



Australian Government

Australian Law Reform Commission

Review of Sedition Laws

DISCUSSION PAPER

You are invited to provide a submission
or comment on this Discussion Paper

DISCUSSION PAPER 71
May 2006

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The closing date for submissions in response to DP 71 is Monday 3 July 2006.

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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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List of Proposals

The relevant sections of the Criminal Code, amended consistently with the proposals, are set out in full in Appendix 2.

2. Overview of Proposed Reforms

- 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 offences against political liberty’, and the heading of s 80.2 should be changed to ‘Offences against political liberty and public order’.
- 2-2 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 proposed changes to federal law.

4. Australian Seditious Laws and Related Provisions

- 4-1 The Australian Government should initiate a review of the remaining offences contained 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*.

6. Seditious Laws in Other Countries

- 6-1 There is no need to introduce into federal law an offence of ‘encouragement or glorification of terrorism’, along the lines of that in s 1 of the *Terrorism Act 2006* (UK).

8. Offences Against Political Liberty

- 8-1 Section 80.2 of the *Criminal Code* (Cth) (*Criminal Code*) 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.
- 8-2 The heading of s 80.2(1) of the *Criminal Code* should be changed to refer to urging the overthrow by ‘force or violence’ of the *Constitution* or Government.
- 8-3 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.

- 8-4 Section 30C of the *Crimes Act 1914* (Cth), concerning ‘advocating or inciting to crime’, should be repealed.
- 8-5 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’.
- 8-6 Section 80.2(3) of the *Criminal Code* should be amended to:
- insert the word ‘intentionally’ before the word ‘urges’, to clarify the fault element applicable to urging the use of force or violence; and
 - apply to interference with the lawful processes for a referendum on a proposed law for the alteration of the *Constitution*.
- 8-7 As a consequence of Proposal 8-6, 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 lawful processes for a referendum on a proposed law for the alteration of the *Constitution* that a person urges another to interfere with.
- 8-8 Sections 80.2(7), (8) and (9) of the *Criminal Code*, 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.
- 8-9 The treason offences in s 80.1(1)(e)–(f) should be amended to:
- remove the words ‘by any means whatever’;
 - provide that conduct must ‘materially’ assist an enemy, making it clear that mere rhetoric or expressions of dissent are not sufficient; and
 - provide that assistance must enable an enemy ‘to engage in war’ with Australia or a country or organisation ‘to engage in armed hostilities’ against the Australian Defence Force.
- 8-10 The Australian Government should review the treason offences in s 80.1 of the *Criminal Code*.
- 8-11 Section 80.1 of the *Criminal Code* should be amended to require that, at the time of the alleged offence, the person is an Australian citizen or resident.
- 8-12 Section 80.5 of the *Criminal Code* regarding the requirement of the Attorney-General’s written consent to a prosecution should be repealed.

9. Urging Inter-Group Violence

- 9-1 The heading of s 80.2(5) of the *Criminal Code* (Cth) (*Criminal Code*) should be changed to refer to urging ‘inter-group force or violence’.
- 9-2 Section 80.2(5) of the *Criminal Code* should be amended to:
- insert the word ‘intentionally’ before the word ‘urges’, to clarify the fault element applicable to urging the use of force or violence; and
 - add ‘national origin’ to the distinguishing features of a group for the purposes of the offence.
- 9-3 As a consequence of Proposal 9-2, 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.
- 9-4 The Australian Government should continue to pursue other strategies, such as educational programs, to promote inter-communal harmony and understanding.

10. Defences and Penalties

- 10-1 Section 80.3 of the *Criminal Code* (Cth) (*Criminal Code*), concerning the defence of ‘good faith’, should be repealed.
- 10-2 Section 80.2 of the *Criminal Code* should be amended to provide that in considering whether a person intends that the urged force or violence will occur, the trier of fact must take into account whether the conduct was done (i) in the performance, exhibition or distribution of an artistic work; or (ii) 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 (iii) in connection with an industrial dispute or an industrial matter; or (iv) in publishing a report or commentary about a matter of public interest; and may have regard to any relevant matter.
- 10-3 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 proposed new provisions regarding proof of intention that the force or violence urged will occur.

11. Unlawful Associations

- 11-1 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.
- 11-2 The Australian Government should include ss 30J and 30K of the *Crimes Act 1914* (Cth) in the larger review of the *Crimes Act* called for in Proposal 4-1.

1. Introduction to the Inquiry

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Background to the Inquiry

The *Crimes Act* provisions on sedition

1.1 As described in detail in Chapter 3, 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 that the prosecution carried the burden of proving that an accused had a ‘seditious intention’ in relation to the offences in ss 24C–24D; and (2) to delete ss 24A(b), (c) and (e), which referred to exciting disaffection in the United Kingdom or the King’s Dominions.

The Gibbs Committee report 1991

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 expressed the view that those provisions were couched in archaic

1 *War Precautions Repeal Act 1920* (Cth) s 12. These provisions mirrored those in the *Criminal Code 1899* (Qld), which were themselves based on the British common law as outlined in *Stephen’s Digest of the Criminal Law: Commonwealth, Parliamentary Debates*, House of Representatives, 23 November 1920, 6851 (L Groom), 6851. See Ch 3 for further discussion.

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).

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 Gibbs 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 government or the Constitution.

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 9).⁶

1.8 Consequently, the Gibbs Committee’s final recommendation was that it be made an offence, 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 on New York and Washington on 11 September 2001, and the Bali (12 October 2002), Madrid (11 March 2004) and London (7 July 2005) bombings. The latter 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

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].

which this might warrant increased domestic surveillance and police powers, as well as criminal offences specifically tailored to cover this area.

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 a 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 (CCTV) 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.

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

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 the Commonwealth’s ability to proscribe terrorist organisations that advocate terrorism; and
- ‘other improvements ... including to the financing of terrorism offence’.

1.14 State and territory leaders also noted that 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.

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’.

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:

- 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 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 warrantless searches and seizures 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).⁹

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’.¹⁰

⁹ Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), 88.

¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 102 (P Ruddock—Attorney-General), 103.

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.¹¹

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.¹²

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 Senate Committee inquiry) for inquiry and report by 28 November 2005.

1.23 The 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 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.¹³

11 Ibid, 102.

12 Ibid, 103.

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

1.25 Similarly, the Australian Federal Police argued before the 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.¹⁴

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.¹⁵

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.¹⁶ Most recommendations had substantial cross-party support, although a dissenting report was filed by Greens Senators Bob Brown and Kerry Nettle;¹⁷ additional comments were supplied by Labor Senator Linda Kirk,¹⁸ and additional comments and a partial dissent were supplied by Australian Democrats Senator Natasha Stott Despoja.¹⁹

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.²⁰

14 Ibid, [2.9].

15 Ibid, [2.6].

16 Ibid.

17 Ibid, 195–198.

18 Ibid, 199–201.

19 Ibid, 203–214.

20 Ibid, [5.173].

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*.²¹

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*).²²

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 7.²³

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 (see Chapter 4), and the Attorney-General confirmed his earlier undertakings that, ‘given the considerable interest in the provisions’, they would be subject to a review.²⁴ Ultimately, the Attorney-General decided that this independent public inquiry should be conducted by the ALRC.

21 Ibid, [5.174].

22 Ibid, [5.176].

23 Ibid, [5.233].

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

Terms of Reference

1.31 On 1 March 2006, the Attorney-General, the Hon Philip Ruddock MP, 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. The Attorney-General announced the review on 2 March 2006.

1.32 The Terms of Reference, which are reproduced at the front of this publication, 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.

Federal criminal law and practice

The reach of federal criminal jurisdiction

1.34 Given the constitutional constraints in Australia, criminal law and procedure is largely, but not entirely, a matter for the states and territories.²⁵ The great bulk of 'standard criminal law'—that is, the matters that most members of the community

²⁵ The ALRC is also currently inquiring into the sentencing and administration of federal offenders; see Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005).

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.

1.35 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 or the external affairs power. Put simply, federal criminal law tends to: (a) be concerned with harm to Australian government property or officials, or to the revenue (eg, taxation or social security frauds); (b) have a clear interstate or international dimension (eg, postal and telegraphic offences; or importing/exporting prohibited goods or substances); or (c) fulfil an obligation pursuant to an international treaty to which Australia is a party (eg, prohibitions on slavery, war crimes and genocide).

1.36 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. In this area 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.

1.37 As becomes evident in Chapter 4, 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.

1.38 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 the Division 80, covering treason and sedition, to exclude state or territory law.

The development of a *Criminal Code* (Cth)

The Gibbs Committee and MCCOC

1.39 The *Crimes Act 1914* (Cth) 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, as discussed in Chapter 8, the *Commonwealth Electoral Act 1918* (Cth) s 327 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 pieces of 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, under 12 months imprisonment).

1.40 In 1987, a Committee of Review of Commonwealth Criminal Law was established, chaired by retired Chief Justice Sir Harry Gibbs (and widely known as ‘the Gibbs Committee’). 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 producing a number of amendments to the *Crimes Act*, including those dealing with computer crime and police powers of investigation.

1.41 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.²⁶

1.42 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. More recently, MCCOC considered the question of double jeopardy.

1.43 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.²⁷

The Criminal Code

1.44 The *Criminal Code* was introduced into federal law (and applicable to external territories) as a Schedule to the *Criminal Code Act 1995* (Cth), which entered into force on 1 January 1997.

1.45 The basic policy of the Australian Government now is that the *Criminal Code* is 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*

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

27 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 the jurisdictions that already have a criminal code, based on Sir Samuel Griffith’s late 19th century model—Queensland, Western Australia and Tasmania.

Act will be left covering matters of police powers (such as arrest, detention, search and seizure, forensic procedures) and criminal procedure.²⁸

1.46 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.

1.47 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

1.48 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.

1.49 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: (a) must be aware there is a substantial risk his or her conduct will bring about the prohibited result, and (b) it is unjustifiable to take that risk in the circumstances.

1.50 As discussed in Chapter 8 of this Discussion Paper, a large number of the submissions to the 2005 Senate Committee inquiry—and to a significant but lesser extent to the present 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*.²⁹ 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.

28 The ALRC has proposed 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, *Sentencing of Federal Offenders*, Discussion Paper 70 (2005) Proposal 2–1.

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

1.51 Chapter 2, Divisions 7–10 of the *Criminal Code* cover the circumstances in which criminal responsibility should *not* be attributed,³⁰ 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

1.52 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.³¹

1.53 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]

1.54 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 the 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, s 80 requires that the jury reach a unanimous verdict³² in a federal criminal trial—whereas some states and territories allow for a majority verdict in certain circumstances—and that jurors should not be pressured to reach unanimous agreement.³³

1.55 The discretion about whether to prosecute serious criminal charges is exercised by the Commonwealth Director of Public Prosecutions (DPP). The DPP is a statutory officeholder, with a very high degree of independence afforded to that office by statute³⁴ and by legal culture and tradition. In the normal course of things, the investigating authority (such as the Australian Federal Police) will provide the DPP with a brief of evidence, upon which the DPP will determine—according to its

30 Such as in the case of a young child (s 7.1); or 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).

31 See ALRC, *Sentencing of Federal Offenders* (ALRC Discussion Paper 70, 2005).

32 *Cheatle v The Queen* (1993) 177 CLR 541, 551-2.

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

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

published guidelines³⁵—whether there is sufficient probative evidence to proceed, and whether launching a prosecution would be in the public interest.

1.56 Although the law³⁶ provides that the Attorney-General may, after proper consultation, issue a guideline or direction to the DPP—which must be tabled in Parliament and published in the Gazette—this never happens in practice.³⁷

1.57 Finally, the DPP 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’.³⁸ Thus, there is very little risk in practice of a private prosecution for treason or sedition—if the allegations have substance, the DPP 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 DPP could be expected to take over promptly and terminate the proceedings.

Law reform processes

Timeframe

1.58 Most ALRC inquiries take one or more years to complete. In the current inquiry, the ALRC has been asked to report within three months. This presents some obvious challenges for the ALRC to manage—mainly in terms of ensuring adequate time for consultation and for conducting the necessary research and writing in-house.

1.59 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.

1.60 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.

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

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

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

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

1.61 Nevertheless, accommodating the need for widespread and meaningful consultation on matters of public interest has resulted in the ALRC producing this Discussion Paper at the three-month mark. Allowing appropriate time for written submissions and other feedback to be submitted, and then considered, means that the final report and recommendations likely will be completed in late July.

Matters outside this Inquiry

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

1.63 The ALRC is not examining a range of issues that arise 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;³⁹ and
- the use of executive authority to refuse, withdraw or cancel passports or visas, based upon security concerns.

Advisory Committee

1.64 It is standard operating procedure for the ALRC to establish a broad based Advisory Committee, or 'reference group', to assist with the development of its inquiries.

1.65 Advisory Committees provide advice and assistance to the ALRC, and have particular value in helping the ALRC to 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

39 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.

the inquiry progresses. Ultimate responsibility for the final report and recommendations, of course, remains with the Commissioners of the ALRC.

1.66 The membership of the Advisory Committee for this inquiry is drawn from the Bench, the Bar, the academy, media organisations, civil liberties groups, 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. The Advisory Committee had its first meeting on 11 May 2006, to consider the proposals contained in this document. It is expected that a second (and final) meeting will be held before the completion of the final report, to consider the draft recommendations for reform.

Issues Paper 30

1.67 *Review of Sedition Laws* (ALRC Issues Paper 30, 2006) (IP 30) was released electronically on 20 March 2006 (and about a week later in hard copy format), in order to commence the community consultation process on an informed basis.

1.68 IP 30 was organised into seven chapters. It included 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.

1.69 IP 30 surveyed the relevant international law in this area, including United Nations conventions, declarations and resolutions, and also provided some comparative perspectives from the 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.

1.70 IP 30 set out 24 key questions that the ALRC identified as arising out of the Terms of Reference, and which required comment before the ALRC could formulate the proposals for reform contained in this Discussion Paper—which are now presented for further community debate and discussion.

Community consultation

1.71 The Terms of Reference indicate that the ALRC ‘will 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.⁴⁰

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

1.72 One of the most important features of ALRC inquiries is the commitment to widespread community consultation.⁴¹ 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 regards this particular inquiry as clearly falling in the latter category.

1.73 The ALRC has developed a broad consultation strategy for this inquiry, so far as time permits, which encourages 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 To date, the ALRC has received 64 written submissions and conducted 19 consultation meetings (many of them multi-party). Lists of the submissions and consultations are set out in Appendices 3 and 4, respectively.

Organisation of Discussion Paper 71

1.75 This Discussion Paper is organised into 11 chapters—although proposals for reform are not spread evenly throughout. Some chapters provide mainly contextual material, while others are more focused on the ‘nuts and bolts’ of the elements of the law.

1.76 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, which are under consideration. Appendix 2 shows how those provisions would look if the Government were to adopt the ALRC’s proposals for reform. As noted above, Appendices 3 and 4 document the public consultation effort to date, including meetings and written submissions. Appendix 5 provides a list of the common abbreviations used in this Discussion Paper.

1.77 Chapter 2 effectively serves as the ‘executive summary’ for this document, but also makes a number of proposals central to the ALRC’s handling of this Inquiry. The chapter considers the case for reform of the law of sedition generally—including the proposed abolition of the term ‘sedition’ from the Australian statute book—and explains the principles and assumptions that underlie the pattern of proposals for reform of the substantive offences against political liberty and public order.

1.78 Chapter 3 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.

41 B Opekin, ‘Engaging the Public: Community Participation in the Genetic Information Inquiry’ (2002) 80 *Reform* 53.

1.79 Chapter 4 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.

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

1.81 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.

1.82 Chapter 8 sets out the details of the ALRC’s proposed scheme for reframing the two ‘urging force or violence’ offences in s 80.2(1) and (3) of the *Criminal Code*, and restructuring the two ‘assisting the enemy’ offences in s 80.2(7) and (8) of the Code—by including those offences, in a modified form, into the offence of treason in s 80.1. In all cases, the fault elements of the offences have been clarified to accord with the serious nature of the crimes and to minimise any impact on freedom of expression. Chapter 8 also considers such ancillary matters as the extra-territorial application of these offences, and the existing requirement to obtain the Attorney-General’s written consent to proceed with a prosecution.

1.83 Chapter 9 sets out the ALRC’s proposed 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.

1.84 Chapter 10 looks at the ‘good faith defence’ to charges of treason and sedition currently provided by s 80.3 of the *Criminal Code*, as well as considering alternative models and concepts, and also examines the penalties for the various offences in Division 80.

1.85 Finally, Chapter 11 considers the case for reform in relation to the ‘unlawful associations’ provisions contained 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*.

Written submissions

1.86 The ALRC strongly encourages interested persons and organisations to make written submissions at the earliest opportunity to help advance the reform process.

1.87 With the release of this Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals, or to any of the background material and analysis provided. There is no specified format for submissions. The ALRC will accept gratefully anything from handwritten notes or a few emailed dot-points, to detailed and comprehensive scholarly analyses. Although not essential, the ALRC prefers electronic communications.

1.88 If there are passages in this Discussion Paper that seem to imply that conclusions already have been drawn about the ultimate findings and recommendations, then this is unintended and is not meant to inhibit the full and open discussion of policy choices before the ALRC's program of research and consultation is completed.

1.89 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.⁴²

1.90 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.⁴³

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

In order to ensure consideration in the forthcoming final report, **submissions addressing the proposals in this Discussion Paper must reach the ALRC no later than Monday, 3 July 2006**. Details about how to make a submission are set out at the front of this publication.

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

43 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.

2. Overview of Proposed Reforms

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Introduction

2.1 This Discussion Paper details the changes that the ALRC proposes to the existing sedition offences (which are described and analysed in Chapter 4, and set out in full in Appendix 1) and related matters. The purpose of this chapter is to explain the principles and assumptions that underlie the pattern of law reform proposals. In effect, this chapter serves as an executive summary, but it also contains a number of proposals that set the scene for the rest of the Discussion Paper.

Background

2.2 As discussed in detail in the following chapter, sedition law has its roots in the suppression of political dissent, prohibiting criticism that would ‘bring into hatred or contempt, or to excite disaffection against the person of His Majesty, his heirs or successors, or the government or constitution . . . or the administration of justice’, or ‘to raise discontent or disaffection among His Majesty’s subjects, or to promote feelings of ill-will and hostility between different classes’. 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 even ‘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’.¹

2.3 Australian states and territories ‘inherited’ their sedition laws from the United Kingdom, whether through the common law or by enactment of parallel statutory provisions, but the precise formulations vary somewhat (see Chapter 4). South Australia and the ACT have no legislation prohibiting sedition, and both abolished the common law offence (in 1992 and 1996, respectively) in an effort to remove ‘outdated common law rules’.

2.4 Sedition was a relatively late entrant to federal law, with s 24A of the *Crimes Act* (Cth) added in 1920, replacing transitional provisions introduced by the *War Precautions Act 1914* (Cth), which were aimed at suppressing criticism of the aims and alliances, and conscription policy and practice, of the First World War.²

2.5 Perhaps to a greater extent than any other offence except treason, sedition is a quintessentially ‘political’ crime, punishing speech that is critical of the established order.

2.6 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 4, 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—which arguably is closer conceptually to the criminal laws of incitement and riot than it is to common law sedition.

2.7 Nevertheless, given the history and the factual circumstances in which the new offences are likely to be applied and prosecuted, there are concerns held by members of the community, and politicians across party lines, that there is potential for the law to over-reach, and to inhibit free speech and free association.

2.8 Australians place a very high premium on free speech 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.

2.9 At the same time, all liberal democratic societies place some limits on the exercise of free speech—as authorised under all international human rights conventions (see Chapter 5)—for example, through civil defamation laws and prohibitions on

1 *Crimes Act 1900* (NSW) s 16—which expressly continues the operation of the *Treason Act of 1351* (Imp) 25 Edw III c 2.

2 The section was amended in 1986, following recommendations from the Hope Royal Commission, to remove references to exciting disaffection against the United Kingdom Parliament, government or constitution, or the government or constitution of ‘any of the King’s Dominions’.

obscenity, serious racial vilification or incitement to commit a crime. In the famous dictum of United States Supreme Court Justice Oliver Wendell Holmes Jr, ‘the most stringent protection of free speech would not protect a man in falsely shouting “fire” in a theatre and causing a panic’.³

2.10 Under the Terms of Reference, the central questions for this Inquiry are whether the new regime (taking together the new offences in s 80.2 and the ‘good faith’ defence provided in s 80.3): (a) is well-articulated, as a matter of criminal law; and (b) strikes an acceptable balance in a tolerant society (or is ‘reasonably justifiable in a democratic society’, to use the term of art employed in international human rights law).

Do we need the concept of ‘sedition’?

2.11 Although the contributions made to the debate and analysis through the consultation process are considered at length in the remainder of this Discussion Paper, two general points about the tenor of the public feedback are worth making. First, there is little doubt that, on any dispassionate analysis, the new sedition laws introduced in 2005 are ‘better’ than the old laws they replaced—whether from a technical or a human rights and civil liberties perspective.

2.12 The new offences contained in s 80.2 of the *Criminal Code* shift the emphasis from speech that is critical of the established order to exhortations to use force or violence against the established authority, voters or particular groups within the community. It is very difficult to understand why exhortations to use force or violence should *not* be prohibited by federal law—so long as the offences are properly framed. Further, the defence contained in s 80.3, which was modified after the Bill stage as a consequence of feedback and recommendations from the Senate Committee, represents an advance on earlier law in expressly recognising the social interest in permitting media reports and commentary on matters of public interest.

2.13 Nevertheless, it is clear from the ALRC’s community consultation process—as it was during the Senate Committee’s process—that there is palpable public concern about the effects of the new laws on freedom of speech and freedom of association, both directly (that is, fear of conviction and punishment) and even more so through the so-called ‘chilling effect’—that is, self-censorship to avoid being charged in the first place. A significant proportion of the requested consultation meetings and the written submissions have come from individuals or organisations in Australia associated with the print and broadcast media, writers, visual artists, theatre groups and filmmakers.

2.14 It is an interesting phenomenon observed in law reform from time to time that the codification or ‘modernisation’ of old laws creates new and greater concerns, even where these efforts bring some objective improvement and increased certainty to the law. The chilling effect of laws that are outdated and unlikely to be used seems to be

3 *Schenck v United States* 249 US 47 (1919).

greatly outweighed by the chilling effect of modernised laws upon which public attention has been focused—and which may be more likely to be enforced. Thus, the far more draconian state and territory laws on sedition and treason apparently have not occasioned a similar chill—because no one knows about them.

2.15 Where such concerns are simply misconceived, as a matter of law and practice, the best remedy is education rather than legislative change. Where such concerns are justifiable—in a liberal democratic society that places a very high premium on freedom of speech and freedom of association—then proper law reform will require both education and legislative change.

2.16 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 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.

2.17 Thus the view—of opponents of the legislation as well as proponents—was that while sedition offences may have been regarded as a ‘dead letter’ in western countries in recent decades, they were being modernised in November 2005 in order to be used.

2.18 As indicated above, the sedition offences were revised at that time to place the focus squarely on urging the use of force or violence, rather than on expressions of dissent. Nevertheless, a great deal of the debate and media coverage continued to argue—incorrectly—that a person could fall foul of the new laws by saying that ‘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’.⁴

2.19 The ALRC considers that governments have a perfect 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.

2.20 This remains the case even though there may be other federal, state and territory laws that might be transgressed along the way to committing one of these new ‘sedition’ offences; for example, riot, affray, assault, malicious damage to property or hindering public officials. It would be a curious result, indeed, if the Australian Government could not legislate to protect itself and the fundamental institutions of

4 See, eg, B O’Keefe, ‘Sedition threatens uni debate’, *The Australian*, 3 May 2006, 23.

democracy from violent attack, but had to rely on the legislatures of the states and territories to do this for it.

2.21 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 Commonwealth. The Gibbs Committee criticised the old *Crimes Act* definition of ‘seditious intention’ for being ‘expressed in archaic terms and ... misleadingly wide’,⁵ and while the new offences in s 80.2 are modelled on those recommended by the Gibbs Committee, the Committee was silent on the matter of a heading.⁶

2.22 Nevertheless, 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 offences; in the ‘defence’ contained in s 80.3; in any of the related evidentiary or procedural provisions; or anywhere else in the *Criminal Code*.⁷

2.23 There are two consequences to the retention of the term ‘sedition’ in the *Criminal Code*. First, under s 13 of the *Acts Interpretation Act 1901* (Cth):

(1) The headings of the Parts Divisions and Subdivisions into which any Act is divided shall be deemed to be part of the Act. ...

(3) No marginal note, footnote or endnote to an Act, and no heading to a section of an Act, shall be taken to be part of the Act.

2.24 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; however, the heading of s 80.2 does not form part of the Act.

2.25 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 legislation⁸ and may utilise relevant extrinsic material—such as Second Reading Speeches, Explanatory Memoranda and the reports of parliamentary committee and law reform commissions—if this aids interpretation.⁹ Further, federal statutes must be construed subject to the *Australian Constitution*—which, as interpreted, contains an implied

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

6 *Ibid*, [32.18].

7 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 Proposal 11–1 the ALRC calls for repeal of these provisions.

8 *Acts Interpretation Act 1901* (Cth) s 15AA.

9 *Ibid* s 15AB.

freedom of political speech¹⁰—and there is a strong tradition in the common law that provisions imposing criminal liability must be narrowly construed by the courts.

2.26 The second consequence goes more to the broad social understanding of the law than to its technical construction. As discussed above, the sedition provisions were subject to intense criticism in the media and in most of the roughly 300 submissions to the 2005 Senate Committee inquiry into the Anti-Terrorism Bill (No 2) 2005. In the face of this high emotion, the Senate Committee recommended, with bipartisan support, that Schedule 7 (containing the sedition provisions) ‘be removed from the Bill in its entirety’ and referred to the ALRC for public inquiry.¹¹ The Government accepted some of the Senate Committee’s suggested amendments in this area,¹² but chose to pass the legislation and then to refer it to the ALRC for review.

2.27 In this Discussion Paper (and summarised below), the ALRC makes a range of proposals to improve the existing law. Some of these represent technical refinements to the drafting. Mainly, however, the proposals 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.

2.28 The ALRC is confident that, following further community feedback on these proposals, the final report and 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 origins and history as a crime rooted in criticising—or ‘exciting disaffection’ against—the established authority.

2.29 Chapters 5 and 7 consider in some detail the extent to which freedom of expression is guaranteed by international law and by domestic law (respectively). As noted above, Australians place a high premium on free speech 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.

2.30 Consequently, the ALRC proposes 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 offences against political liberty’, and the heading of s 80.2 should be changed to ‘Offences against political liberty and public order’.

10 See Ch 7.

11 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.173-5.174], rec 27–28.

12 *Ibid.*, [5.176], rec 29.

(Proposal 11–1 calls for the repeal of s 30A of the *Crimes Act*, which contains the definition of ‘seditious intention’ for the purposes of unlawful associations.)

Proposal 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 offences against political liberty’, and the heading of s 80.2 should be changed to ‘Offences against political liberty and public order’.

2.31 As discussed above, 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 also proposes 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.

Proposal 2–2 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 proposed changes to federal law.

‘Glorification’ of terrorism

2.32 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 engage in the encouragement or ‘glorification’ of terrorism. Glorification is defined to include ‘any form of praise or celebration, and cognate expressions are to be construed accordingly’.¹³ This law has been very controversial in the UK—including in the House of Lords and the UK 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).

2.33 The submission to this Inquiry of the Australian Government Attorney-General’s Department (AGD) notes that the use of terms like ‘praise’ and ‘glorify’ were considered during the development of the *Anti-Terrorism Act (No 2) 2005* (Cth)—but rejected as too imprecise and capable of generating difficulties of proof.¹⁴ The AGD submission concludes that the existing Australian law already ‘appropriately

¹³ *Terrorism Act 2006* (UK) s 20(2).

¹⁴ Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

encapsulates incitement and glorification of [terrorist] acts’ and thus there ‘appears to be no need for a separate offence’.¹⁵ The ALRC agrees, and Proposal 6–1 states that there is no present need to introduce into federal law an offence of encouragement or glorification of terrorism along the lines of the recent law in the UK.

Offences against political liberty and public order

2.34 While freedom of expression must be given a high premium, it is also well understood that every liberal democratic society must place some limits on the exercise of free speech; for example, through civil defamation laws and criminal prohibitions on obscenity or incitement to commit a crime. The test at international law is whether any such limits are necessary and reasonably justifiable in a democratic society.

Urging force or violence

2.35 In Chapters 8 and 9, the ALRC proposes ways of reframing or otherwise dealing with the five offences in s 80.2 of the *Criminal Code* to place a greater emphasis on the ‘force or violence’ aspect—continuing in the direction that the Government established in the 2005 amendments—and to draw the bright line between permitted speech and criminal conduct.

2.36 The ALRC proposes the retention of the basic offences contained in s 80.2(1) (urging the overthrow by force or violence of the Constitution or Government); s 80.2(3) (urging interference in parliamentary elections by force or violence); and s 80.2(5) (urging inter-group force or violence). However, two changes are suggested to the scope of the offences:

- section 80.2(3) should be extended to cover urging another to use force or violence to interfere with a constitutional referendum;¹⁶ and
- section 80.2(5) should include ‘national origin’ among the distinguishing features of a group for the purpose of that offence.¹⁷

2.37 More fundamental changes to the manner in which these offences should operate are also proposed, including that:

- Each of the three provisions should be amended to make clear that the person must intentionally urge the use of force or violence.¹⁸

15 Ibid.

16 Proposals 8–6, 8–7.

17 Proposal 9–2.

18 Proposals 8–3, 8–6, 9–2.

- An additional provision should be inserted into s 80.2 to make clear that for a person to be guilty of any of the three offences, the person must intend that the urged force or violence will occur.¹⁹
- In considering whether the person intended the urged force or violence to occur, context is critical. The ALRC proposes that the court must take into account whether the conduct was done: (i) in the performance, exhibition or distribution of any artistic work; or (ii) 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 (iii) in connection with an industrial dispute or an industrial matter; or (iv) in publishing a report or commentary about a matter of public interest.²⁰
- Given the effect of those proposed changes, the ‘good faith’ defence in s 80.3 is inappropriate and should be repealed.²¹ 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 the 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’. Proposal 10–2 meets these concerns by building the contextual issues into the required elements of the offences, rather than relying on an affirmative defence.

Assisting the enemy and treason

2.38 The ALRC has significantly more concern about the offences currently contained in s 80.2(7)–(8), which are not built around the concept of ‘urging force or violence’, but rather with urging another to ‘assist’ an enemy at war with Australia or an entity that is engaged in armed hostilities against the Australian Defence Force (ADF), respectively. Unlike the three offences considered above, the ‘assisting’ offences were not recommended by the Gibbs Committee.

2.39 The ALRC agrees with the run of submissions and commentary that point to the undesirable breadth of the term ‘assist’, 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 these provisions mirror almost exactly the terms of s 80.1(1)(e) and (f) on treason, which carries a maximum penalty of life imprisonment.

2.40 The ALRC cannot suggest reform of the ‘assisting’ offences in s 80.2, while leaving intact the parallel provisions dealing with treason. For that reason, the ALRC

19 Proposal 8–1.
20 Proposal 10–2.
21 Proposal 10–1.

proposes the repeal of s 80.2(7)–(9),²² and proposes a number of key changes to the equivalent provisions governing the treason offences in s 80.1.

2.41 First, there is significant concern that such a blanket prohibition on conduct that ‘assists’ the enemy unduly impinges 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—or ‘assists’—the enemy.

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

2.43 To remedy these concerns, the ALRC proposes that s 80.1(1)(e)–(f) should 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.²³ The addition of the term ‘materially’ is meant 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.

2.44 The ALRC also proposes that s 80.1 be amended to require that the person must be an Australian citizen or resident at the time of the alleged conduct.²⁴ 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.²⁵ 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 (see below). 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.²⁶

2.45 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 rather archaic, and does not mesh with the modern

22 Proposal 8–8.

23 Proposal 8–9.

24 Proposal 8–11.

25 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).

26 See the discussion in Ch 8.

terminology or concepts used in the *Criminal Code*. There are also questions about the appropriateness of 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. Consequently, the ALRC proposes that the Australian Government conduct a further review of s 80.1.²⁷

Unlawful associations

2.46 Part IIA of the *Crimes Act* on unlawful associations was introduced in 1926 to deal with the perceived threat of the Community Party of Australia and radical trade union activity,²⁸ but rarely has been used. Canadian provisions that served as a model for Part IIA were repealed in 1936.²⁹

2.47 The Terms of Reference for the current Inquiry ask the ALRC to consider Part IIA because the declaration of an ‘unlawful association’ may proceed from a finding that the group shares a ‘seditious intention’, as defined by s 30A of the *Crimes Act*. (This area is discussed in further detail in Chapter 11.)

2.48 Once a body is declared to be an unlawful association, a number of criminal offences come into play, including: failure to provide information relating to an unlawful association upon the request of the Attorney-General;³⁰ being an officer, member or representative of an unlawful association;³¹ giving contributions of money or goods to, or soliciting donations for, an unlawful association;³² printing, publishing or selling material issued by an unlawful association;³³ and allowing meetings of an unlawful association to be held on property owned or controlled by a person.³⁴

2.49 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’.³⁵ In its final report, the Gibbs Committee noted that all the submissions received in response to the proposal to repeal Part IIA endorsed that view, and the Committee so recommended.³⁶

27 Proposal 8–10.

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

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

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

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

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

33 *Ibid* ss 30E, 30F and 30FA.

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

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

36 *Ibid*, [38.8].

2.50 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).

2.51 A group may be ‘listed’ as a terrorist organisation in Australia following proceedings in the Federal Court, or pursuant to a regulation (disallowable in Parliament) where the Attorney-General is satisfied that the criteria are met (s 102.1(2)). Prior listing by the United Nations Security Council is no longer required.

2.52 Consultations and submissions strongly favoured the repeal of the unlawful associations provisions in Part IIA of the *Crimes Act*. Only the submission of the AGD did not agree with this proposition, but agreed that Part IIA was ‘developed in the context of concern about communism in Australia’, while ‘circumstances have changed dramatically since’ and the new terrorism provisions are better crafted to ‘address contemporary threats to the Australian community’.³⁷

2.53 The ALRC agrees with the Gibbs Committee and the predominant 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 proposes that the unlawful associations provisions of Part IIA of the *Crimes Act* be repealed.³⁸

2.54 There are three ‘stand alone’ sections in Part IIA that do not rely on the concept of ‘seditious intent’ or the declaration of an ‘unlawful association’: s 30C (advocating the overthrow of the Government), s 30J (illegal lockouts and strikes) and s 30K (hindering services by threats or violence). In Proposal 8–5, the ALRC suggests that s 30C is made redundant by the proposed new offences against political liberty, and should be repealed. There are no existing or proposed counterparts for ss 30J–K, and further consideration of these offences would be outside the Inquiry’s Terms of Reference. Proposal 11–2 adds these provisions to a suggested list of those that the Australian Government should cause to be reviewed (see below).

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

38 See Ch 11, Proposal 11–1, which specifies repeal of ss 30A, 30AA, 30AB, 30B, 30D, 30E, 30F, 30FA, 30FC, 30FD, 30G and 30H.

Review of old *Crimes Act* provisions

2.55 In the course of this Inquiry, the ALRC has come across a large number of old provisions in Part II of the *Crimes Act* that are related to the existing 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).

2.56 All of these provisions are couched in archaic language, and many of them may have been superseded by new and better laws. It is beyond the Inquiry’s Terms of Reference and timeframe to conduct a systematic review of these provisions, but the ALRC proposes that the Australian Government initiate a review 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.³⁹

Ancillary matters

Extraterritorial application

2.57 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 pronounced 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.

2.58 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.

2.59 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.⁴⁰ 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.

39 See Ch 4, Proposal 4–1.

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

2.60 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 proposes to address this issue 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.⁴¹

Requirement of Attorney-General's consent

2.61 Under s 80.5, an offence under Division 80 of the *Criminal Code* may not be prosecuted without the written consent of the Attorney-General. In practice, this provision would be used only in very rare circumstances, 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. According to the Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2005, this provision is designed to provide an additional safeguard for a person charged with a sedition offence.⁴²

2.62 The requirement for the Attorney-General's consent to a prosecution is found throughout the federal criminal law. In some cases, this is because the legislation pre-dates the establishment of the independent office of the DPP in 1983.⁴³ However, a number of modern provisions also impose the requirement—for example, offences in relation to people smuggling offences;⁴⁴ espionage;⁴⁵ and genocide, crimes against humanity, and war crimes.⁴⁶

2.63 Section 16.1 of the *Criminal Code* also provides a general rule that the Attorney-General's consent is required to prosecute any offence where: (a) the alleged conduct occurs wholly in a foreign country; and (b) the person is not an Australian citizen, resident or body corporate incorporated in Australia.⁴⁷ In such cases, the purpose of the consent requirement is said to give regard to considerations of international law, practice and comity, international relations, and other public interest considerations.⁴⁸

2.64 The ALRC accepts that the intention behind s 80.5 is to provide an additional safeguard for defendants, rather than an attempt to 'politicise' this area. As the AGD argued before the 2005 Senate Committee inquiry, 'the Attorney is a political

41 See Ch 8, Proposal 8–11.

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

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

44 *Criminal Code* (Cth) Division 73, Subdivision A. See s 73.5.

45 *Ibid* Part 5.2. See s 93.1.

46 *Ibid* Division 268. See s 268.121.

47 *Ibid* s 16.1.

48 I Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney-General's Department and Australian Institute of Judicial Administration, 1 March 2002, 365.

safeguard on the DPP and the DPP is a safeguard on the Attorney'.⁴⁹ The AGD reiterated this view in a submission to this Inquiry, stating that the consent requirement 'addresses any concerns about officials misusing the offence'.⁵⁰

2.65 However, as discussed above, sedition (especially in its earlier forms) can be characterised as an inherently political offence, used against dissidents and opponents of the established political order. Against this background, it is not surprising that significant misgivings were expressed in consultations and submissions about any perceived influence by an Attorney-General—an elected politician—in a prosecution process that has been reserved for the past twenty years to independent officers operating under published guidelines and ethical obligations to the court.

2.66 On balance, the ALRC proposes that s 80.5 should be repealed.⁵¹ The continued existence of the general requirement in s 16.1 seems adequate to ensure that the Attorney-General is given a role where there are significant implications for international relations. 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 against political liberty and public order.

Net effect of the proposed changes

2.67 It is proposed that most of Part IIA of the *Crimes Act* (on unlawful associations) be repealed, with two offences (ss 30J and 30K) to be reviewed.

2.68 A number of major and minor changes are proposed for Division 80 of the *Criminal Code*, on treason and sedition. Appendix 1 of this Discussion Paper contains the provisions in Division 80 as they currently exist. Appendix 2 indicates what these provisions would look like if the ALRC's proposals were implemented, with the changes highlighted.

49 Senate Legal and Constitutional Committee—Australian Parliament, *Anti-Terrorism Bill (No 2) 2005: Transcript of Public Hearing*, 18 November 2005, 19 (G McDonald).

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

51 See Ch 8, Proposal 8–12.

3. Origins and History of Sedition Law

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Introduction

3.1 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.

3.2 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

3.3 The classic definition of seditious intention is found in 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, His Majesty, his 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 His 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 His Majesty's subjects, or to promote feelings of ill-will and hostility between different classes of such subjects.³

3.4 In this context, seditious intention further defines the physical element of the offences, rather than referring to the mental or fault element required.⁴ Thus it can be seen that the legal elements of seditious offences are ill-defined. The vagueness of the language used to describe the notion of seditious intention makes it difficult to demarcate the boundaries of seditious offences with any certainty. In *Boucher v The Queen*, Kellock J stated that 'probably no crime has been left in such vagueness of definition'.⁵

3.5 Historically, the law of seditious intention 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 has fluctuated significantly over time.⁶ One commentator has remarked:

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.⁷

3.6 The historical account of the law of seditious intention set out below reveals that the development and use of seditious laws has 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 seditious offences in accordance with contemporary emphasis on the importance of free speech 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.

3.7 However, an examination of prosecutions in Australia in the 20th century also reveals cases in which the law of seditious intention 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), cited in Law Commission of England and Wales, *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Seditious and Allied Offences* (1977), 42.

4 *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* [1991] 1 QB 429, 433.

5 *Boucher v The Queen* [1951] 2 DLR 369, 382.

6 See *Ibid* per Kellock J, 382.

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

The origins and evolution of common law seditious

Early origins

3.8 The law of seditious 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.⁸ Seditious 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 seditious 'frequently precedes treason by a short interval'.⁹

3.9 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.¹⁰ 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 be punished.¹¹

3.10 Prior to the early 17th century, offences that would now be classified as seditious offences were prosecuted pursuant to statutes creating treason offences¹² and other felonies,¹³ *scandalum magnatum*,¹⁴ or martial law.¹⁵

8 See 'Historical Concept of Treason: English and American' (1960) 35 *Indiana Law Journal* 70. The word 'seditious' derives from the Latin *seditio*, meaning uprising or insurrection. In classical Rome and in medieval England, *seditio* was used to refer to offences that, according to modern understanding, would be referred to as 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, 'Seditious Through the Ages: A Note on Legal Terminology' (1979) 37 *University of Toronto Faculty of Law Review* 266, 266–267.

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

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

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

12 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 Seditious' (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, St 5, 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 the enactment of additional statutes 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 Seditious' (1980) 12 *Albion* 99.

3.11 Seditious libel emerged as a distinct offence in the early 1600s in the Court of Star Chamber.¹⁶ In *De Libellis Famosis* the defendant was prosecuted for defaming the deceased Archbishop of Canterbury.¹⁷ 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.¹⁸ In addition, it held that a libel against a public figure was a greater offence than one against a private person, since

it concerns not only the breach of the peace, but also the scandal of government; for what greater scandal of government can there be than to have corrupt or wicked magistrates to be appointed and constituted by the King to govern his subjects under him? And greater imputation to the state cannot be, than to suffer such corrupt men to sit in the sacred seat of justice, or to have any meddling in or concerning the administration of justice.¹⁹

3.12 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 state²⁰—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 hence seditious libel was developed as a more efficient and effective means of securing convictions.²¹

Common law development

3.13 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’.²² 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

13 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.

14 *Scandalum magnatum*, first proscribed in the 1275 *Statute of Westminster* (3 Edw 1 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.

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

16 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.

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

18 *Ibid.*, 250.

19 *Ibid.*, 251.

20 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.

21 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.

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

matters communicated affected the finding of guilt.²³ The courts emphasised that it was the mere tendency of criticism to undermine government that rendered the conduct an offence.²⁴

3.14 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.²⁵ It has been noted that this gave rise to conflicts between judges and juries, particularly when juries were urged by defence counsel to use their verdicts to protest against unjust prosecutions.²⁶

3.15 A notable change to the law occurred with the passage of *Fox’s Libel Act* in 1792,²⁷ which gave the jury the legal right to deliver a general verdict on the entire case and to determine the facts and the application of the law to those facts.²⁸ The practical effect of this reform was the introduction of an intention requirement into the law of sedition.²⁹ In addition, by allowing more political considerations 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.³⁰

3.16 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 notion that individuals should have freedom of speech in relation to political matters—the law of sedition adapted to allow more criticism of government.³¹ However, the legal elements of the offences remained far from clear, and authorities varied as to the nature of the intention required and whether such intention was to be determined subjectively or objectively.³² 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.³³ In addition, the focus of sedition prosecutions began to shift to the seditious effect of the words as opposed to their intrinsically libellous nature.³⁴

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

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

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

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

27 32 Geo III c 60.

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

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

30 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.

31 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).

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

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

34 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.

3.17 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 spoken or written, or by a show of force calculated to produce fear, to effect any public object of an evil character’.³⁵ 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.³⁶

3.18 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 the latter half of the century.³⁷ 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.³⁸ 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.³⁹

Sedition in the 20th century

3.19 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 by the British Crown was in 1947.⁴⁰

3.20 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.⁴¹ 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.⁴²

3.21 Sedition law was most recently considered by the Divisional Court in England in 1991 when a private prosecution was brought against the author and publishers of *The*

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

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

37 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.

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

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

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

41 D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002), 898. For example, in *R v Burns* (1886) 16 Cox CC 355, 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: 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.

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

Satanic Verses.⁴³ The Court approved the statement in *Boucher* that incitement to violence or public disorder for the purpose of disturbing constituted authority is a necessary ingredient of the common law offences of sedition.⁴⁴

Sedition in Australia

Colonial era inheritance

3.22 The Australian states inherited the British common law of sedition.⁴⁵ 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;⁴⁶
- Governor Darling’s political opponents, including critics in the press, in the early 1800s;⁴⁷
- Henry Seekamp, the editor and owner of the *Ballarat Times* at the time of the Eureka Stockade in 1854;⁴⁸
- anti-conscriptionists who opposed Australia’s involvement in the First World War;⁴⁹ 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 1930.⁵⁰

Crimes Act 1914 (Cth)

3.23 Until 1914, criminal law in Australia was almost entirely the province of the states and territories.⁵¹ Following the commencement of the First World War, judicial

43 *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* [1991] 1 QB 429, 453.

44 *Ibid*, 453.

45 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.

46 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.

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

48 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.

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

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

51 The first piece of federal criminal legislation was the *Punishment of Offences Act 1901* (Cth), which provided punishments for infringements of the Commonwealth statutory prohibitions. Subsequently, a number of federal offences were created as incidental to particular statutes: G Sawyer, *Australian Federal Politics 1901–1929* (1956), 135.

doctrine approved a marked expansion in Commonwealth legislative power, resulting in a spate of federal laws to regulate public order.⁵²

3.24 The first comprehensive piece of federal criminal legislation was the *Crimes Act 1914* (Cth), which contained a number of offences against the government, including treason and incitement to mutiny.⁵³ 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.⁵⁴

3.25 The sedition provisions were inserted into the *Crimes Act* in 1920.⁵⁵ These provisions repeated in substance the common law definition of the offence,⁵⁶ but were somewhat broader in that they did not require proof of subjective intention and did not require incitement to violence or public disturbance.⁵⁷ 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.

3.26 ‘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;
- (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;

52 Ibid, 155.

53 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.

54 For example, s 4(d) of the *War Precautions Act 1914* (Cth) 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 Seditious Customs, the Attorney-General’s Department and the Administration of Peacetime Political Censorship’ (2002) 30 *Federal Law Review* 135.

55 *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).

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

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

- (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.⁵⁸

3.27 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.⁵⁹

Communist Party prosecutions

3.28 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.⁶⁰ 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.⁶¹ It has also 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.⁶²

3.29 It appears that the first federal sedition prosecution occurred in 1948.⁶³ 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, there is little information available on the manner or frequency of these prosecutions.⁶⁴ It has been reported that there were three sedition prosecutions brought against communists in Queensland in the 1930s, and two prosecutions 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.⁶⁵ One historian notes that these latter prosecutions received little attention

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

59 *Crimes Act 1926* (Cth) s 17. These provisions were further strengthened by the *Crimes Act 1932* (Cth).

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

61 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.

62 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.

63 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.

64 *Ibid.*, 138.

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

outside the states in which they were brought, and on this basis concludes that there may have been other state sedition prosecutions during this period.⁶⁶

3.30 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.⁶⁷ 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 be likely to convict defendants for anti-war propaganda.⁶⁸

3.31 The first federal sedition prosecution was brought in 1948 against a member of the CPA, Gilbert Burns.⁶⁹ 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 making the following statement:

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.⁷⁰

3.32 On appeal, Burns argued that the federal provisions were constitutionally invalid and that his words were not expressive of a seditious intention as they referred to a hypothetical contingency. 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 were expressive of a seditious intention, and the decision of the Chief Justice prevailed. Latham CJ held that, in effect, unlike the common law, the statutory provisions did not require incitement to violence or public disorder.⁷¹ 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 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.⁷²

66 Ibid, 76.

67 Ibid, 76–77.

68 Ibid, 76.

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

70 Ibid, 114.

71 Ibid, 108.

72 Ibid, 108–109.

3.33 A second seditious case came before the High Court in 1949.⁷³ 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.⁷⁴

3.34 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 affect the question of whether it could be considered seditious.

3.35 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 the statement directly intended to incite violence or public disorder.

3.36 The High Court’s interpretation of the federal seditious provisions—which, in effect, enabled them to be used to punish expressions of disloyalty—stands in contrast to the common law, which had in the previous century narrowed seditious words or behaviour that incited violence or public disorder. This interpretation also stands in stark contrast to the approach adopted by the United States Supreme Court, which had drawn a distinction between behaviour creating a ‘clear and present danger of public disorder’ and ‘doctrinal justification or prediction of the use of force under hypothetical conditions at some indefinite future’.⁷⁵

3.37 The High Court’s extension of the seditious offences can be explained by reference to the evolving Cold War context and the desire of the Chifley Government

⁷³ *R v Sharkey* (1949) 79 CLR 121.

⁷⁴ *Ibid.*, 138.

⁷⁵ 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.

to prove to the Australian public and the American and British Governments that it was taking measures to combat the internal threat of communism.⁷⁶ 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.⁷⁷

3.38 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.⁷⁸ 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.⁷⁹ It has also been suggested that authorities were able to execute far-reaching search warrants on communists' offices and homes when investigating sedition offences.⁸⁰

3.39 The last Commonwealth sedition prosecution was in 1953, when a member of the CPA was tried unsuccessfully for publishing an article derisive of the monarchy.⁸¹ The last sedition prosecution at the state or territory level appears to have been in South Australia in 1960, where a newspaper editor was charged with seditious libel for criticising the Royal Commission inquiring into the Stuart murder case.⁸²

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

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

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

79 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.

80 R Douglas, 'The Ambiguity of Sedition: The Trials of William Fardon Burns' (2004) 9 *Australian Journal of Legal History* 227, 247; L Maher, 'Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case' (1994) 16 *Adelaide Law Review* 1, 24.

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

82 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: see *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.

Recent consideration

3.40 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.⁸³

3.41 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,⁸⁴ but there is no evidence of formal consideration being given to this by government officials.

Reform trends: modernise or abolish?

3.42 Law reform commissions in Canada, Ireland and the United Kingdom have recommended the abolition of existing sedition offences⁸⁵ on the basis that they are unnecessary in light of more modern criminal offences, such as incitement and other public order offences;⁸⁶ undesirable in light of their political nature and history;⁸⁷ 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.⁸⁸

Hope Royal Commission

3.43 In 1984, the Hope Royal Commission on Australia's Security and Intelligence Agencies (the Hope Commission) examined federal sedition law as part of its review of national security offences relevant to the Australian Security Intelligence Organisation.⁸⁹ The Hope Commission criticised the High Court decisions in *Burns v Ransley*⁹⁰ and *R v Sharkey*,⁹¹ stating that 'mere rhetoric or statements of political belief

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

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

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), 45; 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.

86 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.

87 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.

88 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.

89 Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Australian Security Intelligence Organization* (1985). The Commission was chaired by New South Wales Justice Robert Hope.

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

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

should not be a criminal offence, however obnoxious they may be to constituted authority'.⁹²

3.44 The Hope Commission recommended that the provisions be amended to include the common law requirement of intention to create violence, public disturbance or disorder.⁹³ 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.⁹⁴ The federal provisions were amended in accordance with the Hope Commission's recommendations in 1986.⁹⁵

Gibbs Committee

3.45 Australia's federal sedition provisions were also reviewed by the Committee of Review of Commonwealth Criminal Law (the Gibbs Committee) in 1991.⁹⁶ 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'.⁹⁷ 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.⁹⁸ 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
- 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.⁹⁹

Legislative amendments in 2005

3.46 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.¹⁰⁰ Prior to this, Australia's sedition laws—like those in Britain and Canada—

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

93 *Ibid.*, [4.101].

94 *Ibid.*, [4.98].

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

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

97 *Ibid.*, [32.13].

98 *Ibid.*, [32.13]–[32.18].

99 *Ibid.*, [32.18].

100 J Howard (Prime Minister), 'Counter-Terrorism Laws Strengthened' (Press Release, 8 September 2005).

were thought to be suspended somewhere ‘between obsolescence and abolition’.¹⁰¹ 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.¹⁰²

3.47 Despite largely having fallen out of use in the last 50 years, the Australian Government stated that in the counter-terrorism context, ‘sedition is just as relevant as it ever was’,¹⁰³ 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’.¹⁰⁴ The 2005 amendments to federal sedition offences reflect international initiatives to criminalise activity deemed to promote terrorist violence.¹⁰⁵ These amendments are discussed in greater detail in the following Chapter.

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- 101 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; M Armstrong, D Lindsay and R Watterson, *Media Law in Australia* (3rd ed, 1995), 150. 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; Lord Denning, *Landmarks in the Law* (1984), 295; H Lee, *Emergency Powers* (1984), 92.
- 102 Explanatory Memorandum, *Anti-Terrorism Bill (No 2) 2005* (Cth), 88.
- 103 Senate Legal and Constitutional Committee—Australian Parliament, *Anti-Terrorism Bill (No 2) 2005: Transcript of Public Hearing*, 14 November 2005, 4 (G McDonald).
- 104 J Howard (Prime Minister), ‘Counter-Terrorism Laws Strengthened’ (Press Release, 8 September 2005).
- 105 In May 2005, the Council of Europe adopted a new *Convention on the Prevention of Terrorism*, which requires States to criminalise public provocation to commit a terrorist offence: art 5(2). See the detailed discussion in Chs 5 and 6.

4. Australian Seditious Laws and Related Provisions

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Introduction

4.1 This chapter summarises the current federal seditious provisions and other aspects of federal law related to seditious, including the related 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 seditious, treason and related matters.

4.2 A deeper analysis of four of the current seditious offences and proposals for their reform are contained in Chapter 8. Chapter 9 considers the offence of urging inter-group violence. Chapter 10 considers the appropriate defences and penalties for these offences.

4.3 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 11.

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

New sedition offences in the *Criminal Code*

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

4.5 Schedule 7 repealed the old sedition offences found in ss 24A–24F of the *Crimes Act*.³ The new offences 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 *Crimes Act* now mainly concerned with matters of practice and procedure).⁴

4.6 The stated purposes of the new sedition provisions were to modernise the language of the offences and to ‘address problems with those who incite directly against other groups within the community’.⁵

4.7 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
 - (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.

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

3 See Ch 3 for a brief history of the old sedition offences. A new s 30A(3) has been inserted into the *Crimes Act*, defining a ‘seditious intention’. However, this is applicable only in relation to the offences of ‘unlawful association’ (see Ch 11).

4 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth). In its Inquiry into the sentencing of federal offenders, the ALRC has proposed the repeal of Part IB of the *Crimes Act* and its replacement by a dedicated federal Sentencing Act: Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper 70 (2005), Proposal 2–1.

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

4.8 The second offence, *Urging interference in Parliamentary elections*, under 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.

4.9 The third offence, *Urging violence within the community*, under 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.

4.10 The fourth offence, *Urging a person to assist the enemy*, under 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.

4.11 The fifth offence, *Urging a person to assist those engaged in armed hostilities*, under 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.

4.12 Each of the five offences carries a maximum penalty of imprisonment for seven years. This follows the 1991 recommendation of the Committee of Review of Commonwealth Criminal Law (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 the *Crimes Act*, ss 24A–24D.⁶

Other features of the provisions

Fault elements

4.13 There has been considerable confusion in the public debate over the fault elements required for the new sedition offences. IP 30 noted that much of this uncertainty stemmed from a lack of understanding about how the physical and fault elements work under the *Criminal Code*.⁷

4.14 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’. Issues concerning the application of fault elements to the offences are discussed in detail in Chapter 8.

Urging group-based violence

4.15 The *Anti-Terrorism Act (No 2) 2005* (Cth) created a new offence of urging a group or groups to use force or violence against another group or other groups.

4.16 Section 80.2(5) proscribes only the urging of force or violence—it does not extend to vilification or incitement of racial hatred. The offence is limited in that it applies only where a person urges a group or groups to use force or violence against another group or other groups. It would not cover the urging of an individual to use force or violence against a group (with the distinguishing characteristics mentioned above), nor the urging of a group to use force or violence against an individual.⁹

4.17 Section 80.2(5)(b) also requires that the force or violence that is urged must threaten the ‘peace, order and good government of the Commonwealth’. Both limbs must be proven for the offence to be complete.

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

7 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), [3.21]–[3.34].

8 *Criminal Code* (Cth) s 5.6.

9 Explanatory Memorandum, Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth), 4; B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 877; N Roxton Shadow Attorney-General, *Submission SED 63*, 28 April 2006.

Extra-territorial application

4.18 The sedition and treason¹⁰ offences under Division 80 of the *Criminal Code* are characterised as ‘Category D’ offences—as are the terrorism offences created in 2002¹¹ in Divisions 101–104 of the *Criminal Code*.¹² 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.

4.19 The implications of this extra-territorial application are considered in Chapter 8.

Requirement of Attorney-General’s consent

4.20 Under s 80.5, proceedings for an offence under these provisions may not be commenced without the written consent of the Attorney-General. According to the Explanatory Memorandum, this provision is designed to provide an additional safeguard to a person charged with a sedition offence.¹³ This matter is also discussed in Chapter 8.

Defences

4.21 Section 80.3 of the *Criminal Code* provides for a specific defence 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*.

4.22 Under s 80.3, comments made in good faith must, for example, point out mistakes in government policy,¹⁴ urge people to lawfully change laws or policies,¹⁵ or comment on matters that produce feelings of hostility between groups with a view to bringing about removal of those matters.¹⁶ Section 80.3(1)(f) also allows the publication in good faith of a report or commentary about a matter of public interest.

4.23 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

10 *Criminal Code* (Cth) s 80.1(7).

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

12 *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.

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

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

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

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

safety or defence of the Commonwealth;¹⁷ to assist an enemy;¹⁸ or with the intention of causing violence or creating public disorder or a public disturbance.¹⁹

4.24 Defences and proposals for reform are discussed in detail in Chapter 10.

Related federal legislation

4.25 The previous sedition offences under 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.²⁰ However, aside from changes such as removal of the death penalty, many of these offences have remained unchanged since their enactment in 1914. The response to modern threats against the state posed by terrorism has generally been to enact a new set of offences in the *Criminal Code* rather than rely on these older provisions.²¹

4.26 Some submissions and commentary suggest 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*.

4.27 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

4.28 The offence of treason was moved into the *Criminal Code* in 2002.²² 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

17 Ibid s 80.3(2)(a).

18 Ibid s 80.3(2)(b).

19 Ibid s 80.3(2)(f).

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

21 Part 5.3 of the *Criminal Code* sets out a raft of terrorism offences. The operation and effectiveness the counter-terrorism laws has been recently reviewed by the Security Legislation Review Committee, as a statutory requirement of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth). At the time of writing the findings of the review had not been released to the public. The Committee's terms of reference are available at <www.ag.gov.au/slrc> (19 May 2006).

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

recommendations of the Gibbs Committee, as well as to modernise the language and make it consistent with the drafting style used in the *Criminal Code*.²³

4.29 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;
- 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;
- 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.

4.30 The penalty for an act of treason is imprisonment for life. Under s 80.1(1A) there is a defence to the charges of assisting the enemy where the person engages in the conduct ‘by way of, or for the purposes of, the provision of aid of a humanitarian nature’.²⁴ In common with the sedition offences, the defence of ‘good faith’ is available under s 80.3.

4.31 There is significant overlap between treason in s 80.1 and the sedition offences, particularly in relation to the provisions concerning assisting the enemy or those engaged in armed hostilities against the Australian Defence Force (ADF) in s 80.2(7)–(8) of the *Criminal Code*. 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.

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

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

4.32 A number of submissions to this Inquiry highlighted the overlap issue,²⁵ although Patrick Emerton notes that the new offence under s 80.2(7) is broader, since the offender need only *urge* treasonous conduct, rather than *intend* both treasonous conduct *and* treasonous intentions, on the part of others.²⁶

4.33 In Chapter 8, the ALRC suggests that the direct overlap is unwarranted in these circumstances and proposes that s 80.2(7) and (8) be repealed.²⁷ Chapter 8 also highlights concerns with the framing of aspects of the treason offences, and makes a number of proposals for reform.²⁸

Terrorism offences

4.34 Part 5.3 of the *Criminal Code* was enacted in 2002 as part of the Australian Government's counter-terrorism legislative package.²⁹ 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.

4.35 Division 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) and (3), 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; seriously interferes with, disrupts, or destroys an electronic system; and is not advocacy, protest, dissent or industrial action.

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

- engaging in a terrorist act;³⁰
- providing or receiving training connected with a terrorist act;³¹
- possessing things connected with a terrorist act;³²

25 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.

26 P Emerton, *Submission SED 36*, 10 April 2006.

27 Proposal 8–8.

28 Proposal 8–9 to 8–11.

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

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

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

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

- collecting or making documents likely to facilitate a terrorist act;³³ or
- doing other acts in preparation for, or planning, a terrorist act.³⁴

4.37 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.³⁵ 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.³⁶ The offences under s 80.2 currently require only an intention to urge the conduct, not that the person intended that the crime urged be committed.³⁷ This distinction is discussed in greater detail in Chapter 8.

Causing harm to public officials

4.38 Section 147.1–147.2 of the *Criminal Code* makes it an offence to harm or threaten to harm a Commonwealth public official. This offence applies where the 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.³⁸

Crimes Act 1914

4.39 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

4.40 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. Treachery carries a maximum penalty of life imprisonment.

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

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

35 B Saul, *Submission SED 52*, 14 April 2006.

36 *Criminal Code* (Cth) s 11.4(2).

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

38 *Criminal Code* (Cth) ss 147.1, 147.1(2), 147.2, 147.2(3).

4.41 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.³⁹ This wording is now part of the treason and sedition offences in the *Criminal Code*.

Sabotage

4.42 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.

4.43 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.⁴⁰

4.44 In common with the new sedition offences, a prosecution for treachery or sabotage may be instituted only with the consent of the Attorney-General.⁴¹

Inciting mutiny

4.45 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.⁴² The 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.⁴³

Assisting prisoners of war to escape

4.46 Section 26 makes it an offence, with a 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*.⁴⁴

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

40 *Ibid*, [33.10].

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

42 *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’.

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

44 *Ibid*, [35.7].

Unlawful drilling

4.47 ‘Unlawful drilling’ involves training or drilling others ‘to the use of arms or the practice of military exercises, movements, or evolutions’,⁴⁵ contrary to a proclamation of the Governor-General. No proclamation for the purpose of this section has 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

4.48 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

4.49 Part IIA of the *Crimes Act* contains a range of provisions concerning unlawful associations. Chapter 11 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).

Electoral offences

4.50 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’.

4.51 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) there is a mirror offence providing 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’.⁴⁶ These offences are considered in more detail in Chapter 8.

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

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

Crimes (Foreign Incursions and Recruitment) Act 1978

4.52 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. Under the Act, 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).

4.53 ‘Hostile activities’ under the Act include doing an act 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 the death or injury to the head of state or public officials; or damaging the foreign government’s property.⁴⁷

4.54 The Act does not apply to acts done in defence of Australia, or in the course of a person’s duty to the Commonwealth.⁴⁸ An offender must be an Australian citizen, permanent resident or resident in Australia for at least a year.⁴⁹ Proceedings under the Act require the Attorney-General’s written consent.⁵⁰

4.55 The offences under s 80.2(7) and (8) 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).⁵¹

47 Ibid s 6(3).

48 Ibid s 5.

49 Ibid s 6(2).

50 Ibid s 10.

51 See Proposal 8–8.

ALRC's views

4.56 While it is outside the Inquiry's Terms of Reference and timeframe to conduct a full review of all federal law relating to the security of the Commonwealth, it is clear that while attention has been given to modernisation of some of the *Crimes Act* offences, many still languish as 'dead-letter' laws, which 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.

4.57 Consequently, the ALRC proposes that the Australian Government initiate a review of the remaining offences contained in Part II of the *Crimes Act* (and ss 30J and 30K in Part IIA)⁵² 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.

Proposal 4-1 The Australian Government should initiate a review of the remaining offences contained 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*.

State and territory seditious laws

4.58 Federal seditious law proscribes, among other things, urging the overthrow by force or violence of 'the Government of the Commonwealth, a State or a Territory'.⁵³ However, the Commonwealth does not intend to 'cover the whole field'⁵⁴ in relation to seditious—which might render state and territory laws inoperative under s 109 of the *Australian Constitution*.⁵⁵

4.59 Section 80.6 of the *Criminal Code* states that the treason and seditious 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.

4.60 Commonwealth, state and territory laws define seditious in different terms. For example, some state laws seek to protect the Sovereign, Government and Constitution of the United Kingdom from seditious conduct.⁵⁶ In contrast, the *Criminal Code*

52 See Ch 11, Proposal 11-2.

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

54 See *Viskauskas v Niland* (1983) 153 CLR 280.

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

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

provisions apply only to sedition against the Australian Constitution or the Government of the Commonwealth or an Australian state or territory.⁵⁷

4.61 In New South Wales and Victoria, the common law offence of seditious libel remains in effect.⁵⁸ 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 attempt the alteration of any matter as by law established, otherwise than by lawful means ...⁵⁹

4.62 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.⁶⁰

4.63 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.

4.64 Queensland, Western Australia, Tasmania and the Northern Territory have statutory sedition offences. The offence provisions, and the relevant defences, are framed in a similar manner to those in the repealed *Crimes Act 1914* (Cth) provisions⁶¹—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.⁶²

4.65 In Queensland, sedition offences are contained in the *Criminal Code* (Qld).⁶³ 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).⁶⁴ The definition of 'seditious intention' refers to sedition directed at the Sovereign, Government or Constitution of the United Kingdom or of

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

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

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

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

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

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

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

64 *Ibid* s 52(1)–(2).

Queensland, or against the Parliaments of the United Kingdom or Queensland, or against the administration of justice.⁶⁵

4.66 In Western Australia, the *Criminal Code* (WA) provides for the offences of conspiring to carry into execution a seditious enterprise and publishing seditious words.⁶⁶ The offences are punishable by imprisonment for a maximum of three years.⁶⁷ 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.⁶⁸

4.67 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.⁶⁹ 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.⁷⁰

4.68 In addition, Chapter V of the Tasmanian legislation, dealing with treason,⁷¹ 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 ...⁷²

4.69 Northern Territory legislation provides for offences in relation to engaging in a seditious enterprise or publishing seditious words.⁷³ Both offences are punishable by

65 Ibid s 44(b).

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

67 Ibid s 52.

68 Ibid s 44.

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

70 Ibid s 66(1)(b). 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: *Criminal Code 1924* (Tas) s 68.

71 *Criminal Code 1924* (Tas) ch V: ‘Treason and Other Crimes Against the Sovereign’s Person or Authority’.

72 Ibid s 62.

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

imprisonment for a maximum of three years.⁷⁴ 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.⁷⁵

4.70 In South Australia, the common law offence of seditious libel was abolished in 1992, along with a number of other common law offences.⁷⁶ The ACT abolished the common law offence of seditious libel in 1996 as part of a measure intended to remove ‘outdated common law rules’.⁷⁷

4.71 The abolition of seditious libel in the ACT was a by-product of defamation law reform.⁷⁸ In 1995, the Community Law Reform Committee of the ACT recommended 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’.⁷⁹

4.72 In Chapter 2, the ALRC proposes that the term ‘sedition’ be removed from the federal statute book. 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. Proposal 2–2 states 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.

74 Ibid s 24E.

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

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

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

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

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

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 how international law interacts with Australia's sedition provisions.

Status of international law

5.4 The status of international law, and its intersection 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 an international treaty to which Australia is a party only becomes part of Australian law to the extent that it is implemented by way of Australian domestic legislation.³
- The *International Covenant on Civil and Political Rights 1966*⁴ (ICCPR) is an example of a treaty that has been ratified by Australia but has not been fully incorporated 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 provision in question 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.
- The courts will generally interpret legislation in a way 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 may, for instance, lead to proceedings being commenced against Australia in a United Nations (UN) tribunal or committee.

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].

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 may be 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 The Security Council called upon 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 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 See *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*, UN GA, 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 acts 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 proposals that affect the right to freedom of expression.

Article 20 of the ICCPR: incitement

5.15 In its submission 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 Australian Government Attorney-General's Department (AGD) asserted that some of the sedition provisions—and especially the new offence in s 80.2(5) of the *Criminal Code*—fall within the ambit of art 20 of the ICCPR.²¹ Article 20 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.

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.

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

5.16 The AGD stated that s 80.2(5) is ‘in part implementation of Article 20 of the ICCPR which requires State parties to prohibit advocacy that incites violence, discrimination or hostility’.²² The 1991 *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.

5.17 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

5.18 Dr Ben Saul has made a different criticism of s 80.2(5), arguing that it does not go far enough in implementing art 20(2) of the ICCPR. He has observed that s 80.2(5) only operates to protect ‘groups’, thereby excluding ‘incitements aimed to provoke individuals, or groups not mentioned in the legislation’. Moreover, 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.²⁶

Article 4 of the ICCPR: derogation

5.19 The issue of ‘derogation’ from human rights obligations arose in testimony before and submissions to the 2005 Senate Committee inquiry.²⁷ International law gives states a limited capacity of derogation. This means that, in certain emergency situations, a state may suspend its obligation to give full protection to certain rights recognised by the ICCPR. The purpose of derogation has been explained as follows:

22 Ibid.

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.

27 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [2.26]–[2.31].

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.²⁸

5.20 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.²⁹

5.21 In Australia, the AGD's submission to the 2005 Senate Committee 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

International human rights law: article 19 of the ICCPR

5.22 International human rights law articulates fundamental obligations with which state parties must conform. Concern has been expressed that certain aspects of the Australian sedition provisions may be incompatible with Australia's international human rights obligations.

Explanation of article 19 of the ICCPR

5.23 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.

28 N Jayawickrama, *The Judicial Application of Human Rights Law* (2002), 202.

29 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.

30 Australian Government Attorney-General's Department, *Submission 290B to Senate Inquiry into Anti-Terrorism Bill (No 3) 2005*, 24 November 2005.

31 *Ibid.*

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.

5.24 Under art 19, a restriction on a person's right to express himself or herself freely is permissible only if that restriction: (a) is 'provided by law'; and (b) satisfies the test of necessity in art 19(3).

5.25 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).

5.26 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 ...³²

5.27 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.³³ The Human Rights and Equal Opportunity Commission (HREOC), in its submission to the 2005 Senate Committee inquiry, framed the question as follows:

32 United Nations Human Rights Committee, *General Comment 10: Article 19*, 19th session, UN Doc HRI/GEN/1/Rev1 (1983), [4].

33 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 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).

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.³⁴

Question of compatibility

5.28 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 this test.³⁵ Many participants who commented on this issue expressed concern, often in strong terms, that the new sedition offences might be inconsistent with art 19.³⁶ IP 30 contains a summary of the views of those who argued to 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 19.³⁷

5.29 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 Committee acknowledged concerns about the related issue of the 'potential impact of the sedition provisions on freedom of speech in Australia'.³⁸

5.30 Given these concerns, IP 30 asked: 'Are ss 80.2 and 80.3 of the *Criminal Code* necessary for the protection of national security or public order within the meaning of art 19(3)?'³⁹

34 Human Rights and Equal Opportunity Commission, *Submission 158 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005.

35 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.

36 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.

37 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), [5.35]–[5.39].

38 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.169].

39 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Question 22.

Submissions and consultations in the ALRC Inquiry

5.31 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 19.⁴⁰ Only the AGD disagreed, simply stating that ‘the Government is satisfied that sections 80.2 and 80.3 of the Criminal Code are consistent with its obligations under international law’.⁴¹

5.32 A number of submissions simply stated that the provisions—either in part or in their entirety—fail the test of necessity.⁴² Others offered a more detailed critique. As summarised below, this criticism falls into three main categories: that there is an insufficient link between the offence provisions in s 80.2 and violence; that the offences are insufficiently clear; and that the existing offence provisions are sufficient.

No link with violence

5.33 In their submissions, the 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.⁴³

5.34 The ALHR, Dr Saul and the non-governmental organisation, ARTICLE 19, submitted that further guidance can be gleaned from the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (the Johannesburg Principles).⁴⁴ The Johannesburg Principles, like other international instruments, can be relevant in statutory construction.⁴⁵ In particular, Principle 6 states that ‘subject to Principles 15 and 16’ (neither of which is relevant here):

40 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; 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.

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

42 Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

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; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

44 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.

45 *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 and Others v Queensland (No. 2)* (1992) 175 CLR 1, [42] (Brennan J, covering the relevance of

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.

5.35 The 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”’.⁴⁶ ARTICLE 19 made a similar argument.⁴⁷ Instead, the s 80.2 offences ‘apply to expression which, viewed objectively, presents no threat whatsoever to the Australian population’. The ALHR submitted that the offences should be redrafted so as to accord with the requirements in the Johannesburg Principles.⁴⁸

5.36 The ALHR was particularly concerned about s 80.2(7) and (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’ may conceivably 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’.⁴⁹

Lack of clarity

5.37 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 citizen 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.⁵⁰

international law more generally); D Williams, ‘Recognising Universal Rights in Australia’ (2001) 24 *University of New South Wales Law Journal* 771, 773.

46 Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

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

48 Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

49 *Ibid.*

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

5.38 ARTICLE 19 submitted that the term ‘assist’ (in s 80.2(7) and (8)) is particularly problematic, in that it is so ‘vague’ as ‘potentially [to] prohibit a wide raft of legitimate speech’.⁵¹

Existing powers sufficient

5.39 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’.⁵² The Chief Minister for the ACT made a similar point, stating that the ‘existing offences ... adequately address incitements to violence and to the extent that the sedition laws go further they cannot be justified’.⁵³ He further 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.⁵⁴

ALRC’s views

5.40 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 remains necessary to check this preliminary judgment against the considerations required by 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,⁵⁵
- any restriction on freedom of expression must not jeopardise the right itself,⁵⁶ and
- the ‘exceptions [in art 19(3) of the ICCPR] are to be construed strictly and narrowly’.⁵⁷

5.41 The ALRC’s concerns about the compatibility of the sedition provisions with art 19 of the ICCPR may be divided into two categories. The first category relates to

51 Ibid.

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

53 Chief Minister (ACT), *Submission SED 44*, 13 April 2006.

54 See Ch 7.

55 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976) art 5(1).

56 United Nations Human Rights Committee, *General Comment 10: Article 19*, 19th session, UN Doc HRI/GEN/1/Rev1 (1983), [4].

57 *Coleman v Power* (2004) 220 CLR 1, 93.

the offences in s 80.2(1), (3) and (5); and the second category relates to the remaining offences in s 80.2(7) and (8).

The offences in section 80.2(1), (3) and (5)

5.42 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 *European Convention on Human Rights 1950*, which is the equivalent of art 19(3) of the ICCPR.⁵⁸ 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 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.⁵⁹

5.43 The ALRC has addressed this concern in Proposals 8–1, 8–3 and 9–2. These proposals, if adopted, would have the effect of amending the offences in s 80.2(1), (3) and (5) to clarify that the proscribed ‘urging’ must be intentional. This would have the benefit of removing the risk that a broader interpretation may be adopted.⁶⁰

The offences in section 80.2(7) and (8)

5.44 The ALRC is concerned that the use of the term ‘assist’ in s 80.2(7) and (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 strict and narrow. The equivalent jurisprudence relating to art 10 of the *European Convention on Human Rights 1950* emphasises that any restriction on freedom of expression must be proportionate to the legitimate objective that parliament is seeking to achieve. An anti-terrorism measure must not, for instance, jeopardise the jurisdiction’s fundamental democratic principles.⁶¹ Similarly, in the Australian context, it has been stated that in ‘reconciling

58 *Sunday Times v United Kingdom* (1979) 2 EHRR 245. See also ARTICLE 19, *Submission SED 14*, 10 April 2006.

59 *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 271.

60 For further explanation of these proposals, see accompanying text in Chs 8 and 9.

61 *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 *European Convention on Human Rights 1950* in Ch 6.

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'.⁶²

5.45 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'.⁶³

5.46 This concern is one of the factors contributing to Proposals 8–8 and 8–9. In particular, the adoption of Proposal 8–8 would mean the repeal of s 80.2(7) and (8).

5.47 Many of the arguments raised in the critique of s 80.2(7) and (8) may also be made in respect of the treason offences in s 80.1(e) and (f). Consequently, the amendment suggested to the offence of treason in Proposal 8–9 would have the effect of clarifying that only *material* 'assistance' is intended to be captured by these offences (as 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 incitements 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.

62 H Lee, P Hanks and V Morabito, *In the Name of National Security: The Legal Dimensions* (1995), 15.

63 *Coleman v Power* (2004) 220 CLR 1, 92–93.

6. Sedition Laws in Other Countries

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Introduction

6.1 An important principle of comparative law is that useful lessons can be drawn from studying how other jurisdictions approach common problems.¹ This chapter examines sedition laws in a number of selected countries, focusing on how other jurisdictions seek to reconcile the need to proscribe seditious conduct with the requirements of international law.²

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 However, the Attorney-General's Department (AGD) has stated that it is necessary to focus on the substance

1 M Glendon, W Gordon and C Osakwe, *Comparative Legal Traditions* (2nd ed, 1994), 10.

2 K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd ed, 1998), 34–35.

3 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.32]–[5.42]. See also C Connolly, 'Five Key Facts on Sedition' (2005) (November/December 2005) *Human Rights Defender (Special Issue)* 20, 20. Connolly states that Canada, Ireland, Kenya, New Zealand, South Africa, Taiwan and the United States have repealed or are in the process of repealing sedition legislation.

of offences in other jurisdictions, rather than mere nomenclature, to determine whether they are ‘sedition’ offences.

While some have commented on a trend in some other countries away from ‘sedition’ offences, this appears to be an observation in relation to the naming of such offences, rather than an observation that the substance of such offences are being removed from the Statute books.⁴

Europe

European Convention on Terrorism

6.3 Two European treaties are particularly relevant to the law of sedition. The first is the Council of Europe’s *Convention on the Prevention of Terrorism* (the European Convention on Terrorism), adopted in 2005.⁵ Article 5 of this Convention requires State parties to establish an offence of ‘public provocation to commit a terrorist offence’,⁶ 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.⁷

6.4 Article 5(2) provides that public provocation to commit a terrorist offence is only an offence when committed ‘unlawfully and intentionally’. Currently, there are 31 signatories to this Convention.

6.5 The Explanatory Report on this 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’⁸ and ‘presenting a terrorist offence as necessary and justified’.⁹

6.6 Dr Ben Saul has commented that the fact that art 5 requires a specific intent to incite the commission of a terrorist offence and a danger that a terrorist offence may be committed means that ‘merely justifying or praising terrorism, without more, is not criminalised’.¹⁰ In addition, Dr Saul has noted that the drafters of this Convention only

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

5 *Council of Europe Convention on the Prevention of Terrorism*, 16 May 2005, CETS 196, (entered into force generally on 16 May 2005).

6 *Ibid* art 5(2).

7 *Ibid* art 5(1).

8 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].

9 *Ibid*, [98].

10 B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 870.

agreed to criminalise provocation because European human rights remedies were available to protect free expression from undue influence.¹¹

European Convention on Human Rights

6.7 The second relevant treaty is 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 ECHR).¹² Australia is not a party to this Convention. However, art 10 is substantially similar to art 19 of the *International Covenant on Civil and Political Rights 1966* (ICCPR),¹³ to which Australia is a party. Thus, the way in which European jurisdictions have approached sedition in light of art 10 of the ECHR is instructive in the Australian context.

6.8 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.

6.9 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'.¹⁴ Thus, to constitute the offence of sedition there must be a nexus 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.

6.10 There has not been a direct challenge to the legitimacy of domestic sedition legislation under the ECHR either in the European Court of Human Rights or in the

11 Ibid, 869–870.

12 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222, (entered into force generally on 3 September 1953).

13 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976). See also the discussion of art 19 of the ICCPR in Ch 7.

14 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.

European Commission of Human Rights.¹⁵ 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 of the ECHR.¹⁶ 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.¹⁷

6.11 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(1) of the ECHR have been interpreted narrowly. However, the context is critical: where the provision in question limits expression of a political nature, that provision is more likely to fall foul of art 10 than other forms of expression.¹⁸

6.12 A number of decisions of the European Court of Human Rights have been particularly protective of political speech.¹⁹ For example, *Vereinigung Demokratischer Soldaten Osterreichs 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.²⁰ 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) of the ECHR.²¹

6.13 In contrast to the protection afforded to political expression, domestic legislation proscribing racial hatred is much less likely to fall foul of art 10 of the ECHR. Professor David Feldman has noted that the ‘weakest protection of all is accorded [by art 10 of the ECHR] to racist expression and the promulgation of racial hatred’.²²

15 E Barendt, *Freedom of Speech* (revised ed, 1996), 158. Professor Barendt states generally 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’.

16 *Piermont v France* (1993) 15 EHRR 76. The issue was raised indirectly because the applicant (the defendant at first instance) 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’.

17 *Ibid.*, 76.

18 D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002), 754.

19 See, eg, *Lingens v Austria* (1986) 8 EHRR 407; *Vereinigung Demokratischer Soldaten Osterreichs 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).

20 *Vereinigung Demokratischer Soldaten Osterreichs and Gubi v Austria* (1995) 20 EHRR 56.

21 This provision is materially equivalent to art 19(3) of the ICCPR. For further discussion, see Ch 7.

22 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.

6.14 On the whole, states have been able to use art 10(2) of the ECHR to criminalise the expression of racist views and hate speech, so long as the tests of legality, necessity and proportionality are satisfied.²³ For example, it is an offence in a number of European countries to publish material denying that the Holocaust took place.²⁴ The European Court of Human Rights has indicated that legislation that prohibits a person from denying the Holocaust will not contravene art 10 of the ECHR if it satisfies the test of proportionality.²⁵

United Kingdom

Common law sedition offences

6.15 The United Kingdom does not have a statutory offence of sedition. However, as discussed in Chapter 3, it has several common law sedition offences such as the offence of uttering seditious words.

6.16 It has been argued that the common law sedition offences require an incitement to cause violence or disorder.²⁶ This is said to give them ‘a public-order aspect’, which probably makes them compatible with art 10 of the ECHR.²⁷ However, a public order offence that detracts from freedom of expression must be ‘strictly necessary’ to avoid contravening art 10 of the ECHR.²⁸

6.17 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.²⁹ Further, the Law Commission stated that:

23 See *Jersild v Denmark* (1994) 19 EHRR 1.

24 See, eg, the relevant German legislation: *Penal Code* s 130(3) which 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* (2006) <http://www.hreoc.gov.au/Human_RightS/briefs/brief_4.html#hr4.30> at 14 March 2006.

25 A good summary of the relevant case law can be found in 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.

26 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.

27 D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002), 898.

28 See, eg, *Percy v DPP* [2002] Crim LR 835, 835.

29 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) (Sum) *Public Law* 128, 147.

it 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'.³⁰

6.18 There have been relatively few prosecutions of sedition offences in the United Kingdom during the 20th century—fewer even than in Australia.³¹ It has been argued that sedition offences have been 'superseded by public-order legislation, including the statutory crime of inciting racial hatred'.³²

6.19 The most recent sedition case in the United Kingdom was *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury*.³³ 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.³⁴

The encouragement or glorification of terrorism offence

6.20 As noted above, there is no statutory offence of sedition in the United Kingdom. However, in April 2006 legislation came into force making it an offence to encourage or glorify terrorism.³⁵ In Issues Paper 30 (IP 30) the ALRC asked whether there was a need for a similar offence in Australia.³⁶

6.21 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.

30 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].

31 L Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287, 294. See also E Barendt, *Freedom of Speech* (revised ed, 1996), 155.

32 D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002), 899.

33 *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* [1991] 1 QB 429.

34 *Ibid*, 453.

35 *Terrorism Act 2006* (UK).

36 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Question 9.

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- (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—
- (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; ...

6.22 The concept of glorification is defined to include ‘any form of praise or celebration, and cognate expressions are to be construed accordingly’.³⁷ Section 2 of the Act creates a separate offence of ‘dissemination of terrorist publications’, which relies also on the concept of glorification.³⁸

6.23 The creation of an offence of encouraging or glorifying terrorism was controversial.³⁹ An offence of condoning or glorifying terrorism was initially included in the Racial and Religious Hatred Bill 2005 (UK). However, it was heavily criticised⁴⁰ and abandoned prior to enactment.⁴¹ 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).⁴² 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. The European Convention on Terrorism provided some impetus for encouragement of terrorism offences.⁴³ However, s 1(5)(a) of the *Terrorism Act 2006* makes it clear that it is not limited by the scope of this Convention.

6.24 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’.⁴⁴

6.25 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

37 *Terrorism Act 2006* (UK) s 20(2).

38 There are also other references to ‘glorification’. See Ibid ss 3 and 21.

39 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.

40 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.

41 See *Racial and Religious Hatred Act 2006* (UK).

42 B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 871.

43 Ibid, 871.

44 R Dahrendorf, *Free Speech on Trial* (2005) Project Syndicate <<http://www.project-syndicate.org/commentary/dahrendorf45>> at 27 February 2006.

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.⁴⁵

6.26 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’.⁴⁶

Submissions and consultations

6.27 In the current Inquiry, those stakeholders who commented on this issue unanimously opposed the introduction of a new offence of the encouragement or glorification of terrorism in Australia. The AGD informed the ALRC that it did not presently have any intention of enacting such an offence.⁴⁷ 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.⁴⁸

6.28 ARTICLE 19 submitted that criminalising the glorification of terrorism violates the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* because ‘there is an insufficient connection between the speech and a likelihood of imminent violence’.⁴⁹ 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.⁵⁰

6.29 Dr Saul submitted that introduction of a glorification offence would be particularly undesirable ‘in the absence of any entrenched protection of human rights in

45 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.

46 E Barendt, ‘Threats to Freedom of Speech in the United Kingdom’ (2005) 28 *University of New South Wales Law Journal* 895, 896–897.

47 Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006; Australian Government Attorney-General’s Department, *Consultation*, Canberra, 26 April 2006.

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

49 ARTICLE 19, *Submission SED 14*, 10 April 2006. The Johannesburg Principles are discussed in Ch 7.

50 Ibid.

Australia'.⁵¹ 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.⁵²

ALRC's views

6.30 The ALRC agrees that it is undesirable to introduce an offence of 'glorification' or 'encouragement' of terrorism. The term 'glorification' is vague and is not used elsewhere in the *Criminal Code*. However, 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 there is a risk that such praise might lead a person to engage in a terrorist act.⁵³

6.31 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.⁵⁴ 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.

6.32 Further, an offence of glorification of terrorism could represent an unwarranted incursion into freedom of expression and the constitutionally protected freedom of political discourse.⁵⁵ In the United Kingdom, courts must interpret statutory provisions so that they are consistent with the human rights protections in the ECHR.⁵⁶ 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.

Proposal 6-1 There is no need to introduce into federal law an offence of 'encouragement or glorification of terrorism', along the lines of that in s 1 of the *Terrorism Act 2006* (UK).

51 B Saul, *Submission SED 52*, 14 April 2006.

52 Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

53 *Criminal Code* (Cth) s 102.1(1A)(c).

54 See especially *Ibid* s 102.1(2).

55 See Ch 7.

56 *Human Rights Act 1998* (UK) s 3.

United States of America

Background

6.33 The *Sedition Act* of 1798 was the first piece of legislation proscribing sedition in the United States.⁵⁷ Since the passage of this Act, the offence of sedition has been removed from the statute books from time to time and has fallen into disuse at other times.⁵⁸ Sedition prosecutions were common in the United States during World War I and immediately following World War II.⁵⁹ However, ‘modern-day sedition trials are almost unheard of’ in the United States.⁶⁰

6.34 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*.⁶¹ Professor Chafee has stated that a common defect in sedition laws, and one that is arguably not limited to the United States, is that their operation is unpredictable:

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.⁶²

6.35 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 “seditious” utterances or acts has virtually no limit’. Accordingly, the provision fell foul of the First Amendment protection of free speech.⁶³ Brennan J held that it cast ‘a pall of orthodoxy’⁶⁴ enabling selective prosecution of people who articulated views critical of the government. This has been described in the United States literature as ‘viewpoint discrimination’.⁶⁵

6.36 The most recent Supreme Court case dealing with the constitutionality of sedition law is *Brandenburg v Ohio* in 1969.⁶⁶ In this case, the Court refined and

57 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.

58 For a detailed account 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).

59 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.

60 *Ibid.*, 202.

61 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.’

62 *Brandenburg v Ohio* 395 US 444 (1969); Z Chafee, *Free Speech in the United States* (2nd ed, 1954), 459.

63 *Keyishian v Board of Regents* 385 US 589 (1967), 598–599 (Brennan J).

64 *Ibid.*, 603.

65 See I Hare, ‘Method and Objectivity in Free Speech Adjudication: Lessons from America’ (2005) 54 *International and Comparative Law Quarterly* 49, 57.

66 *Brandenburg v Ohio* 395 US 444 (1969).

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.⁶⁷ 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’.⁶⁸

Current sedition offence

6.37 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.⁶⁹

6.38 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 the text of § 2384. This may be ‘because the word “seditious” in and of itself does not sufficiently convey what conduct it forbids’.⁷⁰

6.39 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 to undertake subversive activities, such as plotting to blow up the headquarters of the United Nations and other buildings in New York City, during his sermons. In his sermons he 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’.⁷¹ Further, he

67 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.

68 See, eg, *Cohen v California* 403 US 15 (1971), 20.

69 *Crimes and Criminal Procedure Code of 1948* (1994) 18 USC § 2384.

70 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.

71 *United States v Rahman* 189 F 3d 88 (1999), 104.

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’.⁷²

6.40 Rahman’s sentence and the constitutionality of § 2384 were affirmed by the Court of Appeals for the Second Circuit.⁷³ The Court of Appeals held that the fact that his speech or conduct was ‘religious’ did not immunise him from prosecution under generally applicable criminal statutes.⁷⁴

6.41 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’.⁷⁵

The Smith Act

6.42 The *Alien Registration Act* of 1940, or ‘Smith Act’,⁷⁶ has been described as the ‘companion statute’ to the law on seditious conspiracy.⁷⁷ 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

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.⁷⁸

72 Ibid, 107.

73 Ibid.

74 Ibid, 117.

75 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.

76 Named after Representative Howard W Smith of Virginia.

77 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.

78 *Crimes and Criminal Procedure Code of 1948* (1994) 18 USC § 2385.

6.43 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’.⁷⁹ Purely ‘academic discussion’ is not enough to support a prosecution.⁸⁰ 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’.⁸¹ The constitutionality of the Smith Act was affirmed by the United States Supreme Court in 1951.⁸² 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’.⁸³

Hong Kong

6.44 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 so as 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.

6.45 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 2003⁸⁴—‘the largest protest march ever held against the Hong Kong government’.⁸⁵ Ultimately, the Bill was withdrawn from the Legislative Council.

79 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.

80 *Ibid.*, 235.

81 *Ibid.*, 231.

82 *Dennis v United States* 341 US 494 (1951).

83 *Yates v United States* 354 US 298 (1957), 325.

84 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.

85 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.

6.46 Accordingly, Hong Kong retains colonial era offences of sedition, which criminalise any seditious act, seditious words or dealings with a seditious publication.⁸⁶ 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;
- (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.

6.47 This offence was used by the colonial authority to suppress internal dissent.⁸⁷ It has been described as ‘archaic’, out of step with ‘a narrower definition to comport with the stability of most modern states’,⁸⁸ and ‘draconian’.⁸⁹ It is also said to have a ‘chilling effect on free speech’.⁹⁰ The offence was used in the 1960s, but rarely thereafter.⁹¹

6.48 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. Thus it presents a relatively low bar to prosecution.⁹² The Bill that was proposed to implement art 23 of

86 *Crimes Ordinance* (HK) ss 10(1) and (2).

87 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.

88 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.

89 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].

90 *Ibid.*, [7].

91 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.

92 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.

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.⁹³

Canada

6.49 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]?’⁹⁴

6.50 This 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*,⁹⁵ 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.⁹⁶

6.51 Nevertheless, sedition remains a part of Canadian criminal law.⁹⁷ However, 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.

Other countries

6.52 Prosecutions for sedition are relatively rare. Nevertheless, they still occur from time to time in other countries. The following is a brief, representative 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.

6.53 There have been very few recent reported cases of sedition in Europe or North America (other than the United States case of *Rahman* discussed above). Rather, it appears that sedition is now viewed as an outdated and inappropriate offence. For

93 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.

94 Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 35–36.

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

96 Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 36.

97 *Criminal Code 1985* (Canada) ss 59–61.

example, on 3 May 2006, 78 people of German descent convicted of sedition during World War I in the United States state of Montana were posthumously pardoned.⁹⁸

6.54 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.⁹⁹ 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'.

6.55 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 therefore more closely analogous to the Australian sedition offences that are the subject of this Inquiry.¹⁰⁰

6.56 These offences have been 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.¹⁰¹ 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.¹⁰²

6.57 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

98 For a detailed 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>.

99 See report in 'Jail Threatened Over Islam Insults', *The Australian* (online), 21 March 2006, <www.theaustralian.news.com.au>.

100 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).

101 H Bryant, L Macale and N Lee, "'No" to the Dark Days', *Philippine Journalism Review Reports*, March 2006, 10.

102 See G Mabutas, 'Publisher Wants Charge Dismissed', *Manila Bulletin Online* (online), 10 May 2006, <<http://www.mb.com.ph/issues/2006/05/10/MTNN2006051063599.html>>.

by one third. However, ‘expressions of thought intended to criticize shall not constitute a crime’.¹⁰³

6.58 It has been reported that at least 29 journalists have been charged under art 301,¹⁰⁴ 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.¹⁰⁵ However, in May 2006, a judge acquitted the defendants of the sedition charges after a prosecutor said the two men had used their right to free speech in the report.

103 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/ENGEUR440032006?open&of=ENG-TUR>> at 24 April 2006.

104 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.

105 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/ENGEUR440032006?open&of=ENG-TUR>> at 24 April 2006.

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 Most 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)

¹ The term 'bill of rights' is used here as a shorthand expression to describe any legislative or constitutional instrument that purports to list and offer legal protection to basic human rights.

currently possesses a bill of rights—and so (except in the ACT) 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 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 infringe too much on freedom of expression.
- The sedition provisions provide 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 or importance.

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 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 vague and, if interpreted broadly, may cover satire and ridicule, which ought not to be proscribed.

7.6 Some of these concerns are interrelated. All are addressed in greater detail in this chapter, along with consideration of some proposed solutions.

Freedom of expression and the *Constitution*

7.7 The *Australian 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 discourse.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

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.

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 *Australian Constitution*: Gilbert & Tobin Centre of Public Law, *Submission 80 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 10 November 2005.

7 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

8 *Ibid*, 567.

9 *Coleman v Power* (2004) 220 CLR 1, 78.

7.10 Some stakeholders expressed concern in this Inquiry that the sedition provisions may be unconstitutional. The joint submission of John Fairfax Holdings Ltd (Fairfax), News Ltd and Australian Associated Press (AAP), with which the Australian Broadcasting Corporation (ABC) agreed,¹⁰ argues 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 argues 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 view

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

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, which was endorsed in Australian Broadcasting Corporation, *Submission SED 49*, 20 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 Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.75].

7.14 The second proposition is that this 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 proposed 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 for freedom of political discourse, such as *Lange*, 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 Australian Government Attorney-General’s Department (AGD)

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 only permitted to have regard to such explanatory material as is produced prior to the enactment of the statutory provisions that the court is construing: *Ibid* s 15AB(2).

and the Attorney-General of Australia have sought to make clear that it was not the intention of the government 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 (then draft) 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 At 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 for freedom of political communication, as it has been articulated by the High Court. However, even if the Crown advocated a contrary interpretation in a prosecution for 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) and (8)

7.21 The ALRC is also of the view that the offences in s 80.2(7) and (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’. It is certainly conceivable that, if a court took a broad view of the word ‘assist’ in subsections (7) and (8), some forms of assistance to an enemy of Australia or 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 these provisions satisfy the second limb of the *Lange* test. Certainly, 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 See *Acts Interpretation Act 1901* (Cth) s 15A.

24 The ALRC proposes, for other reasons, that s 80.2(7) and (8) be repealed. See Ch 8, Proposal 8–8.

7.23 The High Court decision in *Coleman v Power* is relevant here.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) and (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) and (8). Putting to one side the

25 *Coleman v Power* (2004) 220 CLR 1.

26 This provision was amended by the Queensland Parliament 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 conceive of a person being prosecuted under s 80.2(7) or (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 proposal 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) and (8), and their overlap with the substantially similar provisions in s 80.1(1)(e)–(f) of the *Criminal Code* concerning treason. In Chapter 8, the ALRC proposes the repeal of s 80.2(7) and (8), and reform aimed at rationalising and narrowing the related treason provisions.

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

7.31 On the whole, responses to this question indicated no great concern about inconsistency between the sedition provisions and domestic human rights legislation.³⁴ 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 offences of general application means that there is no substantive inconsistency with federal human rights legislation.³⁵

31 See the discussion in Chs 2, 8 and 10 on the discretion of the Director of Public Prosecutions to refuse to prosecute, and the likely interpretation of the offence and defence provisions.

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 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.

35 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 31 March 2006.

7.32 The AGD rejected any suggestion that the sedition provisions are inconsistent with any 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.³⁶

ALRC’s view

7.33 Putting to one side the question whether the sedition provisions are compatible with the *International Covenant on Civil and Political Rights 1966* (ICCPR), which is discussed in Chapter 5, the ALRC sees 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 proposed by the ALRC were adopted.

Risk of unfair or discriminatory application of sedition laws

7.34 In IP 30, 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. IP 30 asked whether this was a problem and, if so, what legal or administrative steps should be taken to address it.³⁷

7.35 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). There are also protections afforded by other federal laws dealing with discrimination in particular circumstances,³⁸ and by state and territory anti-discrimination laws.³⁹

7.36 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

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

37 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Question 24.

38 See, eg, *Human Rights and Equal Opportunity Commission Act 1986* (Cth); *Workplace Relations Act 1996* (Cth) s 222.

39 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).

another person on the basis of certain grounds, such as X's national origin.⁴⁰ 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.⁴¹

Submissions and consultations

7.37 Submissions to the Inquiry demonstrate a concern that the sedition provisions, in their application, may have an unfair or indirectly discriminatory impact on certain groups within the Australian community, particularly those who are already disadvantaged or marginalised.⁴² The AGD does 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'.⁴³

7.38 Some of those critical of the provisions argue that this is an inevitable incident of the legislative framework. For example, the Federation of Community Legal Centres (Federation of CLCs) submits:

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.⁴⁴

7.39 A similar point is made by the New South Wales Young Lawyers Human Rights Committee, and others, who point to the fact that public order offences, and particularly those directed 'against publicly insulting or offensive speech', historically have been disproportionately and unfairly enforced.⁴⁵

7.40 A number of stakeholders assert that there has been disproportionate 'targeting' of individuals of Muslim faith or those of Middle Eastern origin,⁴⁶ and a rise in

40 *Racial Discrimination Act 1975* (Cth) s 9(1).

41 *Ibid* s 9(1A).

42 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.

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

44 Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006.

45 New South Wales Young Lawyers Human Rights Committee, *Submission SED 38*, 10 April 2006. See also E Nekvapil, *Submission SED 45*, 13 April 2006.

46 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.

Australia and other western countries of what has been termed ‘Islamophobia’. The Australian Muslim Civil Rights Advocacy Network (AMCRAN) describes this as a form of ‘social exclusion’.⁴⁷ The Federation of CLCs submits:

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.⁴⁸

7.41 The Public Interest Advocacy Centre (PIAC) states that the establishment of a permanent police taskforce to work in Muslim communities in south-west Sydney has caused greater scrutiny of this section of the broader community. PIAC submits that this, coupled with the fact that s 80.2 only requires the Attorney-General to give consent to the prosecution of a sedition offence (with no such consent 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’.⁴⁹

7.42 The Combined Community Legal Centres Group (NSW) Inc cites the concluding observations of the Committee on the Elimination of Racial Discrimination, 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.⁵⁰

7.43 AMCRAN expresses 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’.⁵¹

47 Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

48 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.

49 Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

50 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].

51 Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

Suggestions for reform

7.44 Suggestions have been made to counteract the threat of unfair enforcement of the sedition offences. These fall into two categories: education and external monitoring.

7.45 In relation to the former, it is suggested in submissions 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’,⁵² and that law enforcement authorities be given more cross-cultural training.⁵³ Emrys Nekvapil submits 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’.⁵⁴

7.46 The AGD also recognises 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 across the organisation to all employees, with the first of many courses commencing this financial year.⁵⁵

7.47 In relation to monitoring, PIAC submits 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’.⁵⁶ Similarly, Emrys Nekvapil suggests 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’.⁵⁷

7.48 The AGD notes 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.⁵⁸ It also would be possible to take a complaint to the Commonwealth Ombudsman or to seek disciplinary action against an Australian Federal Police officer.

52 E Nekvapil, *Submission SED 45*, 13 April 2006.

53 B Saul, *Submission SED 52*, 14 April 2006.

54 E Nekvapil, *Submission SED 45*, 13 April 2006.

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

56 Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

57 E Nekvapil, *Submission SED 45*, 13 April 2006.

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

ALRC's view

7.49 One concern of the ALRC is the risk that the choice about the categories of people prosecuted for a seditious offence may be tainted by politics. As outlined in Chapter 3, the law of seditious historically has been used to criminalise political dissent in a manner that seems incompatible with contemporary notions of free speech in a liberal democracy.

7.50 The ALRC considers that this risk can be dealt with in two ways. First, it proposes that the term 'seditious' be removed from the statute book, thereby severing the tie with the old jurisprudence, which pays insufficient regard to freedom of expression and freedom of association.⁵⁹ Secondly, the ALRC proposes repeal of the current provisions dealing with consent to prosecutions. The ALRC endorses the independent role of the Commonwealth Director of Public Prosecutions (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 about whether or not to prosecute.⁶⁰

7.51 The ALRC is of the view that the legislation is itself neither directly nor indirectly discriminatory. As Gummow, Hayne and Heydon JJ stated in *Purvis v New South Wales*, 'the requirement for equality of treatment' is 'central to the operation of ... the *Racial Discrimination Act 1975*'. A 'central purpose' of the Act 'is to require that people not be treated differently' on the grounds prescribed in the Act.⁶¹ It cannot reasonably be said that the statutory provisions that are the subject of this inquiry promote an object, or tend towards consequences, inconsistent with the operative purpose of the RDA. Although the seditious offences are not structured so 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.

7.52 The ALRC is conscious of the genuinely held concern that the seditious 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 seditious provisions is through education and related strategies.⁶² For this reason, the ALRC proposes that the Australian Government should continue to pursue strategies, such as educational programs, to promote inter-communal harmony and understanding.

59 See Ch 2 and Proposals 2-1 and 2-2.

60 See Ch 8 and Proposal 8-12.

61 *Purvis v New South Wales* (2003) 217 CLR 92, 153-154.

62 See Ch 9 and Proposal 9-4.

Absence of bills of rights in Australia

7.53 As previously noted, the ACT is the only Australian jurisdiction that currently possesses a bill of rights.⁶³ 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.

7.54 The Chief Minister of the ACT submits 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’. Also, ‘assist’ in s 80.2(7) and (8) ‘is too wide and too imprecise’. Fourthly, the defences do not provide adequate protection for legitimate expression.⁶⁴

7.55 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 received its second reading speech on 4 May 2006.⁶⁵ The Bill is designed to ‘establish a framework for the protection and promotion of human rights’, based on those contained in the ICCPR.⁶⁶ The Bill 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

⁶³ *Human Rights Act 2004* (ACT).

⁶⁴ Chief Minister (ACT), *Submission SED 44*, 13 April 2006.

⁶⁵ Charter of Human Rights and Responsibilities Bill 2006 (Vic).

⁶⁶ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic).

- (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
 - (b) for the protection of national security, public order, public health or public morality.⁶⁷

7.56 Governments in Tasmania, Western Australia and New South Wales also have indicated that they may consider the introduction of bills of rights.⁶⁸ 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.⁶⁹

7.57 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,⁷⁰ Germany⁷¹ and South Africa⁷²—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.

7.58 Other jurisdictions recognise freedom of expression in statutory bills of rights, such as those of the United Kingdom⁷³ and New Zealand.⁷⁴ Irrespective of whether it is protected by a constitutional or a statutory bill of rights, freedom of expression in these jurisdictions tends to be conceived, and protected, in a manner that is broadly consistent with the approach taken in art 19 of the ICCPR.⁷⁵ In other words, freedom of

67 Charter of Human Rights and Responsibilities Bill 2006 (Vic), cl 15.

68 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.

69 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.

70 *Canadian Charter of Rights and Freedoms* s 2(b).

71 *Basic Law* art 5(1).

72 *Constitution of the Republic of South Africa 1996* s 16.

73 *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.

74 *New Zealand Bill of Rights Act 1990* (NZ) ss 13–14.

75 *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.

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.

7.59 Submissions and consultations express a concern that the sedition provisions are made more problematic by the absence of a federal bill of rights in Australia.⁷⁶ Some express this concern in general terms, with the argument essentially being that a bill of rights would provide an important counter-balance to any undesirable incursions that the sedition provisions might make on people's human rights.⁷⁷

7.60 Another concern expressed is 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.⁷⁸

ALRC's view

7.61 It may be the case that the presence of a bill of rights would provide some safeguards against the unwarranted and undesirable incursion of anti-terrorism measures into individuals' human rights. However, the question whether Australia should enact a bill of rights falls well outside the Terms of Reference in this Inquiry and the ALRC does not express any opinion on this matter.

7.62 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.⁷⁹ 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 individual human rights.

7.63 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. The absence of a federal bill of rights heightens the need for legislation to be carefully considered—both prior to enactment in Parliament and when the law is subject to later review—in order to ensure that the provisions do not breach fundamental human rights, as recognised, for instance, in the ICCPR.

Sedition and freedom of expression generally

7.64 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.

76 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.

77 See, eg, Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

78 E Nekvapil, *Submission SED 45*, 13 April 2006.

79 See, in particular, the discussion in Ch 6.

7.65 As a general proposition, this is neither unique nor illegitimate. For instance, 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:

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...⁸⁰

7.66 The question is whether the 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 of people who are said to be at particular risk of being affected include academics,⁸¹ political activists, religious leaders and dissidents more generally.

Submissions and consultations

7.67 Many stakeholders argue 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.⁸² This criticism often is linked to the more specific concern that the offences may be interpreted broadly, and unduly infringe upon freedom of expression.⁸³

⁸⁰ *James v Commonwealth* (1936) 55 CLR 1, 56.

⁸¹ See Australian Vice-Chancellor's Committee, *Submission SED 60*, 25 April 2006.

⁸² S Smith, *Submission SED 04*, 24 March 2006; B Ho, *Submission SED 07*, 9 March 2006; A Spathis, *Submission SED 17*, 10 April 2006; The 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; Chief Minister (ACT), *Submission SED 44*, 13 April 2006; Australian Press Council Office, *Submission SED 48*, 13 April 2006; Australian Screen Directors Association Limited, *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-Chancellor's Committee, *Submission SED 60*, 25 April 2006; Media and Arts Organisations, *Consultation*, Sydney, 29 March 2006; Media Organisations, *Consultation*, Sydney, 28 March 2006.

⁸³ 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; 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,

7.68 AMCRAN submits 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’.⁸⁴ AMCRAN observes:

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.⁸⁵

7.69 There is particular concern about s 80.2(7) and (8), with a number of people arguing that these provisions are too broad, inhibiting freedom of expression to an unwarranted degree.⁸⁶ The National Association for the Visual Arts (NAVA) submits:

[O]rganizers 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.⁸⁷

The New South Wales Council for Civil Liberties and the Fitzroy Legal Service offer similar examples,⁸⁸ and argue that criminalising such activity would be fundamentally anti-democratic.

7.70 Most critics of s 80.2(7) and (8) argue for repeal.⁸⁹ Others put as their preferred position⁹⁰—or as a second preference if repeal is unavailable⁹¹—that these provisions should be amended to ensure they only capture conduct intended to lead to violence.

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-Chancellor’s Committee, *Submission SED 60*, 25 April 2006; N Roxton Shadow Attorney-General, *Submission SED 63*, 28 April 2006; Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 31 March 2006; Human Rights Lawyers, *Consultation*, Sydney, 29 March 2006; Media Organisations, *Consultation*, Sydney, 28 March 2006.

84 Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

85 Ibid.

86 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 Office, *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.

87 National Association for the Visual Arts, *Submission SED 30*, 11 April 2006.

88 New South Wales Council for Civil Liberties Inc, *Submission SED 39*, 10 April 2006; Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006.

89 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.

90 Australian Major Performing Arts Group, *Submission SED 61*, 16 April 2006; N Roxton Shadow Attorney-General, *Submission SED 63*, 28 April 2006.

91 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 Office, *Submission SED 48*, 13 April 2006;

7.71 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.⁹²

ALRC's view

7.72 Among the provisions that are the subject of this Inquiry, s 80.2(7) and (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.⁹³

7.73 For these reasons, and those discussed in Chapter 8, the ALRC proposes the repeal of s 80.2(7) and (8). Further, the ALRC proposes 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 that the defendant has materially assisted an enemy to wage war—for instance, by way of funds, troops, armaments or strategic information.⁹⁴

7.74 As discussed in detail in Chapters 8 to 10, the ALRC also proposes reframing the elements required for liability under s 80.2(1), (3) and (5) of the *Criminal Code*. In conscious recognition of the need for clear protection for freedom of expression, the ALRC proposes that the prosecution should be required to prove that the person intended that the force or violence urged will occur (Proposal 8–1). Under Proposal 10–2, the trier of fact, in considering this element of the offence, would be asked to consider the context—that is, whether the conduct in question was done: in connection with the performance or exhibition of an artistic work; as part of any

Australian Screen Directors Association Limited, *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.

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

93 H Lee, P Hanks and V Morabito, *In the Name of National Security: The Legal Dimensions* (1995), 17.

94 See Proposals 8–8 and 8–9, and accompanying text in Ch 8.

discussion or debate in pursuit of any genuine academic, artistic or scientific purpose, or for any other genuine purpose in the public interest; in connection with an industrial dispute or an industrial matter; or in publishing a report or commentary about a matter of public interest.

Journalism and the arts

7.75 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.

Journalists

7.76 Submissions to the Inquiry identify 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.⁹⁵ 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.⁹⁶

7.77 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

95 Media Entertainment and Arts Alliance, *Submission SED 28*, 10 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006; Australian Screen Directors Association Limited, *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-Chancellor’s Committee, *Submission SED 60*, 25 April 2006; N Roxton Shadow Attorney-General, *Submission SED 63*, 28 April 2006; Media Organisations, *Consultation*, Sydney, 28 March 2006; Human Rights Lawyers, *Consultation*, Sydney, 29 March 2006.

96 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.

community to publicly express their views and their opposition to government actions and programs'.⁹⁷ The Media, Entertainment and Arts Alliance (MEAA) submit:

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.⁹⁸

7.78 Another concern relates to the potential breadth of the 'urging' offences in s 80.2 of the *Criminal Code*. The MEAA ask whether journalists 'who directly quote other people in their stories' are likely to commit an urging offence, albeit 'unwittingly'.⁹⁹ Fairfax, News Ltd and AAP express 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"'.¹⁰⁰

7.79 Thirdly, the offences of assisting the enemy in s 80.2(7) and (8) are potentially so broad as to capture conduct that ought not to be criminalised. The MEAA hypothesises 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'.¹⁰¹

7.80 The AGD reject 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.¹⁰²

97 Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

98 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.

99 Media Entertainment and Arts Alliance, *Submission SED 28*, 10 April 2006. See also Free TV Australia, *Submission SED 59*, 19 April 2006.

100 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.

101 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.

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

7.81 The AGD's submission also points out that, in any event, under existing law 'the defence of good faith would protect journalists and media organisations that act in good faith'.¹⁰³

The arts

7.82 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.¹⁰⁴ There was a concern that the offences may be interpreted so as to criminalise certain forms of satire, parody and ridicule.¹⁰⁵

7.83 The Australian Writers' Guild submit 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.¹⁰⁶

7.84 The Arts Law Centre of Australia submit 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'.¹⁰⁷

7.85 A further risk—one that NAVA submits is already a reality—is that those who facilitate the exhibition and performance of artistic works (gallery owners, theatre

103 Ibid.

104 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, *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; Chief Minister (ACT), *Submission SED 44*, 13 April 2006; Arts Law Centre of Australia, *Submission SED 46*, 13 April 2006; Australian Press Council Office, *Submission SED 48*, 13 April 2006; Australian Screen Directors Association Limited, *Submission SED 51*, 10 April 2006; Media and Arts Organisations, *Consultation*, Sydney, 29 March 2006.

105 Media and Arts Organisations, *Consultation*, Sydney, 29 March 2006; The 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 Roxton Shadow Attorney-General, *Submission SED 63*, 28 April 2006.

106 Australian Writers' Guild, *Submission SED 29*, 11 April 2006. A similar point is made in Australian Press Council Office, *Submission SED 48*, 13 April 2006.

107 Arts Law Centre of Australia, *Submission SED 46*, 13 April 2006.

companies etc) will refuse to deal with certain works if they are fearful that they may be interpreted as being seditious.¹⁰⁸

7.86 During consultations, a number of hypothetical scenarios were raised. Some stakeholders express the fear that mere discussion of certain matters related to terrorism could be caught by the new sedition provisions. NAVA offers the following hypothetical example:

[A]n 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.¹⁰⁹

7.87 The Cameron Creswell Agency Pty Ltd is 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.¹¹⁰

7.88 NAVA offer 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.¹¹¹

7.89 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.¹¹²

108 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'.

109 Ibid.

110 The Cameron Creswell Agency Pty Ltd, *Submission SED 26*, 10 April 2006. See also Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

111 National Association for the Visual Arts, *Submission SED 30*, 11 April 2006.

112 Arts Law Centre of Australia, *Submission SED 46*, 13 April 2006; Australian Screen Directors Association Limited, *Submission SED 51*, 10 April 2006.

Suggestions for reform

7.90 A number of stakeholders propose legislative reform to dilute the potential negative impact of the sedition provisions. NAVA favours repealing the offences in s 80.2 of the *Criminal Code* but argues 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’.¹¹³

7.91 NAVA proposes a program of education and policy to augment legislative reform in this area, stating:

[T]he 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.¹¹⁴

ALRC’s view

7.92 As noted above, the ALRC proposes removal of the concept—and historical legacy—of ‘sedition’ from Australian criminal law.¹¹⁵ Chapters 8 to 10 contain a range of proposals aimed at tightening the elements and interpretation of the ‘urging force or violence’ offences in order to minimise any effects on freedom of expression. Specific recognition is given to the nature of the work of journalists, artists, academics, social critics and others.

7.93 Taken together, Proposals 8–1 and 10–2 require the prosecution to prove that the person intended that the force or violence they urged will occur—and 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. Proposal 8–9 makes clear that the treason offences relating to ‘assisting the enemy’ deal with the provision of *material* assistance (guns, funds, intelligence) rather than with the expression or reporting of dissenting views.

7.94 Finally, Proposal 11–1 calls for the repeal of the provisions in Part IIA of the *Crimes Act* concerning unlawful associations, which should remove concerns by universities, theatre owners, art galleries and others that they might be prosecuted for hosting conduct by others that has an underlying ‘seditious intention’.

113 National Association for the Visual Arts, *Submission SED 30*, 11 April 2006.

114 *Ibid.*

115 Proposals 2–1 and 2–2.

8. Offences Against Political Liberty

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Introduction

8.1 This chapter presents the ALRC's proposals for reform of four of the five existing sedition offences, which were inserted in s 80.2 of the *Criminal Code* (Cth)

(*Criminal Code*) 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;²
- urging another person to interfere in Parliamentary elections by force or violence;³
- urging another person to assist an enemy at war with Australia;⁴
- urging another person to assist those engaged in armed hostilities against the Australian Defence Force (ADF).⁵

8.2 Issues solely concerning reform of s 80.2(5), which deals with urging inter-group violence⁶—and with its relationship with offences under anti-vilification legislation—are dealt with separately in Chapter 9.

8.3 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 retention of the offences is justified, the focus should be on the urging of force or violence and they should be characterised as offences against political liberty and public order.

8.4 The ALRC proposes to retain, in a modified form, 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;⁷ and to repeal the offences dealing with urging a person to assist the enemy or those engaged in armed hostilities with the ADF.⁸ In connection with the latter, the ALRC also proposes amendments to the treason offences set out in s 80.1 of the *Criminal Code*.

8.5 Aspects of the framing of the offences, both present and proposed, are discussed in detail. 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 of other offences;⁹ the role of intention and recklessness as fault elements; and the interpretation of certain terms used in the provisions. The chapter discusses

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 proposed in this Discussion Paper, are set out in Appendix 2.

2 *Criminal Code* (Cth) s 80.2(1).

3 *Ibid* s 80.2(3).

4 *Ibid* s 80.2(7).

5 *Ibid* s 80.2(8).

6 *Ibid* s 80.2(5).

7 *Ibid* s 80.2(1), (3).

8 *Ibid* s 80.2(7), (8).

9 That is, the offence of incitement under *Ibid* s 11.4.

matters that are common to more than one of the present offences before dealing, in turn, with reform of each specific offence.¹⁰

8.6 The chapter also examines the extraterritorial application of these offences and the requirement for the Attorney-General to consent to prosecution.

Incitement and the sedition offences

8.7 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 4. 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 concerning causing harm to Commonwealth officials under Part 7.8 of the *Criminal Code*;
- offences against the government under Part II of the *Crimes Act 1914* (Cth) (*Crimes Act*);
- 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
- standard criminal offences prohibiting harm, or threats of harm, against persons or property.

8.8 Part 2.4 of the *Criminal Code* provides extensions of 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.

10 The offences in s 80.2(7) and (8) are dealt with together.

- (2) For the person to be guilty, the person must intend that the offence incited be committed.

8.9 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.¹¹ 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.¹²

Incitement and ulterior intention

8.10 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.¹³ The requirement that the prosecution prove an ulterior intention arguably is equivalent to a requirement of proof of purpose.¹⁴ In the context of incitement to commit an offence, the requirement of an ulterior intention requires proof beyond reasonable doubt that it was the offender’s object to induce commission of the offence incited.¹⁵

8.11 In contrast, the sedition offences do not require an ulterior intention that the conduct incited be committed.¹⁶ 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 an example.

8.12 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;¹⁷ 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.

11 See, eg, J Goldring, *Submission SED 21*, 5 April 2006.

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

13 I Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney-General’s Department and Australian Institute of Judicial Administration, 1 March 2002, 61.

14 Ibid, 61, referring to *Chew v The Queen* (1991) 173 CLR 626.

15 I Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney-General’s Department and Australian Institute of Judicial Administration, 1 March 2002, 273.

16 This also stands in contrast to the repealed *Crimes Act 1914* (Cth) 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.

17 *Criminal Code* (Cth) s 100.1(2).

8.13 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.¹⁸

8.14 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.

8.15 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,¹⁹ incitement requires a connection to a 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.²⁰

8.16 Interestingly, 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;²¹ making documents likely to facilitate terrorist acts;²² or doing any acts in preparation or planning for terrorist acts;²³ are the kinds of conduct that, in other contexts, would be caught by attempt, complicity and common purpose, incitement or conspiracy.²⁴

Connection with a specific offence

8.17 It was noted in Issues Paper 30 (IP 30) that the framing of the new sedition offences was aimed at overcoming the obstacle posed by the requirement to show a

18 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 through the plan; or the building that is to be attacked has burned down already.

19 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].

20 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.

21 *Criminal Code* (Cth) s 101.4.

22 Ibid s 101.5.

23 Ibid s 101.6.

24 Under Ibid Part 2.4.

connection to a terrorist act or a particular terrorist organisation, in order to prove incitement to commit a terrorism offence.²⁵

8.18 The Australian Government 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'.²⁶

8.19 In its submission to this Inquiry, the AGD confirms this perspective and states:

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 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.²⁷

8.20 Dr Ben Saul states 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.²⁸

8.21 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.²⁹ The *Prosecution Policy of the Commonwealth*, prepared by the Office of the Director of Public Prosecutions (DPP), states that, whenever possible, substantive charges should be laid, rather than ancillary charges such as incitement or conspiracy.³⁰

25 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), [3.108] citing The Hon Philip Ruddock MP (Attorney-General), *New Counter Terrorism Measures: Incitement of Terrorism (Question and Answer Brief 17 October 2005)* (2005) <www.abc.net.au/mediawatch/img/2005/ep33/tpsedition.pdf> at 12 March 2006.

26 Senate Legal and Constitutional 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.

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

28 B Saul, *Submission SED 52*, 14 April 2006.

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

30 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].

8.22 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.³¹ In cases relating to aiding and abetting, 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.³²

8.23 In *R v Bainbridge*, the English Court of Criminal Appeal held that it was not 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.³³

8.24 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’.³⁴ In the *Criminal Code*, the complicity and common purpose provisions state expressly that the person must have intended that his or her conduct would aid, abet, counsel or procure the commission of any offence *of the type* the other person committed (emphasis added).³⁵

8.25 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 offence³⁶—it is not necessary that the substantive offence be committed.³⁷ Therefore, there may be no conduct, beyond the incitement itself, which may be referred to in making this determination.

8.26 A related issue is whether the present sedition offences, or proposed new offences, *should* require a closer connection between urging and the commission of another offence.

31 S Bronitt and B McSherry, *Principles of Criminal Law* (2005), 433.

32 *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].

33 *R v Bainbridge* [1960] 1 QB 129, 133.

34 S Bronitt and B McSherry, *Principles of Criminal Law* (2005), 363. The High Court case *Giorgianni v The Queen* (1985) 156 CLR 473 may support such a proposition.

35 *Criminal Code* (Cth) s 11.2(3).

36 *Ibid* s 11.2.

37 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.

8.27 IP 30 noted concerns about the existing lack of a direct connection.³⁸ For example, in the course of the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005 (Cth) (2005 Senate Committee inquiry),³⁹ the Gilbert and Tobin Centre of Public Law argued that the absence of a requirement of ulterior intention resulted in criminalising ‘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’.⁴⁰

8.28 Submissions to this Inquiry made similar points.⁴¹ Judge John Goldring submits that incitement, conspiracy,⁴² and the extended application of complicity,⁴³ would cover any possible conduct that should be proscribed. He considers that the requirement that incitement be specific and intentional should apply to all Commonwealth offences.⁴⁴ Fairfax, News Ltd and AAP submit that the sedition offences should include a ‘rider’, similar to that in s 11.4(2) of the *Criminal Code*.⁴⁵

ALRC’s views

8.29 The ALRC considers 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 on the ground that much of the conduct proscribed by them constitutes incitement to commit other offences.

8.30 There was a deliberate policy decision to retain a distinction between ‘urging’ for purposes of the sedition offence and incitement. The new sedition offences were framed to avoid any need for a connection between urging and a specific terrorist act or other crime.⁴⁶ A central rationale for the sedition offences is that this particular form of

38 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), [3.106]–[3.107].

39 See, Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.117]–[5.122].

40 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 Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.105]–[5.106]; Human Rights and Equal Opportunity Commission, *Submission 158B to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005. See also B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 881.

41 See, eg, J Goldring, *Submission SED 21*, 5 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006; Chief Minister (ACT), *Submission SED 44*, 13 April 2006.

42 *Criminal Code* (Cth) s 11.5.

43 *Ibid* s 11.2.

44 J Goldring, *Submission SED 21*, 5 April 2006.

45 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

46 They do not differ in this respect from the repealed sedition offences in the *Crimes Act*.

‘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. 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 match up with 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 with regard to the commission of a specific offence.

8.31 This justification for the 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 that the person have an ‘ulterior intention’, or purpose directed to the commission of a specific offence by another person.

8.32 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 force or violence. The ALRC proposes that for the person to be guilty of the offences, he or she should intend that the force or violence urged will occur. This requirement will help remove from the ambit of the offences rhetorical statements that the person does not intend anyone will act upon. At the same time, this ‘ulterior intention’ falls short of that required to prove incitement.

Proposal 8–1 Section 80.2 of the *Criminal Code* (Cth) (*Criminal Code*) 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 proposed, are set out in Appendix 2.)

Fault elements

8.33 There has been considerable confusion over the fault elements required under the sedition provisions, much of which appears to proceed from a misunderstanding of the construction of criminal responsibility under the *Criminal Code*.⁴⁷ The report of the

47 See Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), [3.21], [3.30]–[3.31].

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*

8.34 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

8.35 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. However, Parliament is not prevented from enacting a law that specifies other fault elements for a physical element of an offence where that is seen to be desirable, and the language used is clear and express.

8.36 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.

8.37 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.

48 Senate Legal and Constitutional 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.

(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.

8.38 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’. As a term of art in Australian criminal law, recklessness is much closer to intentionality, requiring that the person consciously consider the substantial and unjustifiable risks involved, and nevertheless proceed with the conduct.

8.39 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 upon the circumstances) will apply by default. Section 5.6 of the *Criminal Code* provides that (emphasis supplied):

(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

8.40 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’.

8.41 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 That is, the physical elements of the offence are not divisible into conduct and a circumstance or result.

8.42 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

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 Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.107]–[5.112].

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).

8.43 Three of the sedition offences expressly contain recklessness as a fault element, but only 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 fact that it is the Constitution or Government that others have been urged to overthrow;⁵⁵ the fact that it is the lawful processes of a Parliamentary election that others have been urged to interfere with;⁵⁶ or the fact that it is a group distinguished by race, religion, nationality or political opinion that others have been urged to use force or violence against.⁵⁷

8.44 Some submissions also criticised the express application of recklessness as the fault element for some elements of the sedition offences.⁵⁸ In particular, it is argued that it is hard to understand how a person could intend to urge a person to, for example, overthrow the Government by force or violence, but only be reckless as to whether the entity to be overthrown was, in fact, the Government.⁵⁹ 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’.⁶⁰

ALRC’s views

8.45 The ALRC considers that the technical construction given to the offences in s 80.2(1), (3) and (5) by the AGD is correct.⁶¹ However, in IP 30, the ALRC suggested that there nevertheless may be value in putting the matter beyond doubt by stating that all of the offences involve intentional urging of the use of force or violence. The suggestion that the application of the fault elements should be clarified received broad support in submissions.⁶²

54 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006; A Steel, *Submission SED 23*, 18 April 2006; B Saul, *Submission SED 52*, 14 April 2006.

55 *Criminal Code* (Cth) s 80.2(2).

56 *Ibid* s 80.2(4).

57 *Ibid* s 80.2(6).

58 J Pyke, *Submission SED 18*, 10 April 2006; Chief Minister (ACT), *Submission SED 44*, 13 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

59 J Pyke, *Submission SED 18*, 10 April 2006.

60 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.

61 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 Act 1995* (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 Act 1995* (Cth) s 80.2(7)(b); 80.2(8)(b) (emphasis added).

62 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

8.46 Even assuming that the application of the general principles of criminal responsibility in the *Criminal Code* to the sedition offences is reasonably clear,⁶³ there are arguments that the applicable fault elements should be stated expressly in any new offences drafted to replace them.

8.47 As discussed elsewhere in this Discussion Paper, where interests in freedom of speech and expression are constrained by criminal sanctions, community perceptions about the law are especially important. Submissions to the Inquiry emphasised the importance of clarity in promoting community understanding of the law.⁶⁴

8.48 It would not be inconsistent with the way in which the *Criminal Code* is drafted to state that a person commits an offence if he or she ‘intentionally urges’ the conduct referred to in s 80.2. There are many other offence provisions in the Code that follow this model, including those where, arguably, it is clear that intention is the fault element by virtue of the operation of s 5.6.⁶⁵

8.49 For example, under s 72.3(1) of the *Criminal Code* a person commits an offence if the person ‘intentionally’ delivers, places, discharges, or detonates an explosive or lethal device; under s 102.2(1) a person commits an offence if the person ‘intentionally’ directs the activities of a terrorist organisation; under s 102.3(1) a person commits an offence if the person ‘intentionally’ is a member of a terrorist organisation; under s 102.4(1) a person commits an offence if the person ‘intentionally’ recruits a person to join a terrorist organisation; under s 102.5(1) a person commits an offence if the person ‘intentionally’ provides training for terrorism.

Other drafting issues

The meaning of ‘urges’

8.50 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.⁶⁶ 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.⁶⁷

Media and Communications Law, *Submission SED 32*, 12 April 2006; Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

63 As submitted by the AGD: Australian Government Attorney-General’s Department, *Submission SED 31*, 12 April 2006.

64 Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006; N Roxton Shadow Attorney-General, *Submission SED 63*, 28 April 2006.

65 See, eg, *Criminal Code* (Cth) ss 102.6 (1); 102.7 (1); 102.8(1)(a)(i); 270.3 (1); 471.7(2)(a).

66 *Criminal Code Act 1995* (Cth) s 80.2(1), (3), (5), (7), (8).

67 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.95].

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’.⁶⁸

8.51 The ALRC has received similar comments.⁶⁹ ARTICLE 19, an international human rights 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.⁷⁰

8.52 Others expressed concerns about the uncertainty of the concept of urging,⁷¹ 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.⁷²

8.53 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’.⁷³ For example, the *Crimes Act* incitement provisions used the words ‘incites to, urges, aids or encourages’.⁷⁴ MCCOC expressed concern that some courts have interpreted ‘incites’ as requiring causing rather than advocating the offence.⁷⁵ MCCOC stated that using the word ‘urges’ would avoid this ambiguity.⁷⁶

68 Liberty Victoria, *Submission 221 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005.

69 ARTICLE 19, *Submission SED 14*, 10 April 2006; Combined Community Legal Centres Group (NSW) Inc, *Submission SED 50*, 13 April 2006.

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

71 N Roxton Shadow Attorney-General, *Submission SED 63*, 28 April 2006.

72 Chief Minister (ACT), *Submission SED 44*, 13 April 2006. See also Australian Muslim Civil Rights Advocacy Network, *Submission SED 54*, 17 April 2006.

73 Model Criminal Code Officers Committee, *Model Criminal Code: Chapters 1 and 2: General Principles of Criminal Responsibility* (1992), 95.

74 *Crimes Act 1914* (Cth), s 7A (repealed).

75 However, the case law does not clearly establish that the term ‘urges’ is broader than other terms used to describe incitement. *Laws of Australia* states 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 *A-G (UK) Reference (No 1 of 1975)* [1975] QB 773.

76 Model Criminal Code Officers Committee, *Model Criminal Code: Chapters 1 and 2: General Principles of Criminal Responsibility* (1992), 95.

8.54 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.⁷⁷

8.55 The AGD stated that this term was adopted by the drafters of the *Criminal Code* seditious provisions for similar reasons and for internal consistency.⁷⁸ 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

8.56 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*. It has been suggested that the meaning of 'force or violence' for the purposes of the seditious offences is unclear and too broad.⁷⁹

8.57 ARTICLE 19 observes 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.⁸⁰

8.58 The Federation of Community Legal Centres (Vic) expresses 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.⁸¹

77 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.

78 Australian Government Attorney-General's Department, *Submission 290 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 16 November 2005.

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

80 Ibid.

81 Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006. See also B Saul, *Submission SED 52*, 14 April 2006; A Steel, *Submission SED 23*, 18 April 2006.

8.59 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 humanity and war crimes.⁸²

Reasonable likelihood of violence

8.60 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.⁸³ For example, Dr Saul stated that only ‘incitements which have a direct and close connection to the commission of a specific crime are justifiable restrictions on speech’.⁸⁴ Dr Saul and others⁸⁵ referred to the United States case of *Brandenburg v Ohio*.⁸⁶

8.61 In *Brandenburg*, the United States Supreme Court confirmed that constitutional guarantees of free speech and 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’.⁸⁷ Dr Saul submits that:

The twin requirements of the imminence and likelihood (or probability) of crime ensure that speech is not prematurely restricted; there must be a sufficiently proximate connection or causal link between the advocacy and the eventuality of crime.⁸⁸

8.62 Similar points were made by others. For example, Australian Lawyers for Human Rights recommends that s 80.2 be redrafted so that in order for ‘urging’ to constitute an offence, it 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’.⁸⁹ ARTICLE 19 stated 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’.⁹⁰

82 *Criminal Code* (Cth) Ch 8.

83 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.

84 B Saul, *Submission SED 52*, 14 April 2006.

85 L Maher, *Consultation*, Melbourne, 4 April 2006; University of Melbourne Academics, *Consultation*, Melbourne, 5 April 2006.

86 *Brandenburg v Ohio* 395 US 444 (1969).

87 *Ibid.*, 447.

88 B Saul, *Submission SED 52*, 14 April 2006.

89 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 art 6.

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

8.63 Introducing such a requirement could provide an additional protection for interests in freedom of speech and 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. Expert sociological or other evidence may be required. The suggested requirement would provide additional protection for a defendant only where the defendant intended to urge force or violence.

8.64 The ALRC considers that the proposal to require that, for the purposes of the s 80.2 offences, the person must intend that the urged force or violence will occur (Proposal 8–1) adequately addresses the concerns expressed about the need for a closer connection between the urging and the increased likelihood of violence eventuating.

Urging the overthrow of the Constitution or Government

8.65 The first of the present 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.

Framing the provision

8.66 A range of concerns are expressed in relation to the framing of s 80.2(1). Questions are raised about the abstract and vague nature of some of its terms. For example, what does it mean to ‘overthrow’ the Constitution by force or violence⁹¹—especially given that ‘the Constitution’ is a legal concept rather than a physical institution? One view is 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.⁹²

8.67 To what extent must the ‘lawful authority’ of the Government be challenged? 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?⁹³

91 M Weinberg, *Consultation*, Melbourne, 3 April 2006; A Steel, *Submission SED 23*, 18 April 2006.

92 A Steel, *Submission SED 23*, 18 April 2006.

93 University of Melbourne Academics, *Consultation*, Melbourne, 5 April 2006; P Emerton, *Submission SED 36*, 10 April 2006.

8.68 Patrick Emerton notes that the 1991 recommendations of the Committee of Review of Commonwealth Criminal Law (Gibbs Committee) refer to ‘the lawful authority of [the Government of the Commonwealth] *in respect of the whole or part of its territory*’ (emphasis added).⁹⁴ Emerton submits 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.⁹⁵

ALRC’s views

8.69 As discussed in Chapter 2, s 80.2(1) is not best characterised as a sedition offence. 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 constituent elements of democratic government in Australia. For this reason it is better characterised as an offence against political liberty.

8.70 The ALRC considers 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 Proposal 8–2). This offence should retain the current wording but should state in relevant part that ‘a person commits an offence if the person *intentionally urges* another person to overthrow by force or violence ...’.⁹⁶

8.71 The ALRC considers that, even assuming that the application of s 5.6 of the *Criminal Code* to this offence is clear, the applicable fault element should be stated expressly in the offence. This amendment is in addition to Proposal 8–1, which would add an ‘ulterior intention’—that is, an intention to achieve an objective which is not a physical element of the offence—in respect to which the meaning of intention is determined by ordinary usage and common law.⁹⁷

8.72 A number of other criticisms may be levelled at the present framing of s 80.2(1). However, the ALRC is not convinced that the section can be significantly improved without introducing other broad concepts as alternatives or adding unwarranted complexity. The terms ‘Constitution’ and ‘Government’ have been used in sedition offences since 1920. The concept of advocating the ‘overthrow’ of the Constitution or

94 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [31.18].

95 P Emerton, *Submission SED 36*, 10 April 2006.

96 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).

97 I Leader-Elliott, *The Commonwealth Criminal Code: A Guide for Practitioners*, Attorney-General’s Department and Australian Institute of Judicial Administration, 1 March 2002, 61.

the Government has existed since 1926.⁹⁸ Other elements of the drafting of the s 80.2 offences were recommended by the Gibbs Committee.⁹⁹

8.73 The Australian Government and the DPP 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—but do not propose any alternative formulation. The ALRC does not consider that there would be any 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.

8.74 There is a significant overlap between the offence in s 80.2(1) and other offences in the *Criminal Code*, *Crimes Act* and elsewhere. Many submissions suggested that the sedition offence provisions should be repealed on this basis.¹⁰⁰ However, as discussed above, there are important differences between ‘urging’ under s 80.2 and incitement under s 11.4 of the *Criminal Code*. These mean that, despite the number of alternative substantive offences, the ancillary offence of incitement cannot cover all conduct proscribed by the existing sedition offences.

8.75 An exception is the offence in s 30C of the *Crimes Act*, entitled ‘*Advocating or inciting to crime*’,¹⁰¹ which 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;
- (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.

8.76 The ALRC proposes that s 30C of the *Crimes Act* be repealed. Repeal need not await the outcome of the review of offences in Part II and Part IIA of the *Crimes Act*

98 *Crimes Act 1914* (Cth) s 30C inserted by *Crimes Act 1926* (Cth) s 17.

99 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [32.18].

100 Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; Liberty Victoria, *Submission 221 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005; P Emerton, *Submission SED 36*, 10 April 2006.

101 Located in *Crimes Act 1914* (Cth) Pt IIA (‘*Protection of the Constitution and of public and other services*’).

(see Proposals 4–1 and 11–2). Consistently with *Criminal Code* harmonisation policy, this review will involve modernising some offences for re-enactment in the *Criminal Code*, and the repeal of others. However, because s 30C is clearly redundant there is no need to save it for such a review.

Proposal 8–2 The heading of s 80.2(1) of the *Criminal Code* should be changed to refer to urging the overthrow by ‘force or violence’ of the *Constitution* or Government.

Proposal 8–3 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.

Proposal 8–4 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 proposed, are set out in Appendix 2.)

Urging interference in Parliamentary elections

8.77 The second of the present sedition offences 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.

8.78 The *Commonwealth Electoral Act 1918* (Cth) defines ‘election’ as ‘an election of a member of the House of Representatives or an election of senators for a State or Territory’.¹⁰²

Related offences

8.79 As in the case of s 80.2(1), there is some overlap between the offence in s 80.2(3) and other offences, and submissions suggested that the offence should be repealed on this basis. 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.

¹⁰² *Commonwealth Electoral Act 1918* (Cth) s 287(1).

8.80 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.

8.81 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.

8.82 The AEC also administers elections for the Torres Strait Regional Authority (TSRA) under Division 5 of the *Aboriginal and Torres Strait Islander Act 2005* (Cth) and secret ballots under Division 4 of the *Workplace Relations Act 1996* (Cth). Both Acts contain a number of offences relating to interference in the conduct of such elections and ballots.¹⁰³

ALRC’s views

8.83 Again, s 80.2(3) is better characterised as an offence against political liberty than as a sedition offence (see Proposal 2–1). 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*’.

8.84 Urging interference in elections by force or violence is as much a threat to the constituent elements of democratic government as the conduct proscribed by s 80.2(1), and should also be punishable. As is the case with the offence in s 80.2(1), 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 ...’.¹⁰⁴ New s 80.2(7) will also apply—to require that the person intends that the force or violence urged will occur (see Proposal 8–1).

103 See, eg, *Aboriginal and Torres Strait Islander Act 2005* (Cth) s 198(3); *Workplace Relations Act 1996* (Cth) s 821(2).

104 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).

8.85 The ALRC considers that the logic behind the provision means that it should cover constitutional referenda as well as parliamentary election processes. There is, however, no reason to include TSRA elections or workplace ballots, which are far less ‘national’ or central to the protection of democratic institutions (and are subject to specific and targeted offences). Section 80.2(4) also should be amended in a consistent manner, to refer to constitutional referenda.

8.86 The offence in s 28 of the *Crimes Act* 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’,¹⁰⁵ and narrower, in that incitement of the offence requires an intention that the offence incited be committed.¹⁰⁶ Section 28 should be reviewed as part of the proposed review of offences in Part II and Part IIA of the *Crimes Act* (see Proposals 4–1 and 11–2).

Proposal 8–5 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’.

Proposal 8–6 Section 80.2(3) of the *Criminal Code* should be amended to:

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

Proposal 8–7 As a consequence of Proposal 8–6, 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 lawful processes for a referendum on a proposed law for the alteration of the *Constitution* that a person urges another to interfere with.

(The relevant sections of the Criminal Code, amended as proposed, are set out in Appendix 2.)

Urging a person to assist the enemy

8.87 Sections 80.2(7) and (8) are significantly different from the other three offences in that they do not require that a person urge the use of force or violence. These

¹⁰⁵ This could, for example, include the implied constitutional right of freedom of political communication.

¹⁰⁶ Under *Criminal Code* (Cth) s 11.4(2).

sections make it an offence for a person to urge another person to engage in conduct intended to ‘assist’ the enemy or those engaged in armed hostilities against the ADF.

8.88 Submissions to 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’.¹⁰⁷ Further, the provisions were said to conflict with 1991 recommendations of the Gibbs Committee.¹⁰⁸ The Gibbs Committee recommended the enactment of three sedition offences, each of which required the incitement of force or violence.¹⁰⁹

8.89 The AGD did not accept that the offences were new, but argued that they were ‘clearly contemplated’ by the repealed *Crimes Act* sedition provisions. The AGD’s view was based on the fact that *Crimes Act* s 24F(1) 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.¹¹⁰ Submissions to this Inquiry challenged the AGD’s view that the offences are not new.¹¹¹

The meaning of ‘assist’

8.90 The word ‘assist’ is not defined. 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 provisions of the *Criminal Code*.¹¹² These categories of conduct are forms of assistance, albeit direct in nature. However, at the other end of the range of interpretation, to ‘assist’ might encompass mere intellectual or moral ‘support’.

8.91 IP 30 noted that, 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’.¹¹³ Further, s 80.2(7) and (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

107 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.117].

108 Ibid, [5.117].

109 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), 306–307.

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

111 Fairfax, News Ltd and AAP submit 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.

112 *Criminal Code Act 1995* (Cth) s 11.2.

113 B Walker, *Memorandum of advice to Australian Broadcasting Corporation*, 24 October 2005.

be prosecuted for condemning illegal violence by their government, or for seeking to uphold the *United Nations Charter*.¹¹⁴

8.92 Many submissions to the Inquiry express concern about the breadth of the term ‘assist’ as used in s 80.2(7) and (8).¹¹⁵ Submissions provide numerous examples of conduct that, it is 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;¹¹⁶
- performing a theatrical production drawing attention to the casualties of war;¹¹⁷
- showing a documentary which sympathises with or presents the perspective of insurgents in, for example, Iraq;¹¹⁸
- encouraging Australian soldiers and their allies to lay down their arms and refuse to fight;¹¹⁹ and
- publishing opinion in the media that might be seen to support or lend sympathy to claims made by armed groups which might encounter the ADF in the course of peace-keeping operations overseas.¹²⁰

8.93 Media organisations express particular concern about the possible impact of s 80.2(7) and (8) on their activities. Fairfax, News Ltd and AAP highlight a range of media activities that could give rise to conduct seen as urging a person to assist an enemy.¹²¹ For example, it is claimed that the provisions may be breached if third party commentators make statements supportive of an enemy or those engaged in armed hostilities with the ADF.¹²²

114 B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 873.

115 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; Chief Minister (ACT), *Submission SED 44*, 13 April 2006; Australian Press Council Office, *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.

116 Pax Christi, *Submission SED 16*, 9 April 2006.

117 Ibid.

118 Confidential, *Submission SED 22*, 3 May 2006.

119 P Emerton, *Submission SED 36*, 10 April 2006.

120 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

121 Ibid.

122 Ibid.

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.¹²³

8.94 Submissions highlight 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.¹²⁴

8.95 Some concerns about the breadth of the term ‘assist’ may be exaggerated. The AGD submit that the word ‘assist’ is intended to be interpreted by 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.¹²⁵

8.96 Most of those who made submissions to the Inquiry consider that s 80.2(7) and (8) should be repealed. If not repealed, the provisions could be narrowed, by defining the forms of assistance that are prohibited (for example, providing military equipment or personnel).¹²⁶

Other issues

8.97 The 2005 Senate Committee report recommended that, if enacted, s 80.2(7) and (8) should be amended to require a link to force or violence’.¹²⁷ Many submissions to the present Inquiry agreed with this view.¹²⁸

8.98 Uncertainty is seen to arise from the reference to those ‘engaged in armed hostilities against the Australian Defence Force’ under s 80.2(8).¹²⁹ Judge Goldring submits that it does not accord with the rule of law for conduct to be criminalised when

123 Ibid.

124 Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

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

126 Pax Christi, *Submission SED 16*, 9 April 2006.

127 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.175], rec 28.

128 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.

129 J Goldring, *Submission SED 21*, 5 April 2006; Australian Press Council Office, *Submission SED 48*, 13 April 2006.

a person cannot know with certainty whether a given country or organisation falls in this category.¹³⁰

8.99 Similar concern is 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’.¹³¹ 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.¹³²

Reform of the treason offences

8.100 IP 30 noted the view that s 80.2(7) and (8) are redundant because much of the conduct proscribed would constitute incitement to commit other offences, such as the offences of treason and treachery.¹³³ 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:
 - (i) another country; or
 - (ii) an organisation;
 that is engaged in armed hostilities against the Australian Defence Force

...

8.101 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.

130 J Goldring, *Submission SED 21*, 5 April 2006.

131 Media Entertainment and Arts Alliance, *Submission SED 28*, 10 April 2006; Australian Press Council Office, *Submission SED 48*, 13 April 2006.

132 Under *Criminal Code* (Cth) s 80.2(7)(c)(ii).

133 B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 873.

8.102 Submissions emphasise the overlap between the offences in s 80.2(7) and (8) and treason¹³⁴ and highlighted the fact that many criticisms made about the former offences apply equally to treason.¹³⁵ As John Pyke observes, ‘the sedition offence really cannot be considered separately; the treason, treachery and sedition offences should be rationalised at the same time, and harmonized’.¹³⁶

ALRC’s views

8.103 The ALRC concludes that the offences in s 80.2(7) and (8), and the associated defence in s 80.2(9), should be repealed. The offences are inappropriately broad. 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 verbal encouragement or support for those in conflict with Australian government policy.

8.104 Importantly, these provisions make it an offence to urge conduct by others that is itself legal. 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 judicial interpretation.

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.¹³⁷

8.105 Given the similarity of the language used in s 80.2(7) and (8) with that in s 80.1(1)(e) and (f), aspects of the treason offences must be addressed by this Inquiry.¹³⁸

8.106 Treason offences should not encompass strong political dissent and rhetoric including 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 amounted to giving ‘aid and comfort to the enemy’ in terms of the United States Constitution.¹³⁹

134 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.

135 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.

136 J Pyke, *Submission SED 18*, 10 April 2006.

137 Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006.

138 Reform of these aspects of the treason provisions clearly constitutes a ‘related matter’ under the Inquiry’s Terms of Reference.

139 Art III, s 3.

8.107 Rather, s 80.1(1)(e) and (f) should apply 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. Sections 80.1(1)(e) and (f) are stated not to apply to ‘engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature’.¹⁴⁰ Despite this, the provisions are still inappropriately broad.

8.108 The ALRC considers that s 80.1(1)(e) and (f) should be reframed. Section 80.1(1)(e) should 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).

8.109 Similarly, s 80.1(1)(f) should 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’. In addition, the phrase ‘by any means whatever’ should be deleted from both subsections,¹⁴¹ and a note added below s 80.1(f) explaining the intended meaning of the word ‘materially’.

8.110 Given the proposed alterations to the offence of treason, the ALRC does not consider that there is any need for a separate, specific provision concerning ‘urging’ others to assist an enemy or those engaged in armed hostilities against the ADF. As with the other strands of treason, a prosecution for urging treason should have to rely on the law of incitement and require an ulterior intention that this very serious offence be committed.¹⁴²

8.111 There are other aspects of the treason offences that, while not related directly to the ALRC’s Inquiry, have come to attention and should be reviewed. For example, s 80.1(1)(h) provides a separate ground for treason where a person ‘forms an intention to do any act referred to in a preceding paragraph and manifests that intention by an overt act’.

8.112 The historical antecedents of this provision are clouded, but it may be 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. As such offences were concerned with ‘acts of the mind’, some ‘open or overt act’ was required to prove the offence.¹⁴³ In modern legal terms, 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.¹⁴⁴

140 *Criminal Code* (Cth) s 80.1(1A).

141 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.

142 That is, under *Criminal Code* (Cth) s 11.4(2).

143 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), 13.

144 *Criminal Code* (Cth) s 11.5.

Section 80.1(1)(h) appears redundant and should probably have been deleted, along with s 80.1(1A) and 80.1(8), in modernising the offence for enactment in the *Criminal Code*. The Gibbs Committee recommended the repeal of the equivalent *Crimes Act* provision.¹⁴⁵

8.113 The offences and penalties set out in s 80.1(2) also deserve 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, accessories after the fact to treason and misprision of treason.¹⁴⁶ The offences are punishable by life imprisonment. Arguably, such ancillary offences should be covered by general provisions dealing with extensions of criminal responsibility,¹⁴⁷ and subject to a lesser penalty than the substantive offence of treason.

Proposal 8–8 Sections 80.2(7), (8) and (9) of the *Criminal Code*, 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.

Proposal 8–9 The treason offences in s 80.1(1)(e)–(f) should be amended to:

- remove the words ‘by any means whatever’;
- provide that conduct must ‘materially’ assist an enemy, making it clear that mere rhetoric or expressions of dissent are not sufficient; and
- provide that assistance must enable an enemy ‘to engage in war’ with Australia or a country or organisation ‘to engage in armed hostilities’ against the Australian Defence Force.

Proposal 8–10 The Australian Government should review the treason offences in s 80.1 of the *Criminal Code*.

(The relevant sections of the Criminal Code, amended as proposed, are set out in Appendix 2.)

145 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [31.38].

146 See *Ibid*, [31.39]–[31.40].

147 See, eg, *Criminal Code* (Cth) Part 2.4; *Crimes Act 1914* (Cth) s 6.

Extraterritorial application

8.114 Common law countries traditionally have based criminal jurisdiction 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 where the act concerned was intended to have its impact there (such as a 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 extra-territorial reach of domestic criminal law—except perhaps for a very limited category of serious crimes with an international flavour, such as piracy or genocide.¹⁴⁸

8.115 However, there has been a pronounced modern trend towards extending the reach of the criminal law across boundaries. In part this was prompted by expanded territorial claims over the seas and airspace,¹⁴⁹ and in part by globalisation and the increased speed and capabilities of modern transportation and communications technology. This trend clearly has been accelerated by increased concerns over such serious transnational crimes as people smuggling, child sex tourism, sexual servitude, hostage taking and terrorism.

8.116 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.¹⁵⁰

8.117 In 2000, Division 15 of the *Criminal Code* was introduced¹⁵¹ 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.

8.118 The sedition and treason¹⁵² offences under Division 80 of the *Criminal Code* are characterised as ‘category D’ offences—as are the terrorism offences created in 2002¹⁵³ in Divisions 101–104 of the *Criminal Code*.¹⁵⁴ This designation means that, by virtue of s 15.4 of the *Criminal Code*, they apply to all persons (whether or not citizens or residents of Australia):

- whether or not the conduct constituting the offence occurs in Australia; and

148 D Langham, *Cross-Border Criminal Law* (1997), 266.

149 See, eg, *Crimes (Ships and Fixed Platforms) Act 1992* (Cth).

150 *Extradition Act 1988* (Cth).

151 *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth).

152 *Criminal Code* (Cth) s 80.1(7).

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

154 *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 also the discussion below regarding terrorist organisations.

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

Implications of extra-territorial application

8.119 Concerns are expressed about the application of category D extraterritoriality to the sedition offences.¹⁵⁵ This category of extraterritoriality is said to 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’.¹⁵⁶ A particular concern is that such a universal jurisdiction creates a potential conflict with the law on combatant immunity in armed conflict.¹⁵⁷ IP 30 asked about the problems raised by the extra-territorial application of the sedition offences.¹⁵⁸

8.120 Submissions highlight a number of problems claimed to result.¹⁵⁹ For example, John Pyke observes that s 80.4, by 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’.¹⁶⁰ He submits 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.¹⁶¹

8.121 Pax Christi states that the extended jurisdiction of Division 80 amount 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.¹⁶²

8.122 Dr Saul also focuses on the implications for s 80.2(7) and (8) of the *Criminal Code* and expresses concern that the extra-territorial application of these offences potentially interferes with the operation of international humanitarian law in armed

155 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), [3.53]–[3.54].

156 B Walker, *Memorandum of advice to Australian Broadcasting Corporation*, 24 October 2005.

157 B Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 873.

158 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Ch 7, Question 14.

159 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.

160 J Pyke, *Submission SED 18*, 10 April 2006.

161 Ibid. Briefly, under *Criminal Code* (Cth) s 15.1, where category A jurisdiction applies, jurisdiction will be satisfied if a requirement for ‘standard geographical jurisdiction’ (see s 14.1) is met or at the time of the alleged offence the person charged with the offence was an Australian citizen or was a body corporate incorporated under Australian law.

162 Pax Christi, *Submission SED 16*, 9 April 2006.

conflicts. He states that, under these laws 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.¹⁶³

8.123 The AGD considers 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:

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.¹⁶⁴

8.124 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.¹⁶⁵

ALRC's views

8.125 The implications of extraterritoriality are most problematic in relation to the offences in s 80.2(7) and (8), which concern urging another person to assist an enemy or those engaged in armed hostilities against Australia. As discussed above, the ALRC proposes the repeal of these offences.

8.126 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 will generally be intended to occur in Australia, being directed at the Australian Constitution or Government, Australian Parliamentary elections or at groups within Australia.¹⁶⁶

163 B Saul, *Submission SED 52*, 14 April 2006.

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

165 Senate Legal and Constitutional Legislation Committee, *Criminal Code Amendment (Trafficking in Persons Offences) Bill 2004 [2005]* (2005), 25.

166 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).

8.127 Further, under s 16.1 of the *Criminal Code*, the consent of the Attorney-General is required for prosecution where the conduct (the urging) occurs wholly overseas and the person alleged to have committed the offence is not an Australian citizen or body corporate.¹⁶⁷ This provides an additional safeguard against inappropriate prosecution. The ALRC considers that category D extended geographical jurisdiction should continue to apply to the offences in s 80.2(1), (3) and (5).

8.128 The application of category D to the treason offences in s 80.1 creates more difficulty. Patrick Emerton states:

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.¹⁶⁸

8.129 Any problems that are seen to arise in relation to the application of category D to s 80.2(7) and (8) (which the ALRC proposes be repealed) also may apply to the treason offences in s 80.1(1)(e) and (f), with implications for the concept of combatant immunity and other aspects of international humanitarian law.

8.130 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—and may then be subject to prosecution for engaging in armed hostilities against the Australian Defence Force under s 80.1(1)(f).

8.131 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 offence. Such a qualification is consistent with the historical origins of the law of treason, which punished acts deemed to constitute a violation of a subject's allegiance to his or her lord or monarch.¹⁶⁹

8.132 The concept of allegiance has retained legal importance in the law of treason.¹⁷⁰ The *Treason Act of 1351* (Imp),¹⁷¹ 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 the World War II, for high treason. Joyce was an American citizen, who had resided in British territory and applied for and

167 This position will not be changed by the repeal of s 80.5 (Proposal 8–12).

168 P Emerton, *Submission SED 36*, 10 April 2006.

169 See, eg, 'Historical Concept of Treason: English and American' (1960) 35 *Indiana Law Journal* 70.

170 In the United States, the United States Code offence of misprision of treason applies only to those 'owing allegiance to the United States': 18 USC 2382.

171 *Treason Act of 1351* 25 Edw III c 2.

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.¹⁷²

8.133 The repealed *Crimes Act* treason offences had 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’.¹⁷³ The Gibbs Committee recommended that the offence of treason should be stated to 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.¹⁷⁴

8.134 For present purposes, the ALRC considers 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. If the ambit of the treason offences is restricted to citizens and residents, the operation of category D jurisdiction is appropriate. 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 in Australia.

8.135 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, Governor-General or Prime Minister are covered by many other standard provisions in the criminal law.

Proposal 8–11 Section 80.1 of the *Criminal Code* should be amended to require that, at the time of the alleged offence, the person is an Australian citizen or resident.

(The relevant sections of the Criminal Code, amended as proposed, are set out in Appendix 2.)

Requirement of Attorney-General’s consent

8.136 Under s 80.5, proceedings for an offence under Division 80 of the *Criminal Code* may not be commenced without the written consent of the Attorney-General.

172 *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.

173 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [31.6].

174 *Ibid.*, [31.34].

According to the Explanatory Memorandum, this provision is designed to provide an additional safeguard for a person charged with a sedition offence.¹⁷⁵

8.137 A person may be arrested, charged and remanded into custody without the prior consent of the Attorney-General.¹⁷⁶ As with any other criminal matter, the investigating authority, such as the Australian Federal Police, will provide the DPP with a brief of evidence, on which the DPP will determine—according to its published guidelines¹⁷⁷—whether there is sufficient probative evidence to proceed, and whether launching a prosecution would be in the public interest. Once the DPP has made a decision to prosecute, then the written consent of the Attorney-General must be sought under s 80.5.

8.138 A number of other *Criminal Code* offences require the Attorney-General's written consent to prosecute.¹⁷⁸ These include offences in relation to:

- international terrorist activities using explosive or lethal devices;¹⁷⁹
- people smuggling offences;¹⁸⁰
- espionage and similar activities;¹⁸¹
- harming Australians;¹⁸² and
- genocide, crimes against humanity, war crimes and crimes against the administration of the justice of the International Criminal Court.¹⁸³

8.139 In addition, as noted above, the *Criminal Code* provides that the Attorney-General's consent is required in prosecutions for any offence (to which the jurisdictional provisions apply)¹⁸⁴ if the alleged conduct occurs wholly in a foreign country, and the person is not an Australian citizen, resident or body corporate incorporated in Australia.¹⁸⁵ In such cases, the purpose of the consent requirement is to

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

176 *Criminal Code* (Cth) s 80.5(2)(a) and (b).

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

178 The consent of the Attorney-General is also required for offences under some other statutes, including under the *Crimes Act 1914* (Cth); *Crimes (Ships and Fixed Platforms) Act 1992* (Cth) and *Crimes at Sea Act 2000* (Cth).

179 *Criminal Code* (Cth) Division 72. See s 72.7.

180 *Ibid* Division 73, Subdivision A. See s 73.5.

181 *Ibid* Part 5.2. See s 93.1.

182 *Ibid* Division 115. See s 115.6.

183 *Ibid* Division 268. See s 268.121.

184 That is, *Ibid* ss 14.1, 15.1, 15.2, 15.3 or 15.4.

185 *Ibid* s 16.1.

give regard to considerations 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’.¹⁸⁶

Consent and the prosecution process

8.140 There have been suggestions that the political nature of the sedition offences mean there could be perceptions in the community 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.¹⁸⁷

8.141 In IP 30, the ALRC stated that it agrees that the requirement of the Attorney-General’s written consent is intended as an additional safeguard rather than an attempt to ‘politicise’ this area. The DPP is a statutory officeholder, with a high degree of independence afforded to that office by statute and legal culture, while the Attorney-General is accountable to the people for his or her actions through Parliament, and subject to media scrutiny. As the AGD argued before the 2005 Senate Committee inquiry ‘the Attorney is a political safeguard on the DPP and the DPP is a safeguard on the Attorney’.¹⁸⁸

8.142 IP 30 asked whether the Attorney-General’s consent should be required for any prosecution for the sedition offences.¹⁸⁹ There was a mixed response to this question in submissions to the Inquiry. Some consider that the requirement does provide an additional protection against unwarranted prosecution;¹⁹⁰ others oppose the involvement of the Attorney-General or hold serious reservations about it.¹⁹¹

8.143 Sedition, at least in its earlier forms, can be characterised as an inherently political offence. Historically, sedition was used against political dissidents and opponents of the established political order. Against this background, it is not surprising that there are misgivings about involving the Attorney-General in the prosecution process.

186 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.

187 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.146]–[5.151].

188 Senate Legal and Constitutional Committee—Australian Parliament, *Anti-Terrorism Bill (No 2) 2005: Transcript of Public Hearing*, 18 November 2005, 19 (G McDonald).

189 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Ch 7, Question 15.

190 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.

191 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) Inc, *Submission 167 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005; 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.

8.144 The Federation of Community Legal Centres (Vic) submits that ‘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’. The requirement for the 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.¹⁹²

8.145 The Centre for Media and Communications Law expresses similar concerns and notes that removing the requirement for 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’.¹⁹³

8.146 ARTICLE 19 oppose 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’.¹⁹⁴

8.147 The consent of the Attorney-General only becomes an issue where the DPP has already made a decision to prosecute. Concerns about the Attorney’s involvement are also directed to decisions *not* to prosecute—that is, the risk of selective prosecution, where some categories of alleged offenders are prosecuted but not others. Arguably, the Attorney 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 is suggested that, to provide additional transparency in decision-making, the Attorney-General should have to give a report justifying the exercise of the discretion.¹⁹⁵ Others suggest, as a further safeguard, the promulgation of guidelines for sedition prosecutions.¹⁹⁶

8.148 The AGD states that there is no reason to remove the consent requirement, which provides an additional safeguard and ‘addresses any concerns about officials misusing the offence’.¹⁹⁷

ALRC’s views

8.149 On balance, the ALRC considers that s 80.5 should be repealed. The Attorney-General’s consent to prosecution would still be required under s 16.1, where the

192 Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006.

193 Centre for Media and Communications Law, *Submission SED 32*, 12 April 2006.

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

195 Law Institute of Victoria, *Consultation*, Melbourne, 4 April 2006.

196 University of Melbourne Academics, *Consultation*, Melbourne, 5 April 2006.

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

alleged conduct occurs wholly in a foreign country and the person charged is not an Australian citizen, resident or body corporate incorporated in Australia.¹⁹⁸

8.150 In modern offences, the requirement for the Attorney-General to consent to prosecution is most often imposed in response to considerations about the extraterritorial operation of offences. In relation to the offences in Division 80 of the *Criminal Code*, s 16.1 seems adequate to ensure that these implications are considered by the Attorney-General.

8.151 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 against political liberty and public order (as proposed by the ALRC).

8.152 The AGD advises 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 officials. The ALRC is not convinced that this rationale justifies the consent requirement for the Division 80 offences. The independent status given to the Director of the Office of the DPP under the *Director of Public Prosecutions Act 1983* (Cth) (DPP Act) provides adequate protection in this regard.

8.153 The *Prosecution Policy of the Commonwealth*¹⁹⁹ (the Prosecution Policy) provides guidelines for the making of decisions in the prosecution process. Chapter 2 of 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, for example:

- (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 ...;

198 See *Criminal Code* (Cth) ss 80.4, 15.4, 16.1.

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

(t) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.²⁰⁰

8.154 The Prosecution Policy also provides that a decision whether or not to prosecute must clearly 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 ...;

(c) possible political advantage or disadvantage to the Government or any political group or party ...²⁰¹

8.155 Under s 8 of the DPP Act, the performance of the DPP's functions is subject to directions or guidelines given by the Attorney-General. Such directions or guidelines may, among other things, relate to the circumstances in which the Director should institute or carry on prosecutions for offences; and can be given in relation to particular cases.²⁰² Section 8 directions or guidelines must be published in the *Gazette* and tabled in Parliament.²⁰³ Therefore, while the ALRC proposes the repeal of s 80.5, there remains another mechanism for ministerial intervention in prosecutions under s 80.2—one that is subject to Parliamentary scrutiny.²⁰⁴

8.156 Further, under s 9(5) of the DPP Act, the DPP may 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 MP, observed that the consent provisions were originally enacted for the purpose of deterring private prosecutions brought in inappropriate circumstances—particularly for offences which related 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.²⁰⁵

200 Ibid, [2.10].

201 Ibid, [2.10].

202 *Director of Public Prosecutions Act 1983* (Cth) s 8(2)(a)–(b).

203 Ibid s 8(3).

204 The ALRC understands that, to date, the power to issue s 8 directions or guidelines has not been exercised by an Attorney-General: Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 26 April 2006.

205 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 December 1996, 7714 (D Williams, Attorney-General).

Proposal 8–12 Section 80.5 of the *Criminal Code* regarding the requirement of the Attorney-General’s written consent to a prosecution should be repealed.

(The relevant sections of the Criminal Code, amended as proposed, are set out in Appendix 2.)

9. Urging Inter-Group Violence

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Introduction

9.1 This chapter will examine 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.

9.2 The scope and operation of the offence is set out in detail in Chapter 4.

9.3 Section 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’.¹

9.4 This new offence overlaps to some extent with existing federal and state anti-vilification laws, which render unlawful (and in some cases, criminal) public acts which could incite others to hate, hold in contempt or seriously ridicule a person or group of people. At a federal level, the conduct proscribed by s 80.2(5) may in some cases be prosecuted using other criminal offences such as incitement to commit an offence or telecommunications offences. However, s 80.2(5) is the first federal provision specifically to criminalise the urging of violence against racial, religious, national or political groups.

9.5 Section 80.2(5) has generated mixed 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 subject to a number of criticisms in relation to both the drafting of the provision and the anti-terrorist framework in which it was enacted. In particular, it has been argued that the urging of inter-group violence cannot be properly categorised as ‘sedition’ and that such an offence belongs with anti-vilification laws, rather than with the cluster of offences in s 80.2.

9.6 This chapter will examine the background and policy rationale for the creation of a federal offence of urging the use of force or violence against groups distinguished on the basis of race, religion, nationality or political opinion. It will examine 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 will be examined in detail.

9.7 The ALRC proposes to characterise the present offence as an offence against public order, and to retain it in a modified form in the *Criminal Code*. 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.

9.8 Aspects of the framing of the offence, 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 detail in Chapter 8. Defences are discussed in detail in Chapter 10.

1 *Crimes Act 1914* (Cth) s 24A(g).

Legislating against the incitement of hatred and violence

9.9 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 which highlighted the nature and extent of the problem of racism and racist violence in Australia.² The first anti-vilification laws were introduced in New South Wales in 1989,³ and similar legislation subsequently was enacted in all state and territory jurisdictions except the Northern Territory.⁴ Despite having been debated since the 1970s,⁵ federal anti-vilification laws were not introduced until 1995.⁶

Federal law reform

9.10 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),⁷ 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.⁸ 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)’.⁹

9.11 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,¹⁰ and incitement of racist

2 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.

3 *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW).

4 *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).

5 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.

6 *Racial Hatred Act 1995* (Cth), which inserted Pt IIA in the *Racial Discrimination Act 1975* (Cth).

7 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 1975, 285 (K Enderby—Attorney-General).

8 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 June 1975, 3248 (K Enderby—Attorney-General).

9 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).

10 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991), 297.

violence and incitement to racial hatred likely to lead to violence.¹¹ HREOC also recommended that incitement to racial hostility should be made unlawful, but not attract criminal sanctions.¹² It was further recommended that federal, state and territory criminal laws be amended to enable courts to impose higher penalties where there is a racist motivation in the commission of an offence.¹³

9.12 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.¹⁴

9.13 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. This is discussed later in this Chapter.

9.14 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 of 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 in order 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

9.15 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

11 Ibid, 298.

12 Ibid, 299.

13 Ibid, 302.

14 Royal Commission into Aboriginal Deaths in Custody, *National Report*, Vol 4 (1991), Rec 213.

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].

9.16 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’: first, threatening to cause physical harm to a person or group because of their race, colour, or national or ethnic origin;¹⁹ secondly, threatening to destroy or damage property because of the race, colour, or national or ethnic origin of any other group;²⁰ and thirdly, doing an act otherwise than in private that is reasonably likely to incite racial hatred.²¹

9.17 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

9.18 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

9.19 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’.²⁵

9.20 Religious vilification is not included in this provision; however, courts have held that some religious groups (such as Jewish people and Sikhs) fall within the definition of groups distinguished by ‘ethnic origin’.²⁶ It has yet to be determined

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). In this speech the Minister also 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 *Racial Discrimination Act 1975* (Cth) s 18C.

26 Human Rights and Equal Opportunity Commission, *Isma—Listen: National Consultations on Eliminating Prejudice Against Arab and Muslim Australians* (2004), 29.

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 Muslim people do not share a common racial, national or ethnic origin.²⁷ In its 2004 report, *Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians*, 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.²⁸

State and territory anti-vilification laws

9.21 As outlined above, all state and territory jurisdictions in Australia except the Northern Territory have anti-vilification laws. However, there is significant jurisdictional variation as to which groups are protected from vilification, what harm thresholds are applied, and whether criminal sanctions or civil remedies are available.

9.22 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, and may amount to a criminal offence where the conduct is serious.

9.23 Religious vilification is unlawful in Tasmania, Queensland and Victoria. In the latter two jurisdictions, serious conduct may attract criminal sanctions.

9.24 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).

9.25 In most jurisdictions, for vilification to be a criminal offence it must generally 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.³⁰

27 Ibid, 29.

28 Ibid, 30.

29 *R v Rae* (1998) 45 NSWLR 546.

30 *Anti-Discrimination Act 1977* (NSW) s 20D.

Reform movements: 1995 to 2005

9.26 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 jurisdictional uniformity 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 clarity in a number of key respects, which has led to the development of an incoherent body of case law.³¹

9.27 In both its 1998 report, *Article 18: Freedom of Religion and Belief*, and its 2004 report, *Isma—Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians*, HREOC recommended the introduction of a federal law rendering vilification on the ground of religion or belief unlawful.³² HREOC criticised the current federal and state regimes for being inconsistent and inadequate.³³ 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,³⁴ whether a person was able to seek redress pursuant to anti-vilification laws depended upon the jurisdiction in which the conduct occurred.³⁵

9.28 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 1994.³⁶ The Bill did not proceed.

9.29 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* as the Opposition's preferred option 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

31 D Meagher, 'So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia' (2004) 32 *Federal Law Review* 226, 227.

32 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.

33 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), 3–4; Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998), 139.

35 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.

36 Racial and Religious Hatred Bill 2003 (Cth); Racial and Religious Hatred Bill 2003 [No 2] (Cth).

groups.³⁷ There was no requirement that the violence disturb the peace, order and good government of the Commonwealth.³⁸ 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.

Sedition and inter-group violence

9.30 In light of the protracted debate about federal legislative reform to address the incitement of hatred and violence against particular groups, many have 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

9.31 Classically, 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’.³⁹

9.32 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.⁴⁰ Although the legal basis for this aspect of Stephen’s statement of the law has been challenged,⁴¹ his definition was adopted by the Criminal Code Commissioners in England⁴² and by the courts.⁴³

9.33 This extended definition of the offence allowed it, in theory, to be used to prosecute those who incited racial or religious hatred.⁴⁴ However, the few recorded

37 Explanatory Memorandum, Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth), 4.

38 Ibid, 4.

39 J Stephen, *A Digest of the Criminal Law* (1887), 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), 42.

40 *O’Connell v The Queen* (1844) 8 ER 1061, discussed in *Boucher v The King* [1951] 2 DLR 369, 381–382 (Kellock J).

41 *Boucher v The King* [1951] 2 DLR 369, 381.

42 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.

43 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.

44 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.

cases in this area indicate that attempts to prosecute this type of conduct using sedition law were generally unsuccessful.⁴⁵

9.34 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 disturbing constituted authority. This uncertainty was addressed by the decision of the Supreme Court of Canada in *Boucher v The King*, where a 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'.⁴⁶ 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.⁴⁷

9.35 The decision in *Boucher* was approved by the Queen's Bench in *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudury*, where a private prosecution for seditious and blasphemous libel was brought against the author and publishers of *The Satanic Verses*.⁴⁸ 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.⁴⁹

9.36 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

45 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 some detail in *Boucher v The King* [1951] 2 DLR 369.

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

47 *Ibid.*, 453.

48 *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudury* [1991] 1 QB 429.

49 *Ibid.*, 453.

groups, unless 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

9.37 The recently repealed sedition provisions in the *Crimes Act* were enacted in 1920 and replicated in substance 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 Commonwealth’,⁵⁰ either by engaging in a seditious enterprise,⁵¹ or by writing, printing, uttering or publishing seditious words.⁵²

9.38 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.⁵³ The majority held that s 24A(g) was constitutionally valid,⁵⁴ 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’.⁵⁵ For example, Williams J stated:

The difficulty is to determine what is meant by the Commonwealth. If it means the Commonwealth as a geographical unit, the provision would be too wide, because laws directed to prevent the promotion of ill-will and hostility between different classes of His Majesty’s subjects would fall within the sphere of State legislative power except to the extent to which the promotion of such feelings could detrimentally affect the exercise of the executive legislative or judicial powers of the Commonwealth. But the word ‘Commonwealth’ is capable of meaning the Commonwealth as the body politic in the sense in which it is used in the Act to constitute the Commonwealth of Australia. I am of the opinion that this meaning should be given to the word in s 24A(1)(g) of the Crimes Act. The words ‘so as to endanger the peace, order and good government of the Commonwealth’ then limit the generality of the preceding words and confine the seditious intention to an intention 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 as a body politic.⁵⁶

9.39 The majority held that Sharkey’s words were expressive of a seditious intention within the meaning of s 24A(g) of the *Crimes Act*.

50 *Crimes Act 1914* (Cth) s 24A(g).

51 *Ibid* s 24C.

52 *Ibid* s 24D.

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

54 *Ibid*, 137–138 (Latham CJ), 145 (Rich J), 158 (McTiernan J) 159–160 (Williams J), 163 (Webb J).

55 *Ibid*, 157 (McTiernan J).

56 *Ibid*, 159–160.

9.40 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. ...⁵⁷

The words are in my opinion incapable of any definite meaning which would provide the necessary connection with the subjects of Federal power, with the administration of the Federal Government or with the security of any of its institutions. They are as large as the practically identical words in s 51 which are larger than the enumerated legislative powers of the Parliament.⁵⁸

9.41 There are no reported cases in Australia in which s 24A(g) has been used to prosecute vilification of racial, religious or other groups.⁵⁹ 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.⁶⁰ However, the Attorney-General's Department (AGD) informed the Senate Committee inquiry into the Anti-Terrorism Bill (No 2) 2005 that s 24A(g) may not apply in this context as the word 'classes' might be read literally so as not to apply to groups distinguished on the basis of race and similar grounds.⁶¹

Gibbs Committee

9.42 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).⁶² In particular, the Gibbs Committee considered that a 'narrower version' of s 24A(g) should be included,⁶³ and recommended that it be made an offence to

57 Ibid, 150.

58 Ibid, 153.

59 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].

60 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.

61 Australian Government Attorney-General's Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, 3.

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

63 Ibid, [32.16].

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.⁶⁴

9.43 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’.

9.44 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, neither the background nor the policy rationale for such reform was alluded to by the Gibbs Committee.

Legislative amendments in 2005

9.45 According to the Explanatory Memorandum for the *Anti-Terrorism Act (No 2) 2005*, ‘new subsection 80.2(5) modernises the language from classes or groups as recommended by the Gibbs Report’.⁶⁵ 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.

9.46 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’.⁶⁶ 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.⁶⁷ 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*

64 Ibid, [32.18].

65 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), 90.

66 Australian Government Attorney-General’s Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, Attachment A, 19.

67 Ibid, 2–3.

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.⁶⁸

9.47 The AGD also stated that s 80.2(5) partly implemented art 20 of the *International Covenant on Civil and Political Rights 1966* (ICCPR).⁶⁹ 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. Indeed, 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.⁷⁰

Criticisms of section 80.2(5)

9.48 Section 80.2(5) has generated largely positive, but at times 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.

9.49 It should be noted that 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 offences may capture an excessively broad range of conduct. These more generalised concerns are dealt with in Chapters 7 and 8, while this chapter addresses specific criticisms relating to the offence in s 80.2(5).

Sedition and vilification

9.50 Most submissions and consultations that directly addressed s 80.2(5) supported the existence of an offence of this type.⁷¹ However, there has been considerable support for the view that the urging of inter-group violence should not be characterised as sedition.⁷² It has been argued that sedition centres on subversion of political

68 Ibid, 2–3.

69 Ibid, Attachment A, 6.

70 Ibid, Attachment A, 20.

71 There was also some opposition to or ambivalence towards an offence of this kind, primarily due to a concern 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.

72 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*

authority, and has little to do with inter-group violence.⁷³ The rationale for protecting one group from violence by another is to guarantee the dignity of the members of that group.⁷⁴ Accordingly, a large number of commentators and submissions suggest that the appropriate place for such an offence is within the framework of anti-discrimination legislation.⁷⁵ Others suggest it could be framed as a public order offence within criminal legislation, but with the sedition link removed.⁷⁶

9.51 John Pyke argues that the offence in s 80.2(5) does not belong in s 80.2 because, if the violence urged within the community were so severe that it threatens constitutional government, the urging will be an offence under s 80.2(1) (treason). Alternatively, if the violence urged were less severe, such urging should not be characterised as sedition or anything synonymous.⁷⁷

9.52 The AGD submits 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, which is made up of different cultures and religions, constitutes ‘a very real attack on the fabric of society’.⁷⁸ It submits:

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.⁷⁹

54, 17 April 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006; National Legal Aid, *Submission SED 62*, 20 April 2006; M Weinberg, *Consultation*, Melbourne, 3 April 2006.

73 B Saul, *Submission SED 52*, 14 April 2006; Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

74 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.

75 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; 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-Chancellor’s 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.

76 Australian National University Academics, *Consultation*, Canberra, 27 April 2006; Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 31 March 2006.

77 J Pyke, *Submission SED 18*, 10 April 2006.

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

79 Ibid.

9.53 The AGD argues 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 relation to the argument that a criminal offence of this type might be appropriate in the RDA, the AGD notes that the Act has no criminal regime, but instead has established civil remedies that are particularly 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.⁸⁰

Linking inter-group violence and terrorism

9.54 In its submission to the Senate Committee inquiry, the AGD described the urging of violence by one racial group against another as a ‘key terrorist theme’.⁸¹ In its submission to this Inquiry, the AGD was clear that it considers 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’.⁸²

9.55 Dr Ben Saul argues that inter-group violence is conceptually distinct from terrorism, and should be treated separately by the criminal law.⁸³ Further, a number of submissions criticise 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 terrorist.⁸⁴ In its 2004 report *Isma—Listen*, HREOC found that Australian Arabs and Muslims are often vilified on the basis that they share responsibility for terrorism or are potential terrorists.⁸⁵ 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.⁸⁶

80 Ibid.

81 Australian Government Attorney-General’s Department, *Submission 290 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 16 November 2005, 4.

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

83 B Saul, *Submission SED 52*, 14 April 2006. See also B Saul, ‘Preventing Communal Violence: Blurring Seditious, Vilification and Terrorism’ (2005) (November/December 2005) *Human Rights Defender (Special Issue)* 15, 16.

84 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; 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.

85 Human Rights and Equal Opportunity Commission, *Isma—Listen: National Consultations on Eliminating Prejudice Against Arab and Muslim Australians* (2004), [2.2.3].

86 Ibid, [2.2.1]–[2.2.3].

9.56 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.⁸⁷ Concerns were expressed to the Senate Committee inquiry and to this 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.⁸⁸ For example, Pax Christi submits:

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.⁸⁹

9.57 Emrys Nekvapil submits 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 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.⁹⁰

9.58 A parallel was drawn between the effect of this offence on the Muslim community and the effect of some summary offences on the Aboriginal and Torres Strait Islander community—while the offences were seemingly neutral, the circumstances of the population and decisions surrounding prosecution had a disproportionate effect on one group.⁹¹

9.59 A number of submissions indicate that moving the offence to anti-vilification legislation would alleviate some of the concerns relating to stigmatisation of certain groups.⁹²

9.60 Patrick Emerton argues that if the purpose of s 80.2(5) is the preservation of public order, then the offence is unnecessary because inter-group violence (or

87 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.

88 See, eg, P Matthew, *Submission 187 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, (undated).

89 Pax Christi, *Submission SED 16*, 9 April 2006.

90 E Nekvapil, *Submission SED 45*, 13 April 2006.

91 Human Rights Lawyers, *Consultation*, Sydney, 29 March 2006.

92 E Nekvapil, *Submission SED 45*, 13 April 2006; R Connolly and C Connolly, *Consultation*, Melbourne, 5 April 2006.

incitement thereto) does not generally pose any particular threat to public order in Australia.⁹³

Peace, order and good government of the Commonwealth

9.61 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).⁹⁴ 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’.⁹⁵ Australian Lawyers for Human Rights also acknowledge that s 80.2(5) draws to some extent upon art 4 of CERD and art 20 of the ICCPR.⁹⁶ 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’.⁹⁷

9.62 The AGD agrees that the ‘peace, order and good government of the Commonwealth’ phrase is not necessary to provide a ‘constitutional peg’, but argues that the inclusion of the requirement in the offence provides the appropriate Commonwealth ‘flavour’ for the offence.⁹⁸

9.63 A number of commentators and submissions have questioned the ‘peace, order and good government’ limb of the offence. One issue raised is whether the word ‘Commonwealth’ in s 80.2(5) is used in a geographic sense or whether it refers to the ‘matrix of institutions, rights and functions constituted under the Federal

93 P Emerton, *Submission SED 36*, 10 April 2006. Emerton suggests that while there are some examples of terrorism overseas that can be usefully analysed in terms of group conflict (for example, Chechnya, Israel/Palestine), this is not relevant in the Australian context, although he notes recent isolated examples such as the Redfern and Cronulla riots.

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

95 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [32.17]. For a more detailed discussion of Australia’s obligations under international law, see Chs 5, 7.

96 Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006.

97 *Toben v Jones* (2004) 74 ALD 321, 328 referring to *Victoria v Commonwealth* (1996) 187 CLR 416. While many submissions argue that the articles are not fully implemented, the ‘deficiency’ in implementation of the relevant articles is only fatal to the validity of the law 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.

98 Australian Government Attorney-General’s Department, *Consultation*, Canberra, 26 April 2006. Officers of the CDPP agreed that the phrase may not be constitutionally necessary: Commonwealth Director of Public Prosecutions, *Consultation*, Canberra, 26 April 2006.

Constitution'.⁹⁹ On the basis of the High Court's interpretation in *Sharkey*, the latter is likely to be the preferred interpretation.

9.64 The phrase is commonly used in constitutions to convey plenary power and the proposition that it constitutes 'words of limitation' has been rejected.¹⁰⁰ 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.¹⁰¹ McTiernan J gave some indication of its meaning in the criminal context when quoting from Stephen's, *The Criminal Law of England*:

The first and most general object of all political associations whatever is to produce and to preserve a state of things in which the various pursuits of life may be carried on without interruption by violence, or, according to the well-known expression of our law, to keep the peace. Every crime is to a greater or less extent a breach of the peace, but some tend merely to break it as against some particular person or small number of persons, whereas others interfere with it on a wider scale, either by acts which strike at the State itself, the established order of Government, or by acts which affect or tend to affect the tranquillity of a considerable number of persons or an extensive local area.¹⁰²

9.65 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,¹⁰³ and that sporadic or isolated incitements to violence may not be covered by s 80.2(5) without a broader link to the Commonwealth.¹⁰⁴ The Explanatory Memorandum for the Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth) 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.¹⁰⁵

9.66 For example, if 'Commonwealth' is interpreted in a geographical sense, those involved in the urging of force or violence in the Cronulla riot in Sydney in December 2005 could be prosecuted under s 80.2(5) if SMS messages were sent across state

99 G Griffith, *Sedition, Incitement and Vilification: Issues in the Current Debate: Briefing Paper No 1/06* (2006), 35.

100 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 10.

101 *R v Sharkey* (1949) 79 CLR 121, 152, 154.

102 *Ibid.*, 158.

103 G Griffith, *Sedition, Incitement and Vilification: Issues in the Current Debate: Briefing Paper No 1/06* (2006), 35. See also Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006.

104 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.

105 Explanatory Memorandum, Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth), 4.

boundaries.¹⁰⁶ However, if ‘Commonwealth’ is interpreted in an institutional and functional sense, it may be more difficult to draw a link to s 80.2(5).¹⁰⁷ A number of commentators and submissions consider that this makes the provision too narrow, particularly when considering whether the offence implements Australia’s international human rights obligations (this issue is discussed in more detail below).

9.67 The Federation of Community Legal Centres submits 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’.¹⁰⁸ PIAC notes that the approach promotes a ‘narrow view of human rights by making protection from incitement to violence contingent upon the effect of such violence on the authority of the government’.¹⁰⁹

9.68 However, some consider that the terminology of the ‘peace, order and good Government of the Commonwealth’ requirement makes s 80.2(5) too broad. If retained as a sedition offence, the Centre for Media and Communications Law submits that the common law requirement of incitement to violence against ‘constituted authority’ should be substituted in place of the ‘peace, order and good Government of the Commonwealth’ requirement.¹¹⁰

Obligations under international law

9.69 Issues Paper 30 (IP 30) asked whether the offence in s 80.2(5) implements effectively Australia’s obligations under international law to proscribe incitement of national, racial or religious hatred (in particular, art 20 of the ICCPR and art 4 of CERD).¹¹¹

9.70 A number of submissions welcome the federal move towards the creation of a federal offence of racial and religious vilification, but argue that s 80.2(5) is too narrow to provide full compliance with Australia’s obligations under international law.

9.71 Fitzroy Legal Service raises a number of issues that would need to be addressed before Australia’s obligations under CERD could be implemented effectively. In

106 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.

107 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.

108 Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006.

109 Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

110 Although it should be noted that the Centre for Media and Communications Law considers 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.

111 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Question 20.

particular, it notes 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.¹¹² A human rights group, ARTICLE 19, expresses 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 20.¹¹³

9.72 Without commenting directly on whether s 80.2(5) implements Australia’s international obligations, HREOC notes that art 20 of the ICCPR is not really concerned with public order offences but is rather directed towards anti-discrimination and anti-vilification.¹¹⁴

9.73 The AGD notes 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 emphasises that the enactment of s 80.2(5) is consistent with, but not required by, Australia’s obligations under international law.¹¹⁵ While acknowledging the existence of the reservations, a number of bodies have called for the Australian Government to remove the reservations.¹¹⁶

Identified groups

9.74 The AGD notes 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 language of ‘class’ in s 24A(g) was removed and the offence was redrafted to focus on groups in the community. The AGD submits that the move away from ‘classes’ to ‘groups’ has ‘advantages for national unity and identity’.¹¹⁷

9.75 One submission points out that the question of which groups deserve protection is complex and deserves more consideration:

[A]ny 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

112 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.

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

114 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 31 March 2006.

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

116 See, eg, Fitzroy Legal Service Inc, *Submission SED 40*, 10 April 2006.

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

controversial example—why ought it to be especially criminal to use force against fascists, for example?¹¹⁸

9.76 Dr Saul queries whether incitement to violence against groups based on ‘political opinion’ can be supported in the provision.¹¹⁹ If the provision’s constitutional validity rests on the external affairs power, it can be supported only to the extent that it implements a treaty obligation. Saul notes that no such protection for groups based on ‘political opinion’ is found in human rights treaties. Others query whether it would always be appropriate to punish or protect groups based on ‘political opinion’ advocating violence, citing Jews defending themselves against a violent fascist group or Fretilin’s resistance activities in pre-independence East Timor as examples.¹²⁰

9.77 The inclusion of ‘religion’ is questioned by some. 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.¹²¹ One of the principle concerns appears 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 is concern that mere criticism could be caught thereby stifling free and open public debate.¹²² 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.

9.78 In a consultation, HREOC suggested that a further group of ‘national origin’ should be added to the provision.¹²³ 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 have taken out Australian citizenship or were born in Australia. The AGD agreed with this suggestion.¹²⁴

118 P Emerton, *Submission SED 36*, 10 April 2006.

119 B Saul, *Submission SED 52*, 14 April 2006.

120 University of Melbourne Academics, *Consultation*, Melbourne, 5 April 2006.

121 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.

122 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.

123 Human Rights and Equal Opportunity Commission, *Consultation*, Sydney, 31 March 2006.

124 Australian Government Attorney-General’s Department, *Consultation*, Canberra, 26 April 2006.

9.79 PIAC is concerned that the requirement that the urging of violence be directed to a group with a common characteristic limits the operation to situations where those being urged can be identified as a homogenous group in terms of race, religion, nationality or political opinion. PIAC considers the provision may therefore miss more general urging at large, such as through mass media or the Internet.¹²⁵

9.80 Following the argument that s 80.2(5) is not an implementation of Australia's international obligations, and 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.¹²⁶ 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).

Broader review of anti-vilification laws

9.81 A number of submissions criticise existing anti-vilification laws and pointed to a need to review this area generally in order to develop effective responses to the problem of inter-communal violence.

9.82 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. Saul submits:

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

9.83 Fitzroy Legal Service states that existing federal measures to eradicate racial hatred, violence, discrimination and vilification are inadequate in both form and substance.¹²⁸ Australian Lawyers for Human Rights submits 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'.¹²⁹

125 Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006. See also New South Wales Young Lawyers Human Rights Committee, *Submission SED 38*, 10 April 2006.

126 L Lasry and K Eastman, *Memorandum of advice to Australian Capital Territory Chief Solicitor*, (undated), 42.

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.

129 Australian Lawyers for Human Rights, *Submission SED 47*, 13 April 2006. See also B Saul, *Submission SED 52*, 14 April 2006.

ALRC's view

A public order offence

9.84 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 should be characterised as sedition offences (see Proposal 2–1). However, there is a need for an offence such as s 80.2(5) in Commonwealth 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 Proposal 9–1).

9.85 There are examples in recent history where inter-group violence has occurred 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 common 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.

9.86 Although there is a clear relationship between s 80.2(5) of the *Criminal Code* and the RDA, the ALRC proposes to retain the ‘urging inter-group violence’ offence in the *Criminal Code* as a public order offence. There are two reasons why the ALRC considers this would be preferable to moving the offence to the RDA.

9.87 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 related to anti-vilification laws, the ALRC considers that the offence is best characterised as a public order offence.

9.88 Another reason for maintaining s 80.2(5) in the *Criminal Code* is that the ALRC considers it appropriate to retain serious criminal offences in the *Criminal Code* rather than spread throughout various pieces of legislation. There is also a question whether the RDA—which has a strong conciliation and civil remedies basis—would be the appropriate location for serious criminal offences, even where based on racial or other discriminatory grounds.

9.89 As outlined above, many submissions consider that the s 80.2(5) offence is too narrow, inappropriately focuses on the state rather than the individual, and does not fully implement Australia’s international obligations particularly in relation to art 4 of CERD and art 20 of the ICCPR. This does not necessarily mean that s 80.2(5) is bad law, or that it lacks constitutional support from the external affairs power. A number of

lawyers and agencies have acknowledged that s 80.2(5) is consistent with Australia's international obligations.

9.90 While supportive of the s 80.2(5) offence, the ALRC agrees that a broader range of offences is required in order to implement fully Australia's international obligations. These may include some criminal offences as well as additional civil offences. However, it is beyond this Inquiry to examine and recommend changes to the federal anti-discrimination regime more generally.

9.91 The ALRC notes the concerns raised about the stigmatising effect of characterising the conduct proscribed in s 80.2(5) as sedition, 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.

9.92 The ALRC considers that further initiatives are necessary in order to ensure that the offence is appropriately characterised in the future. It is 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 stifle the kinds of activities that might otherwise need to be punished using the criminal offence.

9.93 As indicated above, it is beyond the scope of this Inquiry to examine and recommend changes to anti-discrimination law more generally. However, the ALRC notes that, unlike other federal anti-discrimination legislation, the RDA has not been the subject of review since its enactment in 1975.¹³⁰ During this time 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 considers that a targeted review of the RDA would be highly desirable.

Modification of the offence

Fault elements

9.94 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 all of the 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*

130 See Productivity Commission, *Review of the Disability Discrimination Act 1992* (2004). Many components of the *Sex Discrimination Act 1984* (Cth) have been reviewed as part of the ALRC inquiry on women and the law or by the Sex Discrimination Commissioner: see, eg, 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).

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 an offence if he or she ‘*intentionally* urges’ the conduct referred to in s 80.2.

9.95 Consistent with proposals in relation to s 80.2(1) and (3),¹³¹ the ALRC proposes that s 80.2(5) be amended to insert the word ‘intentionally’ before the word ‘urges’.

9.96 Chapter 8 also 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 proposes that for a person to be guilty of any of the s 80.2 offences the person should intend that the force or violence urged will occur.¹³² Proposal 8–1, which would apply to s 80.2(5) and the other s 80.2 offences, will help remove from the ambit of the offences rhetorical statements that a person does not intend anyone to act upon.

Peace, order and good government of the Commonwealth

9.97 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 public order issues related to the Commonwealth. This provides a federal offence that is distinct from state and territory laws, and focuses on more serious inter-group conduct that has an impact on the broader society. 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 exhibited in the case of the Cronulla riot. Not every incident of civil unrest requires federal intervention. Although the ALRC notes there may be gaps in existing anti-violence 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.

9.98 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 propose to remove or make any change to this limb of the offence.

Identified groups

9.99 The ALRC generally supports the modernisation of s 80.2(5) to include specific groups as distinguishing factors. 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

131 See Proposal 8–3 and 8–6.

132 Proposal 8–1.

to identify a homogenous group. 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.

9.100 Consistent with advice received from HREOC, the ALRC proposes inserting 'national origin' as an additional category of 'group'. As noted above, there is at present a gap in the provision relating to Australian citizens who are identified with a particular national community. The ALRC considers that 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.

9.101 With the retention of the 'peace, order and good government of the Commonwealth' limb of the offence, the offence has two possible constitutional pegs. This would alleviate concerns that the inclusion of 'political opinion' as a distinguishing factor has no constitutional support given its absence from art 4 of CERD and art 20 of the ICCPR. At this stage the ALRC is not proposing to remove the distinguishing factor of 'political opinion', although would welcome further comment on this point.

9.102 The ALRC also notes concerns regarding using 'religion' as a distinguishing factor, although does not consider the concerns persuasive in relation to an offence that seeks to protect a religious group from being subjected to group force or violence. In addition, in this case there is a clear basis for the inclusion of religion as a distinguishing factor in s 80.2(5) given its history in art 20 of the ICCPR.

Other drafting issues

9.103 The meanings of 'urges' and 'force or violence' are discussed in detail in Chapter 8. The ALRC does not propose changes to these aspects of s 80.2(5).

9.104 Chapter 8 also discusses the idea that, if the current offences in s 80.2 are retained, there should be some requirement that force or violence is intended to occur as a result of the urging. The ALRC proposal to require that the person must intend that the urged force or violence will occur (Proposal 8-1) addresses these concerns. However, the ALRC is interested in further comment on this issue.

9.105 The approaches taken to the issues of extraterritoriality and the requirement of consent of the Attorney-General in relation to s 80.2(5) are dealt with in Chapter 8. The application of a defence to s 80.2(5) is discussed in Chapter 10.

Proposal 9–1 The heading of s 80.2(5) of the *Criminal Code* (Cth) (*Criminal Code*) should be changed to refer to urging ‘inter-group force or violence’.

Proposal 9–2 Section 80.2(5) of the *Criminal Code* should be amended to:

- insert the word ‘intentionally’ before the word ‘urges’, to clarify the fault element applicable to urging the use of force or violence; and
- add ‘national origin’ to the distinguishing features of a group for the purposes of the offence.

Proposal 9–3 As a consequence of Proposal 9–2, 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.

Proposal 9–4 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.)

10. Defences and Penalties

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Introduction

10.1 This chapter presents the ALRC's proposals in relation to the defences provided by s 80.3 of the *Criminal Code* (Cth) (*Criminal Code*). Section 80.3 provides defences to treason (s 80.1) and the offences created in s 80.2, where the acts in question are done 'in good faith'.

10.2 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, among other things, lack of clarity and failure to protect media reporting and artistic expression.

10.3 The ALRC proposes the repeal of the good faith defences, which are no longer appropriate given the modifications made to the offences in s 80.2(1), (3) and (5) and the proposed repeal of s 80.2(7) and (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 there is an intention that the force of violence urged will occur.

10.4 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 proposed modified offences.

The good faith defences

10.5 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. Under s 80.3(1)(a) it is 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.

10.6 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

10.7 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.

10.8 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 a state of affairs within the community.

10.9 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.

10.10 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; were intended to assist an enemy or those

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 proposed in this Discussion Paper, 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).

engaged in armed hostilities against the Australian Defence Force (ADF); or were intended to cause violence or create public disorder or a public disturbance.⁴

History of the good faith defences

10.11 The provisions in s 80.3 of the *Criminal Code* substantially replicate those in the repealed s 24F of the *Crimes Act*, 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 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

10.12 Another difference between the *Criminal Code* and repealed *Crimes Act* provisions is that an additional good faith defence was inserted (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 media organisation concerns, expressed to the 2005 Senate Committee inquiry,⁸ that they might commit a sedition offence by reporting the views or statements of others.

10.13 As discussed in Chapter 3, 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 Digest of the Criminal Law*.⁹

10.14 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 3, the sedition provisions of 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

The meaning of good faith

10.15 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.

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 *Criminal Code* (Cth) s 80.3(f). Compare Draft-in-Confidence Anti-Terrorism Bill (No 2) 2005 (Cth).

8 See, Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.117]–[5.122].

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.

10.16 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

10.17 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

10.18 In defamation law, the protection accorded by qualified privilege is lost if the publisher was motivated by what the common law describes as malice and—prior to the enactment of the uniform defamation Acts¹²—statutory codifications of defamation law referred to as the absence of good faith.¹³

10.19 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

10.20 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 case of the publication of news.¹⁵ Therefore, this privilege was not lost simply because the defendant knew that statements included in the report were false.¹⁶

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 6, [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).

16 Law Book Company, *The Laws of Australia*, vol 6 Communications, 6.1, Ch 6, [89].

10.21 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 a publisher is under a positive duty to pass on the defamatory information.¹⁸

10.22 The position with regard to the extended qualified privilege that is accorded to the publication of material concerning government and political matters¹⁹ has particular relevance to the meaning of good faith in the context of sedition law. This privilege derives from decisions of the High Court culminating in *Lange v Australian Broadcasting Corporation*.²⁰ The right is said to be based on the interest of each member of the Australian community in ‘in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia’.²¹

10.23 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

10.24 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

10.25 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 improper motive.²⁴

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.

24 Law Book Company, *The Laws of Australia*, vol 6 Communications, 6.1, Ch 6, [87].

10.26 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

10.27 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.

10.28 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

10.29 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

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).

29 *Bropho v Human Rights & Equal Opportunity Commission* (2004) 204 ALR 761.

30 *Ibid*, 787.

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

10.30 The *Bropho* case was applied in *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)*.³² In this case 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.

10.31 The respondents made claims about Muslim beliefs and conduct, including that Muslims are violent, terrorist, demonic, seditious, untruthful, misogynist, 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

10.32 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 express 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.

10.33 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.

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 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.

10.34 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 is 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

10.35 A related concern is that media organisations or journalists may be required to reveal information about the sources of information and the integrity of those sources in order to show good faith.³⁷ This is said to raise similar concerns as in 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 their views to the media.³⁹

10.36 Submissions to this Inquiry also question the effectiveness of the defences in protecting media organisations and journalists.⁴⁰ For example, the Chief Minister of the ACT observes 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 the comments (which might be said to be seditious) to do no more than to advance the discussion.⁴¹

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.

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; 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; The Cameron Creswell Agency Pty Ltd, *Submission SED 26*, 10 April 2006.

41 Chief Minister (ACT), *Submission SED 44*, 13 April 2006.

10.37 The Public Interest Advocacy Centre notes that this defence applies only to a ‘report’ or ‘commentary’ and may not include other forms of communication such as satire.⁴² Dr Saul states that the defence may be too narrow because it allows judges to ‘second-guess expert journalists on what matters are thought to be in the public interest’.⁴³

10.38 Fairfax, News Ltd and AAP express 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’. 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

10.39 The Australian Government Attorney-General’s Department’s (AGD) position is that the good faith defences adequately protect journalists and media organisations as the defence applies where a communication is ‘merely about criticising government policy or publishing reports or commentary on public interest matters’.⁴⁶

10.40 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

10.41 Media and arts organisations also focus 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 or hold political institutions in contempt.

42 Public Interest Advocacy Centre, *Submission SED 57*, 18 April 2006.

43 B Saul, *Submission SED 52*, 14 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 and this position will be clarified by the ALRC’s proposals.

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

47 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. 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.

10.42 The defences in s 80.3 do not make any special provision for artistic expression. Submissions to the Inquiry note 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 include 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

10.43 Submissions to the Inquiry argue that the nature of artistic work expressly should be recognised and protected, as in the RDA provisions.⁵¹ Section 18D 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’.

10.44 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 person intended to urge the use of force or violence, or intended to assist an enemy of Australia. The Department observed, in relation to a hypothetical scenario about the positive portrayal of a suicide bomber in a painting or a play, that:⁵²

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.⁵³

10.45 The AGD referred to the danger wholesale exemptions or ‘special defences’ might allow terrorists ‘to use education, the arts and journalism as a shield for their activities’.⁵⁴

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.

54 Ibid.

Burden of proof

10.46 IP 30 noted concerns expressed to the 2005 Senate Committee inquiry that the wording of the defences in s 80.3 might shift the burden of proof onto the defendant.⁵⁵ In response, the AGD noted that, as is standard practice under Australian evidence law, the defendant only must satisfy the *evidential* burden that there is a reasonable possibility that the defence exists:

The defences do not shift the legal burden of proof to the defence. The defence has to satisfy the evidential burden. This means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the defence exists (s 13.3(6) of the *Criminal Code*). Once the defence establishes that this reasonable possibility exists, the prosecution has to prove the defence does not exist beyond reasonable doubt. The prosecution takes this into account when making the initial decision to prosecute. No prosecutor goes to court without being in a position to counter defences of this nature.⁵⁶

10.47 Section 13.3 of the *Criminal Code* provides:

- (1) Subject to section 13.4, a burden of proof that a law imposes on a defendant is an evidential burden only. ...
- (3) 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. The exception, exemption, excuse, qualification or justification need not accompany the description of the offence. ...
- (6) In this Code:

evidential burden, in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

10.48 In the context of the defence in s 80.3, once the accused has satisfied the evidential burden by raising a reasonable possibility, the ultimate burden shifts to the prosecution to *negate* that defence beyond reasonable doubt.⁵⁷ The published policy of the AGD is that the evidential onus only should be placed on the defendant

where the matter is peculiarly within the knowledge of the defendant; and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.⁵⁸

55 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), [3.69].

56 Australian Government Attorney-General's Department, *Submission 290A to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, 3–4.

57 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.145].

58 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences: Civil Penalties and Enforcement Powers* (2004), Part 4.6.

10.49 Some submissions to the Inquiry continue to express concern about the burden of proof in proceedings under s 80.2.⁵⁹ Patrick Emerton submits that ‘in a liberal democracy, a dissenter should not bear even an evidential burden with respect to the legitimacy of speech’.⁶⁰ Rather, offences that criminalise speech should be defined with sufficient precision so as not to interfere with free speech.⁶¹

Criticism of the good faith requirement

10.50 Some who favour extending the defences consider that the term ‘good faith’ is inappropriate and should be removed.⁶² 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*.

10.51 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 in relation to which a complaint may be made to the Human Rights and Equal Opportunity Commission.⁶³ Similarly, the New South Wales defences⁶⁴ do not apply to the criminal offences of serious vilification⁶⁵ (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.⁶⁶

10.52 The New South Wales Council for Civil Liberties criticises 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.⁶⁷

59 See, eg, Federation of Community Legal Centres (Vic), *Submission SED 33*, 10 April 2006; P Emerton, *Submission SED 36*, 10 April 2006; John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

60 P Emerton, *Submission SED 36*, 10 April 2006.

61 *Ibid.*

62 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.

63 See *Racial Discrimination Act 1975* (Cth) s 18C; *Human Rights and Equal Opportunity Commission Act 1986* (Cth) Pt IIB.

64 See, eg, *Anti-Discrimination Act 1977* (NSW) s 20C(2).

65 *Ibid* s 20D.

66 *Ibid* s 20D.

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

10.53 Fairfax, News Ltd and AAP submit that ‘good faith’ is a 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 do not support a defence based on the RDA unless the words ‘reasonably and in good faith’ are excised.⁶⁸

10.54 In contrast, the AGD advises that the Government does not want to remove the concept of ‘good faith’ from the defence:

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.⁶⁹

A media exemption?

10.55 Submissions to the Inquiry suggest 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’.⁷⁰

10.56 Media organisations suggest that the media and journalists should be exempt from the ambit of the offences.⁷¹ In this context, Fairfax, News Ltd and AAP highlight precedents for such media exemptions in the *Trade Practices Act 1974* (Cth) 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].⁷²

10.57 Fairfax, News Ltd and AAP also state that such an exemption should be ‘wide enough to ensure freedom from liability for contributors, including letter writers,

68 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

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

70 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.

71 Australian Press Council Office, *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.

72 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 Office, *Submission SED 48*, 13 April 2006; Australian Broadcasting Corporation, *Submission SED 49*, 20 April 2006; Free TV Australia, *Submission SED 59*, 19 April 2006.

arising out of publication of their views in the media'.⁷³ Similarly, the Press Council states that a media exemption would not be sufficient in the absence of protection for 'artists, freelance writers, webloggers and other citizens who engage in expressive conduct'.⁷⁴

10.58 Other submissions oppose a media exemption. For example, the National Association for the Visual Arts states that the scope of such an exemption—in terms of the people to whom the exemption would apply—is difficult to determine and involves a high degree of subjectivity.⁷⁵ Further, it would be anomalous for the media to be permitted to engage in conduct that would be criminal, if committed by anyone else.⁷⁶

10.59 The AGD advises 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.⁷⁷

10.60 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.⁷⁸ 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.⁷⁹

10.61 Under the TPA, 'prescribed information providers' are exempt from compliance with some of the consumer protection provisions of Part V of the TPA.⁸⁰ A prescribed information provider is defined as 'a person who carries on a business of providing information'.⁸¹

73 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

74 Australian Press Council Office, *Submission SED 48*, 13 April 2006.

75 National Association for the Visual Arts, *Submission SED 30*, 11 April 2006.

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

77 *Ibid.*

78 *Privacy Act 1988* (Cth) s 7B(4).

79 *Ibid* s 6.

80 *Trade Practices Act 1974* (Cth) s 65A.

81 *Ibid* s 65A(3).

ALRC's views

10.62 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 the good faith itself—and whether this should be retained.

10.63 The s 80.3 defences are criticised for being too limited. It is 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.⁸²

10.64 The Senate Committee recommended that, should the new sedition offences be introduced, the defence for acts done in good faith should 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).⁸³ Submissions to the Inquiry agree that the more elaborated defences under s 18D of the RDA provide a better model, by extending the defences to cover a broader range of activity.⁸⁴

10.65 The Senate Committee also recommended that the words ‘in good faith’ should be removed from the defences,⁸⁵ and this suggestion receives some support in submissions to this Inquiry.⁸⁶

10.66 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.⁸⁷

82 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.126].

83 *Ibid.*, [5.175], Rec 28.

84 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-Chancellor's Committee, *Submission SED 60*, 25 April 2006; N Roxton Shadow Attorney-General, *Submission SED 63*, 28 April 2006.

85 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.175], Rec 28.

86 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.

87 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

10.67 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. Critically, at that time, the sedition offences did not require proof of subjective intention or incitement to violence or public disturbance.⁸⁸

10.68 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.⁸⁹ 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 requirement is not needed because the elements of the offence are not made out in the first place.

10.69 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 makes little sense.

10.70 Rather than attempt to protect freedom of expression through a 'defence' that arises after a person has been found to have 'technically' committed a sedition offence, the ALRC considers 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. 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 Proposal 8-1).

10.71 Further, the ALRC proposes that in considering whether a person has such an intention, the trier of fact should be required explicitly to take into account whether the conduct was done:

that a law enforcement officer 'acting in good faith in the course of his 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.

88 See L Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287, 290.

89 The ALRC proposes to clarify the application of intention as the fault element of the offences in s 80.2(1), (3) and (5). See Ch 8.

- 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
- in connection with an industrial dispute or an industrial matter; or
- in publishing a report or commentary about a matter of public interest.

10.72 The proposed new provision, set out in Proposal 10–2 below, draws from words used in the RDA defences⁹⁰ and existing s 80.3(1)(e)–(f) of the *Criminal Code*. The ALRC also observes that s 100.1(3) of the *Criminal Code*, which comprises part of the definition of a terrorist act for the purposes of the terrorist offences in Part 5.3, provides, in effect, that action is not terrorism if it is ‘advocacy, protest, dissent or industrial action’ and ‘is not intended’ to cause physical harm or a serious risk to the health or safety of the public. The ALRC’s approach to reform of s 80.3 takes a consistent approach—focusing on intention and context in the formulation of the offences rather than on elaborate defences.

10.73 The ALRC does not believe that a case has been made for any blanket exemption for media organisations or journalists. The general principles of corporate criminal responsibility under the *Criminal Code* provide that the Code applies to bodies corporate in the same way as it applies to individuals, with such modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.⁹¹

10.74 The provisions cited as precedents for a media exemption do not relate to criminal offences but exempt organisations from compliance with 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.

Proposal 10–1 Section 80.3 of the *Criminal Code* (Cth) (*Criminal Code*), concerning the defence of ‘good faith’, should be repealed.

⁹⁰ See *Racial Discrimination Act 1975* (Cth) s 18D(a)–(b).

⁹¹ *Criminal Code* (Cth) s 12.1. Where intention, knowledge or recklessness is a fault element in relation to a physical element of an offence (as is the case with the sedition offences), that fault element must be attributed to a body corporate that ‘expressly, tacitly or impliedly authorised or permitted the commission of the offence’: *Criminal Code* (Cth) s 12.3(1).

Proposal 10–2 Section 80.2 of the *Criminal Code* should be amended to provide that in considering whether a person intends that the urged force or violence will occur, the trier of fact must take into account whether the conduct was done (i) in the performance, exhibition or distribution of an artistic work; or (ii) 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 (iii) in connection with an industrial dispute or an industrial matter; or (iv) in publishing a report or commentary about a matter of public interest; and may have regard to any relevant matter.

Proposal 10–3 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 proposed new provisions regarding proof of intention that the force or violence urged will occur.

(The relevant sections of the Criminal Code, amended as proposed, are set out in Appendix 2.)

Penalties

10.75 Each of the five sedition 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 sedition offences under the *Crimes Act*, ss 24A–24D.⁹²

10.76 These penalties may be compared with the maximum periods of imprisonment for the following *Criminal Code* offences:

- treason—life;⁹³
- espionage—25 years;⁹⁴
- engaging in a terrorist act—life;⁹⁵
- directing the activities of a terrorist organisation—25 years;⁹⁶

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

93 *Criminal Code* (Cth) s 80.1.

94 *Ibid* s 91.1.

95 *Ibid* s 101.1.

96 *Ibid* s 102.2.

- membership of a terrorist organisation—10 years;⁹⁷
- getting funds for a terrorist organisation—25 years.⁹⁸

10.77 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:

- 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.

10.78 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.⁹⁹

10.79 IP 30 asked whether the maximum penalties for the offences in s 80.2 of the *Criminal Code* are appropriate.¹⁰⁰ Bearing in mind that most submissions favour the abolition of the sedition offences, it is perhaps unsurprising that many also considered that the penalties were too high¹⁰¹ and should not exceed the maximum of three years imprisonment, as provided under the repealed *Crimes Act* provisions.¹⁰²

10.80 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 submits:

97 Ibid s 102.3.

98 Ibid s 102.6.

99 See Australian Law Reform Commission, *Sentencing of Federal Offenders*, DP 70 (2005), Ch 7. A penalty unit for the purpose of Commonwealth offences is \$110: *Crimes Act 1914* (Cth) s 4AA.

100 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Ch 7, Question 10.

101 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.

102 Australian Writers' Guild, *Submission SED 29*, 11 April 2006; Victoria Legal Aid, *Submission SED 43*, 13 April 2006.

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. Furthermore, we would recommend that the use of custodial sanctions be limited to the most serious of the scale of the offences, and that it should be a discretionary rather than a mandatory penalty, so as to allow for a proper consideration of the full appropriateness of applying a custodial penalty in the individual case.¹⁰³

10.81 Mr Alex Steel states 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 observes:

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 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.¹⁰⁴

10.82 However, Mr Steel considers that the maximum penalties for the offences in s 80.2(3) and (5) are not appropriate when compared with offences under the s 327 of the *Commonwealth Electoral Act 1914* (Cth)¹⁰⁵ and most State assault offences—the penalties for which are set considerably lower.

10.83 The AGD refers to the conclusions of the Gibbs Committee and advises 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’. The AGD also notes that the imprisonment period is consistent with the penalty in the equivalent new offence in the United Kingdom.¹⁰⁶

ALRC’s views

10.84 The ALRC does not propose 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 proposals in this Discussion Paper. 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 proposed, the maximum penalties may not adequately reflect the seriousness of the conduct.¹⁰⁷

10.85 There are stronger arguments that the penalties are inappropriate for the offences in s 80.3(7) and (8), which require no link with force or violence—but the ALRC proposes that these offences be repealed.

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

104 A Steel, *Submission SED 23*, 18 April 2006.

105 However, this offence need not involve the use of force or violence.

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

107 M Weinberg, *Consultation*, Melbourne, 3 April 2006.

10.86 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.¹⁰⁸ The review team is due to report to the Government by the end of 2006.

108 See Australian Government Attorney-General's Department, *Review of Criminal Penalties in Commonwealth Legislation* (2006) Australian Government Attorney-General's Department <www.ag.gov.au/penalties> at 23 March 2006.

11. Unlawful Associations

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Introduction

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

11.2 Part IIA 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.

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

11.4 This chapter considers the unlawful associations provisions as they currently stand and the new definition of 'seditious intention' inserted into s 30A. It then 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 within Part IIA that are not directly linked to unlawful associations, and

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.

proposes that they be subject to repeal or review, in line with previous proposals in this Discussion Paper.

Unlawful associations provisions

11.5 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.

11.6 Under s 30A(1A) a body is an unlawful association if it is declared to be so by the Federal Court of Australia, following a ‘show cause’ application by the Attorney-General pursuant to s 30AA.² 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 subsequently changed its policies and activities in relevant ways, and should no longer be deemed to be an unlawful association.³

11.7 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 the *Crimes Act* that was recommended by the Gibbs Committee.⁴

2 *Crimes Act 1914* (Cth) s 30AA.

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 4.

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

sedition 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.

11.9 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
- allowing meetings of an unlawful association to be held on property owned or controlled by a person.⁹

11.10 Each offence involves a maximum penalty of imprisonment for six or twelve months.

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.

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

History of the unlawful associations provisions

11.11 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 attack trade unions and their leaders in Australia.¹⁰ The Australian Government Attorney-General's Department (AGD) note that Part IIA was developed in the context of concern about communism in Australia.¹¹

11.12 The unlawful associations legislation was based on a similar Canadian model, although the penalties in Australia were considerably lighter. This Canadian legislation was repealed in 1936.¹² 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*.¹³

11.13 Only one person has ever been convicted in Australia of an offence under the unlawful associations provisions—and that conviction was overturned on appeal.¹⁴ Dr 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.¹⁵

11.14 Douglas notes that even when the *Communist Party Dissolution Act 1950* (Cth) was defeated in the High Court, no attempt was made to use the unlawful associations provisions to prosecute communists.¹⁶

Criticisms of the unlawful associations provisions

11.15 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

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

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

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

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

15 *Ibid*, 261.

16 *Ibid*, 261.

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

11.16 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.

11.17 A comprehensive survey of the history and use of the Part IIA provisions on unlawful associations by Douglas concludes 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—'centrally co-ordinated bodies with authoritative programs, proud of their revolutionary credentials'.²⁰ However, these laws were not even effective against the Communist Party of Australia once it had '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

11.18 Douglas suggests that prosecutions may not have been attempted under the sections because of both 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 need to link to *violent* revolution). In the case of the Communist Party, 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 propaganda was produced by the particular body sought to be banned.²⁴

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 and 295.

21 *Ibid.*, 261 and 295.

22 *Ibid.*, 261 and 295.

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.

11.19 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 maker poses a seditious intention and that the acts not be done in good faith. There is no defence of good faith available to a body or persons prosecuted under Part IIA.²⁵

11.20 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. 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

11.21 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

11.22 Chris Connolly raised a number of objections to Part IIA, including that it:

- does not require any link whatsoever to force, violence or assisting the enemy;
- is not subject to any ‘good faith defence’ or humanitarian defence;
- appears to have no link at all to terrorism; and
- 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).²⁸

11.23 During the Senate Committee’s inquiry, the AGD 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*’.²⁹

25 Ibid, 263.

26 Senate Legal and Constitutional 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 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 C Connolly, *Submission 56 to Senate Inquiry into Anti-Terrorism Bill (No 2) 2005*, 7 November 2005.

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

Submissions and consultations

11.24 Issues Paper 30 (IP 30) noted that the unlawful associations provisions still rely on the concept of ‘seditious intention’ and asked whether this was appropriate, given that this concept is no longer used in connection with the offences in s 80.2 of the *Criminal Code*.³⁰

11.25 The use of the concept of ‘seditious intention’ was criticised by almost every submission that referred to the issue.³¹

11.26 The New South Wales Council for Civil Liberties argues that the re-enactment of the old definition of seditious intention is out of step with the new offence created under s 80.2.³²

11.27 Victoria Legal Aid (VLA) criticises 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*. VLA agrees with the 2005 Senate Committee inquiry and the Gibbs Committee that Part IIA of the *Crimes Act* should be repealed.³³

11.28 ARTICLE 19 also submits 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.³⁴

11.29 Other criticisms of the unlawful associations provisions include that the language of the sections is archaic,³⁵ and the meaning of terms such as ‘civilised country’³⁶ are unclear and the fact that the inserted definition of ‘seditious intention’ does not include any requirement that there be any actual violence, disorder or breach of the peace.³⁷

30 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Question 18.

31 See, eg, B Saul, *Submission SED 52*, 14 April 2006; National Association for the Visual Arts, *Submission SED 30*, 11 April 2006; Australian Screen Directors Association Limited, *Submission SED 51*, 10 April 2006.

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

33 Victoria Legal Aid, *Submission SED 43*, 13 April 2006. This view was shared by others: National Association for the Visual Arts, *Submission SED 30*, 11 April 2006; B Saul, *Submission SED 52*, 14 April 2006.

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

35 J Pyke, *Submission SED 18*, 10 April 2006.

36 *Ibid.*

37 John Fairfax Holdings Ltd, News Limited and Australian Associated Press, *Submission SED 56*, 18 April 2006.

11.30 Consistent with its position during the 2005 Senate Committee inquiry, the AGD's submission to this Inquiry indicates that the definition of 'seditious intention' was inserted by the *Anti-Terrorism Act* simply as a consequential amendment to preserve the status quo, not with the purpose of reinvigorating the unlawful associations provisions.³⁸

Terrorist organisations under the *Criminal Code*

11.31 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. It has been suggested to this Inquiry that the acts covered by the unlawful associations provisions are now more appropriately dealt by the offences banning terrorist organisations under the *Criminal Code*.

11.32 In IP 30, the ALRC noted that the enactment in 2002 of a new set of counter-terrorism measures, including provisions dealing with acts of terrorism and terrorist organisations, suggests that the Parliament saw the Part IIA provisions as inadequate to the task of dealing with the challenges of modern terrorism.³⁹

Terrorist acts

11.33 Division 100.1 of the *Criminal Code* defines a 'terrorist act' as 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. 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;
- 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 the above consequences.⁴⁰

11.34 Division 101 creates a number of serious associated offences, including:

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

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

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

- engaging in a terrorist act;⁴¹
- providing or receiving training connected with terrorist acts;⁴²
- possessing things connected with terrorist acts;⁴³
- collecting or making documents likely to facilitate terrorist acts;⁴⁴ or
- doing other acts in preparation for, or planning, terrorist acts.⁴⁵

Terrorist organisations

11.35 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.

11.36 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).⁴⁶

11.37 The Anti-Terrorism Bill (No 2) 2005 added an additional criteria by which the Attorney-General can find that an organisation is a terrorist organisation: where the organisation *advocates* the doing of a terrorist act (whether or not a terrorist 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.⁴⁷

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

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

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

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

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

46 Ibid s 102.1(2).

47 Ibid s 102.1(1A).

11.38 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.⁴⁸ An organisation may be re-listed after the initial two-year period by making a new regulation.⁴⁹ Since 2004, regulations also are subject to review by the Parliamentary Joint Committee on Intelligence and Security—which may recommend disallowance.⁵⁰ There are currently 19 organisations officially listed as terrorist organisations.⁵¹

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

- to direct the activities of the organisation;⁵²
- intentionally to be a member of that organisation;⁵³
- to recruit persons to the organisation;⁵⁴
- to receive training from, or provide training to, the organisation;⁵⁵
- to receive funds from, or provide funds to, the organisation;⁵⁶
- to provide support or resources to the organisation;⁵⁷ or
- on two or more occasions, intentionally to associate with a terrorist organisation, or its members or leadership, with the intention that the association will assist the terrorist to expand or to continue to exist.⁵⁸

11.40 The Security Legislation Review Committee, chaired by the Hon Simon Sheller AO, has conducted a review of the operation and effectiveness of the counter-terrorism laws, including Divisions 101 and 102. The review is a statutory requirement of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth). At the time of writing the findings of the review had not been released to the public.

48 Ibid s 102.1(3)–(4).

49 Ibid s 102.1(3)(c).

50 Ibid s 102.1A.

51 The full list may be found at Australian Government Attorney-General’s Department, *Listing of Terrorist Organisations* <www.nationalsecurity.gov.au> at 12 March 2006.

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

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

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

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

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

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

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

Comparing the unlawful associations and terrorist organisation provisions

Conceptual basis

11.41 Terrorist organisations and unlawful associations are based on different underlying concepts.⁵⁹ 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.

11.42 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.

11.43 As noted above, an unlawful association is a body of persons who 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. The AGD suggests that a circumstance may arise where it is possible to show that a group advocated or encouraged one of the acts listed in s 30A of the *Crimes Act* but it is not possible to establish the intention needed to establish a terrorist act.⁶⁰

Listing

11.44 As noted above, s 30A(1A) requires a body must be declared an unlawful association by the Federal Court following a ‘show cause’ application by the Attorney-General under s 30AA.

11.45 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 else a dedicated piece of legislation would have to be passed by the Australian Parliament in each case.

11.46 The Australian Government argued that this mechanism was too restrictive and cumbersome to meet Australia’s particular security needs. For example, the Security

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

60 Ibid. The AGD made a submission to the Sheller Committee, in which it called for the removal of the requirement to prove an intention to advance a political, religious or ideological cause on the basis that it makes the definition of a terrorist act overly complicated, and placed a heavy burden on the prosecution: Attorney-General’s Department, *Submission to the Security Legislation Review* (2006), 12.

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 Security Council resolutions.

11.47 Prior to 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 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.

Submissions and consultations

11.48 IP 30 asked to what extent the unlawful associations provisions overlap with the more recent terrorist organisations provisions of Division 102 of the *Criminal Code*, and whether the unlawful associations provisions were still necessary.⁶¹

11.49 The Australian Federal Police indicate that, in practice, the unlawful associations provisions were not considered for use, and expressed satisfaction with the framing of the terrorist organisation offences.⁶² The Commonwealth Director of Public Prosecutions agree that the definition of a terrorist organisation was likely to be sufficiently broad to effectively cover the activities of any group that previously would have been considered for designation as an unlawful association.⁶³

11.50 VLA agree 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’.⁶⁴

11.51 The New South Wales Council for Civil Liberties submit that Part IIA 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.⁶⁵ This view was shared by a number of other lawyers and commentators with whom the Inquiry consulted.⁶⁶

11.52 ARTICLE 19 note that:

61 Australian Law Reform Commission, *Review of Sedition Laws*, IP 30 (2006), Question 19.

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

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

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

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

66 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.

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 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 application, including the *Workplace Relations Act 1996* (Cth) and the counter-terrorism amendments to the *Criminal Code* in 2002.⁶⁷

11.53 The AGD notes that ‘circumstances have changed dramatically since the enactment of Part IIA. The terrorism provisions address contemporary threats to the Australian community’.⁶⁸

ALRC’s views

11.54 The ALRC agrees that the unlawful associations provisions are outdated and unnecessary. There has been little disagreement with the view that the provisions should be repealed.

11.55 In Chapter 2, the ALRC proposes that, due to its historical connotations, the term ‘sedition’ should be removed from the federal statute book. The ALRC agrees with the submissions to this Inquiry that argue that preserving an old definition of seditious intention in Part IIA of the *Crimes Act* creates two different and inconsistent meanings of ‘sedition’ in federal law.

11.56 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 in scope to cover the types of organisations that advocate or urge politically motivated violence. This is particularly the case now that an organisation may be proscribed for advocating or praising the doing of a terrorist act. The link to the urging of serious violence or serious risk is a more modern and appropriate framing of the offences than banning organisations with a ‘seditious intention’.

11.57 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. Further, if such a case should arise, the ALRC agrees with the Gibbs Committee that existing criminal laws covering murder, assault, abduction,

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

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

damage to property or conspiracy—or incitement to any of the above activities—would be sufficient to deal appropriately with offenders.⁶⁹

11.58 The ALRC therefore proposes that ss 30A, 30AA, 30AB, 30B, 30D, 30E, 30F, 30FA, 30FC, 30FD, 30G, 30H and 30R of Part IIA the *Crimes Act* be repealed.

Proposal 11–1 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

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

Section 30C

11.60 Section 30C is another sedition-type provision, making 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.

11.61 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 8, the ALRC suggests that s 30C is redundant and proposes that it be repealed.⁷⁰

Sections 30J and 30K

11.62 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:

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].

70 Proposal 8–4.

- 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;⁷¹
- 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.⁷²

11.63 It appears that such a proclamation only has been made once, in 1951.⁷³

11.64 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 penalty for an offence under s 30K is imprisonment for one year.

11.65 The justification for ss 30J and 30K at the time of enactment was ‘that the sanctions are needed to prevent the dislocation of interstate and overseas trade and commerce and the working of Commonwealth services and authorities’.⁷⁴ Lee notes that, unlike the state governments, the Commonwealth, largely for constitutional reasons, does not have comprehensive ‘emergency powers’ type legislation.⁷⁵

11.66 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’.⁷⁶

11.67 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 recent amendments to the *Workplace Relations Act*, as part of the WorkChoices reforms,⁷⁷ has seen the inclusion of provisions under which industrial action may be terminated in certain circumstances. For 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

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

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

73 *Government Gazettes* 1951, 623 and 802.

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

75 *Ibid*, 166.

76 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.

77 *Workplace Relations Amendment (Work Choices) Act 2005* (Cth).

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 person contravenes such an order, a civil penalty may be imposed.⁷⁸

11.68 However, there is no direct equivalent of these emergency powers within the industrial relations legislation, nor any criminal penalties for incitement of an illegal strike or lockout. The question of the necessity of criminal sanctions in this context and the appropriate prohibitions on serious industrial action falls outside the terms of reference for this Inquiry.

11.69 The ALRC has proposed elsewhere in this Discussion Paper that the Australian Government should initiate a review of a range of offences contained in the *Crimes Act* to determine which warrant retention, relocation to the *Criminal Code*, or repeal. Sections 30J and 30K should be included in this process.

Proposal 11–2 The Australian Government should include ss 30J and 30K of the *Crimes Act 1914* (Cth) in the larger review of the *Crimes Act* called for in Proposal 4–1.

78 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).

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. Proposed Division 80 of the *Criminal Code*

[The ALRC's proposed amendments to Division 80 are highlighted.]

Chapter 5—The security of the Commonwealth

Part 5.1—Treason and offences against political liberty and public order

Division 80—Treason and offences against political liberty and public order

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 made for the purpose of this paragraph specifies 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 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 Offences against political liberty and public order

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 considering whether for the purposes of subsection (7) a person intends that the urged force or violence will occur, the trier of fact must take into account whether the conduct was done
- (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 connection with an industrial dispute or an industrial matter; or
 - (d) in publishing a report or commentary about a matter of public interest;
- and may have regard to any relevant matter.

(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—Repealed

See s 80.2(7)–(8) regarding proof of intention that the urged force or violence will occur, and the context to be considered.

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>
ARTICLE 19	SED 14	10 April 2006
Arts Law Centre of Australia	SED 46	13 April 2006
Australia Council for the Arts	SED 34	11 April 2006
Australian Broadcasting Corporation	SED 49	20 April 2006
Australian Government Attorney-General's Department	SED 31	12 April 2006
Australian Lawyers for Human Rights	SED 47	13 April 2006
Australian Major Performing Arts Group	SED 61	16 April 2006
Australian Muslim Civil Rights Advocacy Network	SED 54	17 April 2006
Australian Press Council	SED 48	13 April 2006
Australian Screen Directors Association	SED 51	10 April 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
Cameron Creswell Agency Pty Ltd	SED 26	10 April 2006
Centre for Media and Communications Law	SED 32	12 April 2006
Civil Liberties Australia	SED 37	10 April 2006

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
Combined Community Legal Centres Group (NSW) Inc	SED 50	13 April 2006
Confidential	SED 12	4 April 2006
Confidential	SED 22	3 May 2006
P Emerton	SED 36	10 April 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
J Goldring	SED 21	5 April 2006
S Gurciullo	SED 03	29 March 2006
M Head	SED 08	28 March 2006
B Ho	SED 07	9 March 2006
John Fairfax Holdings Ltd, News Limited and Australian Associated Press	SED 56	18 April 2006
A Johnston	SED 02	24 April 2006
Law Society of Western Australia	SED 19	28 March 2006
G McBain	SED 13	30 March 2006
Media, Entertainment and Arts Alliance	SED 28	10 April 2006
J Melville	SED 15	7 April 2006
A Moore	SED 01	31 March 2006
National Association for the Visual Arts	SED 30	11 April 2006
National Legal Aid	SED 62	20 April 2006

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
National Tertiary Education Union	SED 25	10 April 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 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
J Purvey	SED 06	12 March 2006
J Pyke	SED 18	10 April 2006
Queensland Council for Civil Liberties	SED 41	10 April 2006
N Roxon MP, Shadow Attorney-General	SED 63	28 April 2006
B Saul	SED 52	14 April 2006
Screen Producers Association of Australia	SED 35	11 April 2006
C Shaw	SED 11	27 March 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
A Steel	SED 23	18 April 2006

<i>Name</i>	<i>Submission Number</i>	<i>Date</i>
Sydney PEN	SED 27	10 April 2006
M Talbot	SED 10	21 March 2006
Victoria Legal Aid	SED 43	13 April 2006
H Wiles	SED 42	12 April 2006
D Wilson	SED 05	21 March 2006
B Wright	SED 58	19 April 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 Federal Police	Canberra
Australian Government Attorney-General's Department	Canberra
Australian National University Academics	Canberra
Commonwealth Director of Public Prosecutions	Canberra
R Connolly & C Connolly	Melbourne
K Eastman	Sydney
Human Rights and Equal Opportunity Commission	Sydney
Human Rights Lawyers	Sydney
Law Institute of Victoria	Melbourne
L Maher	Melbourne
Media and Arts Organisations	Sydney
Media Organisations	Sydney
D Neal	Melbourne
New South Wales Bar Association	Sydney
B Saul	Sydney
University of Melbourne Academics	Melbourne
Victorian Bar Human Rights Committee	Melbourne
M Weinberg	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
Basic Law	<i>Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 1997</i>
CCTV	Closed circuit television
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
DPP	Director of Public Prosecutions
ECHR	Council of Europe <i>Convention for the Protection of Human</i>

	<i>Rights and Fundamental Freedoms 1950</i>
Gibbs Committee	Committee of Review of Commonwealth Criminal Law
Hope Commission	Hope Royal Commission on Australia's Security and Intelligence Agencies
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	<i>International Covenant Civil and Political Rights 1966</i>
IP 30	<i>Review of Sedition Laws (ALRC Issues Paper 30, 2006)</i>
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
ONA	Office of National Assessments
PIAC	Public Interest Advocacy Centre
POW	Prisoner of War
RDA	<i>Racial Discrimination Act 1975 (Cth)</i>
SCAG	Standing Committee of Attorneys-General
TSRA	Torres Strait Regional Authority
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNHRC	United Nations Human Rights Committee
VLA	Victoria Legal Aid