.

Other drafting issues

The meaning of ‘urges’

8.59 The offences in s 80.2 of the *Criminal Code* provide that a person commits an offence if the person ‘urges’ another person to engage in the proscribed conduct.⁷⁰ The term ‘urges’ is not defined in the *Criminal Code* and, in the course of the 2005 Senate Committee inquiry, concerns were expressed about the broad scope of the term.⁷¹ For example, Liberty Victoria stated:

Urging involves a person endeavouring to induce or persuade, as by entreaties or earnest recommendations; to recommend or advocate earnestly. This is far broader than the better term ‘incitement’ which embraces such terms as to ‘spur on, stir up, prompt to action, instigate or stimulate’.⁷²

8.60 The ALRC received similar comments.⁷³ ARTICLE 19, a non-government organisation, submitted that to ‘incite’ would be a preferable term because:

Not only is the language of incitement recognised under international standards as the threshold for restricting freedom of expression, the lay usage of the term ‘incite’, rather than ‘urge’ recognises the implicit connection with unlawful behaviour or violence.⁷⁴

8.61 Others expressed concerns about the uncertainty of the concept of urging,⁷⁵ its inherent subjectivity, and the difficulty in determining whether

when an opinion is expressed or a comment made which, by the manner in which it is made, might be one which in a particular context had sufficient forcefulness in its manner, delivery or content to evidence the act of urging.⁷⁶

⁶⁸ See, eg, *Criminal Code* (Cth) ss 102.6(1); 102.7(1); 102.8(1)(a)(i); 270.3(1); 471.7(2)(a).

⁶⁹ Recs 9–2, 9–5, 10–2.

⁷⁰ *Criminal Code Act 1995* (Cth) s 80.2(1), (3), (5), (7), (8).

⁷¹ Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.95].

⁷² Liberty Victoria, *Submission 221 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005.

⁷³ ARTICLE 19, *Submission SED 14*, 10 April 2006; Combined Community Legal Centres Group (NSW) Inc, *Submission SED 50*, 13 April 2006.

⁷⁴ ARTICLE 19, *Submission SED 14*, 10 April 2006.

⁷⁵ N Roxon MP Shadow Attorney-General, *Submission SED 63*, 28 April 2006.

8.62 As discussed above, under the *Criminal Code*, the conduct element of incitement is to ‘urge’ another person or persons to commit an offence. The 1992 MCCOC report on principles of criminal responsibility noted that differing verbs had been employed in relevant Australian and overseas legislation dealing with incitement ‘with little consideration of what the differences, if any, might be’.⁷⁷ For example, the *Crimes Act* incitement provisions used the words ‘incites to, urges, aids or encourages’.⁷⁸ MCCOC expressed concern that some courts have interpreted ‘incites’ as requiring that the defendant cause rather than advocate the offence.⁷⁹ MCCOC stated that using the word ‘urges’ would avoid this ambiguity.⁸⁰

8.63 Consistently with MCCOC’s advice, s 11.4(1) of the *Criminal Code* provides that a person ‘who urges the commission of an offence is guilty of the offence of incitement’:

The restriction of liability to circumstances in which the defendant ‘urges’ the commission of an offence narrows the common law, which traditionally imposed liability for incitement when the offender ‘counsels, commands or advises’ the commission of an offence. The Code formulation was intended to emphasise the necessity for proof that the activity of the defendant was meant to encourage the commission of the offence ...⁸¹

8.64 The AGD stated that this term was adopted by the drafters of the *Criminal Code* seditious provisions for similar reasons and for internal consistency.⁸² It makes sense for the language to be consistent with the incitement provisions of the *Criminal Code*. In the ALRC’s view, there is no reason to change the existing terminology in this regard.

Force or violence

8.65 Another set of concerns expressed to the Inquiry relates to the words ‘force or violence’, used in s 80.2(1), (3) and (5). Neither term is defined in the *Criminal Code*.

76 J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006. See also Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

77 Model Criminal Code Officers’ Committee, *Model Criminal Code: Chapters 1 and 2: General Principles of Criminal Responsibility* (1992), 95.

78 *Crimes Act 1914* (Cth) s 7A (repealed).

79 However, the case law does not clearly establish that the term ‘urges’ is broader than other terms used to describe incitement. It has been stated that the words ‘urges’ and ‘encourages’ are synonyms for ‘incites’: Law Book Company, *The Laws of Australia*, vol 9 Criminal Law Principles, [122]. The word ‘procures’—sometimes also treated as a synonym of ‘incites’—has in some cases been given a meaning that makes it equivalent to ‘cause’: Law Book Company, *The Laws of Australia*, vol 9 Criminal Law Principles, [122] citing *Attorney-General’s (UK) Reference (No 1 of 1975)* [1975] QB 773.

80 Model Criminal Code Officers’ Committee, *Model Criminal Code: Chapters 1 and 2: General Principles of Criminal Responsibility* (1992), 95.

81 I Leader-Elliot, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney-General’s Department and Australian Institute of Judicial Administration, 1 March 2002, 271–273.

82 Australian Government Attorney-General’s Department, *Submission 290 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 16 November 2005.

It has been suggested that the meaning of ‘force or violence’ for the purposes of the seditious offences is unclear and too broad.⁸³

8.66 A particular focus of concern was the use of the term ‘force’. ARTICLE 19 observed that

‘force’ is a broad term which is not restricted to ‘imminent violence’. Indeed, ‘force’ could encompass a broad range of non-violent activity. In conjunction with the problematic term ‘urges’, a person could encourage a person to act to lobby or picket against policies of the government, which could be considered ‘force’ and should not be prohibited.⁸⁴

8.67 A review of the case law concluded that ‘while violence implies that there is some degree of strength or severity that must be satisfied before an act can be characterised as violent, such restrictions are not applicable to force’.⁸⁵ Roger Douglas noted that ‘force’ clearly includes activities that are non-violent, as otherwise there would be no need for the additional term; and it is unclear whether the term would cover a blockade or other non-violent civil disobedience. Douglas submitted that the term ‘force’, if retained, should be defined and it should be made clear what activities are not included.⁸⁶

8.68 The Federation of Community Legal Centres (Vic), and others, expressed concern that the provisions do not specify that the force used must be physical force, so that many of the strategies and techniques of activists and protestors may be encompassed by the term.⁸⁷

8.69 It was also noted that the offences do not require an intention to urge unlawful force or violence and, therefore, criminalise statements which encourage others to use force or violence which is ‘otherwise excusable or justifiable under statute or by pleading criminal defences’.⁸⁸ This, it was submitted, could give rise to prosecution under s 80.2(5) where, for example, a person urges one group lawfully to defend itself against violent attacks by another.⁸⁹

8.70 Having considered these views, the ALRC is not convinced that there is any clearly preferable alternative to the words ‘force or violence’. While the term as a whole is not used elsewhere in the *Criminal Code*, there are many uses of the words ‘force’ and ‘violence’, notably in provisions relating to genocide, crimes against

83 ARTICLE 19, *Submission SED 14*, 10 April 2006; R Douglas, *Submission SED 87*, 3 July 2006.

84 ARTICLE 19, *Submission SED 14*, 10 April 2006.

85 A Steel, *Submission SED 23*, 18 April 2006.

86 R Douglas, *Submission SED 87*, 3 July 2006.

87 Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; B Saul, *Submission SED 52*, 14 April 2006; A Steel, *Submission SED 23*, 18 April 2006.

88 B Saul, *Submission SED 52*, 14 April 2006. See also A Steel, *Submission SED 23*, 18 April 2006.

89 B Saul, *Submission SED 122*, 6 July 2006.

humanity and war crimes.⁹⁰ They are terms in common use, which a jury could be expected to apply without further statutory elaboration.

Reasonable likelihood of violence

8.71 There was support, in submissions and consultations, for the idea that, if the sedition offences are retained, there should be some requirement that force or violence is reasonably likely to occur as a result of the offending conduct.⁹¹ For example, it was said that only ‘incitements which have a direct and close connection to the commission of a specific crime are justifiable restrictions on speech’.⁹² Several commentators⁹³ referred to the United States case of *Brandenburg v Ohio*.⁹⁴

8.72 In *Brandenburg*, the United States Supreme Court confirmed that constitutional guarantees of free speech and a free press do not permit a state ‘to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action’.⁹⁵

8.73 Australian Lawyers for Human Rights stated that s 80.2 should be redrafted so that in order for ‘urging’ to constitute an offence, it must be ‘intended to incite imminent violence, be likely to do so and there is a direct and immediate connection between the urging and the likelihood or occurrence of such violence’.⁹⁶ ARTICLE 19 submitted that the concept of urging force ‘does not properly reflect the necessary link between the prohibited speech and a risk of imminent violence which justifies the prohibition in terms of national security’.⁹⁷ Patrick Emerton stated:

A person may intend that his or her speech be taken up and acted upon by others—in the language of the *Criminal Code*, he or she *may mean to bring such violence about*—but she may be wishful in her thinking. There may be no objective likelihood that anyone will listen to her, no matter how much she wishes that they might. If section 80.2 offences are to be retained, they should be amended to require, as a

90 *Criminal Code* (Cth) Ch 8.

91 L Maher, *Consultation*, Melbourne, 4 April 2006; University of Melbourne Academics, *Consultation*, Melbourne, 5 April 2006; Australian Lawyers for Human Rights, *Submission 139 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005; ARTICLE 19, *Submission SED 14*, 10 April 2006; B Saul, *Submission SED 52*, 14 April 2006; P Emerton, *Consultation*, Melbourne, 23 June 2006.

92 B Saul, *Submission SED 52*, 14 April 2006.

93 L Maher, *Consultation*, Melbourne, 4 April 2006; University of Melbourne Academics, *Consultation*, Melbourne, 5 April 2006; B Saul, *Submission SED 52*, 14 April 2006.

94 *Brandenburg v Ohio* 395 US 444 (1969).

95 *Ibid*, 447.

96 Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006, referring to *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 19 and *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (1995) <<http://www.article19.org/pdfs/standards/joburgprinciples.pdf>> at 20 April 2006, Principle 6.

97 ARTICLE 19, *Submission SED 14*, 10 April 2006.

physical element, that the speech is likely to result in the use of force or violence as urged.⁹⁸

8.74 Introducing such a requirement could provide an additional protection for freedom of expression without imposing any burden on the prosecution to make a connection between the conduct and any particular offence or act. The prosecution would only need to point to a category of force or violence that is reasonably likely to be encouraged. On the other hand, it may be difficult, in practice, for the prosecution to show a reasonable likelihood of force or violence.

8.75 The ALRC's recommendation that, for the purposes of the s 80.2 offences, the person must intend that the urged force or violence will occur (Recommendation 8–1) addresses, albeit in an indirect way, concerns about the need for a closer connection between the urging and an increased likelihood of violence eventuating. This amendment, in combination with the recommendation that the trier of fact be required to have regard to the context in which the conduct occurred (Recommendation 12–2), provides sufficient protection for defendants, without introducing the additional complexity of a reasonable likelihood or imminence of violence test.

98 P Emerton, *Submission SED 108*, 3 July 2006.

9. Urging Political Force or Violence

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Introduction

9.1 This chapter presents the ALRC's recommendations for reform of the existing sedition offences of urging another person to overthrow the Constitution or Government by force or violence (s 80.2(1) of the *Criminal Code* (Cth)), and urging another person to interfere in parliamentary elections by force or violence (s 80.2(3)).¹

9.2 These recommendations are informed, in part, by the conclusions reached in Chapter 8 with regard to the relationship between these offences and the offence of incitement, the role of intention and recklessness as fault elements, and other drafting issues.

Urging the overthrow of the Constitution or Government

9.3 The first of the offences deals with urging the overthrow of the Constitution or Government. Section 80.2(1) states that:

- (1) A person commits an offence if the person urges another person to overthrow by force or violence:
 - (a) the Constitution; or
 - (b) the Government of the Commonwealth, a State or a Territory; or
 - (c) the lawful authority of the Government of the Commonwealth.

¹ The relevant sections of the *Criminal Code* (Cth) are set out in full in Appendix 1. The relevant sections of the Code, amended as recommended in this Report, are set out in Appendix 2.

Framing the offence provision

9.4 In the course of the Inquiry, a range of concerns were expressed in relation to the framing of s 80.2(1). For the most part, these concerns related to matters common to several of the five sedition offences. As discussed in Chapter 8, concerns were raised about the distinction between the offences under review and the offence of incitement; the role of intention and recklessness as fault elements; and the interpretation of certain common terms used in the offence provisions.

9.5 In relation to s 80.2(1) specifically, questions were raised about the abstract and vague nature of some of its terms. In particular, what does it mean to ‘overthrow’ the *Constitution* by force or violence²—especially given that ‘the *Constitution*’ is a legal concept rather than a physical institution? Alex Steel expressed the view that

overthrowing connotes a physical act and that the use of the term in relation to the overthrow of regimes is a metaphorical use of the word. It is not appropriate to determine criminal liability with metaphors.³

9.6 He added that the use of the term is ‘doubly unfortunate’ when that which is urged to be overthrown is itself an abstract concept—as the ‘*Constitution*’ is presumably being used in a jurisprudential sense,⁴ rather than as a literal reference to the legal document.⁵

9.7 Another issue concerns the extent to which the ‘lawful authority’ of the Government must be challenged in order to constitute urging the ‘overthrow’ of the lawful authority of the Government. For example, is it sufficient that force or violence be urged to resist one or more specific laws, or must there be a more general challenge to the legitimacy of the Government?⁶ One commentator stated that

it is probable that the expression to ‘overthrow’ a government or Constitution implies more than a single act or isolated series of acts, and requires a more durable, sustained, organized and serious campaign of violence that has some real prospect of overturning the government as a whole.⁷

9.8 The 1991 recommendations of the Committee of Review of Commonwealth Criminal Law (the Gibbs Committee) referred to ‘the lawful authority of [the

2 M Weinberg, *Consultation*, Melbourne, 3 April 2006; A Steel, *Submission SED 23*, 18 April 2006.

3 A Steel, *Submission SED 23*, 18 April 2006.

4 In *Burns v Ransley*, Dixon J held that the word ‘Constitution’ in *Crimes Act 1914* (Cth) s 24A (the old definition of ‘seditious intention’) ‘does not refer to a document or instrument of government but to the polity or organized form of government which the fundamental rules of law have established whether they are expressed in a written constitution or not’: *Burns v Ransley* (1949) 79 CLR 101, 115.

5 A Steel, *Submission SED 23*, 18 April 2006.

6 University of Melbourne Academics, *Consultation*, Melbourne, 5 April 2006; P Emerton, *Submission SED 36*, 10 April 2006.

7 B Saul, *Submission SED 52*, 14 April 2006.

Government of the Commonwealth] *in respect of the whole or part of its territory*'.⁸ In a submission to this Inquiry, Patrick Emerton submitted that, in contrast:

One disturbing feature of [s 80.2(1)] is the vagueness of 'lawful authority of the Commonwealth'. Is it sufficient to constitute the overthrowing of this that the execution of one law be prevented? If so, then we have a manifestly excessive intrusion on political dissent.⁹

ALRC's views

9.9 A number of criticisms may be levelled at the present framing of s 80.2(1), some of which are highlighted above. However, the ALRC is not convinced that the section can be significantly improved in this regard without introducing other broad concepts as alternatives or adding unwarranted complexity. There would be little value in, for example, substituting the phrase 'the institutions of democratic government' for references to the Constitution or Government. Alternative formulations along these lines inevitably would face similar problems of interpretation and application to those that already exist.

9.10 The terms 'Constitution' and 'Government' have been used in federal sedition offences since 1920. The concept of advocating the 'overthrow' of the Constitution or the Government has existed since 1926.¹⁰ Other elements of the drafting of the s 80.2 offences were recommended by the Gibbs Committee.¹¹

9.11 The Australian Government and the Commonwealth Director of Public Prosecutions appear to accept that there are difficulties for the prosecution in interpreting and applying the words of the offence and in proving these matters beyond reasonable doubt.¹² However, they did not propose any alternative formulation.

9.12 As discussed in Chapter 2, s 80.2(1) is not best characterised as a sedition offence.¹³ It does not proscribe conduct that, in terms of the old definition of seditious intention, tends to bring the Sovereign into hatred or contempt, or to excite disaffection against the Constitution or Government. Rather, it criminalises conduct that encourages the use of force or violence against elements of democratic government in Australia. For this reason it is better characterised as an offence of urging political force or violence.

8 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [31.31] (emphasis added).

9 P Emerton, *Submission SED 36*, 10 April 2006.

10 *Crimes Act 1914* (Cth) s 30C, inserted by *Crimes Act 1926* (Cth) s 17.

11 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [32.18].

12 Australian Government Attorney-General's Department, *Consultation*, Canberra, 26 April 2006; Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 26 April 2006.

13 See Rec 2–1.

9.13 The ALRC concludes that an offence based on the present s 80.2(1) should be retained in the *Criminal Code* and headed ‘*Urging the overthrow by force or violence of the Constitution or Government*’ (see Recommendation 9–1).¹⁴ The insertion of the words ‘force or violence’ in the heading is desirable to emphasise that the offence targets the urging of force or violence as distinct from the urging of the overthrow of the Constitution or Government in itself.

9.14 Chapter 8 discusses the fault elements applicable to the offences in s 80.2. For the reasons set out in that chapter, the ALRC recommends that s 80.2(1) should state in relevant part that ‘a person commits an offence if the person *intentionally* urges another person to overthrow by force or violence ...’.¹⁵ The ALRC considers that, even though the application of s 5.6 of the *Criminal Code* to this offence is reasonably clear as a matter of law, the applicable fault element should be stated expressly in a provision that will be consulted by members of the general public.

9.15 This amendment is in addition to Recommendation 8–1, which would add an ‘ulterior intention’—that is, an intention to achieve an objective that is not a physical element of the offence.

9.16 There is a significant overlap between the offence in s 80.2(1) and other offences in the *Criminal Code*, the *Crimes Act 1914* (Cth) and elsewhere. Submissions suggested that the sedition offence provisions should be repealed on this basis.¹⁶ The ALRC does not agree with this view because, as discussed in Chapter 8, there are important differences between ‘urging’ under s 80.2 and incitement under s 11.4 of the *Criminal Code*. These differences mean that, despite the number of alternative substantive offences, the ancillary offence of incitement cannot cover all conduct proscribed by the existing sedition offences.

9.17 However, the offence in s 30C of the *Crimes Act*, entitled ‘*Advocating or inciting to crime*’¹⁷ covers almost identical ground. Section 30C provides that:

Any person who by speech or writing advocates or encourages:

- (a) the overthrow of the Constitution of the Commonwealth by revolution or sabotage;

¹⁴ The proposal received support in submissions to the Inquiry: Australian Press Council, *Submission SED 66*, 23 June 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

¹⁵ Recklessness would still apply to the element that it is the Constitution or Government that others have been urged to overthrow: *Criminal Code* (Cth) s 80.2(2).

¹⁶ Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; P Emerton, *Submission SED 36*, 10 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; B Saul, *Submission SED 52*, 14 April 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 89*, 3 July 2006.

¹⁷ Located in *Crimes Act 1914* (Cth) Pt IIA (‘*Protection of the Constitution and of public and other services*’).

- (b) the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilized country or of organized government; or
 - (c) the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States;
- shall be guilty of an offence and shall be liable on conviction to imprisonment for any period not exceeding 2 years.

9.18 The ALRC recommends that s 30C of the *Crimes Act* be repealed.¹⁸ As the section is clearly redundant, repeal need not await the outcome of the recommended review of other offences in Part II and Part IIA of the *Crimes Act* (see Recommendations 3–1 and 4–2).

Recommendation 9–1 The heading of s 80.2(1) of the *Criminal Code* (Cth) should be changed to refer to urging the overthrow by ‘force or violence’ of the Constitution or Government.

Recommendation 9–2 The word ‘intentionally’ should be inserted in s 80.2(1) of the *Criminal Code* before the word ‘urges’ to clarify the fault element applicable to urging the use of force or violence.

Recommendation 9–3 Section 30C of the *Crimes Act 1914* (Cth), concerning ‘advocating or inciting to crime’, should be repealed.

(The relevant sections of the Criminal Code, amended as recommended, are set out in Appendix 2.)

Urging interference in parliamentary elections

9.19 The second of the sedition offences discussed in this chapter deals with urging interference by force or violence in parliamentary elections. Section 80.2(3) states that:

A person commits an offence if the person urges another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament.

¹⁸ The proposal received support in submissions to the Inquiry: Australian Press Council, *Submission SED 66*, 23 June 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

Related offences

9.20 As in the case of s 80.2(1), there is some overlap between the offence in s 80.2(3) and other offences. Most significantly, s 28 of the *Crimes Act* creates an offence, punishable by three years imprisonment, entitled ‘*Interfering with political liberty*’. The section states:

Any person who, by violence or by threats or intimidation of any kind, hinders or interferes with the free exercise or performance, by any other person, of any political right or duty, shall be guilty of an offence.

9.21 Section 28 covers similar ground to that in s 80.2(3) of the *Criminal Code*. It is wider, in that it refers to interference with any ‘political right or duty’.¹⁹ The offence of inciting interference with political liberty is narrower than s 80.2(3) in that the offence requires an intention that the offence incited be committed.²⁰

9.22 Section 327(1) of the *Commonwealth Electoral Act 1918* (Cth) creates a lesser summary offence, punishable by six months imprisonment, entitled ‘*Interference with political liberty etc*’. This offence does not refer to the use of force, violence, threats or intimidation. It states:

A person shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election under this Act.

9.23 The *Referendum (Machinery Provisions) Act 1984* (Cth) provides a parallel regulatory system for conducting referenda under the authority of the Australian Electoral Commission (AEC). A referendum is defined as: ‘the submission to the electors of a proposed law for the alteration of the Constitution’. Section 120 creates a summary offence, punishable by six months imprisonment, entitled ‘*Interference with political liberty*’. The section states:

A person shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to a referendum under this Act.

9.24 The AEC also administers elections for the Torres Strait Regional Authority under Part 3A, Division 5 of the *Aboriginal and Torres Strait Islander Act 2005* (Cth) and secret ballots under Part 9, Division 4 of the *Workplace Relations Act 1996* (Cth). Both Acts contain a number of offences relating to interference in the conduct of elections and ballots.²¹

19 This could, for example, include the implied constitutional right of freedom of political communication.

20 Under *Criminal Code* (Cth) s 11.4(2).

21 See, eg, *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 198(3); *Workplace Relations Act 1996* (Cth) s 821(2).

ALRC's views

9.25 As discussed in Chapter 2, s 80.2(3) is also better characterised as an offence of urging political force or violence than as a sedition offence (see Recommendation 2–1).

9.26 The ALRC concludes that an offence based on s 80.2(3) should be retained in the *Criminal Code* and entitled ‘*Urging interference in parliamentary elections by force or violence*’.²² Urging interference in elections by force or violence is as much a threat to the elements of democratic government as the conduct proscribed by s 80.2(1), and also should be punishable. While there is some overlap with incitement to commit other offences, as discussed above, there are important differences between urging and incitement, which mean that incitement cannot cover all conduct proscribed by s 80.2(3).²³

9.27 For the reasons set out in Chapter 8, the applicable fault element should be stated expressly in the offence. The offence should state in relevant part that ‘a person commits an offence if the person *intentionally* urges another person to interfere ...’.²⁴ Recommendation 8–1 would also apply—requiring that for a person to be guilty the person must intend that the urged force or violence will occur.

9.28 The ALRC considers that the policy and logic underlying this provision mean that it should cover constitutional referenda as well as parliamentary election processes. There is, however, no compelling reason to include Torres Strait Regional Authority elections or workplace ballots, which are far less ‘national’ or central to the protection of democratic government and are subject to specific and targeted offences in other legislation. Section 80.2(4) also should be amended in a consistent manner, to apply recklessness to the element of the offence under s 80.2(3) that it is the ‘lawful processes for a referendum on a proposed law for the alteration of the Constitution’ in respect of which a person has urged forceful or violent interference.

9.29 Given the potential overlap with s 80.2(3), s 28 should be reviewed as part of the review of offences in Part II and Part IIA of the *Crimes Act* (see Recommendations 3–1 and 4–2). Consistently with *Criminal Code* harmonisation policy, this review should

22 The proposal received support in submissions to the Inquiry: Australian Press Council, *Submission SED 66*, 23 June 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

23 Some submissions suggested that s 80.2(3) should be repealed because it overlaps with other offences: Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; P Emerton, *Submission SED 36*, 10 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; B Saul, *Submission SED 52*, 14 April 2006.

24 Recklessness would still apply to the element that it is the Constitution or Government that others have been urged to overthrow: *Criminal Code* (Cth) s 80.2(2).

involve modernising some offences for re-enactment in the *Criminal Code*, and the repeal of others.

Recommendation 9–4 The heading of s 80.2(3) of the *Criminal Code* should be changed to refer to urging interference in parliamentary elections by ‘force or violence’.

Recommendation 9–5 Section 80.2(3) of the *Criminal Code* should be amended to:

- (a) insert the word ‘intentionally’ before the word ‘urges’ to clarify the fault element applicable to urging the use of force or violence; and
- (b) apply to interference with the lawful processes for a referendum on a proposed law for the alteration of the *Constitution*.

Recommendation 9–6 As a consequence of Recommendation 9–5, s 80.2(4) of the *Criminal Code* should be amended to apply recklessness to the element of the offence under s 80.2(3) that it is the ‘lawful processes for a referendum on a proposed law for the alteration of the *Constitution*’ in respect of which a person has urged interference.

(The relevant sections of the Criminal Code, amended as recommended, are set out in Appendix 2.)

10. Urging Inter-Group Force or Violence

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Introduction

10.1 This chapter examines the new offence of urging inter-group violence in s 80.2(5) and (6) of the *Criminal Code* (Cth), which provides that:

- (5) A person commits an offence if:
 - (a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and
 - (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.
- (6) Recklessness applies to the element of the offence under subsection (5) that it is a group or groups that are distinguished by race, religion, nationality or political

opinion that the first-mentioned person urges the other person to use force or violence against.

10.2 Although it has been characterised as a new offence, to some extent s 80.2(5) ‘modernises’ the old sedition offence contained in s 24A(g) of the *Crimes Act 1914* (Cth), which defined an intention to ‘promote feelings of ill-will and hostility between different classes of Her Majesty’s subjects so as to endanger the peace, order or good government of the Commonwealth’ as a ‘seditious intention’.

10.3 Section 80.2(5) has some overlap with existing federal and state anti-vilification laws, which render unlawful (and in some cases, criminal) public acts that could incite others to hate, hold in contempt or seriously ridicule a person or group of people. However, s 80.2(5) is the first federal provision specifically to criminalise the urging of violence against racial, religious, national or political groups in Australia.

10.4 Section 80.2(5) has generated generally positive responses in public debate and consultation. It has been welcomed by many as a step towards the implementation of Australia’s obligations under international law to criminalise incitement of national, racial and religious hatred. However, it has also been criticised for its drafting and for the anti-terrorist context in which it was enacted. Some have argued that the urging of inter-group violence is not ‘sedition’ and that such an offence belongs with anti-vilification laws, rather than with the cluster of offences in s 80.2.

10.5 This chapter examines the policy rationale for the creation this offence; the historical link between sedition offences and inter-group violence; and the relationship between s 80.2(5) and anti-vilification laws. The criticisms of s 80.2(5) in its current form are examined in detail.

10.6 The ALRC recommends retaining s 80.2(5) in a modified form in the *Criminal Code*. It also recommends that the Australian Government consider extending the offence to circumstances where it is an individual (as distinct from a group) who is being urged to use force or violence against a group. Finally, the important role of anti-discrimination laws is highlighted, and the ALRC recommends continuing educational programs and other strategies designed to promote inter-communal harmony and understanding.

10.7 The aspects of the offence that are common to s 80.2(1) and (3)—including the role of intention and recklessness as fault elements, the extraterritorial application of the offence and the requirement for the Attorney-General to consent to prosecution—are discussed in Chapters 8, 9 and 13. Defences and penalties are discussed in Chapter 12.

Legislating against the incitement of hatred and violence

10.8 The debate about the role that the law—particularly the criminal law—can or should play in combating expressions or acts of racial and other prejudice gained

prominence in the early 1990s, following a number of significant national inquiries that highlighted the nature and extent of the problem of racism and racist violence in Australia.¹ The first anti-vilification laws were introduced in New South Wales in 1989,² and similar legislation subsequently was enacted in all states and territories except the Northern Territory.³ Despite having been debated since the 1970s,⁴ federal anti-vilification laws were not introduced until 1995.⁵

Federal law reform

10.9 The *Racial Discrimination Act 1975* (Cth) (RDA) was introduced to implement into Australian law the provisions of the *International Convention on the Elimination of All Forms of Racial Discrimination 1966* (CERD),⁶ to which Australia is a party. When first debated in Parliament, the Racial Discrimination Bill 1975 (and the earlier 1973 and 1974 Bills) included a number of criminal offences of incitement to racist violence. These were opposed by the majority of the Senate, and the amendment to remove the offences was accepted by the Government ‘with a total lack of enthusiasm’ in order to progress the Bill.⁷ This resulted in the Government entering a reservation to art 4(a) of CERD in relation to criminal offences, which noted that ‘it is the intention of the Australian Government, at the first suitable moment, to seek from Parliament legislation specifically implementing the terms of article 4(a)’.⁸

10.10 In its 1991 report, *Racist Violence*, the Human Rights and Equal Opportunity Commission (HREOC) recommended that the *Crimes Act* be amended to include new criminal offences of racist violence and intimidation,⁹ incitement of racist violence, and incitement to racial hatred likely to lead to violence.¹⁰ HREOC also recommended that incitement to racial hostility should be made unlawful, but not attract criminal sanctions.¹¹ It was further recommended that federal, state and territory criminal laws

1 See M Jones, ‘The Legal Response: Dealing with Hatred—A User’s Guide’ in C Cunneen, D Fraser and S Tomsen (eds), *Faces of Hate—Hate Crime in Australia* (1997) 214.

2 *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW).

3 *Criminal Code 1913* (WA) ss 76–80 (inserted 1990); *Discrimination Act 1991* (ACT) ss 65–67; *Racial Vilification Act 1996* (SA); *Anti-Discrimination Act 1998* (Tas) ss 19, 21; *Anti-Discrimination Act 1991* (Qld) s 124A (inserted 2001); *Racial and Religious Tolerance Act 2001* (Vic).

4 M Jones, ‘The Legal Response: Dealing with Hatred—A User’s Guide’ in C Cunneen, D Fraser and S Tomsen (eds), *Faces of Hate—Hate Crime in Australia* (1997) 214, 217.

5 *Racial Hatred Act 1995* (Cth), which inserted Pt IIA in the *Racial Discrimination Act 1975* (Cth).

6 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 1975, 285 (K Enderby—Attorney-General).

7 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1975, 3248 (K Enderby—Attorney-General).

8 The declaration of reservation was attached to the instrument of ratification entered for Australia on 30 September 1975: *International Convention on the Elimination of all Forms of Racial Discrimination*, 7 March 1966, [1975] ATS 40, (entered into force generally on 4 January 1969).

9 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991), 297.

10 *Ibid.*, 298.

11 *Ibid.*, 299.

be amended to enable courts to impose higher penalties where there is a racist motivation in the commission of an offence.¹²

10.11 In the national report of the Royal Commission into Aboriginal Deaths in Custody, Commissioner Elliott Johnston QC recommended the creation of a civil offence (but not a criminal offence) at the federal level proscribing racial vilification.¹³

10.12 In 1991, the Committee of Review of Commonwealth Criminal Law (the Gibbs Committee) recommended the adoption of a new federal offence of incitement to inter-group violence, whether distinguished by nationality, race or religion, as part of its proposed modernisation of the law of sedition.¹⁴ This is discussed later in this chapter.

10.13 In its 1992 report, *Multiculturalism and the Law*, the ALRC recommended that the *Crimes Act* be amended to include an offence of incitement to racist violence.¹⁵ The ALRC was divided on the question whether incitement to racist hatred and hostility should be made unlawful or a criminal offence. A majority recommended that it should be made unlawful, subject to civil penalties, on the basis that making incitement to racist hatred and hostility a criminal offence would unduly restrict freedom of speech.¹⁶ However, two Commissioners recommended that incitement to racist hatred should be a criminal offence on the basis that this is required to fulfil Australia's international obligations pursuant to art 4(a) of CERD:

Such ideas are the root cause of racism. To leave the propagation of hatred to be dealt with under 'offensive behaviour' or similar provisions is to ignore the quite different insidious effects of this kind of speech.¹⁷

10.14 The minority therefore recommended the inclusion of the following offence in the *Crimes Act*:

A person must not publish, by any means, anything that is based on ideas or theories of superiority of any race or group of persons of one colour or ethnic origin over another, or promotes hatred or hostility between such races or groups, if the person intends that the publication will incite hatred or hostility towards an identifiable group and is likely to have that effect.¹⁸

10.15 Following these inquiries, the Racial Discrimination Amendment Bill 1992 was introduced into the House of Representatives and community consultation was conducted. A revised version, the Racial Hatred Bill, was introduced in 1994. The Bill originally contained three criminal offences, which were to be placed in the *Crimes Act* under the heading 'Offences Based on Racial Hatred'. These were: (a) threatening to

12 Ibid, 302.

13 Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 4 (1991), Rec 213.

14 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991).

15 Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), [7.40].

16 Ibid, [7.47].

17 Ibid, [7.48].

18 Ibid, [7.48].

cause physical harm to a person or group because of their race, colour, or national or ethnic origin;¹⁹ (b) threatening to destroy or damage property because of the race, colour, or national or ethnic origin of any other group;²⁰ and (c) doing an act otherwise than in private that is reasonably likely to incite racial hatred.²¹

10.16 The Senate Legal and Constitutional Legislation Committee examined the Racial Hatred Bill 1994, and the majority supported the introduction of the Bill without amendment.²² However, the Opposition and the Greens were opposed to the inclusion of the criminal offences.²³ The Government agreed to remove the criminal offences from the Bill in order to ensure that the rest of the Bill, including the civil remedies, was enacted.²⁴

Existing anti-vilification laws

10.17 Anti-vilification laws in Australia rely primarily on civil rather than criminal mechanisms. Criminal offences exist in some jurisdictions for acts of serious vilification.

Federal anti-vilification laws

10.18 Section 18C of the RDA renders it unlawful (but not criminal) to use sounds, words, images or writing in public that are ‘reasonably likely to offend, insult, humiliate or intimidate another person or a group of people’ and that are ‘used because of the race, colour or national or ethnic origin of the other person or group of people’.

10.19 Religious vilification is not included in this provision; however, courts have held that some religious groups (such as Jews and Sikhs) fall within the definition of groups distinguished by ‘ethnic origin’.²⁵ It has yet to be determined whether Muslim people fall within the definition under the federal legislation; however, courts that have considered the issue under state and territory laws have held that Muslims do not share a common racial, national or ethnic origin.²⁶ In its 2004 report, *Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians*,

19 Racial Hatred Bill 1994 (Cth) cl 58.

20 Ibid cl 59.

21 Ibid cl 60.

22 Senate Legal and Constitutional Legislation Committee, *Racial Hatred Bill 1994* (1995).

23 Ibid, minority report. See Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 1995, 945 (P Ruddock).

24 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 1995, 945 (M Lee—Minister for Communications and the Arts). The Minister noted the Labor Government’s intention to take the issue of the need for criminal offences relating to incitement of racial violence to the next election.

25 Human Rights and Equal Opportunity Commission, *Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004), 29.

26 Ibid, 29.

HREOC concluded that it is unlikely that a person discriminated against or vilified solely on the basis of their Islamic faith would be protected by the federal legislation.²⁷

State and territory anti-vilification laws

10.20 As outlined above, all state and territory jurisdictions in Australia except the Northern Territory have anti-vilification laws. However, there is significant jurisdictional variation regarding which groups are protected from vilification, what harm thresholds are applied, and whether criminal sanctions or civil remedies are available.

10.21 Racial vilification is unlawful in the ACT, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia. Only civil remedies are available in Tasmania, and only criminal sanctions apply in Western Australia. In the remaining jurisdictions, a two-tiered approach has been adopted—racial vilification constitutes a civil wrong, but may amount to a criminal offence where the conduct is ‘serious’.

10.22 Religious vilification is unlawful in Tasmania, Queensland and Victoria. In the latter two jurisdictions, serious conduct may attract criminal sanctions.²⁸

10.23 In most jurisdictions, for vilification to be a criminal offence it generally must be shown that the conduct involves a high level of harassment or threat, such as incitement to violence, or threats to persons or property.²⁹ For example, in New South Wales, s 20D of the *Anti-Discrimination Act 1977* (NSW) renders it an offence to

by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include: (a) threatening physical harm towards, or towards any property of, the person or group of person, or (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

Reform movements: 1995 to 2005

10.24 The anti-vilification regimes throughout Australia have been subject to a number of criticisms. In particular, the laws have been criticised on the basis that there is no uniformity across jurisdictions with regard to: which groups are protected; which acts are proscribed; what harm thresholds apply; and whether civil or criminal sanctions apply. Further, it has been argued that the existing laws lack precision and

27 Ibid, 30.

28 Vilification on the basis of sexual orientation and gender identity is unlawful in the ACT, New South Wales and Queensland (civil and criminal sanctions apply). Vilification on the basis of HIV/AIDS status is unlawful in New South Wales and the ACT (civil and criminal sanctions apply). Vilification on the basis of disability is unlawful in Tasmania (civil sanctions only).

29 *R v Rae* (1998) 45 NSWLR 546.

clarity in a number of key respects, which has led to the development of an incoherent body of case law.³⁰

10.25 In two separate reports in 1998 and 2004, HREOC recommended the introduction of a federal law rendering vilification on the ground of religion or belief unlawful.³¹ HREOC criticised the current federal and state regimes for being inconsistent and inadequate.³² It stated that while it was clear that vilification, harassment and incitement to religious hatred on the basis of religion or belief occurred in Australia,³³ whether a person was able to seek redress pursuant to anti-vilification laws depended upon the jurisdiction in which the conduct occurred.³⁴

10.26 In 2003, the federal Opposition introduced a Bill to create offences for racial and religious vilification—substantially the same offences as those proposed in the original Racial Hatred Bill 1994.³⁵ The Bill did not proceed.

10.27 In December 2005, when the Anti-Terrorism Bill 2005 (Cth) was before Parliament, the Opposition introduced the Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth). This Bill proposed that criminal offences for racial and religious vilification be inserted in the *Crimes Act* in preference to the proposed s 80.2(5). The proposed incitement offences were broader than the current sedition provision in that they applied to acts directed at individuals on the basis of race etc, and did not confine the offences to incitements directed at defined groups.³⁶ There was no requirement that the violence disturb the peace, order and good government of the Commonwealth.³⁷ Unlike the sedition provisions, the Bill did not contain political opinion as a ground upon which incitement to violence was prohibited. This model mirrors substantially the offence of serious vilification contained in s 20C of the *Anti-Discrimination Act 1977* (NSW). The Bill has not proceeded.

30 D Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 226, 227.

31 Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998), Rec 5.3; Human Rights and Equal Opportunity Commission, *Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004), 6, 129.

32 Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998), 139.

33 Human Rights and Equal Opportunity Commission, *Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004), 3–4; Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998), 139.

34 Human Rights and Equal Opportunity Commission, *Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004), 128; Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998), 139.

35 Racial and Religious Hatred Bill 2003 (Cth); Racial and Religious Hatred Bill 2003 [No 2] (Cth).

36 Explanatory Memorandum, Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth), 4.

37 *Ibid.*, 4.

Sedition and inter-group violence

10.28 In light of the protracted debate about federal legislative reform to address the incitement of hatred and violence against particular groups, a number of those consulted told the ALRC that they found the introduction of s 80.2(5) in 2005 a surprising occurrence. In order to understand s 80.2(5), it is important to examine the historical link between the law of sedition and inter-group violence.

The common law

10.29 Historically, the law of sedition was concerned with words or actions inciting disaffection or violent opposition against the state. In 1887 the eminent legal historian Sir James Fitzjames Stephen, whose definition of seditious intention was widely accepted as the classic statement of the law, asserted that ‘seditious intention’ included an intention to ‘raise discontent or disaffection amongst His Majesty’s subjects, or to promote feelings of ill-will and hostility between different classes of such subjects’.³⁸

10.30 The primary basis of Stephen’s assertion appears to have been an 1844 case, *O’Connell v The Queen*, in which the defendants were prosecuted successfully for conspiring to promote feelings of ill-will and hostility between the English and the Irish.³⁹ Although the legal basis for this aspect of Stephen’s statement of the law has been challenged,⁴⁰ his definition was adopted by the Criminal Code Commissioners in England⁴¹ and by the courts.⁴²

10.31 In theory, this extended definition of the offence allowed it to be used to prosecute those who incited racial or religious hatred.⁴³ However, the few recorded cases in this area indicate that attempts to prosecute this type of conduct using sedition law were generally unsuccessful.⁴⁴

10.32 There was considerable uncertainty at common law about whether inciting ill-will between groups could amount to sedition or whether there was an additional requirement that there be an intention to incite violence or create public disturbance with the purpose of overthrowing constituted authority. This uncertainty was addressed by the decision of the Supreme Court of Canada in *Boucher v The King*, where a

38 J Stephen, *A Digest of the Criminal Law* (1887), 66.

39 *O’Connell v The Queen* (1844) 8 ER 1061, discussed in *Boucher v The King* [1951] 2 DLR 369, 381–382 (Kellock J).

40 *Boucher v The King* [1951] 2 DLR 369, 381.

41 A Criminal Code was drafted and introduced into the British Parliament in 1892, however it was rejected in the House of Commons. Section 102 of the Code adopted in substance Stephen’s definition of ‘seditious intention’: see *Ibid.*, 395.

42 See Law Commission of England and Wales, *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), 41.

43 See, eg, *R v Burns* (1886) 16 Cox CC 355; *R v Caunt* (Unreported, Birkett J, 1947). See also D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002), 899.

44 See, eg, *R v Caunt* (Unreported, Birkett J, 1947); *R v Leese* (*The Times*, 19 and 22 September 1936). The prosecution history of this aspect of sedition is discussed in *Boucher v The King* [1951] 2 DLR 369.

member of the Jehovah's Witnesses was convicted of seditious libel for publishing a pamphlet entitled 'Quebec's Burning Hate for God and Christ and Freedom'.⁴⁵ The pamphlet detailed instances of alleged persecution of members of the group by members of the Roman Catholic clergy and concluded with a statement to the effect that Quebec Catholics were indoctrinated by the priesthood to think that they were serving God's cause by attacking Jehovah's Witnesses. On appeal, the Supreme Court of Canada overturned the conviction, holding that the common law of sedition could not be used to prosecute acts inciting ill-will or violence between groups unless there was an intention to incite resistance or violence for the purpose of disturbing constituted authority.⁴⁶

10.33 The decision in *Boucher* was approved by the Queen's Bench in *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury*, where a private prosecution for seditious and blasphemous libel was brought against the author and publishers of Salman Rushdie's *The Satanic Verses*.⁴⁷ The basis of the charge was that the book's portrayal of Islam created hostility between Muslims and non-Muslims, provoking violence and threats of violence against Muslims. The Court held that the charge of seditious libel had not been made out:

Proof of an intention to promote feelings of ill will and hostility between classes of subjects does not alone establish a seditious intention. Not only must there be proof of an incitement to violence in this connection, but it must be violence or resistance for the purpose of disturbing constituted authority ... By constituted authority what is meant is some person or body holding public office or discharging some public function of the state.⁴⁸

10.34 These authorities emphasise that the focus of sedition offences is the subversion of political authority and indicate that there is little scope for the common law of sedition to be used to prosecute vilification or incitement to violence against particular groups, except where it can be shown that there is a clear intention to incite violence or public disturbance against the state or the institutions of government.

Crimes Act 1914

10.35 The recently repealed sedition provisions in the *Crimes Act* were enacted in 1920 and in substance codified the British common law. Section 24A(g) rendered it an offence to 'promote feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order and good government of the

⁴⁵ *Boucher v The King* [1951] 2 DLR 369.

⁴⁶ *Ibid*, 453.

⁴⁷ *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury* [1991] 1 QB 429. This case is also discussed in Chs 2 and 6.

⁴⁸ *Ibid*, 453.

Commonwealth', either by engaging in a seditious enterprise,⁴⁹ or by writing, printing, uttering or publishing seditious words.⁵⁰

10.36 Subsection 24A(g) was considered by the High Court in *R v Sharkey*, where the defendant was successfully prosecuted for seditious libel on the basis of a statement that the Communist Party of Australia would support Soviet troops in the event that they invaded Australia.⁵¹ The majority held that s 24A(g) was constitutionally valid,⁵² finding that the words 'peace, order and good government of the Commonwealth' were words of limitation which brought the subsection within the Commonwealth's power—pursuant to s 51(xxxix) of the *Constitution*—to punish acts 'which strike at the Constitution, the established order of Government and the execution and maintenance of the Constitution and Commonwealth law'.⁵³ The majority held that Sharkey's words expressed a seditious intention within the meaning of s 24A(g) of the *Crimes Act*.

10.37 In a dissenting judgment, Dixon J held that s 24A(g) was not a valid exercise of Commonwealth power.

Unless in some way the functions of the Commonwealth are involved or some subject matter within the province of its legislative power or there is some prejudice to the security of the Federal organs of government to be feared, ill-will and hostility between different classes of His Majesty's subjects are not a matter with respect to which the Commonwealth may legislate ... It was doubtless because this was seen to be the case that the curious words 'so as to endanger the peace, order or good government of the Commonwealth' were added ...⁵⁴

10.38 There are no reported cases in Australia in which s 24A(g) has been used to prosecute vilification of racial, religious or other groups.⁵⁵ Despite this—and the fact that the *Crimes Act* sedition offences had not been used for over half a century—a number of modern commentaries prior to the 2005 amendments listed the sedition provisions in the *Crimes Act* as a potential means of prosecuting conduct motivated by racial and religious hatred.⁵⁶ However, the Attorney-General's Department (AGD) informed the 2005 Senate Committee inquiry into the Anti-Terrorism Bill (No 2) 2005 (the 2005 Senate Committee inquiry) that s 24A(g) might not apply in this context

49 *Crimes Act 1914* (Cth) s 24C.

50 *Ibid* s 24D.

51 *R v Sharkey* (1949) 79 CLR 121.

52 *Ibid*, 137–138 (Latham CJ), 145 (Rich J), 158 (McTiernan J) 159–160 (Williams J), 163 (Webb J).

53 *Ibid*, 157 (McTiernan J).

54 *Ibid*, 150.

55 I Grant and G Dean, *Regulating Race Hate Speech: A Proposal for Criminal Law Reform* (1999) National Law Review <www.nlr.com.au> at 29 January 2006, [22].

56 See, eg, Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998), 127; I Grant and G Dean, *Regulating Race Hate Speech: A Proposal for Criminal Law Reform* (1999) National Law Review <www.nlr.com.au> at 29 January 2006, [21]; Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991), 29.

because the word ‘classes’ might be read literally so as not to apply to groups distinguished on the basis of race and similar grounds.⁵⁷

The Gibbs Committee

10.39 In 1991, the Gibbs Committee reviewed the sedition provisions in the *Crimes Act* and made a broad recommendation that they be modernised (along with other national security offences, such as treason and treachery).⁵⁸ In particular, the Gibbs Committee considered that a ‘narrower version’ of s 24A(g) should be included,⁵⁹ and recommended that it be made an offence to

incite by any form of communication ... the use of force or violence by groups within the community, whether distinguished by nationality, race or religion, against other such groups or members thereof.⁶⁰

10.40 The Gibbs Committee did not discuss whether the label ‘sedition’ should still attach to the recommended offence. The recommended provision did not contain the requirement that the force or violence be intended to disturb the ‘peace, order and good government of the Commonwealth’.

10.41 The Gibbs Committee’s rationale for recommending the creation of such an offence is not evident in its report. The recommendation was made at a time when the enactment of federal provisions addressing racial and other vilification was being hotly debated, coinciding with a number of significant national inquiries such as HREOC’s national inquiry into racist violence in Australia and the ALRC Inquiry into multiculturalism and the law. However, the Gibbs Committee was silent on both the background and policy rationale for such reform.

Legislative amendments in 2005

10.42 According to the Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2005, ‘new subsection 80.2(5) modernises the language from classes or groups as recommended by the Gibbs Report’.⁶¹ However, s 80.2(5) differs from the provision recommended by the Gibbs Committee in two ways: first, s 80.2(5) contains the requirement that the force or violence urged would threaten the ‘peace, order and good government of the Commonwealth’; and secondly, s 80.2(5) extends protection to groups distinguished on the basis of political opinion.

⁵⁷ Australian Government Attorney-General’s Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, 3.

⁵⁸ H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991).

⁵⁹ *Ibid.*, [32.16].

⁶⁰ *Ibid.*, [32.18].

⁶¹ Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), 90.

10.43 The rationale for retaining and modernising this offence was that the existing provisions did not ‘focus on key terrorism themes such as urging violence by one racial group against another’.⁶² In a submission to the 2005 Senate Committee inquiry, the AGD also argued that s 80.2(5) was necessary to prosecute acts urging violence between groups as other relevant criminal offences such as incitement carried too high a proof threshold.⁶³ It referred to the example of a web page that gave readers instructions on how to shoot foreigners in the streets of Jakarta and stated:

[Section 80.2(5)] would capture the type of conduct outlined in the web page ... Although the page depicts shooting foreigners it does not appear to focus much on the political motivations which would be necessary for proof of a ‘terrorist act’ offence (so charging for incitement to commit a terrorist act offence or a terrorist act offence itself would appear excluded, as would an individual advocating a terrorist act offence) and it is probably insufficiently specific in terms of the target to be prosecuted as incitement to commit murder. The threat to kill offences in the *Criminal Code* do not apply because of lack of specificity about who is being threatened (see s 474.15—using a carriage service to make a threat). Subsection 474.17—Using a carriage service to menace or cause offence—appears feasible but the maximum penalty is only 3 years imprisonment... This offence is easier to prove than the alternatives—it would not have been put forward as an option if it was not.⁶⁴

10.44 The AGD also stated that s 80.2(5) partly implemented art 20 of the *International Covenant on Civil and Political Rights 1966* (ICCPR).⁶⁵ However, the AGD has not indicated whether s 80.2(5) was intended as a response to calls for the enactment of federal anti-vilification laws. In its submission to the 2005 Senate Committee inquiry, the AGD reiterated that

[The Anti-Terrorism Bill (No 2) 2005] implements those aspects of the Gibbs Report that are relevant to the prevention of terrorism. The Bill has been developed to deal with terrorism and is not a suitable vehicle for broader law reform initiatives.⁶⁶

Criticisms of section 80.2(5)

10.45 Section 80.2(5) has generated largely positive, but nonetheless mixed, responses in public debate and community consultation. It has been welcomed by many as a first step in the implementation of Australia’s obligations under international law to proscribe advocacy of racial, religious and national hatred. However, the drafting of s 80.2(5) and the context in which it has been enacted have been questioned.

10.46 Many of the criticisms in public debate and submissions to the present Inquiry apply generally to the offences in s 80.2. These include concerns about insufficient clarity of the fault elements of the offence, leading to an overall concern that the s 80.2

62 Australian Government Attorney-General’s Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, Attachment A, 19.

63 Ibid, 2–3.

64 Ibid, 2–3.

65 Ibid, Attachment A, 6.

66 Ibid. Attachment A, 20.

offences may capture an excessively broad range of conduct. These more generalised concerns are dealt with in Chapters 7, 8, 9, 11 and 12, while this chapter addresses specific criticisms relating to the offence in s 80.2(5).

Sedition and vilification

10.47 Most submissions and consultations that directly addressed s 80.2(5) supported the existence of an offence of this type.⁶⁷ However, there was considerable support for the view that the urging of inter-group violence should not be characterised as sedition.⁶⁸ It has been argued that sedition centres on subversion of political authority and has little to do efforts to inhibit inter-group violence.⁶⁹ The rationale for protecting one group from violence by another is to guarantee the dignity of the members of that group.⁷⁰ Accordingly, a large number of commentators and submissions suggested that the appropriate place for such an offence is within the framework of anti-discrimination legislation.⁷¹ Others suggested it could be framed as a public order offence within criminal law, but with the sedition link removed.⁷² Australian Lawyers for Human Rights (ALHR) submitted that s 80.2(5) should be moved to a separate

67 However, there was also some opposition or ambivalence towards an offence of this kind, primarily due to concerns about the operation of anti-vilification laws generally: L Maher, *Consultation*, Melbourne, 4 April 2006; D Neal, *Consultation*, Melbourne, 4 April 2006; University of Melbourne Academics, *Consultation*, Melbourne, 5 April 2006; P Emerton, *Submission SED 108*, 3 July 2006; Law Council of Australia, *Submission SED 126*, 19 July 2006.

68 G McBain, *Submission SED 13*, 30 March 2006; Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006; B Saul, *Submission SED 52*, 14 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; National Legal Aid, *Submission SED 62*, 20 April 2006; M Weinberg, *Consultation*, Melbourne, 3 April 2006.

69 B Saul, *Submission SED 52*, 14 April 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

70 Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; B Saul, 'Preventing Communal Violence: Blurring Sedition, Vilification and Terrorism' (2005) (November/December 2005) *Human Rights Defender (Special Issue)* 15, 16.

71 Pax Christi, *Submission SED 16*, 9 April 2006; J Pyke, *Submission SED 18*, 10 April 2006; J Goldring, *Submission SED 21*, 5 April 2006; Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; P Emerton, *Submission SED 36*, 10 April 2006; New South Wales Young Lawyers Human Rights Committee, *Submission SED 38*, 10 April 2006; Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006; J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006; Combined Community Legal Centres Group (NSW) Inc, *Submission SED 50*, 13 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006; Australian Vice-Chancellors' Committee, *Submission SED 60*, 25 April 2006; National Legal Aid, *Submission SED 62*, 20 April 2006; Human Rights Lawyers, *Consultation*, Sydney, 29 March 2006; M Weinberg, *Consultation*, Melbourne, 3 April 2006; R Connolly and C Connolly, *Consultation*, Melbourne, 5 April 2006; B Saul, 'Preventing Communal Violence: Blurring Sedition, Vilification and Terrorism' (2005) (November/December 2005) *Human Rights Defender (Special Issue)* 15, 16; B Saul, *Submission SED 122*, 6 July 2006; Law Council of Australia, *Submission SED 126*, 19 July 2006.

72 Australian National University Academics, *Consultation*, Canberra, 27 April 2006; Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 31 March 2006.

section so that there is no confusion with terrorism and political liberty issues.⁷³ This concern was echoed by the Public Interest Advocacy Centre (PIAC), which argued for the removal of the section from s 80.2 of the *Criminal Code* to avoid inter-group violence being conflated with the use of force or violence against the institutions of government (which is the basis for the other provisions).⁷⁴

10.48 The AGD submitted that ‘sedition’ is the appropriate term to identify the conduct in s 80.2(5) because the urging of violence against groups in a society made up of different cultures and religions constitutes ‘a very real attack on the fabric of society’, and that:

While in some circumstances conduct that is covered by s 80.2(5) may also come within the scope of the Commonwealth Racial Discrimination Act 1975 (RDA) the purposes of the legislative regimes are distinctly different. Accordingly, the prospect of overlap in any meaningful way is relatively small.⁷⁵

10.49 The AGD argued that s 80.2(5) sends a strong message to the community that such public acts will not be tolerated, and this offence is likely to provide a greater deterrent than the civil provisions in the RDA or the incitement provisions in the *Criminal Code*. In response to the argument that a criminal offence of this type might be appropriate in the RDA, the AGD noted that the RDA has established civil remedies that are more suited to an anti-discrimination regime

where the focus is on education and conciliation, rather than punitive measures to overcome discrimination and vilification, which are often created in situations of misunderstanding and lack of familiarity.⁷⁶

10.50 The Executive Council of Australian Jewry supported the retention of s 80.2(5) in the *Criminal Code* as ‘it is useful to characterise such activity as a dangerous crime’, although it agreed that the offence should be divorced from the political overtones of traditional sedition law.⁷⁷

Linking inter-group violence and terrorism

10.51 In its submission to the 2005 Senate Committee inquiry, the AGD described the urging of violence by one racial group against another as a ‘key terrorist theme’.⁷⁸ In its submission to this Inquiry, the AGD expressed the view that s 80.2(5) is most appropriately expressed as a sedition offence as it ‘drives at the root cause of the problem of terrorism by focusing on violence that is behind it’.⁷⁹

73 Australian Lawyers for Human Rights, *Submission SED 120*, 4 July 2006. See also National Association for the Visual Arts, *Submission SED 75*, 3 July 2006.

74 Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

75 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

76 Ibid.

77 Executive Council of Australian Jewry, *Submission SED 116*, 3 July 2006.

78 Australian Government Attorney-General’s Department, *Submission 290 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 16 November 2005, 4.

79 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

10.52 Commentators have argued that inter-group violence is conceptually distinct from terrorism, and should be treated separately by the criminal law.⁸⁰ Further, a number of submissions criticised s 80.2(5) on the ground that presenting this offence as a counter-terrorism measure stigmatises inter-group violence and reinforces the stereotyping of certain ethnicities or religions as terrorists.⁸¹ In its 2004 report, *Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians*, HREOC found that Australian Arabs and Muslims are often vilified on the basis that they share responsibility for terrorism or are potential terrorists.⁸² It also found that following the terrorist attacks on 11 September 2001, Australian Muslims and Arabs suffered an increase in physical attacks, threats of physical violence and vilification.⁸³

10.53 It has been argued that the wording of s 80.2(5) could be construed in a manner that allows a person's race, religion, nationality or political opinion to be used adversely and in a discriminatory manner.⁸⁴ Concerns were expressed to the 2005 Senate Committee inquiry and to the ALRC Inquiry that the introduction of such a provision in the present context (where it was previously rejected as a matter of policy) is due to the fact that the provision is concerned with protecting the majority, rather than vulnerable racial or religious minority groups.⁸⁵ For example, Pax Christi submitted:

Section 80.2(5) in particular which is concerned with racial or religious violence may also strengthen the misleading and dangerous impression that the problem of terrorism has its roots in Islam and that the leaders of Islamic communities may be likely to contravene the sedition provisions.⁸⁶

10.54 Emrys Nekvapil submitted that:

The re-enlivening of an offence of sedition, in the modern context, and as part of anti-terror provisions, is clearly a response to the perceived threat of the voice of Islamic extremism. The anxiety of the Muslim community that these new offences are

80 B Saul, *Submission SED 52*, 14 April 2006. See also B Saul, 'Preventing Communal Violence: Blurring Sedition, Vilification and Terrorism' (2005) (November/December 2005) *Human Rights Defender (Special Issue)* 15, 16.

81 Pax Christi, *Submission SED 16*, 9 April 2006; Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; New South Wales Young Lawyers Human Rights Committee, *Submission SED 38*, 10 April 2006; J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006; E Nekvapil, *Submission SED 45*, 13 April 2006; B Saul, *Submission SED 52*, 14 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; R Connolly and C Connolly, *Consultation*, Melbourne, 5 April 2006.

82 Human Rights and Equal Opportunity Commission, *Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004), [2.2.3].

83 Ibid, [2.2.1]–[2.2.3].

84 L Lasry and K Eastman, *Memorandum of Advice to Australian Capital Territory Chief Solicitor*, (undated), 42; P Matthew, *The Anti-Terrorism Bill 2005* (2005) Human Rights and Equal Opportunity Commission <www.hreoc.gov.au> at 29 January 2006, 6.

85 See, eg, P Matthew, *Submission 187 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, (undated).

86 Pax Christi, *Submission SED 16*, 9 April 2006.

designed squarely with them in mind is apparent from submissions to the Senate Inquiry.

The problem is not the enactment of Section 80.2(5) *per se*, but its enactment as part of the newly written laws on sedition under the banner of anti-terrorism legislation. The grave danger in characterising a racial or religious discrimination/vilification law as political offences cannot be over-stated.⁸⁷

10.55 A number of submissions indicated that moving the offence to anti-vilification legislation would alleviate some of the concerns relating to stigmatisation of certain groups.⁸⁸

10.56 Patrick Emerton submitted that ‘the purported link between inter-communal violence and terrorism is entirely spurious’⁸⁹ and so, if the offence in s 80.2(5) were to be retained, the urging of violence against groups should be linked more tightly to the idea of hate crimes. This could be done by the inserting the phrase ‘for reasons of hatred of that group’ after the reference to the urging of the use of force or violence. This would make it clear that it is hate speech that is being targeted by the offence.⁹⁰

Peace, order and good government of the Commonwealth

10.57 While s 24A(g) of the *Crimes Act* contained the ‘peace, order and good government of the Commonwealth’ phrase, the offence as recommended by the Gibbs Committee did not. The phrase was interpreted in *R v Sharkey* as providing constitutional support for s 24A(g).⁹¹ The Gibbs Committee considered that constitutional support for the altered provision could be found in the external affairs power in s 51(xxix) of the *Constitution* and art 20 of the ICCPR, which requires states to prohibit ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.⁹² ALHR also acknowledged that s 80.2(5) draws to some extent upon art 4 of CERD and art 20 of the ICCPR.⁹³ The basis of accepting that s 80.2(5) would be a valid law made in conjunction with the external affairs power of the *Constitution* is that it is ‘reasonably capable of being considered as appropriate and adapted to implementing a treaty to which Australia is a party’.⁹⁴

87 E Nekvapil, *Submission SED 45*, 13 April 2006.

88 Ibid; R Connolly and C Connolly, *Consultation*, Melbourne, 5 April 2006.

89 P Emerton, *Submission SED 108*, 3 July 2006.

90 Ibid.

91 *R v Sharkey* (1949) 79 CLR 121.

92 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [32.17]. For a discussion of Australia’s obligations under international law, see Ch 5.

93 Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

94 *Toben v Jones* (2004) 74 ALD 321, 328 referring to *Victoria v Commonwealth* (1996) 187 CLR 416. While many submissions argued that the articles are not fully implemented, the ‘deficiency’ in implementation of the relevant articles is fatal to the validity of the law only if the deficiency is so substantial ‘as to deny the law the character of a measure implementing the Convention or it is a deficiency which, when coupled with other provisions of the law, make it substantially inconsistent with the Convention’: *Victoria v Commonwealth* (1996) 187 CLR 416, 489.

10.58 The AGD agreed that the ‘peace, order and good government of the Commonwealth’ phrase is not necessary to provide constitutional support for the provision, but argued that the inclusion of the requirement in the offence provides the appropriate Commonwealth ‘flavour’ for the offence.⁹⁵

10.59 A number of commentators and submissions questioned the ‘peace, order and good government’ limb of the offence. One issue raised was whether the word ‘Commonwealth’ in s 80.2(5) is used in a geographical sense or whether it refers to the ‘matrix of institutions, rights and functions constituted under the Federal Constitution’.⁹⁶ On the basis of the High Court’s interpretation in *Sharkey*, the latter is likely to be the preferred interpretation.

10.60 The phrase ‘peace, order and good government’ is commonly used in constitutions to convey plenary power, and the proposition that they are ‘words of limitation’ has been rejected.⁹⁷ However, when examining the predecessor of the s 80.2(5) offence in *Sharkey*, Dixon J expressed concern that, while the phrase had a well-understood constitutional meaning when used to confer a plenary power, it was meaningless as an element of a crime.⁹⁸

10.61 It is of concern to some that the phrase may be interpreted to limit the scope of the offence in s 80.2(5) to the urging of acts of large-scale violence that would damage the Commonwealth’s international standing or reputation,⁹⁹ and that sporadic or isolated incitements to violence may not be covered by s 80.2(5) without a broader link to the Commonwealth.¹⁰⁰ The Explanatory Memorandum to the Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth) (an Opposition Bill) states that the ‘peace, order and good government of the Commonwealth’ requirement

would make it difficult to use [this offence] against those who incite violence against minorities at a local or neighbourhood level. It might also be a barrier to prosecution where the incitement is directed solely at a minority group, rather than a large majority group.¹⁰¹

10.62 For example, if ‘Commonwealth’ is interpreted in a geographical sense, those involved in the urging of force or violence in the Cronulla riots in Sydney in December 2005 could be prosecuted under s 80.2(5) if SMS messages were sent across state

95 Australian Government Attorney-General’s Department, *Consultation*, Canberra, 26 April 2006.

96 G Griffith, *Sedition, Incitement and Vilification: Issues in the Current Debate: Briefing Paper No 1/06* (2006) NSW Parliamentary Library Research Service, 35.

97 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10.

98 *R v Sharkey* (1949) 79 CLR 121, 152, 154.

99 G Griffith, *Sedition, Incitement and Vilification: Issues in the Current Debate: Briefing Paper No 1/06* (2006) NSW Parliamentary Library Research Service, 35. See also Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006.

100 B Saul, *Submission SED 52*, 14 April 2006. See also B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 877.

101 Explanatory Memorandum, Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth), 4.

boundaries.¹⁰² However, if ‘Commonwealth’ is interpreted in an institutional and functional sense, it may be more difficult to satisfy s 80.2(5).¹⁰³ A number of commentators and submissions considered that this makes the provision too narrow, particularly when considering whether the offence implements Australia’s international human rights obligations—an issue discussed in more detail below. Some expressed the view that the uncertainty of the meaning of the term would make the offence difficult to prosecute.¹⁰⁴

10.63 The Federation of Community Legal Centres submitted that narrowing the offence to conduct that threatens the good order and governance of the Commonwealth is ‘misguided’ and ‘has missed the point’ as ‘the incitement of violence within the community is primarily a problem for those groups that find themselves the target of such hostility’.¹⁰⁵

10.64 Dr Ben Saul considered that ‘peace, order and good government’ was an archaic expression that should be either modernised or given a more particular definition, such as an explanatory note which stated that:

The peace, order and good government of the Commonwealth may be threatened where the use of force or violence would: (a) harm Commonwealth officers; (b) extensively damage or destroy Commonwealth property; (c) occur in more than one State or Territory; (d) inhibit the capacity of the Commonwealth to govern or maintain order; or (e) impair the defence of the Commonwealth.¹⁰⁶

10.65 However, some submissions argued the contrary position—that the term ‘peace, order and good Government of the Commonwealth’ makes s 80.2(5) too broad. The Centre for Media and Communications Law submitted that if s 80.2(5) were retained, ‘peace, order and good Government of the Commonwealth’ should be replaced with the common law requirement of incitement to violence against ‘constituted authority’.¹⁰⁷

Obligations under international law

10.66 A number of submissions welcomed the move towards the creation of a federal offence of racial and religious vilification, but argued that s 80.2(5) is too narrow to

102 B Saul, ‘It’s Essential to Clean Up this Mess’, *Sydney Morning Herald* (Sydney), 14 December 2005, 17, 17; Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 26 April 2006.

103 Although the AGD considered there was a reasonable argument that an incident such as this had significance beyond New South Wales: Australian Government Attorney-General’s Department, *Consultation*, Canberra, 26 April 2006.

104 R Douglas, *Submission SED 87*, 3 July 2006; N Roxon MP Shadow Attorney-General, *Submission SED 63*, 28 April 2006.

105 Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006.

106 B Saul, *Submission SED 122*, 6 July 2006.

107 It should be noted that the Centre for Media and Communications Law considered it preferable to delete the provision from sedition offences and amend the *Racial Discrimination Act 1975* (Cth): Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006.

provide full compliance with Australia's obligations under international law (in particular, art 20 of the ICCPR and art 4 of CERD).

10.67 Fitzroy Legal Service raised a number of issues that would need to be addressed before Australia's obligations under CERD could be implemented effectively. In particular, it noted that s 80.2(5) proscribes only incitement to violence, and not incitement of hatred, discrimination and ridicule more generally, and that the 'peace, order and good government of the Commonwealth' limb of the offence narrows the application further.¹⁰⁸ A non-government organisation, ARTICLE 19, expressed concern about the link between group violence and the protection of the state.

This does not reflect the purpose of Article 20, which is a special State obligation to take preventative measures at the horizontal level to enforce the rights to life (Article 6) and equality (Article 26). Accordingly, s 80.2(5)(b) exceeds the scope and purpose of Article 20.¹⁰⁹

10.68 ALHR submitted that Australia has yet to fully implement its obligations under art 20 of the ICCPR 'in the sense that the Commonwealth has failed to implement civil laws which make unlawful religious discrimination and religious hatred in the ways it has done with respect to race'.¹¹⁰

10.69 Without commenting directly on whether s 80.2(5) implements Australia's international obligations, HREOC noted that art 20 of the ICCPR is not really concerned with public order offences but is rather directed towards anti-discrimination and anti-vilification.¹¹¹

10.70 The AGD noted that Australia has entered reservations to both art 20 of the ICCPR and art 4 of CERD, to the effect that Australia does not consider itself bound to enact criminal provisions addressing the advocacy of racial, national or religious hatred. It emphasised that the enactment of s 80.2(5) is consistent with, but not required by, Australia's obligations under international law.¹¹²

Identified groups

10.71 The AGD noted that s 80.2(5) is a modernised version of the pre-existing s 24A(g) of the *Crimes Act*. Following the recommendations of the Gibbs Committee, the term 'class' in s 24A(g) was removed and the offence was redrafted to focus on

108 Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006. See also New South Wales Young Lawyers Human Rights Committee, *Submission SED 38*, 10 April 2006.

109 ARTICLE 19, *Submission SED 14*, 10 April 2006.

110 Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006. See also B Saul, *Submission SED 52*, 14 April 2006.

111 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 31 March 2006.

112 Australian Government Attorney-General's Department, *Submission SED 31*, 12 April 2006.

groups in the community. The AGD submitted that the move away from ‘classes’ to ‘groups’ has ‘advantages for national unity and identity’.¹¹³

10.72 One submission pointed out that the question of which groups deserve specific protection is complex and deserves more consideration:

Any offence of committing violence on the basis of the perceived group affiliation of the victim needs to carefully identify which groups are worthy of such protection. Race is a reasonably clear example, but religion is sometimes considered controversial (what if a religion advocates human sacrifice, for example—ought it to be a crime distinct from ordinary assault to use force against group members in the name of rescuing sacrificial victims?). Political affiliation is an even more controversial example—why ought it to be especially criminal to use force against fascists, for example?¹¹⁴

10.73 The inclusion of ‘religion’ was questioned by others. While ‘religion’ is included in art 20 of the ICCPR, federal laws do not otherwise provide for protection from vilification or discrimination on the basis of religion.¹¹⁵ One of the principle concerns appeared to be the difficulty involved in determining what constitutes a ‘religion’ and the reluctance to extend protection to sects or ‘newer’ religions such as Scientology. Because religion is seen as a matter of belief or ideas (as opposed to race or ethnicity, which are intrinsic), there was concern that mere criticism could be caught, thereby stifling free and open public debate.¹¹⁶ However, these concerns have greater validity when discussing a more general religious vilification offence, as opposed to an offence of urging the use of force or violence against a religious group.

10.74 Bearing in mind the arguments that s 80.2(5) is not an implementation of Australia’s international obligations, and that the ‘peace, order and good government of the Commonwealth’ limb provides a constitutional peg, it has been suggested that it is not necessary to link the conduct described in s 80.2(5) to race, religion or nationality.¹¹⁷ This would enable the inclusion of a greater range of identified groups, or a return to the broader language of ‘class’ used in s 24A(g). The Law Council of Australia (Law Council) submitted that the reference to the distinguishing characteristics of the group should be removed because it ‘tends to draw attention to current sources of conflict and tension’.¹¹⁸

113 Ibid.

114 P Emerton, *Submission SED 36*, 10 April 2006.

115 Although it is argued this is necessary for full implementation of Australia’s obligations under art 20 of the ICCPR: Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

116 See R Chow, ‘Inciting Hatred or Merely Engaging in Religious Debate: The Need for Religious Vilification Laws’ (2005) 30 *Alternative Law Journal* 121; E Barendt, ‘Threats to Freedom of Speech in the United Kingdom’ (2005) 28 *University of New South Wales Law Journal* 895.

117 L Lasry and K Eastman, *Memorandum of Advice to Australian Capital Territory Chief Solicitor*, (undated), 42.

118 Law Council of Australia, *Submission SED 126*, 19 July 2006.

10.75 HREOC suggested that the further characteristic of ‘national origin’ should be added to the provision.¹¹⁹ This would ensure that persons who are Australian citizens but who are identified with a particular national community will receive the same protections as those of that national community who do not hold Australian citizenship. For example, if there were a call to use force or violence against ‘Vietnamese’ in the Australian community, many Vietnamese-Australians would not be covered by the existing provision of ‘race, religion, nationality or political opinion’ as many were born in Australia or have been naturalised as Australian citizens. This view was supported in a number of consultations and submissions.¹²⁰ The Law Council considered that ‘ethnicity’ or ‘ethnic origin’ were preferable terms to ‘national origin’.¹²¹

Limiting the offence to group-on-group violence

10.76 Some submissions and consultations raised concerns that the offence was limited to the situation where a group (defined by reference to a particular characteristic) is being urged to use force or violence against another group (also defined by reference to a particular characteristic).

10.77 The Shadow Attorney-General, Nicola Roxon MP argued that

this offence only applies to urgings made to a ‘group’ ‘distinguished by race, religion, nationality or political opinion’. It does not apply when the urgings are made to an audience which is not so distinguished, for example a classroom of students, anonymous passers-by or listeners to a radio program.

This is an unnecessary limitation that, at best, will simply complicate prosecutions and, at worst, allow inciters of ethnic violence to escape liability by couching messages to general audiences.¹²²

10.78 PIAC agreed that:

To retain the requirement that the group being urged to violence be distinguished by a common characteristic adds an additional element of proof that, in most circumstances in Australia, will be absent. For example, the urging of violence against Indigenous Australians or Australians of Asian origin or background should be caught by this section even if the group being urged to violence can best be characterised as representative of a cross-section of the Australian community.¹²³

119 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 31 March 2006.

120 See, eg, B Saul, *Submission SED 122*, 6 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; Commonwealth Director of Public Prosecutions, *Submission SED 84*, 3 July 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; Human Rights and Civil Liberties Groups, *Consultation*, Sydney, 14 June 2006.

121 Law Council of Australia, *Submission SED 126*, 19 July 2006.

122 N Roxon MP Shadow Attorney-General, *Submission SED 63*, 28 April 2006.

123 Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

10.79 In a similar vein, the argument was made that the offence excludes incitements aimed to provoke individuals, or groups not mentioned in the legislation.¹²⁴

10.80 The Commonwealth Director of Public Prosecutions (CDPP) submitted that, in its view, it is clear that the provision is aimed at capturing, among other situations, force or violence urged against another group or groups distinguished by *not* being of a particular race, religion, nationality or political opinion. However, it argued that it would be of assistance if this were made clear in the provision, or in a note or explanatory material.¹²⁵

10.81 The AGD made a similar point, arguing that it seems necessary to ensure that groups targeted on the basis that they do not share views or affiliate themselves with the views of the person urging the force or violence are protected equally. However, the AGD was concerned that any attempt to remove the focus of the offence on ‘grouping’ would change the fundamental nature of the offence as a public order offence, rather than a vilification offence.¹²⁶

Broader review of anti-vilification laws

10.82 A number of submissions criticised existing anti-vilification laws and pointed to a need to review this area generally to develop effective responses to the problem of inter-communal violence.

10.83 It has been argued that the existing federal and state legislative regimes are inadequate, and that the law should address not only the incitement of violence, but also the incitement of hatred or vilification and the perpetration of actual inter-group violence.

While violence against group members can always be prosecuted as ordinary crime under state, territory or federal law, treating group-based violence or ‘hate crimes’ as ordinary offences fails to recognise the additional psychological element and social harm involved in such cases. It is not sufficient to merely consider racial or religious motives as aggravating factors in sentencing, since that approach does not stigmatise the offending conduct as adequately *naming* the conduct a racial or religious crime.¹²⁷

10.84 Fitzroy Legal Service stated that existing federal measures to eradicate racial hatred, violence, discrimination and vilification are inadequate in both form and substance.¹²⁸

124 B Saul, *Submission SED 52*, 14 April 2006.

125 Commonwealth Director of Public Prosecutions, *Submission SED 84*, 3 July 2006.

126 Australian Government Attorney-General’s Department, *Submission SED 92*, 3 July 2006.

127 B Saul, *Submission SED 52*, 14 April 2006. See also New South Wales Young Lawyers Human Rights Committee, *Submission SED 38*, 10 April 2006.

128 Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006.

ALRC's view

A criminal offence

10.85 As discussed in Chapter 2, the ALRC does not consider that s 80.2(5) or any of the other offences in s 80.2 of the *Criminal Code* should be characterised as sedition offences (see Recommendation 2–1). However, there is a need for an offence such as s 80.2(5) in federal law. The ALRC considers that an offence based on the present s 80.2(5) should be retained in the *Criminal Code* and headed ‘*Urging inter-group force or violence*’ (see Recommendation 10–1).

10.86 There are examples in recent history of inter-group violence in Australia. It is important to ensure that Australian law condemns the urging of such violence and has the capacity to punish this conduct in appropriate cases. It should not be necessary to wait for such anti-social activity to become more prevalent before the Australian Government prohibits such conduct and applies a criminal sanction—both for reasons of deterrence as well as to provide a clear statement about where the line is drawn between acceptable and unacceptable conduct.

10.87 Although there is a connection between s 80.2(5) of the *Criminal Code* and the RDA, the ALRC recommends that the ‘urging inter-group violence’ offence be retained in the *Criminal Code* as a public order offence. There are two reasons why this is preferable to moving the offence to the RDA.

10.88 First, the offence as framed has a narrow application. It applies only to the urging of inter-group force or violence—that is, the force or violence urged must be between two groups rather than between an individual and a group, or between individuals. The offence is also focused on the urging of force or violence, not a more general offence of urging hatred or vilification. Although it is related to anti-vilification laws, the ALRC considers that the offence is best characterised as a public order offence.

10.89 Another reason for maintaining s 80.2(5) in the *Criminal Code* is that it is appropriate to retain *serious* criminal offences in the *Criminal Code* rather than spread them throughout various pieces of legislation. There is also a question whether the RDA, which has a strong conciliation and civil remedies basis, is an appropriate location for serious criminal offences, even where based on racial or other discriminatory grounds.¹²⁹

10.90 As outlined above, many submissions considered that s 80.2(5) is too narrow, inappropriately focuses on the state rather than the individual, and does not fully

129 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 31 March 2006.

implement Australia's international obligations particularly in relation to art 4 of CERD and art 20 of the ICCPR.

10.91 It is beyond the scope of this Inquiry to recommend general changes to the federal anti-discrimination regime. However, based on submissions to the Inquiry, the ALRC believes that a broader range of offences is required to implement fully Australia's international obligations. The ALRC thus recommends that the Australian Government consider two extensions to s 80.2(5), namely: (a) where a person urges another person (as distinct from a group) to use force or violence against a group in the community that is distinguished by race, religion, nationality, national origin or political opinion; and (b) where a person urges a group that lacks one of the specified distinguishing characteristics to use force or violence against a group in the community that is distinguished by race, religion, nationality, national origin or political opinion.

10.92 The ALRC notes the concerns raised about the stigmatising effect of enacting s 80.2(5) as part of a package of anti-terrorism laws. However, the provision itself has been, and should be, welcomed into Australian law. It has value that extends beyond the current climate of terrorism, and can be used as a statement condemning the use of force or violence against any defined racial, national or religious group.

Modification of the offence

Fault elements

10.93 Chapter 8 discusses the technical construction given to the offences in s 80.2(1), (3) and (5). There was broad support in submissions for making it clear that these offences involve intentional urging of the use of force or violence. Even assuming that the application of the general principles of criminal responsibility in the *Criminal Code* to the sedition offences is reasonably clear, it would not be inconsistent with the way in which the *Criminal Code* is drafted to state that a person commits the offence if he or she '*intentionally* urges' the conduct referred to in s 80.2(5). Consistent with proposals in relation to s 80.2(1) and (3),¹³⁰ the ALRC recommends that s 80.2(5) be amended to insert the word '*intentionally*' before the word '*urges*'.

10.94 Chapter 8 considers whether there should be a more concrete link between the offences in s 80.2 and force or violence. While acknowledging the deliberate policy decision to retain a distinction between '*urging*' for the purposes of s 80.2 and incitement, the ALRC recommends that for a person to be guilty of any of the s 80.2 offences the person should intend that the urged force or violence will occur.¹³¹ Recommendation 8-1, which would apply to s 80.2(5), will help remove from the ambit of the offences rhetorical statements that a person does not intend anyone to act upon.

130 Recs 9-2, 9-5.

131 Rec 9-2.

Peace, order and good government of the Commonwealth

10.95 The ALRC has given careful consideration to whether the second limb of s 80.2(5)—that the use of the force or violence would threaten the peace, order and good government of the Commonwealth—should be retained. Retention clearly limits the offence, and provides a ‘public order’ character, which would be diminished without the limb. The ALRC considers that it is appropriate to focus the offence on issues related to the Commonwealth. This element helps to establish a federal offence that is distinct from state and territory offences, and focuses on more serious inter-group conduct that has an impact on the broader community.

10.96 An array of state and territory laws exists to cover group incidents that may not fall within the ambit of s 80.2(5), as demonstrated by the legal proceedings following the Cronulla riots in Sydney in December 2005.¹³² Not every incident of civil unrest requires federal intervention. Although the ALRC notes there may be gaps in existing anti-vilification laws, it does not consider that s 80.2(5) is the place to remedy the deficiencies, or that removal of the ‘good government’ limb would in any case be the ideal solution.

10.97 While it may not be necessary to include the phrase ‘peace, order and good government of the Commonwealth’ for constitutional reasons, the ALRC does not recommend any change to this limb of the offence.

Identified groups

10.98 The ALRC supports the modernisation of s 80.2(5) to include groups identified by distinguishing characteristics. As pointed out in submissions, there may be instances where more general urging of violence is not captured by this provision due to the need to pinpoint a group identified by a distinguishing characteristic. Other provisions exist to capture such conduct and the ALRC considers it is appropriate to have a provision (such as s 80.2(5)) that highlights the particular need to discourage and punish the urging of inter-group violence on the basis of race, nationality, or religion.

10.99 Consistent with views expressed by HREOC, the ALRC recommends inserting ‘national origin’ as an additional category of ‘group’. As noted above, there is a gap in the provision relating to Australian citizens who are identified with a particular national community. The enhancement of the provision is consistent with art 4 of CERD and art 20 of the ICCPR. Section 80.2(6) also should be amended in a consistent manner.

132 In relation to the Cronulla riots, it has been reported that of the 285 charges laid (against 51 people for the riot, plus 53 charged over subsequent ‘revenge’ attacks), 86 were for affray, 75 for riot, 13 for threatening violence and 8 for possession of a prohibited weapon: A Clennell “Police Tough on Both Sides of the Cronulla Riots” *Sydney Morning Herald*, 19 July 2006, 2.

10.100 The ALRC notes concerns about including ‘religion’ as a distinguishing characteristic in s 80.5: discussion and debate about religious ideas and practices, within the bounds of decency, should generally fall within protected free speech. However, the ALRC does not consider these concerns persuasive in relation to an offence that seeks to protect a religious group from being subjected to force or violence. In addition, in this case there is a clear basis for including religion as a distinguishing characteristic in s 80.2(5) given its connection to art 20 of the ICCPR.

Alternatives to the criminal law

10.101 During the course of this Inquiry, a question arose regarding whether books for sale in Sydney containing material promoting suicide bombings and containing anti-Western sentiment could fall under the new sedition provisions. Media reports stated that the books, which were available for sale in bookstores in the suburbs of Lakemba and Auburn, contained material such as:

- promotion of suicide bombing and ‘wiring up one’s body’ for ‘martyrdom or self-sacrifice operations’;
- claims that Australians should be ashamed and that Western culture is ‘the culture of wolves, injustice and racism’;
- claims that Australian police bash young boys, and that there is a conspiracy to turn young Muslims into drug addicts; and
- claims that there is a ‘barbaric onslaught’ against Muslims by Jews, Christians and atheists.¹³³

10.102 The Australian Federal Police and the CDPP considered that the books were not in breach of the sedition laws as the material did not urge or advocate others to use force or violence.¹³⁴ Following this decision, eight books were referred by the Attorney-General to the Classification Review Board and two were subsequently banned. In one case, the book was found to be ‘written in an emotively and passionate manner with the purpose of being a real and genuine call to specific action by Muslims’.¹³⁵ The other book was found to have the ‘objective purpose of promoting and inciting acts of terrorism against “disbelievers”’.¹³⁶ Other books were not banned because, while the material they contained may have been offensive to some members of the Australian public, they did not promote, condone or incite crimes or acts of violence.¹³⁷

133 K Bissett and A Kamper, ‘Muslim “Books of Hate” Get Ok’, *Daily Telegraph* (Sydney), 15 June 2006, 2.

134 Ibid.

135 See decision at <www.oflc.gov.au/resource.html?resource=877&filename=877.pdf> (19 July 2006).

136 See decision at <www.oflc.gov.au/resource.html?resource=873&filename=873.pdf> (19 July 2006).

137 See decision at <www.oflc.gov.au/resource.html?resource=881&filename=881.pdf> (19 July 2006).

10.103 Following these decisions, the Attorney-General has called for a review of censorship laws across the states and territories to assess whether they deal adequately with material that urges or advocates terrorist acts.¹³⁸

10.104 The current federal classification regime is set out in the *Classification (Publications, Film and Computer Games) Act 1995* (Cth). The Act establishes the Classification Board and sets out the procedures to be followed in making classification decisions. Section 9 of the Act provides that publications are to be classified in accordance with the *National Classification Code* and the classification guidelines.¹³⁹ The general principles underlying the classification process are set out in the Code and include the following considerations:

- (a) adults should be able to read, hear and see what they want;
- (b) minors should be protected from material likely to harm or disturb them;
- (c) everyone should be protected from exposure to unsolicited material that they find offensive;
- (d) the need to take account of community concerns about:
 - (i) depictions that condone or incite violence, particularly sexual violence; and
 - (ii) the portrayal of persons in a demeaning manner.

10.105 The Code specifies that publications that ‘promote, incite or instruct in matters of crime or violence’ should be classified ‘RC’ (refused classification)—which makes them unavailable for lawful distribution. In making classification decisions, the Board must take into account a number of matters, including:

- (a) the standards of morality, decency and propriety generally accepted by reasonable adults;
- (b) the literary, artistic or educational merit (if any) of the publication or film;
- (c) the general character of the publication or film, including whether it is of a medical, legal or scientific character; and
- (d) the persons or class of persons to or amongst whom it is published or is intended or likely to be published.¹⁴⁰

10.106 The *2005 Guidelines for the Classification of Publications* also emphasise the critical importance of context and ask the classifiers to assess the likely impact of the

138 P Ruddock (Attorney-General), ‘Attorney Welcomes “Books of Hate” Decision’ (Press Release, 11 July 2006).

139 The guidelines are determined by the Minister to assist the Board in making its determinations: *Classification (Publications, Film and Computer Games) Act 1995* (Cth) s 12. The Code contains general principles, which form the basis of the guidelines.

140 *Classification (Publications, Film and Computer Games) Act 1995* (Cth) s 11.

publication. For example, publications may be classified ‘unrestricted’ even where they ‘emphasise violence, including fighting or combat’, where this is portrayed ‘in a sporting or career context, such as the armed forces’.¹⁴¹

10.107 The application of these laws to the so-called ‘Books of Hate’ is not the first time that classification laws have been used to ban material that might otherwise have been thought of as ‘seditious’. As noted in Chapter 2, during the First World War, the Commonwealth could prohibit the importation of literature with a ‘seditious intent’ pursuant to the *Customs Act 1901* (Cth).¹⁴²

10.108 This controversy illustrates the importance of the Australian Government considering ways other than the criminal law to deal with material that is divisive and offensive but falls short of urging the use of force or violence. Classification decisions are another mechanism by which the issue of inter-group ‘hate speech’ might be dealt with, although censorship decisions always must be pursued with the greatest care in a liberal democratic society.

10.109 It is also important that the Australian Government continues to develop strategies, including educational programs, to promote inter-communal harmony and understanding; and highlight the existence of civil remedies in the RDA and relevant state and territory legislation. It is preferable that such programs exist to stem the kinds of conduct that might otherwise need to be punished using the criminal law.

10.110 As indicated above, it is beyond the scope of this Inquiry to examine and recommend changes to anti-discrimination law generally. However, the ALRC notes that, unlike other federal anti-discrimination legislation, the RDA has not been subject to review since its enactment in 1975.¹⁴³ During this period there has been enactment and reform of state and territory anti-discrimination laws, and at present there are great variations in the coverage and operation of those laws across Australia. The ALRC suggests that a targeted review of the RDA would be highly desirable.

Recommendation 10–1 The heading of s 80.2(5) of the *Criminal Code* (Cth) should be changed to refer to urging ‘inter-group force or violence’.

141 2005 *Guidelines for the Classification of Publications*, 10.

142 See R Douglas, ‘Saving Australia from Sedition: Customs, the Attorney-General’s Department and the Administration of Peacetime Political Censorship’ (2002) 30 *Federal Law Review* 135.

143 See Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004). Many components of the *Sex Discrimination Act 1984* (Cth) have been reviewed by the ALRC (as part of its inquiry into equality and the law) or by the Sex Discrimination Commissioner: see Australian Law Reform Commission, *Equality Before the Law*, ALRC 69 (1994); Human Rights and Equal Opportunity Commission, *Pregnant and Productive: Its a Right Not a Privilege to Work While Pregnant* (1999); Human Rights and Equal Opportunity Commission, *20 Years On: The Challenges Continue...Sexual Harassment in the Australian Workplace* (2004).

Recommendation 10–2 Section 80.2(5) of the *Criminal Code* should be amended to:

- (a) insert the word ‘intentionally’ before the word ‘urges’ to clarify the fault element applicable to urging the use of force or violence; and
- (b) add ‘national origin’ to the distinguishing characteristics of a group for the purposes of the offence.

Recommendation 10–3 As a consequence of Recommendation 10–2, s 80.2(6) of the *Criminal Code* should be amended to apply recklessness to the element of the offence under s 80.2(5) that it is a group distinguished by national origin that a person urges another to use force or violence against.

Recommendation 10–4 The Australian Government should consider extending the offence in s 80.2(5) of the *Criminal Code* to circumstances in which:

- (a) a person urges another person (as distinct from a group) to use force or violence against a group in the community that is distinguished by race, religion, nationality, national origin or political opinion; and
- (b) a person urges a group that lacks one of the specified distinguishing characteristics to use force or violence against a group in the community that is distinguished by race, religion, nationality, national origin or political opinion.

Recommendation 10–5 The Australian Government should continue to pursue other strategies, such as educational programs, to promote inter-communal harmony and understanding.

(The relevant sections of the Criminal Code, amended as proposed, are set out in Appendix 2.)

11. Assisting the Enemy and Related Treason Offences

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Introduction

11.1 This chapter presents the ALRC’s recommendations in relation to the offences of urging a person to assist the enemy or those engaged in armed hostilities with the Australian Defence Force (ADF). The ALRC concludes that these offences, set out in s 80.2(7)–(8) of the *Criminal Code* (Cth), should be repealed, and dealt with in a different way.

11.2 Two of the treason offences set out in s 80.1 of the *Criminal Code* are framed in similar terms to the sedition offences in s 80.2(7)–(8). Therefore, it is appropriate that aspects of the treason offences be addressed by this Inquiry.¹ In this context, this chapter refers to recommendations for reform of the treason offences made by the Security Legislation Review Committee, chaired by the Hon Simon Sheller QC, (the Sheller Committee) as part of a broader review of security laws.² The ALRC recommends a number of complementary amendments to the treason offences.

11.3 The chapter also examines the extraterritorial application of the offences in ss 80.1 and 80.2. In view of this extraterritorial application, the ALRC recommends

1 Reform of these aspects of the treason provisions constitutes a ‘related matter’ under the Inquiry’s Terms of Reference.

2 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006).

that the treason offences expressly should require that, at the time of an alleged offence, the person is an Australian citizen or resident.

Urging a person to assist the enemy

11.4 Subsections 80.2(7)–(8) are significantly different from the other three offences under consideration in that they do not require that a person urge the use of force or violence. Rather, these provisions make it an offence to urge another person to engage in conduct intended to ‘assist’ the enemy or those engaged in armed hostilities against the ADF.

11.5 Submissions to the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005 (Cth) (the 2005 Senate Committee inquiry) argued that these provisions were not a mere update of existing laws, but represented two completely new offences that ‘considerably expand existing sedition laws’.³ Further, the provisions were said to conflict with recommendations of the Committee of Review of Commonwealth Criminal Law (the Gibbs Committee) made in 1991.⁴ The Gibbs Committee recommended the enactment of three sedition offences, each of which required the incitement of force or violence.⁵

11.6 The Attorney-General’s Department (AGD) did not accept that the offences were new, arguing that they were ‘clearly contemplated’ by the repealed sedition provisions in the *Crimes Act 1914* (Cth). The AGD’s view was based on the fact that s 24F(1) of the *Crimes Act* created an exception to the offences for certain acts done in good faith and s 24F(2) provided that an act or thing done with intent to assist an enemy or those engaged in armed hostilities against the ADF is not done in good faith.⁶ Submissions to the ALRC’s Inquiry challenged the AGD’s view that the offences are not new.⁷

The meaning of ‘assist’

11.7 The word ‘assist’ is not defined in the *Criminal Code*. In the context of criminal law, someone who ‘aids, abets, counsels or procures’ the commission of an offence may be guilty of an offence under the complicity and common purpose provisions of the *Criminal Code*.⁸ These categories of conduct are forms of assistance, albeit direct

3 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.117].

4 Ibid, [5.117].

5 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [32.18].

6 Australian Government Attorney-General’s Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, Attachment A.

7 Fairfax, News Ltd and AAP submitted that the AGD view is to ‘conflate matters of defeasance with substantive offence provisions’: John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

8 *Criminal Code* (Cth) s 11.2.

in nature. However, at the other end of the range of interpretation, to ‘assist’ might encompass mere intellectual or moral ‘support’.

11.8 On this basis, it could be argued that to urge another to assist an organisation ‘would conceivably extend to providing verbal support or encouragement for insurgent groups who might encounter the ADF which is present in their country’.⁹ Further, s 80.2(7)–(8) may apply

even if Australia invades another country in violation of international law. If opposing Australian aggression is interpreted as tacit support for its enemies, Australians may be prosecuted for condemning illegal violence by their government, or for seeking to uphold the *United Nations Charter*.¹⁰

11.9 Many submissions to the Inquiry expressed concern about the breadth of the term ‘assist’ as used in s 80.2(7)–(8).¹¹ Submissions provided numerous examples of conduct that, it was claimed, might breach these provisions and impose criminal liability:

- organising an anti-war protest, such as a street rally, calling for the return of ADF personnel from a war zone;¹²
- performing a theatrical production drawing attention to the casualties of war;¹³
- showing a documentary that sympathises with or presents the perspective of insurgents in, for example, Iraq;¹⁴
- encouraging Australian soldiers and their allies to lay down their arms and refuse to fight;¹⁵ and

⁹ B Walker, *Memorandum of Advice to Australian Broadcasting Corporation*, 24 October 2005.

¹⁰ B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 873.

¹¹ ARTICLE 19, *Submission SED 14*, 10 April 2006; Pax Christi, *Submission SED 16*, 9 April 2006; New South Wales Bar Association, *Submission SED 20*, 7 April 2006; Confidential, *Submission SED 22*, 3 May 2006; Media Entertainment and Arts Alliance, *Submission SED 28*, 10 April 2006; Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; P Emerton, *Submission SED 36*, 10 April 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006; J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006; Australian Press Council, *Submission SED 48*, 13 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

¹² Pax Christi, *Submission SED 16*, 9 April 2006.

¹³ Ibid.

¹⁴ Confidential, *Submission SED 22*, 3 May 2006.

¹⁵ P Emerton, *Submission SED 36*, 10 April 2006.

- publishing opinion in the media that could be seen to support or lend sympathy to claims made by armed groups that might encounter the ADF in the course of peace-keeping operations overseas.¹⁶

11.10 Media organisations expressed particular concern about the possible impact of s 80.2(7)–(8) on their activities. Fairfax, News Ltd and AAP highlighted a range of media activities that could give rise to conduct seen as urging a person to assist an enemy.¹⁷ For example, it was claimed that the provisions might be breached if third party commentators make statements supportive of an enemy or those engaged in armed hostilities with the ADF.

The result is that film and television producers, media commentators, leader writers, editorial cartoonists, journalists or current affairs hosts wishing to participate in, facilitate or contribute to debate on the topic of ‘terrorism’ (and indeed a range of far wider matters) cannot be confident that in so doing they will not risk breaching the legislation.¹⁸

11.11 Submissions highlighted many direct and indirect means by which organisations or countries in conflict with Australia may be ‘assisted’. Not all of these can reasonably be seen as justifying criminal sanctions.

It could not, for example, be legitimately said that urging people to send stationery supplies to the insurgents in Iraq is really deserving of imprisonment for up to 7 years.¹⁹

11.12 Some concerns about the breadth of the term ‘assist’ may be overstated. The AGD submitted that the word ‘assist’ is intended to be interpreted in accordance with its ordinary meaning and includes

taking action to help, contribute, work for or be a servant to or of, support. The prosecution would need to prove that the assistance provided assistance to the enemy beyond a reasonable doubt. This would require proving a real contribution.²⁰

11.13 Most of those who made submissions to the Inquiry considered that s 80.2(7)–(8) should be repealed. It was said that the provisions, if not repealed, could be narrowed by defining the forms of assistance that are prohibited (for example, providing military equipment or personnel).²¹

16 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006. See also Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006.

17 Ibid.

18 Ibid.

19 Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

20 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

21 Pax Christi, *Submission SED 16*, 9 April 2006.

Other issues

11.14 The 2005 Senate Committee inquiry recommended that, if enacted, s 80.2(7)–(8) should be amended ‘to require a link to force or violence’.²² Many submissions to the present Inquiry agreed with this view.²³

11.15 Uncertainty was said to arise from the reference to those ‘engaged in armed hostilities against the Australian Defence Force’ under s 80.2(8).²⁴ Judge Goldring submitted that it is contrary to the rule of law for conduct to be criminalised when a person cannot know with certainty whether a given country or organisation falls in this category.²⁵

11.16 Similar concern was expressed about the reference in s 80.2(7) to those at war with the Commonwealth ‘whether or not the existence of a state of war has been declared’.²⁶ However, the legislation is clear on this point: the organisation or country must be specified by Proclamation issued by the Governor-General to be an enemy at war (declared or otherwise) with the Commonwealth.²⁷

11.17 One view was that s 80.2(7)–(8) is redundant because much of the conduct proscribed would constitute incitement to commit other offences, such as the offences of treason and treachery.²⁸ In particular, s 80.1 of the *Criminal Code* states, in relevant part:

- (1) A person commits an offence, called treason, if the person: ...
 - (e) engages in conduct that assists by any means whatever, with intent to assist, an enemy:
 - (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
 - (ii) specified by Proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth; or
 - (f) engages in conduct that assists by any means whatever, with intent to assist:

22 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.175], Rec 28.

23 ARTICLE 19, *Submission SED 14*, 10 April 2006; National Association for the Visual Arts, *Submission SED 30*, 11 April 2006; Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; B Saul, *Submission SED 52*, 14 April 2006.

24 J Goldring, *Submission SED 21*, 5 April 2006; Australian Press Council, *Submission SED 48*, 13 April 2006.

25 J Goldring, *Submission SED 21*, 5 April 2006.

26 Media Entertainment and Arts Alliance, *Submission SED 28*, 10 April 2006; Australian Press Council, *Submission SED 48*, 13 April 2006.

27 Under *Criminal Code* (Cth) s 80.2(7)(c)(ii).

28 B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 873.

- (i) another country; or
 - (ii) an organisation;
- that is engaged in armed hostilities against the Australian Defence Force
...

11.18 The only relevant difference between the sedition offences in s 80.2(7)–(8) and the parallel treason offences in s 80.1(1)(e)–(f) is that the former apply where a person ‘urges another person’ to assist an enemy, while the latter apply where a person himself or herself engages in conduct with intent to assist an enemy.

11.19 The *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) also provides a range of relevant offences. For example, under s 9, it is an offence to recruit another person to serve with an armed force in a foreign state or to advertise or do any other act with the intention of facilitating such recruitment.

ALRC’s views

11.20 The breadth of the term ‘assist’ creates valid concerns that the offences could be interpreted or applied to proscribe legitimate political protest, and punish merely rhetorical encouragement or support for those who disagree with Australian government policy.²⁹

11.21 Importantly, these provisions make it an offence to urge conduct by others that is itself lawful. For example, urging people not to enlist for service in the ADF might constitute the offence if this ‘assists’ an enemy. While courts are likely to interpret this provision narrowly, in accordance with the normal restrictive approach to criminal statutes, there are risks in leaving the provision overly broad and reliant upon such interpretative presumptions. As the Centre for Media and Communications Law stated:

If it was to be interpreted broadly by courts, the provisions could be a very serious limitation on Australia’s democratic process. If the concept was interpreted in a more appropriate and narrow manner, it seems likely that the offences would not be needed, being covered by other aspects of criminal law such as incitement to treason.³⁰

11.22 The ALRC agrees that the offences in s 80.2(7)–(8) are inappropriately broad. In the ALRC’s view, the constraints on freedom of expression imposed by the offences in s 80.2 are justified only where the unlawful use of force or violence is urged. This element is absent from the offences in s 80.2(7)–(8). On the other hand, direct

29 The Sheller Committee raised similar concerns about the term ‘support’ as used in s 102.7 of the *Criminal Code*, which creates an offence of providing support to a terrorist organisation. The Committee recommended that this provision be amended ‘to ensure that the word “support” cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objective’: Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), 122–123, Rec 4.

30 Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006.

assistance to an enemy or entity engaged in armed hostilities with the ADF is covered by the treason offences in s 80.1. These offences are discussed below.

11.23 The ALRC recommends that s 80.2(7)–(8) and the associated defence in s 80.2(9) be repealed, with the conduct in question dealt with under the law of treason (see below). The proposal to repeal these provisions received broad support in submissions to the Inquiry.³¹

Recommendation 11–1 Section 80.2(7), (8) and (9) of the *Criminal Code* (Cth), concerning the offences of urging a person to assist the enemy and urging a person to assist those engaged in armed hostilities against the Australian Defence Force, should be repealed.

Reform of the treason offences

11.24 Submissions emphasised the overlap between the offences in s 80.2(7)–(8) and treason³² and highlighted the fact that many criticisms made about the former offences apply equally to treason.³³ As John Pyke observed, ‘the sedition offence really cannot be considered separately; the treason, treachery and sedition offences should be rationalised at the same time, and harmonized’.³⁴

11.25 The treason offences in s 80.1(1)(e)–(f) proscribe similar conduct to that covered by the sedition offences in s 80.2(7)–(8). The treason offences are punishable by life imprisonment. If s 80.2(7)–(8) are repealed, some conduct covered by the repealed provisions will continue to constitute incitement to treason, which is punishable by 10 years imprisonment.³⁵

³¹ Australian Press Council, *Submission SED 66*, 23 June 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; Independent Producers Initiative Inc, *Submission SED 76*, 3 July 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; Australian Film Commission, *Submission SED 86*, 20 July 2006; R Douglas, *Submission SED 87*, 3 July 2006; Sydney PEN, *Submission SED 88*, 3 July 2006; Queensland Council for Civil Liberties, *Submission SED 101*, 3 July 2006; P Emerton, *Submission SED 108*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; National Tertiary Education Union, *Submission SED 118*, 3 July 2006; Australian Lawyers for Human Rights, *Submission SED 120*, 4 July 2006; B Saul, *Submission SED 122*, 6 July 2006; Law Council of Australia, *Submission SED 126*, 19 July 2006.

³² B Saul, *Submission SED 52*, 14 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006; Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; J Pyke, *Submission SED 18*, 10 April 2006; National Association for the Visual Arts, *Submission SED 30*, 11 April 2006; P Emerton, *Submission SED 36*, 10 April 2006.

³³ B Saul, *Submission SED 52*, 14 April 2006; National Association for the Visual Arts, *Submission SED 30*, 11 April 2006; J Pyke, *Submission SED 18*, 10 April 2006.

³⁴ J Pyke, *Submission SED 18*, 10 April 2006.

³⁵ *Criminal Code* (Cth) s 11.4.

11.26 Given the similarity of the language used in s 80.2(7)–(8) with that in s 80.1(1)(e)–(f), the criticisms levelled at the breadth of the sedition offences also apply to the treason offences. Therefore, the ALRC considers that these aspects of treason should be addressed by this Inquiry.³⁶

ALRC's views

11.27 Treason offences should not extend to instances of strong political dissent and rhetoric, including views expressed through media commentary or artistic expression. Such a broad view of treason calls to mind arguments invoked by United States President Nixon, in the context of anti-Vietnam War protests, that criticism of the war effort gave ‘aid and comfort to the enemy’ within the meaning of the *United States Constitution*.³⁷

11.28 The ALRC considers that s 80.1(1)(e)–(f) are inappropriately broad, notwithstanding that they do not apply to ‘engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature’.³⁸ In Discussion Paper 71 (DP 71), the ALRC proposed amendments to narrow the application of the treason offences in s 80.1(1)(e)–(f), to impose criminal liability only where the person provides assistance (eg, funds, troops, armaments, intelligence, military strategy) that *materially* enables an organisation or country to engage in war against Australia or in armed hostilities against the ADF.

11.29 The ALRC also proposed that s 80.1(1)(e)–(f) should be reframed to draw a closer connection between the assistance and the pursuit of war or armed hostilities. It was proposed that s 80.1(1)(e) require that the person ‘engages in conduct that materially assists ... an enemy *to engage in war* with the Commonwealth’—rather than simply to assist an enemy (that is engaged in such a war). It was also proposed that s 80.1(1)(f) state that the person ‘engages in conduct that materially assists ... another country or an organisation *to engage in armed hostilities* against the Australian Defence Force’.

11.30 In addition, the ALRC proposed that the phrase ‘by any means whatever’ should be deleted from both subsections,³⁹ and a note added below s 80.1(f) explaining the intended meaning of the word ‘materially’—to make clear that mere rhetoric or expressions of dissent are not sufficient; the assistance must enable the enemy or entity to wage war or engage in armed hostilities, such as through the provision of funds, troops, arms, or strategic advice or information.

36 The treachery offence in s 24AA(ii) of the *Crimes Act 1914* (Cth) also uses similar language and makes it an offence to ‘assist by any means whatever, with intent to assist, a proclaimed enemy of a proclaimed country...’. The ALRC recommends that this offence be reviewed along with the other remaining offences contained in Part II of the *Crimes Act 1914* (Cth) (Rec 3–1).

37 *United States Constitution*, Art III, s 3.

38 *Criminal Code* (Cth) s 80.1(1A).

39 Early drafts of the Anti-Terrorism Bill (No 2) 2005 used the words ‘assist, by any means whatever’ in the sedition provisions: Draft-in-Confidence Anti-Terrorism Bill (No 2) 2005 (Cth). These were later deleted.

11.31 All of these proposals received broad support in submissions to the Inquiry,⁴⁰ although it was suggested that the changes might still not be sufficient to ensure that, for example, urging conscientious objection or urging soldiers to lay down their arms are not covered by the offences.⁴¹

11.32 It was argued that the concept of ‘material’ assistance ought to be defined specifically in the legislation.⁴² A model can be found in the United States offence of ‘providing material support to terrorists’.⁴³ This offence contains an extended definition of ‘material support or resources’, which states that the term means:

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials ...⁴⁴

11.33 Suggestions for reform included limiting the ambit of the offence to the provision of ‘direct’ assistance⁴⁵ or to conduct that ‘materially and substantially’ assists an enemy.⁴⁶ It was said that imposing the additional requirement of substantiality would ‘prevent the criminalisation of those who urge trivial assistance to an enemy’.⁴⁷

11.34 The ALRC is not convinced that these alternative formulations offer any significant advantage. The requirement that assistance must enable the enemy or entity to wage war or engage in armed hostilities already places a limit on what can be considered to constitute assisting. An extensive legislative definition of what may constitute ‘materially’ assisting an enemy, along the lines of the United States provision set out above, would not be consistent with the general drafting approach of the *Criminal Code* and is likely to create as many problems as it solves.

40 Australian Press Council, *Submission SED 66*, 23 June 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; National Association for the Visual Arts, *Submission SED 75*, 3 July 2006; Independent Producers Initiative Inc, *Submission SED 76*, 3 July 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; Australian Film Commission, *Submission SED 86*, 20 July 2006; Sydney PEN, *Submission SED 88*, 3 July 2006; Queensland Council for Civil Liberties, *Submission SED 101*, 3 July 2006; P Emerton, *Submission SED 108*, 3 July 2006; Australia Council for the Arts, *Submission SED 114*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

41 P Emerton, *Submission SED 108*, 3 July 2006.

42 Ibid; Australian Lawyers for Human Rights, *Submission SED 120*, 4 July 2006; B Saul, *Submission SED 122*, 6 July 2006.

43 18 USC 2339A.

44 18 USC 2339A(b)(1). The provision contains additional definitions of the terms ‘training’ and ‘expert advice or assistance’: 18 USC 2339A(b)(2)–(3).

45 P Emerton, *Submission SED 108*, 3 July 2006.

46 B Saul, *Submission SED 122*, 6 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

47 B Saul, *Submission SED 122*, 6 July 2006.

11.35 However, the ALRC recommends two other changes to the treason provisions, in addition to those proposed in DP 71. Under s 80.1(1)(e) it is an offence to assist an enemy at war with the Commonwealth and ‘specified by Proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth’.⁴⁸ This provision is capable of being interpreted as having retrospective application.⁴⁹ The subsection should provide that the Proclamation must have been made before the relevant conduct was engaged in.

11.36 Secondly, the ALRC recommends that s 80.1(1)(f) should apply to assisting a ‘group’ as well as an organisation or country engaged in armed hostilities against the ADF.⁵⁰ The Commonwealth Director of Public Prosecutions (CDPP) noted that ‘organisation’ is defined as meaning a body corporate or an unincorporated body whether or not the body is based outside Australia, consists of persons who are not Australian citizens, or is part of a larger organisation.⁵¹ The ALRC agrees that the offence in s 80.1(1)(f) should cover a person who assists groups that may not fit this definition of an organisation, and that the section should be amended accordingly.⁵²

Recommendation 11–2 The treason offences in s 80.1(1)(e)–(f) of the *Criminal Code* should be amended to:

- (a) remove the words ‘by any means whatever’;
- (b) provide that conduct must ‘materially’ assist an enemy, making it clear in a note to the section that mere rhetoric or expressions of dissent are not sufficient;
- (c) provide that assistance must enable an enemy ‘to engage in war’ with the Commonwealth or must enable a country, organisation or group ‘to engage in armed hostilities’ against the Australian Defence Force; and
- (d) provide that the Proclamation under s 80.1(1)(e)(ii) must have been made before the relevant conduct was engaged in.

(The relevant sections of the Criminal Code, amended as recommended, are set out in Appendix 2.)

⁴⁸ *Criminal Code* (Cth) s 80.1(1)(e)(ii).

⁴⁹ G McGowan, *Submission SED 68*, 23 June 2006.

⁵⁰ Commonwealth Director of Public Prosecutions, *Submission SED 84*, 3 July 2006.

⁵¹ *Criminal Code* (Cth) s 80.1A. The definition of organisation in s 80.1A is identical in all relevant respects to that applicable to Part 5.3 of the Code, dealing with terrorism offences and terrorist organisations: *Criminal Code* (Cth) s 101.1(1).

⁵² In considering the recommendations of the Sheller Committee and the recommendations and commentary in this Report (see Rec 11–3), the Australian Government should also consider whether to amend s 80.3(2)(f)—if retained—to refer to a ‘group’ engaged in armed hostilities with the ADF.

Outstanding issues

11.37 In June 2006, the Sheller Committee concluded its review of the operation and effectiveness of a range of security laws, including the treason offences.⁵³ The Sheller Committee rejected ‘the general proposition that in a modern democratic society the offence of treason, so described, should no longer exist’.⁵⁴ However, the Committee expressed concern that s 80.1(1)(f) does not require that the person engaging in the conduct knows that the country or organisation they assist is engaged in armed hostilities against the ADF. Rather, by virtue of the operation of s 5.6 of the *Criminal Code*, the person need only be reckless as to this fact. The Sheller Committee recommended that s 80.1(1)(f)

be amended to require, as an ingredient of the offence, that the person knows that the other country or the organisation is engaged in armed hostilities against the Australian Defence Force.⁵⁵

11.38 Other aspects of the treason offences, while not falling within the ALRC’s Terms of Reference or dealt with by the Sheller Committee, have come to the ALRC’s attention. One of these is that s 80.1(1)(h) provides a separate treason offence where a person ‘forms an intention to do any act referred to in a preceding paragraph and manifests that intention by an overt act’.

11.39 The historical antecedents of this provision are unclear, but it may have derived from a time when the statutory definitions of treason included ‘imagining or compassing the death of the King’ under the 1351 *Statute of Treasons*. Because such offences were concerned with ‘acts of the mind’, some ‘open or overt act’ was required to prove the offence.⁵⁶ Today, the provision shares some characteristics with the offence of conspiracy, which, under the *Criminal Code*, requires the commission of ‘an overt act’ pursuant to an agreement.⁵⁷

11.40 Section 80.1(1)(h) appears redundant and probably should have been deleted, along with s 80.1(1A) and 80.1(8), when the offence was modernised and shifted into the *Criminal Code* in 2002.⁵⁸ In 1991, the Gibbs Committee recommended the repeal of the equivalent *Crimes Act* provision.⁵⁹

53 The treason offences in their present form were inserted into the *Criminal Code* by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) sch 1.

54 Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), [11.15].

55 Ibid, [11.23], Rec 18.

56 M Black, ‘Five Approaches to Reforming the Law: 650 Years of Treason and Sedition’ (Paper presented at Australasian Law Reform Agencies Conference, Sydney, 11 April 2006), 12.

57 *Criminal Code* (Cth) s 11.5.

58 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) sch 1.

59 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [31.38].

11.41 The offences and penalties in s 80.1(2) also require review. These offences concern allowing another person who has committed treason ‘to escape punishment or apprehension’ and not preventing the commission of an offence of treason by informing a constable or using other reasonable endeavours. In other words, these provisions refer to accessories after the fact to treason and misprision of treason.⁶⁰ The offences are punishable by life imprisonment. Arguably, such ancillary offences should be covered by general provisions dealing with extensions of criminal responsibility,⁶¹ and subject to a lesser penalty than the substantive offence of treason.

11.42 Finally, there are questions about whether the good faith defences set out in s 80.3 are appropriate for the treason offences in s 80.1, especially if the treason offences are amended as recommended by the ALRC.⁶² It is hard to envisage circumstances in which a person would be able to claim good faith in, for example, causing the death of the sovereign, levying war against the Commonwealth, or instigating an armed invasion of Australia. The same might be said (depending on the circumstances) in relation to a person who assists an enemy to engage in war with the Commonwealth; or assists a country, organisation or group to engage in armed hostilities against the ADF under amended s 80.1(1)(e)–(f).

11.43 These concerns should be taken into account by the Australian Government—along with Recommendations 11–2 and 11–4 and the recommendations of the Sheller Committee—in implementing reform of the treason provisions.

Recommendation 11–3 In considering the recommendations of the Security Legislation Review Committee (the Sheller Committee) on the law of treason, the Australian Government should take into account relevant recommendations and commentary in this Report.

Extraterritorial application

11.44 In common law countries, criminal jurisdiction traditionally has been based on considerations of territorial sovereignty. The criminal law was said to apply to all offences alleged to have occurred within the territorial boundaries of the state or intended to have its impact there (such as fraud procured in Australia through a communication made from overseas), regardless of the origins of the alleged offender. Conversely, common law countries traditionally have been loath to recognise the concept of ‘universal jurisdiction’ or the extraterritorial reach of domestic criminal

⁶⁰ See Ibid, [31.39]–[31.40].

⁶¹ See, eg, *Criminal Code* (Cth) Pt 2.4; *Crimes Act 1914* (Cth) s 6.

⁶² As discussed in Ch 12, the ALRC recommends that the good faith defences should not apply to the offences in s 80.2.

law—except perhaps for a very limited category of serious crimes with an international flavour, such as piracy or genocide.⁶³

11.45 However, there has been a pronounced modern trend towards extending the reach of the criminal law across territorial boundaries. In part this was prompted by expanded territorial claims over the seas and airspace,⁶⁴ and in part by globalisation and the increased speed and capabilities of modern transportation and communications technology. This trend has been accelerated by increased concerns over serious transnational crimes such as people smuggling, child sex tourism, sexual servitude, hostage taking and terrorism.

11.46 Even where a country can point to jurisdictional authority in principle, as a practical matter it must have custody of the alleged offender in order to proceed. This often will require seeking extradition of the person from another country, usually pursuant to a treaty.⁶⁵

11.47 In 2000, Division 15 of the *Criminal Code* was introduced⁶⁶ to provide a more transparent and certain scheme for the geographical jurisdiction of Commonwealth criminal law. Division 15 provides for four jurisdictional categories (A–D) in ss 15.1–15.4. Category A is the most limited extension; category D is the broadest.

11.48 The sedition and treason offences under Division 80 of the *Criminal Code* are characterised by s 80.4 as ‘category D’ offences—as are the terrorism offences created in 2002⁶⁷ in Divisions 101–104 of the *Criminal Code*.⁶⁸

11.49 This designation means that, by virtue of s 15.4 of the *Criminal Code*, the offences apply to all persons (regardless of citizenship or residency), whether or not:

- the conduct constituting the offence occurs in Australia;
- a result of the conduct constituting the alleged offence occurs in Australia; or
- the conduct is lawful elsewhere.

Implications of extraterritorial application

11.50 Concerns have been expressed about the application of category D extraterritoriality to the sedition offences. This category of extraterritoriality is said to

⁶³ D Langham, *Cross-Border Criminal Law* (1997), 266.

⁶⁴ See, eg, *Crimes (Ships and Fixed Platforms) Act 1992* (Cth).

⁶⁵ *Extradition Act 1988* (Cth).

⁶⁶ *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth).

⁶⁷ *Security Legislation Amendment (Terrorism) Act 2002* (Cth) sch 1.

⁶⁸ *Criminal Code* (Cth) ss 101.1(2), 101.2(4), 101.4(4), 101.5(4), 101.6(3), 102.9, 103.3.

give rise to the possibility that the Commonwealth could launch a prosecution against anyone suspected of these offences, anywhere in the world, ‘creating what is in essence a universal jurisdiction’.⁶⁹

11.51 Submissions highlighted a number of problems claimed to result from the extraterritorial application of the sedition offences.⁷⁰ For example, John Pyke observed that applying category D jurisdiction to the offences in Division 80 makes the ‘action of any person of another country who fights against Australia a criminal offence against our law’.⁷¹ He submitted that while there may be some justification for the laws to apply extraterritorially to Australian citizens, s 80.4 should refer to category A extended jurisdiction, not category D.⁷²

11.52 Pax Christi stated that the extended jurisdiction of Division 80 amounts to a ‘questionable intrusion into the affairs of another state’.

It could have the effect that a person domiciled in say Italy who expresses views on the war in Iraq—for example that Italian forces should be withdrawn—which are entirely lawful in that country could expose himself or herself to prosecution under Australian sedition laws on the grounds that such views assist the enemy.⁷³

11.53 Dr Ben Saul also focused on the implications for s 80.2(7)–(8) of the *Criminal Code* and expressed concern that the extraterritorial application of these offences potentially interferes with the operation of international humanitarian law in armed conflicts. He stated that commanders of enemy forces who order their troops to attack Australian forces in armed conflicts outside Australia may be liable to prosecution under Australian law.

Such offences give rise to a plain conflict with international humanitarian law, under which combatants participating lawfully in an international armed conflict are entitled to *combatant immunity* and Prisoner of War (POW) status upon capture ...

Under international law, Australia is not lawfully entitled to criminalize enemy commanders for directing their forces to fight in conformity with international law. Indeed, international law does not support the kind of extended jurisdiction Australia is seeking to exercise over such conduct, precisely because of the potential conflict with the law on combatant immunity in armed conflict.⁷⁴

11.54 The AGD considered that category D jurisdiction should apply to the offences in s 80.2, in particular, to capture the possible commission of sedition offences via the internet:

⁶⁹ B Walker, *Memorandum of Advice to Australian Broadcasting Corporation*, 24 October 2005.

⁷⁰ J Pyke, *Submission SED 18*, 10 April 2006; Pax Christi, *Submission SED 16*, 9 April 2006; Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; P Emerton, *Submission SED 36*, 10 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; B Saul, *Submission SED 52*, 14 April 2006.

⁷¹ J Pyke, *Submission SED 18*, 10 April 2006.

⁷² Ibid. Others suggested category B should apply: P Emerton, *Consultation*, Melbourne, 23 June 2006.

⁷³ Pax Christi, *Submission SED 16*, 9 April 2006.

⁷⁴ B Saul, *Submission SED 52*, 14 April 2006.

There appears to be no basis for not treating this offence like other offences that involve conduct which could lead to harm to Australians when it occurs outside Australia, whether people trafficking, war crimes or computer offences.⁷⁵

11.55 In the context of a Senate committee inquiry into people trafficking legislation, the AGD advised that category D offences are generally restricted to the most serious international offences—such as genocide, crimes against humanity and war crimes—for which specific resources are available for investigations and prosecutions.⁷⁶

ALRC's views

11.56 The implications of extraterritoriality may be seen as particularly problematic in relation to the offences in s 80.2(7)–(8), which concern urging another person to assist an enemy or those engaged in armed hostilities against Australia. Where the ADF is deployed overseas, the offences may apply to large numbers of foreign citizens; for example, villagers who supply Taliban soldiers in Afghanistan. The breadth of the term ‘assists’—if it encompasses mere intellectual or moral support—makes the offences of broad potential application. However, as discussed above, the ALRC recommends the repeal of these offences.

11.57 The application of category D jurisdiction to the remaining offences in s 80.2—urging the overthrow of the Constitution or Government, urging interference in parliamentary elections, and urging inter-group violence—is not as likely to create undesirable outcomes in practice. The elements of the offences themselves mean that the urged conduct generally will be intended to occur in Australia, being directed at the Constitution or Government, Australian parliamentary elections, or at groups within Australia.⁷⁷ Arguably, extraterritorial jurisdiction is also important in relation to internet websites hosted overseas that disseminate material urging the use of force or violence in Australia. The AGD identified the internet and computer technologies as one reason for the continuing relevance of the offences in s 80.2.⁷⁸

11.58 Further, under s 16.1 of the *Criminal Code*, the consent of the Attorney-General is required for prosecution where the conduct (ie, the urging) occurs wholly overseas and the person alleged to have committed the offence is not an Australian citizen or body corporate.⁷⁹ The ALRC considers that category D extended geographical jurisdiction should continue to apply to the offences in s 80.2(1), (3) and (5).⁸⁰

75 Australian Government Attorney-General's Department, *Submission SED 31*, 12 April 2006.

76 Senate Legal and Constitutional Legislation Committee, *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005]* (2005), 25.

77 That is, in the case of the latter offence, so as to ‘threaten the peace, order and good government of the Commonwealth’: *Criminal Code* (Cth) s 80.2(5)(b).

78 Australian Government Attorney-General's Department, *Submission SED 31*, 12 April 2006.

79 This position will not be changed by the repeal of s 80.5 (Rec 13–1).

80 The Sheller Committee concluded that category D extended geographical jurisdiction was appropriate for the terrorism offences in Divisions 101 and 102 of the *Criminal Code*. It noted that ‘terrorism in its

11.59 The application of category D to the treason offences in s 80.1 creates more difficulty. In his submission, Patrick Emerton stated:

This aspect of Australia's law of treason is objectionable in itself, because it makes criminals under Australian law of all foreigners—both civilians and soldiers—who wage war against Australia, contrary to general principles of international law relating to armed conflict. Criminalising foreign soldiers, in particular, threatens principles of combatant immunity, and undermines the reciprocal forbearance between conflicting powers that Australian soldiers rely upon when engaged in military action.⁸¹

11.60 Any problems that are seen to arise in relation to the application of category D jurisdiction to s 80.2(7)–(8) also may apply to the treason offences in s 80.1(1)(e)–(f)—with implications for the concept of combatant immunity and other aspects of international humanitarian law.

11.61 An example is if a person were forcibly conscripted by the Taliban and required to fight against Australian troops in Afghanistan. The person later flees to Australia and is granted a temporary protection visa while claims for refugee status are being determined. Such a person may then be subject to prosecution under s 80.1(1)(f) for engaging in armed hostilities against the ADF.

11.62 A simple solution to these problems would be to limit the application of the treason offences to those who are Australian citizens or residents at the time of the alleged offence.⁸² Further, such a qualification is consistent with the historical origins of the law of treason, which punished acts deemed to violate a subject's allegiance to his or her lord or monarch.⁸³

11.63 The concept of allegiance has retained legal importance in the law of treason.⁸⁴ The 1351 *Statute of Treasons*,⁸⁵ which remains in force in the United Kingdom (and New South Wales) was used to prosecute William Joyce (also known as 'Lord Haw-Haw'), a propagandist for Germany during World War II, for high treason. Joyce was an American citizen, who had resided in British territory and applied for and obtained a British passport. A key issue on appeal before the House of Lords was whether Joyce had divested himself of allegiance to the British Crown.⁸⁶

current forms is known to operate without regard to borders or jurisdictional limits': Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006), 149.

81 P Emerton, *Submission SED 36*, 10 April 2006.

82 This proposal received support in submissions: Queensland Council for Civil Liberties, *Submission SED 101*, 3 July 2006; P Emerton, *Submission SED 108*, 3 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006. Emerton suggested that a citizenship or residency requirement should also be applied to the offences in s 80.2: P Emerton, *Submission SED 108*, 3 July 2006.

83 See, eg, 'Historical Concept of Treason: English and American' (1960) 35 *Indiana Law Journal* 70.

84 For example, the offence of misprision of treason in the *United States Code* applies only to those 'owing allegiance to the United States': 18 USC 2382.

85 25 Edw III c 2.

86 *Joyce v Director of Public Prosecutions* [1946] AC 347. The Court held that an alien abroad holding a British passport enjoys the protection of the Crown and if he is adherent to the King's enemies he is guilty of treason, so long as he has not renounced that protection.

11.64 The repealed treason offences in the *Crimes Act* contained no citizenship qualification, although the Gibbs Committee observed that the treason offences ‘must obviously be construed so as not to apply to an enemy alien in time of war outside Australia’.⁸⁷ The Gibbs Committee recommended that the offence of treason apply to:

- (i) an Australian citizen or a member of the Public Service or Defence Force anywhere; and
- (ii) any person (including an enemy alien) voluntarily in Australia.⁸⁸

11.65 For present purposes, the ALRC concludes that the term ‘Australian citizen or resident’ should be adopted. These words are used extensively in the *Criminal Code*, including in relation to extended geographical jurisdiction. By way of analogy, the coverage of some offences in the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)⁸⁹ is limited to persons who, at the time of the doing of the act that is alleged to constitute the offence, were Australian citizens or ‘ordinarily resident in Australia’, or were present in Australia for a purpose connected with the act.⁹⁰

11.66 The application of category D jurisdiction extends the operation of the offences in Division 80 of the *Criminal Code* (including the treason offences) to any person whether or not the conduct constituting the alleged offence occurs in Australia, and whether or not a result of the conduct constituting the alleged offence occurs in Australia.⁹¹ However, by restricting the ambit of the treason offences to citizens and residents the potential problems of such extended jurisdiction are avoided. On the other hand, if a citizen or resident commits the offence of treason, it should not matter whether or not the conduct or a result of the conduct occurs within Australia.

11.67 Where relevant offences are committed by non-citizens or non-residents there is adequate coverage in other laws, including the terrorism offences in the *Criminal Code*. Those parts of the treason offences dealing with causing the death of, or harming, the Sovereign, the Governor-General or the Prime Minister are covered by many other ordinary provisions in the criminal law.

87 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [31.6].

88 Ibid, [31.34].

89 See Ch 3.

90 *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) ss 6(2), 7(2).

91 *Criminal Code* (Cth) s 15.4.

Recommendation 11–4 Section 80.1 of the *Criminal Code* should be amended to apply only to a person who, at the time of the alleged offence, is an Australian citizen or resident.

(The relevant sections of the Criminal Code, amended as recommended, are set out in Appendix 2.)

12. Defences and Penalties

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Introduction

12.1 This chapter presents the ALRC's approach to the 'good faith' defences currently provided by s 80.3 of the *Criminal Code* (Cth) to the offences of treason (s 80.1) and sedition (s 80.2).

12.2 This chapter describes the scope and history of the good faith defences and the meaning of good faith by reference to defamation and anti-vilification law. As discussed in this chapter, the defences in s 80.3 have been criticised for lacking clarity and failing to protect media reporting and artistic expression.

12.3 The ALRC recommends that the good faith defences should not apply to the offences in s 80.2. The defences are inappropriate, especially given the ALRC's recommended modifications to the offences in s 80.2(1), (3) and (5) and the recommended repeal of s 80.2(7)–(8). The defences should be replaced with a provision that requires the trier of fact to take into account the context of the conduct in question in determining whether the defendant intended that the force or violence urged will occur.

12.4 The chapter also briefly discusses the applicable penalties for the offences in s 80.2 of the *Criminal Code*. The ALRC concludes that the penalties provided under the present sedition offences are appropriate for the modified offences.

The good faith defences

12.5 There are six defences set out in s 80.3(1)(a)–(f).¹ The first three defences can be characterised broadly as dealing with aspects of political communication. Section 80.3(1)(a) provides a defence to try in good faith to show that certain persons are mistaken in any of their counsels, policies or actions—the persons being the Sovereign, the Governor-General, a governor of a state, an administrator of a territory, or their advisers, or a person responsible for the government of another country.

12.6 Section 80.3(1)(b) provides a defence to a person who ‘points out in good faith errors or defects’ in any Australian government, the *Constitution*, Australian legislation, or the administration of justice in Australia or another country ‘with a view to reforming those errors or defects’. This suggests that ‘criticism which is not considered constructive (a subjective determination) is not protected’.²

12.7 Section 80.3(1)(c) protects a person who, in good faith, urges another person to ‘attempt to lawfully procure a change to any matter established by law, policy or practice’ in Australia or another country.

12.8 Section 80.3(1)(d) is concerned with relationships between different groups in the community. It provides that the sedition offences (most relevantly, the offence of urging inter-group violence)³ do not apply to persons who point out in good faith any matters that produce ‘feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters’. It seems that, as with s 80.3(1)(b), the criticism must be constructive—aimed at improving the state of affairs within the community.

12.9 Under s 80.3(1)(e), there is a defence for anything done in good faith in connection with an industrial dispute or matter. Finally, s 80.3(1)(f) provides a defence for a person who ‘publishes in good faith a report or commentary about a matter of public interest’. As discussed in more detail below, the latter defence shares common language with s 18D(c) of the *Racial Discrimination Act 1975* (Cth) (RDA), which provides a defence to an allegation of unlawful offensive behaviour based on racial hatred.

12.10 In considering the application of the defences, the courts may have regard to any relevant matter, including whether the acts done were intended: to be prejudicial to the safety or defence of the Commonwealth; to assist an enemy or those engaged in armed

1 The relevant sections of the *Criminal Code* (Cth) are set out in full in Appendix 1. The relevant sections of the Code, amended as recommended in this Report, are set out in Appendix 2.

2 B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 875.

3 *Criminal Code* (Cth) s 80.2(5).

hostilities against the Australian Defence Force (ADF); or to cause violence or create public disorder or a public disturbance.⁴

History of the good faith defences

12.11 The provisions in s 80.3 of the *Criminal Code* substantially replicate those in the repealed s 24F of the *Crimes Act 1914* (Cth), which were inserted into the *Crimes Act* in 1920 along with the sedition offences.⁵ According to the Explanatory Memorandum to the Anti-Terrorism (No 2) Bill 2005 (Cth), the only substantive difference is that greater discretion is now given to the court in considering whether an act was done in good faith by allowing the court to have regard to ‘any relevant matter’ as well as a number of specific considerations that have been carried over from s 24F.⁶

12.12 Another difference between the *Criminal Code* and the repealed *Crimes Act* provisions is that an additional good faith defence was inserted in the *Criminal Code* (s 80.3(1)(f)), which permits publication in good faith of ‘a report or commentary about a matter of public interest’.⁷ This provision was inserted in response to the concerns of media organisations—expressed to the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005 (Cth) (the 2005 Senate Committee inquiry)—that a sedition offence might be committed by reporting the views or statements of others.⁸

12.13 As discussed in Chapter 2, the 1920 sedition provisions replicated those found in the *Criminal Code 1899* (Qld), which in turn were based on the English common law as outlined in Stephen’s *A Digest of the Criminal Law* (1887).⁹

12.14 The concept of good faith in the context of sedition law is traceable to its origins in the law of libel and defamation. As discussed in Chapter 2, the sedition provisions have their roots in the common law of seditious libel. At least until the 17th century, seditious libel was a sub-category of libel (written defamation) and in 18th century England it was the government’s chief means of controlling the press.¹⁰

4 Ibid s 80.3(2).

5 *War Precautions Repeal Act 1920* (Cth) s 12.

6 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth); *Criminal Code* s 80.3(2).

7 Compare Draft-in-Confidence Anti-Terrorism Bill (No 2) 2005 (Cth) sch 7, cl 12.

8 See, Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.120].

9 J Stephen, *A Digest of the Criminal Law* (1887).

10 P Hamburger, ‘The Development of the Law of Seditious Libel and the Control of the Press’ (1985) 37 *Stanford Law Review* 661, 725.

The meaning of good faith

12.15 Each of the defences in s 80.3(1)(a)–(f) requires that the conduct be ‘in good faith’. Case law provides little guidance on the meaning of good faith in the context of sedition.

12.16 Some guidance on the meaning of good faith is available by analogy from defamation and anti-vilification law. Good faith and the common law test of malice are established elements of defamation law in relation to the defence of qualified privilege. More recently, the concept of good faith has been incorporated into statutory exemptions relating to conduct that might constitute unlawful racial or other vilification.¹¹

12.17 The law in each of these areas relates to civil causes of action rather than criminal offences. However, it has relevance in view of the history of sedition (and its roots in common law seditious libel) and shared concerns with constraints on freedom of expression.

Defamation law: good faith and malice

12.18 In defamation law, the protection accorded by qualified privilege is lost if the publisher was motivated by what the common law describes as malice. Prior to the enactment of the uniform defamation Acts,¹² some statutory codifications of defamation law referred to this as absence of good faith.¹³

12.19 For example, Queensland legislation provided that, for the purposes of general qualified privilege:

a publication is said to be made in good faith if the matter published is relevant to the matters the existence of which may excuse the publication in good faith of defamatory matter; if the manner and extent of the publication does not exceed what is reasonably sufficient for the occasion; and if the person by whom it is made is not actuated by ill will to the person defamed, or by any other improper motive, and does not believe the defamatory matter to be untrue.¹⁴

12.20 In the case of the privilege accorded to the publication of reports on matters of public interest, good faith was defined differently. It required that the publisher is not motivated by ill-will or other improper motive; and the manner of the publication is such as is ordinarily and fairly used in the publication of news.¹⁵ Therefore, this

11 See, eg, *Racial Discrimination Act 1975* (Cth) s 18D; *Anti-Discrimination Act 1977* (NSW) s 20C; *Racial and Religious Tolerance Act 2001* (Vic) s 11.

12 *Defamation Act 2005* (Vic) and cognate state and territory legislation.

13 *Defamation Act 1889* (Qld) s 16; *Defamation Act 1957* (Tas) s 16. See, Law Book Company, *The Laws of Australia*, vol 6 Communications, 6.1, Ch 5, [67].

14 *Defamation Act 1889* (Qld) s 16(2). See also, *Defamation Act 1957* (Tas) s 16. It is said that these factors are not dissimilar to those applied under the common law test of malice: Law Book Company, *The Laws of Australia*, vol 6 Communications, 6.1, Ch 6, [89].

15 *Defamation Act 1889* (Qld) s 13(2).

privilege was not lost simply because the defendant knew that statements included in the report were false.¹⁶

12.21 At common law, malice renders the protection accorded by qualified privilege unavailable.¹⁷ Briefly, malice can be shown by having either an improper motive or no honest belief in the truth of the material—although where a publisher has no honest belief in information or even positively disbelieves it, protection will not be lost where the publisher is under a positive duty to pass on the defamatory information.¹⁸

12.22 The position with regard to the extended qualified privilege that is accorded to the publication of material concerning government and political matters has particular relevance to the meaning of good faith in the context of sedition law.¹⁹ This privilege derives from decisions of the High Court culminating in *Lange v Australian Broadcasting Corporation*.²⁰ The right is said to be implicit in the text and structure of the *Australian Constitution* and is based on the interest of each member of the Australian community in ‘disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia’.²¹

12.23 The qualified privilege in relation to government and political matters will be defeated, as with other qualified privilege, if the publication is actuated by malice. However, malice differs in its application to this form of privilege. In *Lange*, the High Court said that:

‘actuated by malice’ is to be understood as signifying a publication made not for the purpose of communicating government or political information or ideas, but for some improper purpose.²²

12.24 The Court stated that having regard to the subject matter of government and politics, the motive of causing political damage to the plaintiff or his or her political party cannot be regarded as improper—‘nor can the vigour of an attack or the pungency of a defamatory statement, without more, discharge the plaintiff’s onus of proof of this issue’.²³

16 Law Book Company, *The Laws of Australia*, vol 6 Communications, 6.1, Ch 6, [89].

17 Ibid, 6.1, Ch 6, [85].

18 See Ibid, 6.1, Ch 6, [86].

19 See Ch 7.

20 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. The decision involved a re-examination of the High Court’s previous decisions in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211.

21 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 571.

22 Ibid, 574.

23 Ibid, 574.

12.25 This differs from the ordinary common law concept of malice in two respects. First, malice cannot be established by showing that the defendant did not have a belief in the truth of what was published. Secondly, the motive of causing political damage is not enough to establish an improper purpose.²⁴

12.26 The recently agreed upon uniform defamation Acts²⁵ preserve the common law relating to malice. The Acts state that, for the avoidance of doubt, a defence of qualified privilege is defeated if the plaintiff proves that the publication of the defamatory matter was 'actuated by malice'.²⁶ The general law applies to determine whether a particular publication was actuated by malice.²⁷

Anti-vilification laws

12.27 Commonwealth, state and territory anti-vilification legislation contains exemptions that are, in some respects, similar to defences in defamation law and refer to the concept of good faith. For example, s 18D of the RDA creates an exemption for:

... 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.

12.28 Similarly, the racial vilification provisions of the *Anti-Discrimination Act 1977* (NSW) state that a 'public act' is not unlawful if it is:

- (a) a fair report of a public act ... or
- (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege ... in proceedings for defamation, or
- (c) ... done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.²⁸

24 Law Book Company, *The Laws of Australia*, vol 6 Communications, 6.1, Ch 6, [87].

25 *Defamation Act 2005* (Vic) and cognate state and territory legislation.

26 *Ibid* s 30(4) and cognate state and territory legislation.

27 *Ibid* s 24(2) and cognate state and territory legislation.

28 *Anti-Discrimination Act 1977* (NSW) s 20C(2).

12.29 There is case law on the meaning of good faith in the context of anti-vilification legislation. In *Bropho v Human Rights and Equal Opportunity Commission*,²⁹ the Full Court of the Federal Court considered the application of s 18D of the RDA. French J held that, having regard to the public mischief to which the RDA is directed, both subjective and objective good faith is required.³⁰

A person acting in the exercise of a protected freedom of speech or expression under s 18D will act in good faith if he or she is subjectively honest, and objectively viewed, has taken a conscientious approach to advancing the exercising of that freedom in a way that is designed to minimise the offence or insult, humiliation or intimidation suffered by people affected by it. That is one way, not necessarily the only way, of acting in good faith for the purpose of s 18D.³¹

12.30 The *Bropho* case was applied in *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)*,³² in which an evangelical Christian group and two pastors were found to have breached s 8 of the *Racial and Religious Tolerance Act 2001* (Vic). This provision states that it is unlawful on the ground of race to incite ‘hatred against, serious contempt for, or revulsion or severe ridicule of’ another person or class of persons.

12.31 The respondents made claims about Muslim beliefs and conduct, including that Muslims are violent, terrorists, demonic, seditious, untruthful, misogynistic, paedophilic, anti-democratic, anti-Christian and intent on taking over Australia.³³ The Victorian Civil and Administrative Tribunal found that the statutory exemptions for conduct engaged in ‘reasonably and in good faith’³⁴ were unavailable in the circumstances. Higgins J found that the ‘unbalanced’ presentation of a seminar about Islam evidenced absence of good faith, whether viewed subjectively or objectively.³⁵

Defences and the media

12.32 A particular focus of concern has been on whether the defences in s 80.3 of the *Criminal Code* provide adequate protection for media organisations and journalists. Media organisations expressed concern that the good faith defences may not be sufficiently broad to cover the publication of the views of others—for example, in the context of news and current affairs or related commentary, opinion and analysis.

²⁹ *Bropho v Human Rights & Equal Opportunity Commission* (2004) 204 ALR 761.

³⁰ *Ibid*, 787.

³¹ *Ibid*, 787. Carr J stated (at 803) that the focus of the inquiry should be ‘an objective consideration of all the evidence, but that the evidence of a person’s state of mind may also be relevant’. Lee J held (at 795) that ‘good faith must be assessed, in part, by having regard to the subjective purpose of the publisher but overall it is an objective determination’.

³² *Islamic Council of Victoria v Catch the Fire Ministries Inc* (2005) EOC 93–377.

³³ See, B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 878.

³⁴ *Racial and Religious Tolerance Act 2001* (Vic) s 11.

³⁵ *Islamic Council of Victoria v Catch the Fire Ministries Inc* (2005) EOC 93–377, [389]. In August 2005, the respondents were granted leave to appeal to the Victorian Court of Appeal.

12.33 Section 80.3(1)(f) is the defence most likely to apply to the media. The effect of this provision is that a person who ‘publishes in good faith a report or commentary about a matter of public interest’ is not guilty of an offence under s 80.2.

12.34 As discussed above, the meaning of good faith in sedition law is unclear. On one view, good faith is a legal term of art (derived from defamation law), which is difficult to apply in another context. It was suggested that the requirement to demonstrate good faith in the context of media reports

is likely to be extraordinarily difficult if not impossible to satisfy in practice, particularly in relation to republication of third-party statements, as it may readily be negated by, for example, a perceived lack of proportion or congruence between the opinion expressed and the facts within the publisher’s knowledge at the time of publication.³⁶

12.35 A related concern was that media organisations or journalists might be required to reveal information about the sources of information and the integrity of those sources in order to show good faith.³⁷ This was said to raise similar concerns to defamation litigation where a media organisation claiming the defence of ‘honest opinion’ may need to prove that the opinion was based on ‘proper material’.³⁸ The possibility that sources may need to be revealed to defend sedition charges may chill media reporting of certain views and affect the willingness of individuals to provide information and views to the media.³⁹

12.36 Submissions to this Inquiry also questioned the effectiveness of the defences in protecting media organisations and journalists.⁴⁰ For example, the Chief Minister of the ACT observed that what amounts to ‘publishing’ is not clear:

Although paragraph (1)(f) may protect media reporting and comment it does not appear to excuse similar (oral) comment or reporting that may occur in the context of public discussion or debate. Public discussions concerning the comments of others would not appear to have the protection of paragraph 1(f) even if the person repeated

36 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

37 Media Organisations, *Consultation*, Sydney, 28 March 2006; Law Council of Australia, *Submission SED 126*, 19 July 2006.

38 Under s 31(3) of the uniform defamation Acts it is a defence to the publication of defamatory matter if the defendant proves that: (a) the matter was an expression of opinion of another person, rather than a statement of fact, and (b) the opinion related to a matter of public interest, and (c) the opinion is based on proper material.

39 In this context, the ALRC recommended in 2005 that the uniform Evidence Acts should be amended to provide for a qualified professional confidential relationship privilege, applicable to confidential relationships, including between journalists and their sources: Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC 102, NSWLRC 112, VLRC FR (2005), Ch 15, Rec 15–1.

40 See, eg, ARTICLE 19, *Submission SED 14*, 10 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006; J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006; B Saul, *Submission SED 52*, 14 April 2006; Cameron Creswell Agency Pty Ltd, *Submission SED 26*, 10 April 2006.

the comments (which might be said to be seditious) to do no more than to advance the discussion.⁴¹

12.37 The Public Interest Advocacy Centre (PIAC) noted that this defence applies only to a ‘report’ or ‘commentary’ and may not include other forms of communication such as satire.⁴² Fairfax, News Ltd and AAP expressed concern about the operation of s 80.3 generally because, in practice, it may be ‘necessary for a publisher to negative recklessness in order to succeed under the defence’.⁴³ This view is based on an understanding that, in defamation law, good faith can be defeated by mere recklessness.⁴⁴ Therefore, to the extent that recklessness is the fault element under the s 80.2 offences, once the requisite fault element has been proven, the good faith defence will fail.⁴⁵

12.38 The Attorney-General’s Department’s (AGD) position was that the good faith defences adequately protect journalists and media organisations because the defence applies where a communication is ‘merely about criticising government policy or publishing reports or commentary on public interest matters’.⁴⁶

12.39 In this context, the ALRC notes that, in interpreting the scope of the good faith defences, courts may be influenced by the implied constitutional right of communication concerning government and political matters.⁴⁷ The ambit of the right is discussed in more detail in Chapter 7.

Defences and artistic expression

12.40 Media and arts organisations also focused on the perceived threat to artistic expression posed by sedition laws. Concerns have been expressed that the defences do not provide adequate protection, for example, in relation to satire, theatre and comedy using irony, sarcasm and ridicule. Such expression may not be ‘constructive’—that is, with a view to reforming political errors or defects as required by s 80.3(b)—nor in good faith, as the purpose may be (at least in the first instance) to ridicule political institutions.

41 J Stanhope MLA Chief Minister ACT, *Submission SED 44*, 13 April 2006.

42 Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

43 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

44 See *Australian Consolidated Press v Uren* (1966) 117 CLR 185. The High Court considered the meaning of ‘good faith’ for the purposes of the defence of qualified privilege under the *Defamation Act 1958* (NSW).

45 The ALRC observes that, as discussed in Ch 8, recklessness is the fault element only in relation to some of the physical elements required to constitute the offences.

46 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

47 The power of a court to read down legislation that may be inconsistent with the *Constitution* is discussed in *Coleman v Power* (2004) 220 CLR 1. See Ch 7.

12.41 The defences in s 80.3 do not make any special provision for artistic expression. Submissions to the Inquiry noted that artists are often critical of the government and the established order and that it is much more difficult to determine whether or not forms of artistic expression are ‘urging’ violence than in the case of the spoken or written word.⁴⁸ For example, visual art may be open to multiple and conflicting interpretations, and dramatic arts may rely on hyperbole to accentuate the issues. Other concerns are that the phrase ‘report or commentary’ in s 80.3(1)(f) is unlikely to cover artistic expression,⁴⁹ and that ‘publishing’ may not extend to audio-visual content.⁵⁰

12.42 Submissions to the Inquiry argued that the nature of artistic work should be expressly recognised and protected, as in the RDA provisions.⁵¹ Section 18D of the RDA provides an exemption for anything said or done reasonably and in good faith ‘in the performance, exhibition or distribution of an artistic work’ or in the course of any statement, publication, discussion or debate made or held for any ‘genuine artistic purpose’.

12.43 In response to suggestions that artistic expression may not be covered by the defences, the AGD highlighted that the prosecution must prove beyond reasonable doubt that the defendant intended to urge the use of force or violence, or intended to assist an enemy of Australia. The AGD observed, in relation to a hypothetical scenario about the positive portrayal of a suicide bomber in a painting or a play, that:

A positive portrayal could be for many other reasons—it might be to do with the person’s appalling poverty, it could be to do with the innocence of the child in the image who has been exploited by the cruel directors of the relevant terrorist organisation. A painting, short of one that has the words, ‘it is your duty to do likewise’ emblazoned next to the image, will not even get off first base in a prosecution for the sedition offence. The same is also true of plays and other forms of art, as well as educative material.⁵²

12.44 The AGD referred to the danger that wholesale exemptions or ‘special defences’ might allow terrorists ‘to use education, the arts and journalism as a shield for their activities’.⁵³

48 Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006; Pax Christi, *Submission SED 16*, 9 April 2006.

49 Human Rights Lawyers, *Consultation*, Sydney, 29 March 2006.

50 Confidential, *Submission SED 22*, 3 May 2006.

51 Media and Arts Organisations, *Consultation*, Sydney, 29 March 2006; Human Rights Lawyers, *Consultation*, Sydney, 29 March 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006; Australian Major Performing Arts Group, *Submission SED 61*, 16 April 2006; National Legal Aid, *Submission SED 62*, 20 April 2006; Confidential, *Submission SED 22*, 3 May 2006; National Association for the Visual Arts, *Submission SED 30*, 11 April 2006; Australia Council for the Arts, *Submission SED 34*, 11 April 2006.

52 Australian Government Attorney-General’s Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005.

53 Ibid.

Criticism of the good faith requirement

12.45 Some observers who favoured extending the defences considered that the term ‘good faith’ is inappropriate and should be removed.⁵⁴ As discussed above, the term ‘good faith’ is a requirement of the defences under the RDA, as well as under s 80.3 of the *Criminal Code*.

12.46 However, s 18D of the RDA does not provide a defence to a criminal offence. Rather, it provides exemptions in relation to certain conduct (offensive behaviour based on racial hatred) that would otherwise amount to a civil wrong for which a complaint may be made to the Human Rights and Equal Opportunity Commission.⁵⁵ Similarly, the New South Wales defences⁵⁶ do not apply to the criminal offences of serious vilification⁵⁷ (where the incitement is by means that include inciting or threatening physical harm to persons or property) but only to conduct that is stated to be ‘unlawful’. There is no express statutory defence to the criminal offences, beyond those generally available in criminal law.

12.47 The New South Wales Council for Civil Liberties criticised the good faith requirement as an inappropriate element in a defence to a criminal offence leading to possible imprisonment:

The requirement for good faith in the various defences ... suggests that if any action was taken for an ulterior motive, then the defences would not apply even though to any other observer it would appear that the person was engaged in legitimate political activity.⁵⁸

12.48 Fairfax, News Ltd and AAP submitted that good faith is a legal term of art, and as such will import into the criminal law ‘singularly inappropriate matters of defeasance which belong to the civil law, in particular the law of defamation’. These media organisations did not support a defence based on the RDA unless the words ‘reasonably and in good faith’ were excised.⁵⁹

12.49 In contrast, the AGD advised that the Australian Government does not want to remove the concept of good faith from the defence:

54 Human Rights Lawyers, *Consultation*, Sydney, 29 March 2006; Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006; Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

55 See, *Racial Discrimination Act 1975* (Cth) s 18C; *Human Rights and Equal Opportunity Commission Act 1986* (Cth) Pt IIB.

56 See, eg, *Anti-Discrimination Act 1977* (NSW) s 20C(2).

57 Ibid s 20D.

58 New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006.

59 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

To do so would open the door to people suggesting that it was legitimate to urge the use of force or violence to procure changes in policy. The use of the term ‘good faith’ in the defence points to the real motivation of the person.⁶⁰

A media exemption?

12.50 Some submissions to the Inquiry suggested that the *Criminal Code* could be amended to make clear that the s 80.2 offence provisions ‘are neither intended nor designed to prevent journalists from reporting, nor to impede the free flow and expression of opinion in the media’.⁶¹

12.51 Media organisations suggested that the media and journalists should be exempt from the ambit of the offences.⁶² In this context, Fairfax, News Ltd and AAP highlighted precedents for such media exemptions in the *Trade Practices Act 1974* (Cth) (TPA) and the *Privacy Act 1988* (Cth):

We suggest a media-specific exception which makes clear that any act or omission in the course of, for the purposes of, or associated or in connection with the reporting or publication of news or current affairs, opinion, comment or artistic expression does not amount to and is not capable of evidencing a seditious intent for the purposes of *Crimes Act* section 30A(3) or of amounting to a breach, or conspiracy to breach, any of the offence provisions set out in section [80.2].⁶³

12.52 Fairfax, News Ltd and AAP also stated that such an exemption should be ‘wide enough to ensure freedom from liability for contributors, including letter writers, arising out of publication of their views in the media’.⁶⁴ Similarly, the Press Council stated that a media exemption would not be sufficient in the absence of protection for ‘artists, freelance writers, bloggers and other citizens who engage in expressive conduct’.⁶⁵

12.53 Other submissions opposed a media exemption. For example, the National Association for the Visual Arts (NAVA) stated that the scope of such an exemption—in terms of the people to whom the exemption would apply—is difficult to determine

60 Australian Government Attorney-General’s Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005.

61 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006; Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006; Law Council of Australia, *Submission SED 126*, 19 July 2006.

62 Australian Press Council, *Submission SED 48*, 13 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006; Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006; Free TV Australia, *Submission SED 59*, 19 April 2006; Australian Major Performing Arts Group, *Submission SED 61*, 16 April 2006.

63 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006. Similar views are expressed by other media organisations: Australian Press Council, *Submission SED 48*, 13 April 2006; Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006; Free TV Australia, *Submission SED 59*, 19 April 2006.

64 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

65 Australian Press Council, *Submission SED 48*, 13 April 2006.

and involves a high degree of subjectivity.⁶⁶ Further, it would be anomalous for the media to be permitted to engage in conduct that would be criminal if committed by anyone else.⁶⁷

12.54 The AGD advised that:

The Government does not want to introduce a defence that specifically applies to journalists or other professions. It is preferable for the whole community to rely on the same defence. The danger with using special defences is that the terrorists may attempt to use that defence as a shield for their activities.⁶⁸

12.55 The ALRC notes that the suggested precedents for a media exemption come from areas of civil regulation, and do not concern criminal offences. The *Privacy Act* provides that an act done, or practice engaged in, by a ‘media organisation’ is an ‘exempt act or practice’ for the purposes of the Act if done by the organisation ‘in the course of journalism’ and the organisation is publicly committed to self-regulatory privacy standards.⁶⁹ A media organisation is defined as:

an organisation whose activities consist of or include the collection, preparation for dissemination or dissemination of the following material for the purpose of making it available to the public:

- (a) material having the character of news, current affairs, information or a documentary;
- (b) material consisting of commentary or opinion on, or analysis of, news, current affairs, information or a documentary.⁷⁰

12.56 Under the TPA, ‘prescribed information providers’ are exempt from compliance with some of the consumer protection provisions of Part V of the TPA.⁷¹ A prescribed information provider is defined as ‘a person who carries on a business of providing information’.⁷²

12.57 The ALRC does not believe that a case has been made for any blanket exemption or ‘carve-out’ for media organisations or journalists. The provisions cited as precedents for a media exemption do not relate to criminal offences; rather, they exempt organisations from compliance with certain regulatory regimes. There is no precedent for exempting classes of persons or bodies corporate defined by occupation or business activity, from the ambit of an indictable criminal offence—and in any event the ALRC believes that such an exemption is undesirable.

66 National Association for the Visual Arts, *Submission SED 30*, 11 April 2006.

67 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

68 Ibid.

69 *Privacy Act 1988* (Cth) s 7B(4).

70 Ibid s 6.

71 *Trade Practices Act 1974* (Cth) s 65A.

72 Ibid s 65A(3).

Reform of the good faith defences

12.58 Discussion concerning the defences in s 80.3 of the *Criminal Code* has focused on the ambit of the defences (in terms of the activities covered) and on the concept of good faith itself—and whether this should be retained.

12.59 The s 80.3 defences have been criticised for being too limited. It has been suggested that while the defences would likely protect much political expression, the protection for academic, educational, artistic, scientific, religious, journalistic or other public interest purposes is significantly more limited.⁷³

12.60 The report of the 2005 Senate Committee inquiry recommended that, should the new sedition offences be introduced, the defence for acts done in good faith be amended to extend the defence to include statements for journalistic, educational, artistic, scientific, religious or public interest purposes (along the lines of the defence in s 18D of the RDA).⁷⁴ Submissions to this Inquiry agreed that the more elaborated defences under s 18D of the RDA provide a better model because they cover a broader range of activity.⁷⁵

12.61 The 2005 Senate Committee inquiry also recommended that the words ‘in good faith’ should be removed from the defences,⁷⁶ and this suggestion received some support in submissions to this Inquiry.⁷⁷ As discussed above, the concept of good faith in sedition law has its origins in seditious libel. In modern civil defamation law, good faith is more often expressed as the requirement for absence of malice. It has been claimed that reliance on good faith as a defence in relation to criminal offences is anomalous and inappropriate.⁷⁸

73 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.126].

74 Ibid, [5.175], Rec 28.

75 Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; Confidential, *Submission SED 22*, 3 May 2006; Media Entertainment and Arts Alliance, *Submission SED 28*, 10 April 2006; Australian Writers’ Guild, *Submission SED 29*, 11 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; Arts Law Centre of Australia, *Submission SED 46*, 13 April 2006; Australian Vice-Chancellors’ Committee, *Submission SED 60*, 25 April 2006; N Roxon MP Shadow Attorney-General, *Submission SED 63*, 28 April 2006.

76 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.175], Rec 28.

77 Human Rights Lawyers, *Consultation*, Sydney, 29 March 2006; Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006; Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006; Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006.

78 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006; Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006; Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006. Good faith is used in some other *Criminal Code* offences. See, eg, *Criminal Code* (Cth) ss 71.8, 71.15: defence to a charge of unlawful sexual penetration that the sexual penetration was ‘carried out in the course of a procedure in good faith for medical or hygienic purposes’. See also s 474.6, which provides that a law enforcement officer ‘acting in good faith in the course of his

12.62 The ALRC considers that the good faith requirement is an anachronism. The statutory good faith defences came into being in 1920, when the sedition offences themselves were enacted. At that time, the sedition offences did not require proof of subjective intention or incitement to violence or public disturbance.⁷⁹

12.63 Arguably, the good faith defences made sense when it was not necessary to prove intention. In contrast, s 80.2(1), (3) and (5) require a person to have an intention to urge force or violence.⁸⁰ It is difficult to envisage circumstances in which a person acts in good faith for purposes set out in s 80.3, yet intends to urge force or violence to overthrow the *Constitution*, interfere with electoral processes or promote inter-group violence. Generally, the good faith defence is not needed because, in the circumstances in which it could be established, the elements of the offence would not have been made out in the first place.

12.64 It is also clear that the way in which the defences are drafted reflects the more deferential political and social environment in which sedition offences emerged. For example, while s 80.3(1)(a) refers to showing that any of the named persons is ‘mistaken’, it is not sufficient to show that such a person is, for example, corrupt, biased or dishonest. Further, in order to rely on the defence in s 80.3(1)(b), a person must have a ‘view to reforming’ the errors or defects pointed out; and under s 80.3(1)(d) the person must be seeking to ‘bring about the removal’ of the matters pointed out. A requirement that acts urging the use of force or violence be done with a ‘constructive’ political or social purpose in order for a defence to be available is undesirable because it privileges certain kinds of expression that are subjectively considered to be socially constructive.

The proposal in DP 71

12.65 In Discussion Paper 71 (DP 71), the ALRC proposed that the good faith defences should be repealed and a new subsection enacted providing that, in considering whether a person has the requisite ulterior intention, the trier of fact should be required explicitly to take into account whether the conduct was done:

- in the performance, exhibition or distribution of an artistic work; or
- 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

or her duties’ is not criminally responsible for offences of interfering with telecommunications facilities; s 474.21, which creates defences in respect of child pornography material; and s 474.30, which creates defences for National Relay Service employees and emergency call persons.

⁷⁹ See, L Maher, ‘The Use and Abuse of Sedition’ (1992) 14 *Sydney Law Review* 287, 290.

⁸⁰ The ALRC recommends that the application of intention as the fault element of the offences in s 80.2(1), (3) and (5) should be stated expressly in the provisions. See Ch 8.

- in connection with an industrial dispute or an industrial matter; or
- in publishing a report or commentary about a matter of public interest.⁸¹

12.66 There was substantial support for this proposal in submissions and consultations,⁸² but a number of refinements were also suggested. In the light of concerns about the protection of artistic expression, it was suggested that the provision also refer to the ‘development’ of an artistic work.⁸³ Sydney PEN noted that the term ‘artistic work’ has a specific and narrow meaning in the *Copyright Act 1968* (Cth) and submitted that the proposed amendment should include reference to ‘dramatic, literary or artistic work’ and to expression for any genuine ‘literary’ purpose.⁸⁴ Media organisations submitted that the phrase ‘in the course of, or in association with, the dissemination of news and current affairs’ would be preferable to the words ‘report or commentary’ and that the words ‘on a matter of public interest’ should be deleted from this subclause.⁸⁵

12.67 There were also more fundamental concerns about the proposal. PIAC expressed concern that the proposal did not give sufficient guidance on what weight should be given to the specified factors or how the factors are to be considered in determining intention.⁸⁶ Australian Lawyers for Human Rights submitted that the proposed provision should read: ‘A person does not intend that the urged force or violence will occur if the conduct was done’ in the relevant contexts.⁸⁷ Similarly, media organisations considered that the proposed amendment should raise a presumption against the existence of intent in the case of the activities specified.⁸⁸ NAVA submitted that there should be an exemption from the offences for artistic expression and professional artists. NAVA stated that any reform should ensure that artists are not placed in the position of having to defend themselves against charges.⁸⁹ The Law

81 Australian Law Reform Commission, *Review of Sedition Laws*, DP 71 (2006), Proposal 10–2.

82 Arts Law Centre of Australia, *Submission SED 65*, 6 June 2006; Australian Press Council, *Submission SED 66*, 23 June 2006; Independent Producers Initiative Inc, *Submission SED 76*, 3 July 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; Australian Film Commission, *Submission SED 86*, 20 July 2006; Sydney PEN, *Submission SED 88*, 3 July 2006; New South Wales Council for Civil Liberties Inc, *Submission SED 89*, 3 July 2006; Australian Dance Council - Ausdance Inc, *Submission SED 97*, 3 July 2006; Live Performance Australia, *Submission SED 109*, 3 July 2006; Australia Council for the Arts, *Submission SED 114*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006. Fairfax, AAP, ABC, News Ltd, Nine Network and WA Newspapers supported the proposal but would prefer a media exemption: John Fairfax Holdings Ltd and others, *Submission SED 91*, 3 July 2006; National Legal Aid, *Submission SED 124*, 7 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

83 Media and Arts Representatives, *Consultation*, Sydney, 14 June 2006; National Association for the Visual Arts, *Submission SED 75*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; National Tertiary Education Union, *Submission SED 118*, 3 July 2006.

84 Sydney PEN, *Submission SED 88*, 3 July 2006.

85 Media Organisations, *Consultation*, Sydney, 28 March 2006; John Fairfax Holdings Ltd and others, *Submission SED 91*, 3 July 2006.

86 Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

87 Australian Lawyers for Human Rights, *Submission SED 120*, 4 July 2006.

88 John Fairfax Holdings Ltd and others, *Submission SED 91*, 3 July 2006.

89 National Association for the Visual Arts, *Submission SED 75*, 3 July 2006.

Council of Australia submitted that, in addition to a general good faith defence, exemptions should be provided for conduct that is for the purposes listed in the ALRC proposal.⁹⁰

12.68 The Commonwealth Director of Public Prosecutions (CDPP) suggested that consideration of the factors should be made discretionary, rather than mandatory. The CDPP was concerned that, under the ALRC's proposal, the prosecution may have a legal burden of proving beyond reasonable doubt that the urging was not done, for example, for an artistic purpose. In the CDPP's view neither the prosecution nor the defence should be required to adduce evidence in relation to any of the factors. No evidential or legal burden should be raised against either party. The CDPP stated that the proposed amendment should be reframed to provide that the trier of fact 'may' have regard to any relevant factor, including the listed factors, in considering intent.⁹¹

12.69 The AGD opposed the proposal in DP 71 and considered that it would make it difficult for juries to understand the scope of the offence, and potentially render the offence 'unusable'.⁹²

ALRC's views

12.70 Rather than attempt to protect freedom of expression through a 'defence' that arises after a person has been found to satisfy all the elements of the offence, the ALRC believes it would be better in principle and in practice to reframe the criminal offences in such a way that they do not extend to legitimate activities or unduly impinge on freedom of expression in the first place.

12.71 In other words, the focus should be on proving that a person intentionally urges the use of force or violence (in the specified circumstances), with the intention that the force or violence urged will occur (see Recommendation 8–1). The ALRC remains of the view that reforms to ensure adequate protection for freedom of expression should focus on intent and context in the application of the offences, rather than on elaborate new or amended defences.

12.72 In DP 71, the ALRC proposed that the trier of fact should be required to take into account whether the conduct was done in certain specific contexts. On balance, the ALRC continues to favour this approach, notwithstanding the concerns expressed by the CDPP about burdens of proof.

90 Law Council of Australia, *Submission SED 126*, 19 July 2006.

91 The CDPP opposed Proposal 8–1 and consequently submitted that the factors should apply to consideration of whether a person intentionally urged force or violence (rather than to whether a person intended that the urged force or violence will occur): Commonwealth Director of Public Prosecutions, *Submission SED 84*, 3 July 2006.

92 Australian Government Attorney-General's Department, *Submission SED 92*, 3 July 2006.

12.73 Under the *Criminal Code*, a defendant who wishes to rely on any ‘exception, exemption, excuse, qualification or justification’ provided by the law creating an offence bears an evidential burden in relation to that matter.⁹³ An evidential burden in relation to a matter is defined as meaning the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.⁹⁴ The prosecution bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.⁹⁵

12.74 The CDPP’s concern appears to be that, once a defendant has raised a reasonable possibility that force or violence was urged, for example, in the context of an artistic work, the prosecution would have the legal burden of proving otherwise. However, the ALRC is not convinced that this is the way the provision would interact with Division 13 of the *Criminal Code*. The prosecution always has the legal burden of proving every element of the offence, including the element of an ulterior intention, if the ALRC’s recommendation in Chapter 8 is accepted.⁹⁶ The fact that urging takes place in a specified context does not necessarily negative the presence of the ulterior intention. Rather, it is a factor that the trier of fact must take into account in considering whether the defendant had the required intention that force or violence occur.

12.75 Under the ALRC’s recommendation, the context of the conduct helps to establish the defendant’s state of mind, but is not determinative in itself and is not a separate element of the offence. Conduct urging the use of force or violence to interfere in elections (for example) with the intent that such force or violence occur would not be rendered lawful simply because the defendant chose to use poetry or street theatre to communicate his or her message of violence. The ALRC considers that juries are fully capable of sorting through conflicting accounts of motivation and intent.⁹⁷

12.76 In the result, the ALRC recommends that s 80.3 of the *Criminal Code* should be amended so that the good faith defences do not apply to the offences in s 80.2.⁹⁸ Instead, a new provision should be enacted stating that, in considering whether a person has the requisite ulterior intention, the trier of fact must have regard to the context in which the conduct occurred, including whether the conduct was done in

93 *Criminal Code* (Cth) s 13.3(3).

94 *Ibid* s 13.3(6).

95 *Ibid* s 13.1(2).

96 Rec 8–1.

97 As was necessary, for example, in the case of Faheem Khalid Lodhi, who was convicted in June 2006 on terrorism offences. The indictment alleged, among other things, that the defendant collected documents in the preparation of a terrorist act, including maps of the Australian electricity supply system and aerial photographs of Australia defence establishments: see *Lodhi v The Queen* [2006] NSWCCA 121. The defence claimed that these items were collected for work or business reasons.

98 Section 80.3 also applies to the treason offences in s 80.1. As discussed in Ch 11, there are questions about whether the good faith defences should continue to apply to treason. However, the ALRC makes no recommendation in this regard.

certain stated contexts, such as in the development of an artistic work. The provision recommended below (Recommendation 12–2) draws from words used in the RDA defences⁹⁹ and existing s 80.3(1)(e) of the *Criminal Code*.

12.77 The implementation of Recommendation 12–2 is dependent on the implementation of Recommendation 8–1. The latter recommends that s 80.2 provide that, for a person to be guilty of any of the offences under s 80.2, the person must intend that the urged force or violence will occur. As discussed in Chapter 8, there is some opposition to the imposition of this requirement for an ulterior intention.¹⁰⁰ In the event that Recommendation 8–1 is not implemented, a provision similar to that recommended should nevertheless be enacted. This alternative provision should require regard to the stated contextual factors in determining whether a person intentionally urged force or violence (rather than in determining whether a person intended that the urged force or violence would occur).

Recommendation 12–1 Section 80.3 of the *Criminal Code* (Cth) concerning the defence of ‘good faith’ should be amended so that it does not apply to the offences in s 80.2.

Recommendation 12–2 Section 80.2 of the *Criminal Code* should be amended to provide that in determining whether a person intends that the urged force or violence will occur for the purposes of s 80.2(7), the trier of fact must have regard to the context in which the conduct occurred, including (where applicable) whether the conduct was done:

- (a) in the development, 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 connection with an industrial dispute or an industrial matter; or
- (d) in the dissemination of news or current affairs.

⁹⁹ See, *Racial Discrimination Act 1975* (Cth) s 18D(a)–(b).

¹⁰⁰ Australian Government Attorney-General’s Department, *Submission SED 92*, 3 July 2006; Commonwealth Director of Public Prosecutions, *Submission SED 84*, 3 July 2006.

Recommendation 12–3 A note should be inserted after each of the offences in s 80.2(1), (3) and (5) of the *Criminal Code* drawing attention to the recommended new provisions regarding proof of intention that the force or violence urged will occur.

(The relevant sections of the Criminal Code, amended as recommended, are set out in Appendix 2.)

Penalties

12.78 Each of the five seditious offences in s 80.2 of the *Criminal Code* carries a maximum penalty of imprisonment of seven years. This follows a recommendation of the Gibbs Committee, which argued that ‘the more specific nature of the proposed offence[s]’ warranted an increase from the maximum penalty of imprisonment for three years specified for the old seditious offences under ss 24A–24D of the *Crimes Act*.¹⁰¹

12.79 These penalties may be compared with the maximum periods of imprisonment for the following *Criminal Code* offences:

- treason—life;¹⁰²
- espionage—25 years;¹⁰³
- engaging in a terrorist act—life;¹⁰⁴
- directing the activities of a terrorist organisation—25 years;¹⁰⁵
- membership of a terrorist organisation—10 years;¹⁰⁶ and
- getting funds for a terrorist organisation—25 years.¹⁰⁷

12.80 A person who urges the commission of these offences is guilty of the offence of incitement. Under s 11.4 of the *Criminal Code* the penalty for incitement is set with reference to the maximum penalty for the offence incited, as follows:

101 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [32.19].

102 *Criminal Code* (Cth) s 80.1.

103 *Ibid* s 91.1.

104 *Ibid* s 101.1.

105 *Ibid* s 102.2.

106 *Ibid* s 102.3.

107 *Ibid* s 102.6.

- if the offence incited is punishable by life imprisonment—10 years;
- if the offence incited is punishable by imprisonment for 14 years or more—7 years;
- if the offence incited is punishable by imprisonment for 10 years or more (but less than 14 years)—5 years; or
- in other cases—3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser.

12.81 Section 4B(2) of the *Crimes Act* sets out a formula that can be applied to determine the maximum pecuniary penalty for an offence where the provision creating the offence refers only to a penalty of imprisonment. In addition, s 4(2A) states that if an offence provides for imprisonment for life, the court may impose a maximum pecuniary penalty of 2,000 penalty units.

12.82 The Inquiry asked whether the maximum penalties for the offences in s 80.2 of the *Criminal Code* are appropriate.¹⁰⁸ Bearing in mind that most submissions favoured the abolition of the sedition offences, it is perhaps unsurprising that many also considered that the penalties were too high¹⁰⁹ and should not exceed the maximum of three years imprisonment, as provided under the repealed *Crimes Act* provisions.¹¹⁰

12.83 There is recognition that the appropriateness of the maximum penalties may change if the offences are narrowed to apply only to the urging of force or violence. For example, ARTICLE 19 submitted:

if custodial sanction were ever to be justified for a s 80.2 offence, the provisions of s 80.2 would need to be much more narrowly drawn, with a direct and immediate connection between an intention to incite imminent violence and a likelihood or occurrence of such violence.¹¹¹

12.84 Alex Steel stated that the maximum penalty for the s 80.2(1) offence is in line with the penalty scheme set out in the *Criminal Code* for incitement offences. He observed:

The basic approach of the Code appears to be to set a maximum of 10 years imprisonment as a default penalty and then increase or decrease depending on the

¹⁰⁸ Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Ch 7, Question 10.

¹⁰⁹ Pax Christi, *Submission SED 16*, 9 April 2006; A Steel, *Submission SED 23*, 18 April 2006; Australian Writers' Guild, *Submission SED 29*, 11 April 2006; Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006.

¹¹⁰ Australian Writers' Guild, *Submission SED 29*, 11 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006.

¹¹¹ ARTICLE 19, *Submission SED 14*, 10 April 2006.

offence. Inchoate offences are given lesser penalties. Incitement to a crime with a maximum life imprisonment has a maximum penalty of 10 years imprisonment ... As urging the overthrow of the government might not incite an act of treason the lesser penalty of a maximum 7 years is appropriate.¹¹²

12.85 The AGD referred to the conclusions of the Gibbs Committee and advised that the Government regards the conduct covered by the offences as ‘sufficiently serious to warrant an increase in the penalty from 3 years to 7 years imprisonment’.¹¹³

ALRC’s views

12.86 The ALRC does not recommend any change to the maximum penalties for the offences in s 80.2(1), (3) or (5) of the *Criminal Code*, as modified by the recommendations in this Report. The ALRC does not consider that the existing penalties are disproportionate to the seriousness of these offences. In fact, on one view, if the offences are narrowed as recommended, the maximum penalties may not adequately reflect the seriousness of the conduct.¹¹⁴

12.87 There are stronger arguments that the penalties are inappropriate for the offences in s 80.2(7)–(8), which require no link with force or violence—but in Chapter 11 the ALRC recommends that these offences be repealed. One consequence of the ALRC’s recommendation is that, in some circumstances, conduct that was covered by these provisions—and punishable by a maximum penalty of imprisonment of seven years—may now have to be prosecuted under the treason offences set out in s 80.1(1)(e)–(f). Incitement to treason has a maximum penalty of imprisonment for ten years.¹¹⁵

12.88 The ALRC notes that, in February 2006, the Australian Government announced a review of criminal penalties in Commonwealth legislation. This review will, among other things, assess the appropriateness of Commonwealth criminal penalties in the light of comparisons with relevant state and territory criminal penalties and international best practice and seek to understand community expectations about penalising criminal offences.¹¹⁶ The review team is due to report to the Government by the end of 2006.

112 A Steel, *Submission SED 23*, 18 April 2006.

113 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

114 M Weinberg, *Consultation*, Melbourne, 3 April 2006.

115 *Criminal Code* (Cth) s 11.4. The maximum penalties specified in provisions creating federal offences are intended for the worst type of case covered by the offence and are subject to a broad sentencing discretion to tailor a sentence that is appropriate to the circumstances of the case. See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, ALRC 103 (2006).

116 Australian Government Attorney-General’s Department, *Review of Criminal Penalties in Commonwealth Legislation* (2006) <www.ag.gov.au/penalties> at 23 March 2006.

13. Consent to Prosecution

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Introduction

13.1 Under s 80.5 of the *Criminal Code* (Cth), proceedings for an offence under Division 80 of the Code (including the sedition offences) may be commenced only with the written consent of the Attorney-General of Australia.

13.2 This chapter discusses the rationale for the consent requirement and considers the arguments for and against its retention. The ALRC concludes that s 80.5 should be repealed.

Requirement of Attorney-General's consent

13.3 The requirement to obtain the Attorney-General's consent to the prosecution of offences in Division 80 of the *Criminal Code* operates as follows. A person may be arrested, charged and remanded into custody without the prior consent of the Attorney-General.¹ As with any other federal criminal matter, the investigating authority, such as the Australian Federal Police, will provide the Commonwealth Director of Public Prosecutions (CDPP) with a brief of evidence. The CDPP will use this in determining—with reference to the guidelines in the *Prosecution Policy of the Commonwealth* (Prosecution Policy)²—whether there is sufficient probative evidence to proceed, and whether launching a prosecution would be in the public interest. Only after the CDPP has decided to prosecute must the written consent of the Attorney-General be sought under s 80.5.

1 *Criminal Code* (Cth) s 80.5(2)(a), (b).

2 Commonwealth Director of Public Prosecutions, *The Prosecution Policy of the Commonwealth* <www.cdpp.gov.au/Prosecutions/Policy/Default.aspx> at 11 March 2006.

13.4 A number of other *Criminal Code* offences require the Attorney-General's written consent to prosecute.³ These include offences relating to:

- international terrorist activities using explosive or lethal devices;⁴
- people smuggling offences;⁵
- espionage and similar activities;⁶
- harming Australians outside of Australian territory;⁷ and
- genocide, crimes against humanity, war crimes and crimes against the administration of justice in the International Criminal Court.⁸

13.5 In addition, the *Criminal Code* provides that the Attorney-General's consent is required in prosecutions for any offence (to which the jurisdictional provisions apply)⁹ where the alleged conduct occurs wholly in a foreign country, and the person is not an Australian citizen, resident or body corporate incorporated in Australia.¹⁰ In such cases, the requirement of the Attorney-General's consent is intended to allow consideration of 'international law, practice and comity, international relations, prosecutions action that is being or might be taken in another country, and other public interest considerations'.¹¹

Consent and the prosecution process

13.6 According to the Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2005 (Cth), the consent requirement is designed to provide an additional safeguard for a person charged with a sedition offence,¹² since a person cannot be prosecuted in respect of one of these offences unless both the CDPP *and* the Attorney-General consent to the proceedings.

13.7 However, there have been suggestions that the political context and history of the sedition offences make the consent requirement problematic.¹³ Specifically, there is

3 The consent of the Attorney-General is also required for offences under some other statutes, including the *Crimes Act 1914* (Cth); *Crimes (Ships and Fixed Platforms) Act 1992* (Cth); *Crimes at Sea Act 2000* (Cth).

4 *Criminal Code* (Cth) Div 72. See s 72.7.

5 Ibid Div 73, Subdiv A. See s 73.5.

6 Ibid Pt 5.2. See s 93.1.

7 Ibid Div 115. See s 115.6.

8 Ibid Div 268. See s 268.121.

9 That is, Ibid ss 14.1, 15.1, 15.2, 15.3 or 15.4.

10 Ibid s 16.1.

11 I Leader-Elliot, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney-General's Department and Australian Institute of Judicial Administration, 1 March 2002, 365.

12 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), 93.

13 For a discussion of the political aspects of the history of sedition, see Ch 2.

a concern that the Attorney-General, as a political figure, might be inclined to agree more readily to the prosecution of persons who criticise government policy or are unpopular with the electorate.¹⁴

13.8 There are several competing factors at play. On one hand, there is no doubt that the requirement of the Attorney-General's written consent is intended as an additional safeguard rather than an attempt to 'politicise' this aspect of executive decision making. Moreover, the Attorney-General is publicly accountable for his or her actions through Parliament, and is subject to media scrutiny. As the Attorney-General's Department (AGD) has argued, 'the Attorney is a political safeguard on the DPP and the DPP is a safeguard on the Attorney'.¹⁵

13.9 On the other hand, it is argued that s 80.5 is inconsistent with the CDPP's position as a statutory officeholder with a high degree of independence conferred by statute and legal culture. Historically, sedition has been used against political dissidents and opponents of the established political order.¹⁶ Against this background, it is not surprising that misgivings have been expressed about involving the Attorney-General in the prosecution process.

Submissions and consultations

13.10 Some submissions to the Inquiry considered that the consent requirement provides an additional protection against unwarranted prosecution.¹⁷ However, the majority of stakeholders opposed the involvement of the Attorney-General or held serious reservations about it.¹⁸ The CDPP itself did not comment on this proposal as it is a matter of policy on which the CDPP believed it would be improper to express a view.¹⁹

13.11 In support of the existing provision, the AGD stated that there is no reason to remove the consent requirement as it provides an additional safeguard and 'addresses any concerns about officials misusing the offence'.²⁰ Moreover, in response to the

14 Senate Legal and Constitutional Legislation Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.146]–[5.151].

15 Senate Legal and Constitutional Legislation Committee—Australian Parliament, *Anti-Terrorism Bill (No 2) 2005: Transcript of Public Hearing*, 18 November 2005, 19 (G McDonald).

16 See Ch 2.

17 A Steel, *Submission SED 23*, 18 April 2006; Australian Government Attorney-General's Department, *Submission SED 31*, 12 April 2006; B Saul, *Submission SED 52*, 14 April 2006.

18 ARTICLE 19, *Submission SED 14*, 10 April 2006; Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; P Emerton, *Submission SED 36*, 10 April 2006; A Spathis, *Submission SED 17*, 10 April 2006; M Weinberg, *Consultation*, Melbourne, 3 April 2006; R Connolly and C Connolly, *Consultation*, Melbourne, 5 April 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

19 Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 June 2006.

20 Australian Government Attorney-General's Department, *Submission SED 31*, 12 April 2006.

ALRC's proposal to repeal s 80.5,²¹ the AGD stated that it did not find the ALRC's reasoning persuasive. The AGD went on to note that

the need for consent is not unprecedented and a similar approach has been taken to the offence of racial vilification where the Attorney General is required to give consent prior to the commencement of a prosecution (see subsection 20D(2) of the *Anti-Discrimination Act 1977* (NSW)).²²

13.12 In contrast, the Federation of Community Legal Centres (Vic) submitted that 'it is the very nature of the laws, in so far as they are intended to prosecute political speech, that they be prosecuted in a politicised manner'. The requirement for the Attorney-General's consent would

create a situation where political motives influence whether particular conduct is prosecuted or not. This is inappropriate in a democratic society and any laws creating the potential for such political influence are anti-democratic as such.²³

13.13 The Centre for Media and Communications Law expressed similar concerns and noted that removing the requirement of the Attorney-General's consent would 'significantly lessen the risk of decisions about prosecutions being *perceived* as political and would place the provisions more clearly within the general operation of the criminal law'.²⁴

13.14 ARTICLE 19, a non-government organisation, opposed requiring the consent of the Attorney-General in matters of press freedom because, in its view, 'written ministerial consent is open to abuse and political interference in respect of the press, which should be robustly protected from such threats to its independence'.²⁵

13.15 As previously stated, the consent of the Attorney-General is necessary only where the CDPP already has made a decision to prosecute. However, there are also concerns about the Attorney-General's involvement in decisions *not* to prosecute. A situation may arise where the Attorney-General refuses to consent to the prosecution of a person who is perceived to be politically aligned to the government of the day, of which the Attorney-General is a member. Thus, there may be a fear—whether real or perceived—of selective prosecution. Arguably, the Attorney-General is less accountable where there is a decision not to prosecute because the prudence of the decision is not exposed by a criminal trial and consequent media and political scrutiny. It was suggested that, to provide additional transparency in decision making, the Attorney-General should have to give a report justifying the exercise of the

21 Australian Law Reform Commission, *Review of Sedition Laws*, DP 71 (2006), Proposal 8–12.

22 Australian Government Attorney-General's Department, *Submission SED 92*, 3 July 2006.

23 Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006.

24 Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006.

25 ARTICLE 19, *Submission SED 14*, 10 April 2006.

discretion.²⁶ Others proposed, as a further safeguard, the promulgation of guidelines for sedition prosecutions.²⁷

ALRC's views

13.16 On balance, the ALRC concludes that s 80.5 of the *Criminal Code* should be repealed.

13.17 A specific requirement for the Attorney-General to consent to prosecution is most often imposed when an offence has a significant extraterritorial operation. Leaving aside s 80.5, the Attorney-General's consent to prosecution is still required under s 16.1 of the *Criminal Code* where the alleged conduct occurs wholly in a foreign country and the person charged is not an Australian citizen, resident or body corporate incorporated in Australia.²⁸

13.18 The ALRC is strongly influenced by the fact that the terrorism offences in Part 5.3 of the *Criminal Code* do not require the consent of the Attorney-General (unless s 16.1 applies). It seems logical for the same position to apply to the Division 80.2 offences, given their character and the purpose for which they were enacted.

13.19 The AGD advised that a consent requirement is sometimes considered desirable to ensure that political responsibility will be taken for offences that are perceived to have potential for abuse in the hands of public officials. However, the ALRC is not convinced that this rationale justifies the consent requirement for the Division 80 offences. The CDPP's independent status is enshrined in the *Director of Public Prosecutions Act 1983* (Cth), and the ALRC believes that this provides adequate protection against inappropriate prosecutions being commenced. Moreover, the ALRC endorses the independent role of the CDPP in making prosecutorial decisions and, in the particular context of these offences, it is preferable to remove the requirement for the Attorney-General's consent in order to avoid any perception that there may be a political element in the decision whether or not to prosecute.

13.20 As previously noted, the CDPP is guided by the Prosecution Policy of the Commonwealth, which structures decision making in respect of the prosecution process. The Prosecution Policy contains a discussion of the factors that may arise for consideration in determining whether the public interest requires a prosecution. These include:

26 Law Institute of Victoria, *Consultation*, Melbourne, 4 April 2006.

27 University of Melbourne Academics, *Consultation*, Melbourne, 5 April 2006.

28 See *Criminal Code* (Cth) ss 80.4, 15.4, 16.1.

- (a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a 'technical' nature only; ...
- (g) the effect on public order and morale;
- (h) the obsolescence or obscurity of the law;
- (i) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute; ...
- (l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- (m) whether the alleged offence is of considerable public concern; ...
- (p) the likely length and expense of a trial; ...
- (t) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.²⁹

13.21 The Prosecution Policy also makes clear that a decision whether or not to prosecute must not be influenced by:

- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved ; ... [or]
- (c) possible political advantage or disadvantage to the Government or any political group or party ...³⁰

13.22 Under s 8 of the *Director of Public Prosecutions Act 1983*, the performance of the CDPP's functions is subject to directions or guidelines given by the Attorney-General. The Attorney-General can provide directions or guidelines about the circumstances in which the CDPP should institute or carry on prosecutions for offences, including in relation to particular cases.³¹ Under s 8 of the Act, such directions or guidelines must be published in the *Gazette* and tabled in Parliament.³²

13.23 If the ALRC's recommendation to repeal s 80.5 were accepted, there would thus remain another mechanism for ministerial intervention in prosecutions under s 80.2—one that is subject to Parliamentary scrutiny.³³ The ALRC believes that this mechanism provides a more appropriate safeguard against inappropriate prosecutions than s 80.5.

29 Commonwealth Director of Public Prosecutions, *The Prosecution Policy of the Commonwealth* <www.cdpp.gov.au/Prosecutions/Policy/Default.aspx> at 11 March 2006, [2.10].

30 Ibid, [2.13].

31 *Director of Public Prosecutions Act 1983* (Cth) s 8(2)(a)–(b).

32 Ibid s 8(3).

33 To date, the power to issue s 8 directions or guidelines has not been exercised by an Attorney-General in relation to a specific case: Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 26 April 2006; Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 20 June 2006. However, the equivalent South Australian provision was exercised recently: see *Nemer v Holloway* (2003) 87 SASR 147, where a majority of the Full Court of the Supreme Court of South Australia upheld the decision by the Attorney-General of South Australia to direct the South Australian Director of Public Prosecutions to appeal in a particular case.

13.24 Finally, it should be noted that, under s 9(5) of the *Director of Public Prosecutions Act 1983*, the CDPP can take over any private prosecution and terminate it. In 1996, with respect to the repeal of certain provisions requiring the Attorney-General's consent to prosecution, the Attorney-General, the Hon Daryl Williams QC, observed that the consent provisions originally were enacted for the purpose of deterring private prosecutions brought in inappropriate circumstances—particularly for offences relating to national security or international treaty obligations:

However, since establishing the office of the Commonwealth Director of Public Prosecutions the retention of those provisions is difficult to justify. That is particularly so now that the Director of Public Prosecutions has the power to take over and discontinue a private prosecution brought in relation to a Commonwealth offence.³⁴

Recommendation 13–1 Section 80.5 of the *Criminal Code* (Cth), regarding the requirement of the Attorney-General's written consent to a prosecution under Division 80, should be repealed.

(The relevant sections of the Criminal Code, amended as recommended, are set out in Appendix 2.)

³⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 1996, 7714 (D Williams, Attorney-General).

Appendix 1. Existing *Criminal Code* Provisions

Chapter 5—The security of the Commonwealth

Part 5.1—Treason and sedition

Division 80—Treason and sedition

80.1A Definition of *organisation*

In this Division:

organisation means:

- (a) a body corporate; or
- (b) an unincorporated body;

whether or not the body is based outside Australia, consists of persons who are not Australian citizens, or is part of a larger organisation.

80.1 Treason

- (1) A person commits an offence, called treason, if the person:
 - (a) causes the death of the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or the Prime Minister; or
 - (b) causes harm to the Sovereign, the Governor-General or the Prime Minister resulting in the death of the Sovereign, the Governor-General or the Prime Minister; or
 - (c) causes harm to the Sovereign, the Governor-General or the Prime Minister, or imprisons or restrains the Sovereign, the Governor-General or the Prime Minister; or
 - (d) levies war, or does any act preparatory to levying war, against the Commonwealth; or
 - (e) engages in conduct that assists by any means whatever, with intent to assist, an enemy:

- (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
 - (ii) specified by Proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth; or
- (f) engages in conduct that assists by any means whatever, with intent to assist:
 - (i) another country; or
 - (ii) an organisation;

that is engaged in armed hostilities against the Australian Defence Force; or
- (g) instigates a person who is not an Australian citizen to make an armed invasion of the Commonwealth or a Territory of the Commonwealth; or
- (h) forms an intention to do any act referred to in a preceding paragraph and manifests that intention by an overt act.

Penalty: Imprisonment for life.

- (1A) Paragraphs (1)(e) and (f) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note 1: A defendant bears an evidential burden in relation to the matter in subsection (1A). See subsection 13.3(3).

Note 2: There is a defence in section 80.3 for acts done in good faith.

- (1B) Paragraph (1)(h) does not apply to formation of an intention to engage in conduct that:

- (a) is referred to in paragraph (1)(e) or (f); and
- (b) is by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1B). See subsection 13.3(3).

- (2) A person commits an offence if the person:

- (a) receives or assists another person who, to his or her knowledge, has committed treason with the intention of allowing him or her to escape punishment or apprehension; or

- (b) knowing that another person intends to commit treason, does not inform a constable of it within a reasonable time or use other reasonable endeavours to prevent the commission of the offence.

Penalty: Imprisonment for life.

- (5) On the trial of a person charged with treason on the ground that he or she formed an intention to do an act referred to in paragraph (1)(a), (b), (c), (d), (e), (f) or (g) and manifested that intention by an overt act, evidence of the overt act is not to be admitted unless the overt act is alleged in the indictment.
- (8) In this section:

constable means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.

80.2 Sedition

Urging the overthrow of the Constitution or Government

- (1) A person commits an offence if the person urges another person to overthrow by force or violence:
 - (a) the Constitution; or
 - (b) the Government of the Commonwealth, a State or a Territory; or
 - (c) the lawful authority of the Government of the Commonwealth.

Penalty: Imprisonment for 7 years.

- (2) Recklessness applies to the element of the offence under subsection (1) that it is:
 - (a) the Constitution; or
 - (b) the Government of the Commonwealth, a State or a Territory; or
 - (c) the lawful authority of the Government of the Commonwealth;that the first-mentioned person urges the other person to overthrow.

Urging interference in Parliamentary elections

- (3) A person commits an offence if the person urges another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament.

Penalty: Imprisonment for 7 years.

- (4) Recklessness applies to the element of the offence under subsection (3) that it is lawful processes for an election of a member or members of a House of the Parliament that the first-mentioned person urges the other person to interfere with.

Urging violence within the community

- (5) A person commits an offence if:
- (a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and
 - (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

- (6) Recklessness applies to the element of the offence under subsection (5) that it is a group or groups that are distinguished by race, religion, nationality or political opinion that the first-mentioned person urges the other person to use force or violence against.

Urging a person to assist the enemy

- (7) A person commits an offence if:
- (a) the person urges another person to engage in conduct; and
 - (b) the first-mentioned person intends the conduct to assist an organisation or country; and
 - (c) the organisation or country is:
 - (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and

- (ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth.

Penalty: Imprisonment for 7 years.

Urging a person to assist those engaged in armed hostilities

- (8) A person commits an offence if:
- (a) the person urges another person to engage in conduct; and
 - (b) the first-mentioned person intends the conduct to assist an organisation or country; and
 - (c) the organisation or country is engaged in armed hostilities against the Australian Defence Force.

Penalty: Imprisonment for 7 years.

Defence

- (9) Subsections (7) and (8) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note 1: A defendant bears an evidential burden in relation to the matter in subsection (9). See subsection 13.3(3).

Note 2: There is a defence in section 80.3 for acts done in good faith.

80.3 Defence for acts done in good faith

- (1) Sections 80.1 and 80.2 do not apply to a person who:
- (a) tries in good faith to show that any of the following persons are mistaken in any of his or her counsels, policies or actions:
 - (i) the Sovereign;
 - (ii) the Governor-General;
 - (iii) the Governor of a State;
 - (iv) the Administrator of a Territory;
 - (v) an adviser of any of the above;

- (vi) a person responsible for the government of another country; or
 - (b) points out in good faith errors or defects in the following, with a view to reforming those errors or defects:
 - (i) the Government of the Commonwealth, a State or a Territory;
 - (ii) the Constitution;
 - (iii) legislation of the Commonwealth, a State, a Territory or another country;
 - (iv) the administration of justice of or in the Commonwealth, a State, a Territory or another country; or
 - (c) urges in good faith another person to attempt to lawfully procure a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country; or
 - (d) points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; or
 - (e) does anything in good faith in connection with an industrial dispute or an industrial matter; or
 - (f) publishes in good faith a report or commentary about a matter of public interest.
 - Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).
- (2) In considering a defence under subsection (1), the Court may have regard to any relevant matter, including whether the acts were done:
- (a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth; or
 - (b) with the intention of assisting an enemy:
 - (i) at war with the Commonwealth; and
 - (ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth; or

- (c) with the intention of assisting another country, or an organisation, that is engaged in armed hostilities against the Australian Defence Force; or
- (d) with the intention of assisting a proclaimed enemy of a proclaimed country (within the meaning of subsection 24AA(4) of the *Crimes Act 1914*); or
- (e) with the intention of assisting persons specified in paragraphs 24AA(2)(a) and (b) of the *Crimes Act 1914*; or
- (f) with the intention of causing violence or creating public disorder or a public disturbance.

80.4 Extended geographical jurisdiction for offences

Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this Division.

80.5 Attorney-General's consent required

- (1) Proceedings for an offence against this Division must not be commenced without the Attorney-General's written consent.
- (2) Despite subsection (1):
 - (a) a person may be arrested for an offence against this Division; or
 - (b) a warrant for the arrest of a person for such an offence may be issued and executed;

and the person may be charged, and may be remanded in custody or on bail, but:

- (c) no further proceedings may be taken until that consent has been obtained; and
- (d) the person must be discharged if proceedings are not continued within a reasonable time.

80.6 Division not intended to exclude State or Territory law

It is the intention of the Parliament that this Division is not to apply to the exclusion of a law of a State or a Territory to the extent that the law is capable of operating concurrently with this Division.

Appendix 2. Recommended Division 80 of the *Criminal Code*

[The ALRC's recommended amendments to Division 80 are highlighted.]

Chapter 5—The security of the Commonwealth

Part 5.1—**Treason and urging political or inter-group force or violence**

Division 80—**Treason and urging political or inter-group force or violence**

80.1A Definition of *organisation*

In this Division:

organisation means:

- (a) a body corporate; or
- (b) an unincorporated body;
whether or not the body is based outside Australia, consists of persons who are not Australian citizens, or is part of a larger organisation.

80.1 Treason

- (1) A person commits an offence, called treason, if **at the time of the offence, being an Australian citizen or resident**, the person:
 - (a) causes the death of the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or the Prime Minister; or
 - (b) causes harm to the Sovereign, the Governor-General or the Prime Minister resulting in the death of the Sovereign, the Governor-General or the Prime Minister; or
 - (c) causes harm to the Sovereign, the Governor-General or the Prime Minister, or imprisons or restrains the Sovereign, the Governor-General or the Prime Minister; or
 - (d) levies war, or does any act preparatory to levying war, against the Commonwealth; or

- (e) engages in conduct that materially assists, with intent to assist, an enemy to engage in war with the Commonwealth:
 - (i) whether or not the existence of a state of war has been declared; and provided that
 - (ii) a Proclamation has been made prior to the relevant conduct for the purpose of this paragraph specifying that the entity assisted is an enemy at war with the Commonwealth; or
 - (f) engages in conduct that materially assists, with intent to assist, another country or an organisation or group to engage in armed hostilities against the Australian Defence Force; or
- Note: The word 'materially' in paragraphs (e) and (f) is meant to make clear that mere rhetoric or expressions of dissent are not sufficient; the assistance must enable the enemy or entity to wage war or engage in armed hostilities, such as through the provision of funds, troops, arms, or strategic advice or information.
- (g) instigates a person who is not an Australian citizen to make an armed invasion of the Commonwealth or a Territory of the Commonwealth; or
 - (h) forms an intention to do any act referred to in a preceding paragraph and manifests that intention by an overt act.

Penalty: Imprisonment for life.

- (1A) Paragraphs (1)(e) and (f) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1A). See subsection 13.3(3).

- (1B) Paragraph (1)(h) does not apply to formation of an intention to engage in conduct that:

- (a) is referred to in paragraph (1)(e) or (f); and
- (b) is by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1B). See subsection 13.3(3).

- (2) A person commits an offence if the person:

- (a) receives or assists another person who, to his or her knowledge, has committed treason with the intention of allowing him or her to escape punishment or apprehension; or
- (b) knowing that another person intends to commit treason, does not inform a constable of it within a reasonable time or use other reasonable endeavours to prevent the commission of the offence.

Penalty: Imprisonment for life.

- (5) On the trial of a person charged with treason on the ground that he or she formed an intention to do an act referred to in paragraph (1)(a), (b), (c), (d), (e), (f) or (g) and manifested that intention by an overt act, evidence of the overt act is not to be admitted unless the overt act is alleged in the indictment.

- (8) In this section:

constable means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.

80.2 Urging political or inter-group force or violence

Urging the overthrow by force or violence of the Constitution or Government

- (1) A person commits an offence if the person intentionally urges another person to overthrow by force or violence:

- (a) the Constitution; or
- (b) the Government of the Commonwealth, a State or a Territory; or
- (c) the lawful authority of the Government of the Commonwealth.

Penalty: Imprisonment for 7 years.

- (2) Recklessness applies to the element of the offence under subsection (1) that it is:

- (a) the Constitution; or
- (b) the Government of the Commonwealth, a State or a Territory; or
- (c) the lawful authority of the Government of the Commonwealth;

that the first-mentioned person urges the other person to overthrow.

Note: See section 80.2(7) regarding proof of intention that the urged force or violence will occur.

Urging interference in parliamentary elections by force or violence

- (3) A person commits an offence if the person intentionally urges another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament or for a referendum on a proposed law for the alteration of the Constitution.

Penalty: Imprisonment for 7 years.

- (4) Recklessness applies to the element of the offence under subsection (3) that it is lawful processes for an election of a member or members of a House of the Parliament or for a referendum on a proposed law for the alteration of the Constitution, that the first-mentioned person urges the other person to interfere with.

Note: See section 80.2(7) regarding proof of intention that the urged force or violence will occur.

Urging inter-group force or violence

- (5) A person commits an offence if:
- (a) the person intentionally urges a group or groups (whether distinguished by race, religion, nationality, national origin or political opinion) to use force or violence against another group or other groups (as so distinguished); and
 - (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

- (6) Recklessness applies to the element of the offence under subsection (5) that it is a group or groups that are distinguished by race, religion, nationality, national origin or political opinion that the first-mentioned person urges the other person to use force or violence against.

Note: See section 80.2(7) regarding proof of intention that the urged force or violence will occur.

(7) For a person to be guilty of an offence under subsections (1), (3) or (5) the person must intend that the force or violence urged will occur.

(8) In determining whether a person intends that the urged force or violence will occur for the purposes of subsection (7), the trier of fact must have regard to the context in which the conduct occurred, including (where applicable) whether the conduct was done:

(a) in the development, 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 connection with an industrial dispute or an industrial matter; or

(d) in the dissemination of news or current affairs.

(7) *Urging a person to assist the enemy—Repealed.*

See s 80.1(1)(e) for the equivalent treason offence.

(8) *Urging a person to assist those engaged in armed hostilities—Repealed.*

See s 80.1(1)(f) for the equivalent treason offence.

(9) *Defence—Repealed.*

See s 80.1(1A) for the equivalent humanitarian aid exclusion to the offence of treason.

80.3 Defence for acts done in good faith

(1) Section 80.1 does not apply to a person who:

(a) tries in good faith to show that any of the following persons are mistaken in any of his or her counsels, policies or actions:

(i) the Sovereign;

(ii) the Governor-General;

(iii) the Governor of a State;

- (iv) the Administrator of a Territory;
 - (v) an adviser of any of the above;
 - (vi) a person responsible for the government of another country; or
 - (b) points out in good faith errors or defects in the following, with a view to reforming those errors or defects:
 - (i) the Government of the Commonwealth, a State or a Territory;
 - (ii) the Constitution;
 - (iii) legislation of the Commonwealth, a State, a Territory or another country;
 - (iv) the administration of justice of or in the Commonwealth, a State, a Territory or another country; or
 - (c) urges in good faith another person to attempt to lawfully procure a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country; or
 - (d) points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; or
 - (e) does anything in good faith in connection with an industrial dispute or an industrial matter; or
 - (f) publishes in good faith a report or commentary about a matter of public interest.
- Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).
- (2) In considering a defence under subsection (1), the Court may have regard to any relevant matter, including whether the acts were done:
 - (a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth; or
 - (b) with the intention of assisting an enemy:
 - (i) at war with the Commonwealth; and

- (ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth; or
- (c) with the intention of assisting another country, or an organisation, that is engaged in armed hostilities against the Australian Defence Force; or
- (d) with the intention of assisting a proclaimed enemy of a proclaimed country (within the meaning of subsection 24AA(4) of the *Crimes Act 1914*); or
- (e) with the intention of assisting persons specified in paragraphs 24AA(2)(a) and (b) of the *Crimes Act 1914*; or
- (f) with the intention of causing violence or creating public disorder or a public disturbance.

80.4 Extended geographical jurisdiction for offences

Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against this Division.

80.5 Attorney-General's consent required—Repealed

80.6 Division not intended to exclude State or Territory law

It is the intention of the Parliament that this Division is not to apply to the exclusion of a law of a State or a Territory to the extent that the law is capable of operating concurrently with this Division.

Appendix 3. List of Submissions

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
M Adams	SED 119	4 July 2006
All at Once	SED 103	3 July 1996
A Anderson	SED 99	3 July 2006
Anonymous	SED 123	18 June 2006
ARTICLE 19	SED 14	10 April 2006
Arts Industry Council of South Australia	SED 112	3 July 2006
Arts Law Centre of Australia	SED 46	13 April 2006
Arts Law Centre of Australia	SED 65	6 June 2006
Artsource	SED 113	3 July 2006
Australia Council for the Arts	SED 34	11 April 2006
Australia Council for the Arts	SED 114	3 July 2006
Australian Broadcasting Corporation	SED 49	20 April 2006
Australian Dance Council—Ausdance Inc	SED 97	3 July 2006
Australian Film Commission	SED 86	20 July 2006
Australian Government Attorney-General's Department	SED 31	12 April 2006
Australian Government Attorney-General's Department	SED 92	3 July 2006
Australian Lawyers for Human Rights	SED 47	13 April 2006
Australian Lawyers for Human Rights	SED 120	4 July 2006
Australian Major Performing Arts Group	SED 61	16 April 2006
Australian Muslim Civil Rights Advocacy Network	SED 54	17 April 2006
Australian Network for Arts and Technology	SED 106	3 July 2006
Australian Press Council	SED 48	13 April 2006

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
Australian Press Council	SED 66	23 June 2006
Australian Screen Directors Association	SED 51	10 April 2006
Australian Screen Directors Association	SED 85	3 July 2006
Australian Society of Authors	SED 24	18 April 2006
Australian Vice-Chancellors' Committee	SED 60	25 April 2006
Australian Writers' Guild	SED 29	11 April 2006
P Bradley	SED 09	22 April 2006
A Brissenden	SED 115	3 July 2006
J Brownrigg	SED 111	3 July 2006
P Callaghan	SED 80	3 July 2006
Cameron Creswell Agency Pty Ltd	SED 26	10 April 2006
M Carter	SED 93	3 July 2006
Centre for Media and Communications Law	SED 32	12 April 2006
Civil Liberties Australia	SED 37	10 April 2006
Combined Community Legal Centres Group (NSW) Inc	SED 50	13 April 2006
Commonwealth Director of Public Prosecutions	SED 84	3 July 2006
Confidential	SED 12	4 April 2006
Confidential	SED 22	3 May 2006
Confidential	SED 81	3 July 2006
R Connolly and C Connolly	SED 90	3 July 2006
L Crosbie	SED 73	19 May 2006
R Douglas	SED 87	3 July 2006
Executive Council of Australian Jewry	SED 116	3 July 2006
P Emerton	SED 36	10 April 2006
P Emerton	SED 108	3 July 2006
Federation of Community Legal Centres (Vic)	SED 33	10 April 2006
Fitzroy Legal Service Inc	SED 40	10 April 2006
Free TV Australia	SED 59	19 April 2006

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
J Gilman	SED 78	3 July 2006
J Goldring	SED 21	5 April 2006
S Gurciullo	SED 03	29 March 2006
B Guy	SED 96	3 July 2006
D Hart	SED 82	3 July 2006
M Head	SED 08	28 March 2006
B Ho	SED 07	9 March 2006
Independent Producers Initiative Inc	SED 76	3 July 2006
John Fairfax Holdings Ltd, News Limited and Australian Associated Press	SED 56	18 April 2006
John Fairfax Holdings Ltd, Australian Associated Press, Australian Broadcasting Corporation, News Limited, Nine Network Australia Ltd, West Australian Newspapers Ltd	SED 91	3 July 2006
C Johnson	SED 77	3 July 2006
A Johnston	SED 02	24 April 2006
A Johnston	SED 83	3 July 2006
P Latos-Valier	SED 94	3 July 2006
Law Council of Australia	SED 126	19 July 2006
Law Institute of Victoria	SED 70	28 June 2006
Law Society of Western Australia	SED 19	28 March 2006
A Levy	SED 72	29 June 2006
Live Performance Australia	SED 109	3 July 2006
G McBain	SED 13	30 March 2006
K McDonald	SED 121	6 July 2006
G McGowan	SED 68	23 June 2006
Media, Entertainment and Arts Alliance	SED 28	10 April 2006
Media, Entertainment and Arts Alliance	SED 117	3 July 2006

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
J Melville	SED 15	7 April 2006
J Melville	SED 69	27 June 2006
A Moore	SED 01	31 March 2006
Music Council of Australia	SED 95	3 July 2006
National Association for the Visual Arts	SED 30	11 April 2006
National Association for the Visual Arts	SED 75	3 July 2006
National Legal Aid	SED 62	20 April 2006
National Legal Aid	SED 124	7 July 2006
National Tertiary Education Union	SED 25	10 April 2006
National Tertiary Education Union	SED 118	3 July 2006
E Nekvapil	SED 45	13 April 2006
D Nelson	SED 53	20 April 2006
New South Wales Bar Association	SED 20	7 April 2006
New South Wales Council for Civil Liberties Inc	SED 39	10 April 2006
New South Wales Council for Civil Liberties Inc	SED 89	3 July 2006
New South Wales Young Lawyers Human Rights Committee	SED 38	10 April 2006
Pax Christi	SED 16	9 April 2006
Public Interest Advocacy Centre	SED 57	18 April 2006
Public Interest Advocacy Centre	SED 125	7 July 2006
J Purvey	SED 06	12 March 2006
J Pyke	SED 18	10 April 2006
J Pyke	SED 100	3 July 2006
Queensland Council for Civil Liberties	SED 41	10 April 2006
Queensland Council for Civil Liberties	SED 101	3 July 2006
J Randell	SED 71	29 June 2006
N Roxon MP, Shadow Attorney-General	SED 63	28 April 2006
B Saul	SED 52	14 April 2006
B Saul	SED 122	6 July 2006

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
Screen Producers Association of Australia	SED 35	11 April 2006
Screen Producers Association of Australia	SED 98	3 July 2006
C Shaw	SED 11	27 March 2006
A Sheba	SED 102	3 July 2006
K Shelper, L Smith & M Dabner	SED 107	3 July 2006
S Smith	SED 04	24 March 2006
A Spathis	SED 17	10 April 2006
R Stanford	SED 55	23 March 2006
J Stanhope MLA, Chief Minister ACT	SED 44	13 April 2006
J Staples	SED 67	27 June 2006
A Steel	SED 23	18 April 2006
Sydney PEN	SED 27	10 April 2006
Sydney PEN	SED 88	3 July 2006
A Synnott	SED 110	3 July 2006
M Talbot	SED 10	21 March 2006
D Trotter	SED 104	3 July 2006
M Utley	SED 74	20 June 2006
Victoria Legal Aid	SED 43	13 April 2006
Victoria Legal Aid	SED 79	3 July 2006
H Wiles	SED 42	12 April 2006
D Wilson	SED 05	21 March 2006
B Wright	SED 58	19 April 2006
W Wright	SED 105	3 July 2006
G Zdenkowski	SED 64	3 May 2006

Appendix 4. List of Consultations

<i>Name</i>	<i>Location</i>
Anti-Discrimination Board of New South Wales	Sydney
Australian Broadcasting Corporation	Sydney
Australian Federal Police	Canberra
Australian Government Attorney-General's Department	Canberra
Australian Lawyers for Human Rights	Sydney
Australian Major Performing Arts Group	Sydney
Australian National University Academics	Canberra
Australian Press Council	Sydney
Australian Society of Authors	Sydney
Australian Writers Guild	Sydney
Commonwealth Director of Public Prosecutions	Canberra
R Connolly & C Connolly	Melbourne
K Eastman, New South Wales Bar	Sydney
P Emerton, Monash University	Melbourne
Free TV Australia	Sydney
Human Rights and Equal Opportunity Commission	Sydney
John Fairfax Holdings Ltd	Sydney
Law Institute of Victoria	Melbourne
L Maher, Victorian Bar	Melbourne
Media, Entertainment and Arts Alliance	Sydney
National Association for the Visual Arts	Sydney
Nationwide News	Sydney
D Neal, Victorian Bar	Melbourne
New South Wales Bar Association	Sydney
New South Wales Council for Civil Liberties	Sydney

News Ltd	Sydney
Public Interest Advocacy Centre	Sydney
N Roxon MP, Shadow Attorney-General	Canberra
B Saul, University of New South Wales	Sydney
SBS	Sydney
Seven Network	Sydney
University of Melbourne Academics	Melbourne
Victorian Bar, Human Rights Committee	Melbourne
M Weinberg, Federal Court of Australia	Melbourne

Appendix 5. List of Abbreviations

The entities listed below are Australian entities unless otherwise stated

AAP	Australian Associated Press
ABC	Australian Broadcasting Corporation
ACT	Australian Capital Territory
ADF	Australian Defence Force
AEC	Australian Electoral Commission
AFP	Australian Federal Police
AGD	Australian Government Attorney-General's Department
ALHR	Australian Lawyers for Human Rights
AMCRAN	Australian Muslim Civil Rights Advocacy Network
ASDA	Australian Screen Directors Association
ASIO	Australian Security Intelligence Organisation
CDPP	Commonwealth Director of Public Prosecutions
CERD	<i>International Convention on the Elimination of all Forms of Racial Discrimination 1966</i>
CLCs	Community Legal Centres
COAG	Council of Australian Governments
CPA	Communist Party of Australia
DP 71	<i>Review of Sedition Laws</i> (ALRC Discussion Paper 71, 2006)
ECHR	<i>Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms 1950</i>

Gibbs Committee	Committee of Review of Commonwealth Criminal Law (1991)
Hope Commission	Royal Commission on Australia's Security and Intelligence Agencies (1985)
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	<i>International Covenant on Civil and Political Rights 1966</i>
IP 30	<i>Review of Sedition Laws</i> (ALRC Issues Paper 30, 2006)
LRCC	Law Reform Commission of Canada
MCCOC	Model Criminal Code Officers Committee
MEAA	Media, Entertainment and Arts Alliance
NAVA	National Association for the Visual Arts Ltd
PIAC	Public Interest Advocacy Centre
RDA	<i>Racial Discrimination Act 1975</i> (Cth)
SCAG	Standing Committee of Attorneys-General
Sheller Committee	Security Legislation Review Committee (2006)
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNHRC	United Nations Human Rights Committee
VLA	Victoria Legal Aid

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