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Commission Reference: IP 30

The Australian Law Reform Commission was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth). The office of the ALRC is at Level 25, 135 King Street, Sydney, NSW, 2000, Australia.

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Making a submission

Any public contribution to an inquiry is called a submission and these are actively sought by the ALRC from a broad cross-section of the community, as well as those with a special interest in the inquiry.

Submissions are usually written, but there is no set format and they need not be formal documents. Where possible, submissions in electronic format are preferred.

It would be helpful if comments addressed specific proposals or numbered paragraphs in this paper.

Open inquiry policy

In the interests of informed public debate, the ALRC is committed to open access to information. As submissions provide important evidence to each inquiry, it is common for the ALRC to draw upon the contents of submissions and quote from them or refer to them in publications. As part of ALRC policy, non-confidential submissions are made available to any person or organisation upon request after completion of an inquiry, and also may be published on the ALRC website. For the purposes of this policy, an inquiry is considered to have been completed when the final report has been tabled in Parliament.

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In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as non-confidential.

Submissions should be sent to:

The Executive Director

Australian Law Reform Commission

GPO Box 3708

SYDNEY NSW 2001

E-mail: sedition@alrc.gov.au

Submissions may also be made using the on-line form on the ALRC's homepage:

<www.alrc.gov.au>.

The closing date for submissions in response to IP 30 is Monday 10 April 2006.

Contents

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

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:

Professor David Weisbrot (President)
Mr Brian Opeskin (Deputy President)
Associate Professor Les McCrimmon (Commissioner)
Justice Susan Kenny (part-time Commissioner)
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1. Introduction to the Inquiry

Contents

Background to the Inquiry

1.1 As described in some detail in Chapter 2, sedition laws developed in England in the 17th and 18th centuries, emerging out of the law against treason, and aimed at shielding the Crown (and its institutions and officers) from criticism that might lessen its standing and authority.

1.2 Perhaps to a greater extent than any other offence except treason, sedition is a quintessentially 'political' crime, punishing communications that are critical of the established order.

The Crimes Act provisions

1.3 Sedition provisions were found in state criminal law from an earlier date, but the offence entered the federal statute book when ss 24A-F were inserted into the *Crimes Act 1914* (Cth) (*Crimes Act*) in 1920.[1] Section 24A(1) originally defined 'seditious intention' as an intention to effect any of the following purposes:

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1 By the *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.

(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]

1.4 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'.

1.5 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 has a 'seditious intention' in relation to the offences in ss 24C–24D; and (2) to delete ss 24A(b) and (e), which referred to exciting disaffection in the United Kingdom or the King's Dominions.

1.6 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 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 which this might warrant increased domestic surveillance and police powers.

1.7 Legislation introduced and passed in the Australian Parliament in late 2005 replaced the old sedition offences in the *Crimes Act* with five new offences, now to be found in s 80.2 of the *Criminal Code*. As detailed in Chapter 3, the new offences

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).

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 law of incitement than it is to common law sedition.

1.8 Nevertheless, given the history and the factual circumstances in which the new offences likely would 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. 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.

1.9 At the same time, every liberal democratic society places some limits on the exercise of free speech—as authorised under international human rights conventions (see Chapter 5)—for example, through civil defamation laws and prohibitions on 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]

1.10 A basic function of this inquiry will be to determine whether the new offences—operating in combination with the 'good faith' defence provided by the new law (see Chapter 3)—are well-articulated and strike an acceptable balance in a tolerant society.

The Gibbs Committee Report 1991

1.11 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 1914*.[4] In a preceding discussion paper, the Gibbs Committee expressed the view that those provisions were couched in archaic language and required modernisation and simplification—but should then be retained in the *Crimes Act*.[5]

1.12 In its Fifth Interim Report, the Gibbs Committee confirmed this criticism, noting that the definition of 'seditious intention' was 'expressed in archaic terms and misleadingly wide'.[6] However, the Gibbs Committee also confirmed its view that

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

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

5 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.

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

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.

1.13 The Gibbs Committee also recognised Australia's international obligations under art 20 of the *International Convention on Civil and Political Rights* and art 4 of the *International Covenant on the Elimination of All Forms of Racial Discrimination* (see Chapter 5) to prohibit incitement to national, racial and religious hatred.[7]

1.14 Consequently, the Gibbs Committee's final recommendation was that it be made an offence, punishable by a maximum of seven year's 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.[8]

1.15 These recommendations were not taken up by the Australian Government at that time, but 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]

1.16 Similarly, in his Second Reading Speech, Attorney-General 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]

COAG Meeting of 27 September 2005

1.17 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

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7 Ibid, [32.17].
8 Ibid, [32.18].
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.

Directors-General of the Office of National Assessments (ONA) 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.

1.18 A communiqué setting out the agreed outcomes of the discussions was issued,[11] under the following headings:

- **National Emergency Protocol**. A National Emergency Protocol should be developed, noting the importance of 'a consistent and co-ordinated response by Commonwealth, State, Territory and local government at the onset of any national emergency'.

- **Mass transport security.** Continued high priority must be given to the security of mass passenger transport, and 'to strengthen and build on existing transport security arrangements' through a range of measures', involving elements of technology, planning and coordination, and staff development.

- **National approach to CCTV**. A national approach is needed to the use of closed circuit television (CCTV) in support of counter-terrorism arrangements, commencing with a review of 'the functionality, location, coverage and operability of mass passenger transport sector CCTV systems'. This also will involve the development of a National Code of Practice for CCTV systems for the mass passenger transport sector.

- **National Action Plan to combat intolerance and communal violence.** A meeting held on 23 August 2005, bringing together Islamic community leaders, the Prime Minister and other Commonwealth Ministers, endorsed a Statement of Principles rejecting terrorism in all its forms, and committing those involved to combat intolerance and violence. COAG noted existing initiatives involving faith leaders to strengthen community harmony, safety and understanding, and agreed to request the Ministerial Council on Immigration and Multicultural Affairs to develop a National Action Plan to build on the principles agreed at the August 2005 meeting, as well as similar meetings held at the state and territory levels.

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11 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.

- **Aviation security and policing.** COAG strongly supported the findings and recommendations in the Wheeler Report on airport security,[12] especially the need 'to establish a unified policing model at each of the 11 counter-terrorism first response (CTFR) airports' under a single command structure.

- **Identity security.** COAG agreed to 'the development and implementation of a national identity security strategy better to protect the identities of Australians', including the development and implementation of a national document verification service to combat the use of false and stolen identities and the investigation of reliable, consistent and nationally operable biometric security measures.

- **National standards for the security industry.** Noting the extensive use of private security arrangements and the importance of that industry to Australia's counter-terrorism arrangements, COAG agreed that New South Wales should 'undertake a review of security industry training, competency, accreditation, registration and licensing, in consultation with all other jurisdictions, to identify any variations in approaches'.

- **National Counter-Terrorism Plan.** COAG endorsed a revised version of the *National Counter-Terrorism Plan,* the primary document on Australia's national counter-terrorism policy and arrangements. The Plan—first launched in June 2003 and recently revised by the National Counter-Terrorism Committee (NCTC)—sets out the collaborative arrangements in place for preventing, preparing for and responding to terrorist incidents within Australia.

- **Counter-terrorism exercises.** COAG emphasised the importance of Australia's current regime of regular counter-terrorism exercises at the national, state and territory levels, and agreed to 'refocus the current regime in light of the lessons learned from the London terror attacks'.

- **Promoting public understanding.** COAG noted the 'importance of maintaining public understanding of, and confidence in, our national counter-terrorism arrangements', and agreed (among other things) that 'each government should have robust arrangements in place to provide the community, business and the media with timely, well coordinated and relevant information during a crisis'.

- **Strategy for chemical, biological, radiological and nuclear security.** COAG agreed that the NCTC, in consultation with the relevant emergency management

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12 Airport Security and Policing Review, *An Independent Review of Airport Security and Policing for the Government of Australia (September 2005)* (2005) Airport Security and Policing Review <http://www.aspr.gov.au> at 13 March 2006. The Review was led by the Rt Hon Sir John Wheeler, who conducted a review of major airport security in the United Kingdom in 2002.

> and health agencies, will develop a national Chemical, Biological, Radiological and Nuclear security strategy focused on prevention, preparedness, response and recovery.

1.19 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.[13]

1.20 State and territory leaders agreed with the Commonwealth that the *Criminal Code* 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, to include organisations that advocate terrorism; and
- 'other improvements … including to the financing of terrorism offence'.[14]

1.21 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.[15]

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13 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.

14 Ibid.

15 Ibid.

1.22 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 is 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 for up to 14 days; and (b) stop, question and search powers in areas such as transport hubs and places of mass gatherings.[16]

1.23 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'.[17]

The Anti-Terrorism Bill (No 2) 2005

1.24 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

16 Ibid.
17 Ibid.

- modernisation of the old sedition offence, as recommended by the Gibbs Committee a decade earlier, by replacing it with a suite of five offences built around the basic concept of prohibiting a person from recklessly 'urging' others to use 'force or violence' in a number of prescribed contexts—and with a specific defence of 'good faith' (Schedule 7).

1.25 In his Second Reading Speech, Attorney-General Philip Ruddock MP 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.[18]

1.26 In relation to the sedition provisions in particular, the Attorney-General 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.[19]

Senate Legal and Constitutional Legislation Committee report

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

1.28 The Committee, 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.

1.29 In relation to the security environment, the Committee 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

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

19 Ibid, 103.

> 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.[20]

1.30 Similarly, the Australian Federal Police argued before the Committee that the clandestine nature of terrorism activity and its catastrophic consequences mandate 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.[21]

1.31 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.[22]

1.32 The Committee's 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.[23] Most recommendations had substantial cross-party support, although a dissenting report was filed by Greens Senators Bob Brown and Kerry Nettle;[24] additional comments were supplied by Labor Senator Linda Kirk;[25] and

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20 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [2.7].
21 Ibid, [2.9].
22 Ibid, [2.6].
23 Ibid.
24 Ibid, 195–198.
25 Ibid, 199–201.

additional comments and a partial dissent were supplied by Australian Democrats Senator Natasha Stott Despoja.[26]

1.33 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.[27]
>
> **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*.[28]
>
> **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*).[29]
>
> **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.[30]

1.34 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—and entered into force on 11 January 2006.

1.35 The Government did not accept Recommendation 29, to remove Schedule 7 from the Bill in its entirety. Instead, some recommended changes were made to the

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26 Ibid, 203–214.
27 Ibid, [5.173].
28 Ibid, [5.174].
29 Ibid, [5.176].
30 Ibid, [5.233].

wording of the offences and the defence in Schedule 7 (see Chapter 3), and the Attorney-General confirmed his earlier undertakings that, 'given the considerable interest in the provisions', they would be subject to a review.[31] Ultimately, the Attorney-General agreed to refer the matter to the ALRC for an independent public inquiry.

Terms of Reference

1.36 On 2 March 2006, the Attorney-General asked the ALRC to conduct a review of the operation of Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* and Part IIA of the *Crimes Act 1914*, with respect to the recently amended provisions dealing with the offence of sedition and related matters, and to report by 30 May 2006.

1.37 The Terms of Reference 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.

1.38 In performing its functions in relation to this reference, the Commission 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.

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

Law reform processes

Timeframe

1.39 Most ALRC inquiries take at least a year 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. However, the issues in question here, although difficult, 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 2005 inquiry—and the nearly 300 submissions made to that inquiry—which has reduced the typical learning curve.

1.40 The ALRC's normal practice involves producing two consultation papers—an Issues Paper and a Discussion Paper—prior to producing the final Report. Notwithstanding the tight timeframe, the ALRC intends to adopt the standard process, and has produced this Issues Paper as quickly as possible in order to commence the community consultation process on an informed basis.

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

1.42 As noted above, the Attorney-General has requested that the final Report be presented by 30 May 2006. Once tabled in Parliament, the Report becomes a public document.[32] The Report will not be a self-executing document—the ALRC is an advisory body and provides recommendations about the best way to proceed, but implementation is always a matter for others.[33]

1.43 In recent reports, 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 will be presented to the Attorney-General, it may be that some of its recommendations will be directed to other government and non-government agencies, associations and institutions for action or consideration.

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

33 However, 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 partially implemented, three per cent are under consideration, and 11 per cent have not been implemented: Australian Law Reform Commission, *Annual Report 2004–05*, ALRC 101 (2005), 24.

Community consultation

1.44 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.[34]

1.45 One of the most important features of ALRC inquiries is the commitment to widespread community consultation.[35] 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.

1.46 Consequently, the ALRC is developing a broad consultation strategy for this inquiry, so far as time permits, which will encourage participation from a wide spectrum of stakeholders, including: community groups; prosecution and law enforcement agencies; criminal defence lawyers; judges; government officials; media organisations and peak associations; legal professional associations; human rights and civil liberties groups; academics; and others.

1.47 This Issues Paper is available free of charge in hard copy from the ALRC, and may be downloaded free of charge from the ALRC's website <www.alrc.gov.au>. Any individual or group that wishes to be informed about the progress of this inquiry may register an interest through the website or by contacting the ALRC.

Advisory Committee

1.48 It is standard operating procedure for the ALRC to establish an Advisory Committee (or 'reference group') to assist with the development of its inquiries. The Advisory Committee had not been established at the time of publication of this Issues Paper; however, it is intended that membership will be settled shortly.

1.49 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, as well as in providing quality assurance in the research, writing and consultation effort. The Advisory Committee also assists with the development of recommendations as an inquiry progresses. However, ultimate responsibility for the Report and its recommendations remains with the Commissioners of the ALRC.

1.50 Advisory Committees typically meet about three to four times during the course of an inquiry. Again, given the tight timeframe in which this inquiry is being

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

35 B Opeskin, 'Engaging the Public: Community Participation in the Genetic Information Inquiry' (2002) 80 *Reform* 53.

conducted, it is likely that the Advisory Committee will meet twice—once before the publication of the Discussion Paper, to consider options for reform, and once before the completion of the final Report, to consider the draft recommendations.

Matters outside this Inquiry

1.51 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 time allowed for reporting.

1.52 The ALRC will not be 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, among the issues excluded from examination are:

- 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 impose preventative detention and control orders;
- the handling of classified and security sensitive information by Australian courts and tribunals;[36] and
- the use of executive authority to refuse, withdraw or cancel passports or visas where there is a security concern.

Organisation of Issues Paper 30

1.53 The Issues Paper is organised into seven chapters. Chapter 2 describes the history of sedition and related offences, from its origins centuries ago in England to more modern usages.

1.54 Chapter 3 outlines the current state of the federal law on sedition and unlawful associations following the amendments in late 2005, and provides discussion and analysis about how the laws are framed. The chapter also describes related aspects of

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

federal law and highlights some of the gaps and overlaps between sedition and other relevant offences (such as treason, treachery and incitement to crime).

1.55 Chapter 4 outlines the position in the Australian states and territories, including the existence of cognate offences, such as those prohibiting racial vilification. Given the constitutional constraints in Australia, criminal law and procedure is largely—but not entirely—a matter for the states and territories.[37] Any federal legislative activity in this field must be underpinned by a head of power provided to the Commonwealth under the *Australian Constitution* (such as the external affairs power or the incidental power).

1.56 Chapter 5 surveys the relevant international law in this area, including United Nations conventions, declarations and resolutions, and considers their influence on Australian law. Chapter 6 provides a comparative view, describing sedition 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.

1.57 Chapter 7 sets out the key questions that the ALRC has identified as arising out of the Terms of Reference, and which will require answers before the ALRC can formulate options and proposals for reform—which will be presented for community consideration in a forthcoming Discussion Paper.

Written submissions

1.58 The ALRC strongly encourages interested persons and organisations to make written submissions at the earliest opportunity to help advance the policy-making process.

1.59 With the release of this Issues Paper, the ALRC invites individuals and organisations to make submissions in response to the specific questions posed in Chapter 7, or to any of the background material and analysis provided in the earlier chapters. There is no specified format for submissions. The Commission 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.

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37 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).

In order to be considered for use in the forthcoming Discussion Paper, **submissions addressing the questions in this Issues Paper must reach the ALRC no later than Monday, 10 April 2006**. Details about how to make a submission are set out at the front of this publication.

2. The History of Sedition Law

Contents

Introduction

2.1 This chapter examines the history of the law of sedition, in particular its evolution at common law and application in Australia in the 20th century.

2.2 Broadly defined, the law of sedition prohibits words or conduct deemed to incite discontent or rebellion against the authority of the state. There is no separate offence of 'sedition' as such; rather, the term denotes a number of common law and statutory offences—uttering seditious words, publishing or printing a seditious libel, and undertaking a seditious enterprise or seditious conspiracy—defined by reference to a seditious intention.[1]

2.3 The classic definition of seditious intention is found in Stephen's *Digest of the Criminal Law* published in 1887:

> 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

1 C Kyer, 'Sedition Through the Ages: A Note on Legal Terminology' (1979) 37(1) *University of Toronto Faculty of Law Review* 266, 267.

> 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.[2]

2.4 In this context, 'seditious intention' further defines the physical element of the offences, rather than referring to the mental element required.[3] This definition was reflected in Australia's federal sedition provisions prior to their amendment in 2005.[4] (See Chapter 3.)

2.5 The legal elements of sedition are notoriously ill-defined and the vagueness of the language renders it difficult to demarcate with any certainty the boundaries of the offence.[5] Historically, the law of sedition has been used to punish a wide range of behaviour—from satirical comment or mere criticism of authority to the incitement of violent uprising. The scope and application of the law 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]

2.6 Historical analysis of the law of sedition reveals that its development and use have been strongly influenced by the changing political climate and the degree of public support for existing state institutions, as well as by theories about the relationship between citizen and state and evolving notions of the relationship between action, idea, association and responsibility.

2.7 There has been a general trend in the common law courts to narrow the scope of sedition offences in accordance with contemporary emphasis on the importance of free speech and open political debate. Hence, a distinction has been drawn between the expression of political opinion with reformist aims and the advocacy of revolutionary or violent political action.[8] However, an examination of sedition prosecutions in Australia in the 20th century also reveals cases in which it has been used to stifle political dissent in a manner that many would consider incompatible with modern democratic processes.

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2 J Stephen, *A Digest of the Criminal Law* (1887), cited in The Law Commission (UK), *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), 42.

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

4 *Crimes Act 1914* (Cth) s 24A.

5 In *Boucher v The Queen* [1951] SCR 265, Kellock J stated that 'probably no crime has been left in such vagueness of definition': 382.

6 See Ibid per Kellock J, 382.

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

8 This is discussed in further detail later in this chapter.

The origins and evolution of common law sedition

Early origins

2.8 Doctrinally, the law of sedition derives from the law of treason, which since feudal times has punished acts deemed to constitute a violation of a subject's allegiance to his or her lord or monarch.[9] Sedition offences are tied conceptually to the law of treason, as certain words or conduct can be a catalyst for the stirring up of discontent or opposition to the established authority.

2.9 Sedition has been described as 'a crime against society, nearly allied to that of treason, and it frequently precedes treason by a short interval'.[10] The prohibition of mere criticism, without further action or incitement to violence, reflects a particular understanding of the relationship between state and society. According to this philosophy, the ruler is regarded as the superior of the subject, inherently entitled to be shielded from criticism or censure likely to diminish the ruler's status or authority.[11]

2.10 In the 1704 case of *R v Tutchin*,[12] Holt LCJ explained the justification of such a strict prohibition in terms of the preservation of the state apparatus:

> 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.[13]

2.11 Prior to the early 17th century, what would now be classified as sedition offences were prosecuted on an ad hoc basis pursuant to statutory variations to the law of treason,[14] *scandalum magnatum*,[15] other felony statutes,[16] or martial law.[17]

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9 See 'Historical Concept of Treason: English and American' (1960) 35 *Indiana Law Journal* 70.

10 *R v Sullivan* (1868) 11 Cox CC 44, 45 per Fitzgerald J. The word 'sedition' 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 which may incite discontent or rebellion against lawfully constituted authority, did not appear until the 1600s: see C Kyer, 'Sedition Through the Ages: A Note on Legal Terminology' (1979) 37(1) *University of Toronto Faculty of Law Review* 266, 266–267.

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

12 *R v Tutchin* (1704) 14 State Trials (OS) 1096.

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

14 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. It 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 basic 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 expedience than principled reforms 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 depended on a broad judicial interpretation or a statutory extension of the law. For example, in 1534 Henry VIII passed legislation which made it possible to commit treason by words or

2.12 The emergence of seditious libel as a distinct offence is attributed to the 1606 decision of the Court of the Star Chamber in *De Libellis Famosis*, in which the defendant was prosecuted for defaming the deceased Archbishop of Canterbury.[18] The Court held that the basis of criminal libel was that it risked a breach of the peace—the truth of the statements made did not provide a defence, since the peace was just as likely to be broken whether the statements were true or false.[19] The Court further 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.[20]

2.13 At the time of this decision, the absolute monarchy was under threat from the rising parliamentarians. Existing means of prosecuting seditious words and writings were inexpedient, and seditious libel was developed as a more efficient and effective means of securing convictions.[21] The recent advent of the printing press prompted a more sustained effort to control expression of critical ideas[22]—foreshadowing, by several centuries, current concerns about the rapid spread of information (and misinformation) through the internet and other forms of modern communications technology.

Common law development

2.14 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 'any criticism of public men, laws or institutions was liable to be treated as sedition'.[23] During this period, neither the intention of the defendant (or rather, the absence of intention to incite disaffection or violence in others) nor the truth of the

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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(3) *Stanford Law Review* 661; R Manning, 'The Origins of the Doctrine of Sedition' (1980) 12 *Albion* 99.

15 *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 P Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37(3) *Stanford Law Review* 661, 668.

16 See Ibid, 670–671.

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

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

19 Ibid, 250.

20 Ibid, 251.

21 See P Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37(3) *Stanford Law Review* 661, 759; R Manning, 'The Origins of the Doctrine of Sedition' (1980) 12 *Albion* 99, 100.

22 Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 6.

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

matters communicated affected the finding of guilt.[24] The courts emphasised that it was the 'bad tendency' of criticism to undermine government that rendered it an offence.[25]

2.15 The breadth of the scope of the law during this period can be attributed in part to the respective functions of the judge and the jury in seditious libel trials: juries were confined to determining factually whether a defendant had uttered, published or printed the alleged words, and were precluded from making a finding as to whether the words were in fact 'seditious' or whether the defendant intended them to be so.[26] 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.[29] In addition, by allowing more political questions to be taken into account by the jury, it forced the law to conform to some extent to popular opinion about the right to free speech and political debate.[30]

2.16 The 19th century saw a significant shift in the definition and use of the sedition offences. In response to the permeation of liberal democratic notions of the relationship between state and society—and, in particular, the 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 offence 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]

2.17 The increasing difficulty in prosecuting seditious libel and the upsurge of radical activity following the Napoleonic wars led to the development of the offence of 'seditious conspiracy', which 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

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

25 See, for example, *R v Tutchin* (1704) 14 State Trials (OS) 1096.

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

27 32 Geo III c 60.

28 B Shientag, *Moulders of Legal Thought* (1943), 177–178.

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(Aut) *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 The 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.

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

unlawful assembly, and was manifested by making speeches, holding meetings or taking steps in concert with others.[36]

2.18 Prosecutions for seditious conspiracy were brought sporadically throughout the 19th century, notably following the Peterloo massacre of 1819 and in connection with the Chartist disturbances in 1839 and 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

2.19 Sedition prosecutions tapered off in the first half of the 20th century and the offences appear to have fallen into disuse in the latter half of the 20th century. The last prosecution initiated by the British Crown was in 1949.[40]

2.20 The legal elements of the common law offences remain uncertain—particularly whether a specific subjective intention is required, or whether a basic intention objectively discerned would suffice.[41] However, the law has narrowed in regard to the matters to which the requisite intention must be directed. In Boucher v R, the Supreme Court of Canada held that there must be a specific intention to incite violence or to create public disturbance or disorder, and that 'it must be violence or resistance or defiance for the purpose of disturbing constituted authority'.[42]

2.21 Sedition law was most recently considered by the Divisional Court in England in 1991, when a private prosecution was brought unsuccessfully against the author and publishers of *The 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 offence.[44]

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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(Aut) *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 in this case 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 The Law Commission (UK), *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), 45.

42 *Boucher v The Queen* [1951] SCR 265, 453.

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

44 Ibid, 453.

Sedition in Australia

Colonial era inheritance

2.22 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 was used to prosecute:

- Governor Darling's political opponents, including critics in the press;[46]
- the Eureka Stockade rebels and their supporters;[47] and
- the anti-conscriptionists who opposed Australia's involvement in the First World War.[48]

Crimes Act 1914 (Cth)

2.23 Until 1914, criminal law was almost entirely the province of the states and territories.[49] Following the commencement of the First World War, judicial doctrine approved a marked expansion in Commonwealth power, resulting in a spate of federal laws to regulate public order.[50]

2.24 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.[51] The sedition offences were not included in the *Crimes Act*; however, the *War Precautions Act 1914* (Cth) created a number of 'precursory' offences designed to suppress discussion of war aims and alliances and conscription policy and practice.[52]

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45 Sedition offences were subsequently codified in the code states, while the common law continued to operate in the other states: *Criminal Code 1924* (Tas) ss 66, 67; *Criminal Code 1913* (WA) ss 44–6; *Criminal Code 1899* (Qld) ss 44–46. These provisions mirrored the common law: see M Head, 'Sedition—Is the Star Chamber Dead?' (1979) 3 *Criminal Law Journal* 89, 91.

46 See D Ash, 'Sedition' (2005) (Summer 2005–2006) *Forbes Flyer* 2, 1.

47 C Connolly, *Submission 56 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 7 November 2005, 9.

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

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

50 Ibid, 155.

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

52 For example, s 4(d) of the *War Precautions Act 1914* (Cth) gave the Governor-General the 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 Sawer, *Australian Federal Politics 1901–1929* (1956), 141. The Commonwealth could also prohibit the importation of literature with a 'seditious intent' pursuant to the *Customs Act 1901* (Cth): see R Douglas, 'Saving Australia from Sedition: Customs, the Attorney-General's Department and the Administration of Peacetime Political Censorship' (2002) 30 *Federal Law Review* 135.

2.25 The sedition provisions were inserted into the *Crimes Act* in 1920.[53] These provisions repeated in substance the common law definition of the offence,[54] but were somewhat broader in that they did not require proof of subjective intention and did not require incitement to violence or public disturbance.[55] Under ss 24C and 24D of the *Crimes Act*, it was an offence to engage in a seditious enterprise with a seditious intention [56] or to write, print, utter or publish seditious words with a seditious intention.[57]

2.26 'Seditious intention' was defined as:

> An intention to effect any of the following purposes, that is to say:
>
> (a) to bring the Sovereign into hatred or contempt;
>
> (b) to excite disaffection against the Sovereign or the Government or the Constitution of the United Kingdom or against either House of Parliament of the United Kingdom;
>
> (c) to excite disaffection against the Government or Constitution of any of the King's Dominions;
>
> (d) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;
>
> (e) to excite disaffection against the connexion of the King's Dominions under the Crown;
>
> (f) to excite His Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth; or
>
> (g) to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order and good government of the Commonwealth.[58]

2.27 The *Crimes Act* was further amended in 1926 to prohibit 'unlawful associations' that advocated or encouraged the doing of any act purporting to have as an object the carrying out of a seditious intention.[59] (See Chapter 3.)

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

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

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

56 *Crimes Act 1926* (Cth) ss 24B, 24C. Section 24C was amended in 1986 to include a requirement that the defendant intended to cause violence or create public disorder or a public disturbance: see discussion later in this chapter.

57 *Crimes Act 1926* (Cth) ss 24B, 24D. Like s 24C, s 24D was amended in 1986 to include a requirement that the defendant intended to cause violence or create public disorder or a public disturbance: see discussion later in this chapter.

58 *Crimes Act 1926* (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).

Communist Party prosecutions

2.28 The advent of federal sedition offences coincided with the foundation of the Communist Party of Australia (CPA), although this was not alluded to extensively in the parliamentary debates.[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]

2.29 It appears that the first prosecution under the Commonwealth sedition provisions did not occur until 1948.[63] State sedition laws had been used on a number of occasions prior to this time, primarily to prosecute members of the CPA; however, there is little information available on the manner or frequency of prosecution.[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 trials received little attention outside of the states in which they were prosecuted, and on this basis concludes that there may have been other state sedition prosecutions during this period.[66]

2.30 There is evidence that the Australian government sought advice on a number of occasions about whether those who opposed Australia's involvement in the Second World War might be prosecuted for sedition.[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]

2.31 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

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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 Sawer, *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.

66 Ibid, 76.

67 Ibid, 76–77.

68 Ibid, 76.

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

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]

2.32 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]

2.33 A second sedition 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

70 Ibid, 114.
71 Ibid, 108.
72 Ibid, 108–109.
73 *R v Sharkey* (1949) 79 CLR 121.

> prevent the workers gaining that power Communists will advise the workers to meet force with force.[74]

2.34 Sharkey was convicted of uttering seditious words and sentenced to 13 months imprisonment. The High Court upheld the conviction on the same basis as in *Burns v Ransley*, again holding that the hypothetical nature of the statement did not affect the question of whether it could be considered seditious.

2.35 In both of these 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 only needed to prove 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 were the statements directly intended to incite violence or public disorder.

2.36 The High Court's interpretation of the federal sedition provisions—which, in effect, enabled them to be used to punish expressions of *disloyalty*—stands in contrast to the common law, which had in the previous century narrowed sedition to words or behaviour that incited violence or public disorder (see above). 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]

2.37 The High Court's extension of the sedition offences can be explained by reference to the evolving Cold War context and the desire of the Chifley Government 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

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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 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.

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

> sedition prosecutions were brought against any of the CPA's equally determined and ruthless opponents on the far right of the political spectrum.[77]

2.38 Although sedition appears not to have been widely prosecuted, there is evidence that the Commonwealth 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]

2.39 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.[80] 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.[81]

Recent consideration?

2.40 There are suggestions that prosecutions for sedition have been considered on a number of occasions in more recent times. Most notably, the Australian Attorney-General's Department was asked for advice in 1976 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.[82]

2.41 In the early 1990s, there was some discussion in the media about the possibility of sedition offences being used to prosecute opponents to Australia's involvement in the first Gulf War,[83] but there is no evidence of formal consideration being given to this by government officials.

Hope Royal Commission

2.42 In 1984, the Hope Royal Commission on Australia's Security and Intelligence Agencies (Hope Commission) examined federal sedition law as part of its review of national security offences relevant to the Australian Security Intelligence

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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 L Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287, 306.

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

81 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.

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

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

Organization.[84] The Hope Commission criticised the High Court decisions in *Burns v Ransley*[85] and *R v Sharkey*,[86] stating that 'mere rhetoric or statements of political belief should not be a criminal offence, however obnoxious they may be to constituted authority'.[87]

2.43 The Hope Commission recommended that the provisions be amended to include the common law requirement of intention to create violence, public disturbance or disorder.[88] It also recommended the removal of those provisions referring to seditious intention in relation to 'any of the Queen's dominions', narrowing the scope of the offences to seditious words or acts directed against the Australian Government or Constitution.[89] The federal provisions were amended in accordance with the Hope Commission's recommendations in 1986.[90]

Reform trends: modernise or abolish?

2.44 Until the Australian Government announced in September 2005 its intention to modernise the federal sedition provisions and adapt them to the counter-terrorism context,[91] Australia's sedition laws—like those in Britain and Canada—were thought to be suspended somewhere 'between obsolescence and abolition'.[92]

2.45 Law reform commissions in Canada, Ireland and the United Kingdom have advocated the abolition of existing sedition offences,[93] stating that such security offences are unnecessary in light of more modern criminal offences, such as incitement and other public order offences;[94] undesirable in light of their political nature and history;[95] and inappropriate in modern liberal democracies—where it is accepted that it

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

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

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

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

88 Ibid, [4.101].

89 Ibid, [4.98].

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

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

92 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.

93 The 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; The Law Commission (UK), *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), 48.

94 The Law Commission (UK), *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.

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

is a fundamental right of citizens to criticise and challenge government structures and processes.[96]

Gibbs Committee

2.46 Australia's federal sedition provisions were reviewed by the Committee of Review of Commonwealth Criminal Law (the Gibbs Committee) in 1991.[97] 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'.[98] 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.[99] 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.[100]

2005 amendments

2.47 These recommendations were not acted upon at the time; however, 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.[101] (See Chapter 3.)

2.48 Despite largely having fallen out of use in the last 50 years, the Australian Government stated that in the counter-terrorist context, 'sedition is just as relevant as it ever was',[102] 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'.[103] These amendments follow international initiatives to criminalise activity deemed to promote

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96 The 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.

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

98 Ibid, [32.13].

99 Ibid, [32.13]–[32.18].

100 Ibid, [32.18].

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

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

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

terrorist violence,[104] in particular the proposed 'encouragement of terrorism' provisions in the UK Terrorism Bill 2006.[105]

104 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 Ch 6 for more detailed discussion.

105 These provisions are discussed in Ch 6.

3. Federal Sedition and Related Laws

Contents

Introduction

3.1 The Terms of Reference ask the ALRC to inquire and report on the operation of Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* (Cth), which inserted sedition offences and related provisions into the *Criminal Code* (Cth) as ss 80.1A to 80.6.

3.2 The ALRC is also to consider the operation of Part IIA of the *Crimes Act 1914* (Cth) (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]

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

3.3 This chapter describes these sedition and unlawful associations provisions and considers the criticisms made of them, especially those raised during the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005 (Cth) (2005 Senate Committee inquiry).

3.4 This chapter also describes other aspects of federal law related to sedition, including provisions dealing with incitement, treason, treachery and racial or other vilification. Some of the gaps and overlaps between sedition and other offences are highlighted.

New sedition offences in the Criminal Code

3.5 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]

3.6 Schedule 7 repeals 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 schedule to the *Criminal Code Act 1995* (Cth) (*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]

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

3.8 Five new offences are 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*, states:

> (1) A person commits an offence if the person urges another person to overthrow by force or violence:
>
> (a) the Constitution; or

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2 Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth); and see Ch 1.

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

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

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

(b) the Government of the Commonwealth, a State or a Territory;

(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.

3.9 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.

3.10 The third offence, *Urging violence within the community*, under s 80.2(5), states:

(5) A person commits an offence if:

(a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and

(b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

(6) Recklessness applies to the element of the offence under subsection (5) that it is a group or groups that are distinguished by race, religion, nationality or political opinion that the first-mentioned person urges the other person to use force or violence against.

3.11 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 engages in conduct; and

(b) the first-mentioned person intends the conduct to assist an organisation or country; and

(c) the organisation or country is:

(i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and

(ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth.

3.12 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.

3.13 Each of the five offences carries a maximum penalty of imprisonment of 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]

Comment and analysis

3.14 The new offences in s 80.2 of the *Criminal Code* were the subject of significant comment and criticism before the 2005 Senate Committee inquiry and in the media—some of it well-founded, but some of it proceeding from a misunderstanding of the construction of criminal responsibility under the *Criminal Code*. This chapter provides some discussion and analysis of the framing of the new sedition offences, with particular regard to:

- the use of the term 'sedition' to describe this cluster of offences;
- the fault elements applicable to each of the offences;
- the adequacy of the defence provided in s 80.3 for acts done in 'good faith';
- the extra-territorial application of the sedition offences;
- the requirement that a prosecution for sedition cannot commence without the written consent of the Attorney-General;
- the use of a 'sedition' offence to deal with the problem of inter-group violence; and
- the overlap between the sedition offences and a range of other federal offences.

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

Is 'sedition' the best term to describe these offences?

3.15 The Terms of Reference ask the ALRC to consider whether 'sedition is the appropriate term' to identify the conduct proscribed in the new offences created under s 80.2 of the *Criminal Code*.

3.16 Virtually all of the submissions to the 2005 Senate Committee inquiry—except for those from the Australian Federal Police, the Commonwealth Director of Public Prosecutions, and the Australian Attorney-General's Department—were hostile to the idea of 're-invigorating' little-used sedition laws by modernising and extending them. The Senate Committee, across party lines, also expressed concerns about the effect of sedition laws on freedom of speech and association, and recommended that 'Schedule 7 should be removed in its entirety' from the Anti-Terrorism Bill (No 2) 2005 (Cth), and subjected to an independent, public review by the ALRC.[7]

3.17 As discussed in Chapter 2, the law of sedition has a long history—and for all of that time the crime has been strongly associated with political conflict and restraints on free speech. The new offences created under s 80.2 of the *Criminal Code* employ more modern language, but also make a number of significant conceptual breaks from the old offences in the *Crimes Act*, which were built around the s 24A definition of 'seditious intention'.[8] First, the focus has been shifted to the protection of *Australian* constitutions, governments, authority and defence forces, rather than those of the British Sovereign and her 'heirs and assigns' or 'dominions'. Second, s 80.2(5) prohibits the urging of *inter-group* force or violence, more akin to race hatred or racial vilification laws than sedition, which was primarily concerned with action, which threatened the safety, status or standing of the established authorities. Third, the offences created in ss 80.2(7) and (8), relating to assisting the enemy, owe more to the ancient crimes of treason and treachery, which remain on the statute book (see below).

3.18 It is very unlikely that the same volume and depth of criticism would have been levelled if the Government had presented Schedule 7 as *repealing* the old offence of sedition and replacing it with a suite of more narrowly defined—and arguably less objectionable—offences, which are aimed at urging the use of force or violence in the community or directed at members of the Australian Defence Force.

3.19 It appears that the caption of 'sedition' in s 80.2 was retained for indirect reasons. As discussed later in this chapter, the unlawful associations provisions in Part

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

8 A modernised definition of 'seditious intention' now appears in s 30A(3) of the *Crimes Act*; however, this applies only in relation to the offences of 'unlawful association'; see below.

IIA of the *Crimes Act* are still underpinned by the concept of a 'seditious intention'.[9] If sedition were to be removed entirely from the statute book, then the Part IIA offences might require recasting. However, this would not present major problems in practice, since these offences have not been prosecuted for decades and, in effect, have been superseded in recent times by the laws on terrorist organisations (see below).

3.20 During this inquiry, the ALRC will consider whether 'sedition' remains the best description for the offences contained in s 80.2 of the *Criminal Code*, or whether it should be replaced by another description.

Fault elements

3.21 The report of the 2005 Senate Committee inquiry noted considerable debate and confusion over the fault elements required under the proposed sedition provisions. The Senate Committee heard concerns that 'recklessness' was the designated fault element and—contrary to the old sedition offences in the *Crimes Act*—the new sedition offences would not require proof of an intention to cause violence.[10]

3.22 Under the *Criminal Code*, an offence consists of physical elements and fault elements.[11] 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.[12]

3.23 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—although the Parliament may enact 'a law that creates a particular offence from specifying other fault elements for a physical element of that offence',[13] where that is seen to be desirable, and the language used is clear and express.

3.24 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.

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9 *Crimes Act 1914* (Cth) s 30A(3).
10 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.96].
11 *Criminal Code* (Cth) s 3.1.
12 Ibid s 3.1.
13 Ibid s 5.1(2).

> (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.

3.25 Section 5.4 of the *Criminal Code* defines 'recklessness' as follows:

> (1) A person is reckless with respect to a circumstance if:
>
> (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (2) A person is reckless with respect to a result if:
>
> (a) he or she is aware of a substantial risk that the result will occur; and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
>
> (3) The question whether taking a risk is unjustifiable is one of fact.
>
> (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

3.26 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 'negligent', or perhaps 'seriously negligent'. As a term of art in Australian criminal law, recklessness is much closer to intentionality, requiring that the person consciously consider the substantial risks involved, and nevertheless to proceed with the conduct.

3.27 This subjective awareness represents a higher level of moral culpability than is the case with the objective elements of criminal negligence ('a great falling short of the standard of care that a reasonable person would exercise in the circumstances')[14] or ordinary (civil) negligence. Recklessness also presents more difficulties for the prosecution to demonstrate beyond reasonable doubt, because it must prove that the accused *actually* adverted to the circumstances, whereas objective tests require proof only that the notional ordinary person would have behaved more responsibly in the circumstances.

3.28 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):

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14 Ibid s 5.5.

> (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.

3.29 As shown above, three of the new sedition offences expressly contain recklessness as a fault element, at least 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 (s 80.2(2)); or the fact that it is the lawful processes of a Parliamentary election that others have been urged to interfere with (s 80.2(4)); 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 (s 80.2(6)).

3.30 Submissions to and evidence taken by the 2005 Senate Committee inquiry expressed concern and confusion about the fault elements for the new sedition offences. First, there was concern that, using recklessness, the fault element may have been set too low for an offence that is contentious and carries a serious penalty. As discussed above, however, most of this criticism proceeded from a misunderstanding of the precise nature of 'recklessness' under s 5.4 of the Criminal Code, or the way Australian courts have required something very close to proof of intention before the prosecution satisfies its burden.

3.31 Secondly, because of the presence of ss 80.2(2), (4) and (6), some assumed that recklessness is the *only* fault element that the prosecution must prove for conviction, particularly since the offences created in ss 80.2(1), (3), (5), (7) and (8) do not specify a fault element associated with the physical act of 'urging'. For non-experts (and sometimes even for experts), it can be difficult to separate the physical elements of an offence into 'conduct' on the one hand, and a 'circumstance' or 'result' on the other.[15] In the case of the sedition offences, questions arose about whether the physical elements of the offence comprise 'conduct' only, or 'conduct' *plus* one or more 'circumstances' or 'results'.

3.32 The construction given to these provisions by the Commonwealth Attorney-General's Department is as follows:

- where the physical elements of the offence comprise conduct only, intention is the fault element;[16]

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15 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.

16 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].

- where the physical elements are divisible, however, the person need only be reckless as to whether the conduct occurs in particular circumstances or leads to particular results.

3.33 The 2005 Senate Committee inquiry noted that, given the inevitable encroachment on freedom of expression by sedition offences and the serious penalties involved, any uncertainty is undesirable. The Senate Committee recommended that 'all offences in proposed section 80.2 should be amended to expressly require intentional urging'.[17]

3.34 The ALRC's view, at this early stage, is that the construction given to these provisions by the Australian Attorney-General's Department (above) is correct under Chapter 2 of the *Criminal Code*, which covers matters of criminal responsibility. However, there may be value in putting the matter beyond doubt with amendments to s 80.2 making it express that all of the offences involve *intentional* urging, with recklessness required in respect of the existence of the particular circumstances specified in ss 80.2(2),(4) and (6).

Assisting the enemy

3.35 Sections 80.2(7) and (8) do not require that a person urge the use of force or violence. These 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 Australian Defence Force, and are discussed in more detail below.

3.36 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'.[18] Further, the provisions were said to conflict with 1991 recommendations of the Gibbs Committee.[19] The Gibbs Committee recommended the enactment of three sedition offences, each of which required the incitement of force or violence.[20]

3.37 The Senate Committee recommended that, should the new sedition offences be introduced, 'proposed subsections 80.2(7) and 80.2(8) should be amended to require a link to force or violence'.[21]

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17 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.176], rec 29.

18 Ibid, [5.117].

19 Ibid, [5.117].

20 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), 306–307.

21 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.175], rec 28.

3.38 The Attorney-General's Department did not accept that the offences were new, but claimed them to be 'clearly contemplated' by the repealed *Crimes Act* sedition provisions. The Department's view was based on the fact that s 24F(1) created an exception to the sedition 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 Australian Defence Force is not done in good faith.[22]

3.39 The word 'assist' is not defined. Early drafts of the Bill used the words 'assist, *by any means whatever*'.[23] The report of the 2005 Senate Committee inquiry recommended that these additional words be deleted. However, even without the deleted additional words, the term 'assist' can be interpreted broadly.

3.40 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*.[24] These categories of conduct can all be seen as forms of assistance, albeit direct in nature.

3.41 However, at the other end of the range of interpretation, to 'assist' might encompass mere 'support', for example, of those engaged in armed hostilities against Australia. On that basis it could be argued, for example, that to urge another to assist an organisation under s 80.2(8) 'would conceivably extend to providing verbal support or encouragement for insurgent groups who might encounter the Australian Defence Force which is present in their country'.[25] Further, it is said that ss 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 be prosecuted for condemning illegal violence by their government, or for seeking to uphold the *United Nations Charter*.[26]

3.42 Another criticism is that the offences in ss 80.2(7) and (8) may be redundant because much of the proscribed conduct would constitute incitement to commit other offences, such as the offences of treason and treachery.[27] For example, under s 80.1(1)(e) a person commits the offence of treason if he or she 'engages in conduct that assists by any means whatever, with intent to assist, an enemy'. The *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) provides a range of relevant offences. For example, under s 9, it is an offence to recruit another person to serve with

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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 Draft-in-Confidence Anti-Terrorism Bill (No 2) 2005 (Cth) (emphasis added).

24 *Criminal Code Act* 1995 (Cth) s 11.2.

25 B Walker, *Memorandum of advice to Australian Broadcasting Corporation*, 24 October 2005.

26 B Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28 *University of New South Wales Law Journal* 868, 873.

27 Ibid, 873.

an armed force in a foreign state or to advertise or do any other act with the intention of facilitating such recruitment.

Urging group-based violence

3.43 In updating the previous sedition offences, the *Anti-Terrorism Act (No 2) 2005* (Cth) created an offence of urging a group or groups to use force or violence against another group or other groups.

3.44 The conduct proscribed by s 80.2(5) overlaps to some extent with conduct that rendered unlawful (but not criminal) by the racial vilification provisions in the *Racial Discrimination Act 1975* (Cth) (see below) and similar state and territory legislation (see Ch 4). However, the application of s 80.2(5) is limited to circumstances where force or violence is urged and where the use of that force or violence would threaten the peace, order and good government of the Commonwealth.

3.45 The creation of this new offence was welcomed in a number of submissions to the 2005 Senate Committee inquiry, although it was argued by some that it should be dealt with as a separate offence and would be more appropriately placed with other vilification offences, rather than with sedition offences.[28]

3.46 The characterisation of urging group-based violence as 'sedition' has been criticised as an error of classification, as sedition centres on subversion of political authority, and has little to do with group-based violence. The rationale for protecting one group from violence by another is not to prevent sedition or terrorism, but to guarantee the dignity of the members of those groups. Hence it has been argued that the appropriate place for such an offence is within the framework of anti-vilification legislation. The provision has also been criticised on the basis that presenting this offence as a counter-terrorism measure stigmatises group-based violence and reinforces the stereotyping of certain ethnicities or religions as terrorist.

3.47 Although many have welcomed the creation of a racial and religious vilification offence at a federal level, the offence in s 80.2(5) has been criticised as too narrow and insufficient to meet Australia's obligations at international law to prosecute incitement of national, racial or religious hatred (see Ch 6).

Extra-territorial application

3.48 Traditionally, common law countries 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

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28 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.92].

the act concerned was intended to have its impact there (such as a fraud procured in Australia through a communication made 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 some very serious crimes with an international flavour, such as piracy or genocide.[29]

3.49 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,[30] 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.

3.50 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.[31]

3.51 The sedition and treason[32] offences under Division 80 of the *Criminal Code* are characterised as 'Category D' offences—as is the range of terrorism offences created in 2002[33] in Divisions 101–104 of the *Criminal Code*.[34] This designation means that, by virtue of s 15.4 of the *Criminal Code*, they 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.

3.52 Section 15.4 was introduced into the *Criminal Code* in 2000 to provide a more transparent and certain scheme for the geographical jurisdiction of Commonwealth criminal law.[35]

3.53 Bret Walker SC has noted that the application of s 15.4 to s 80.2 gives rise to the possibility that the Commonwealth could launch a prosecution against anyone

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29 D Langham, *Cross-Border Criminal Law* (1997), 266.
30 See, for example, the *Crimes (Ships and Fixed Platforms) Act 1992* (Cth).
31 See, *Extradition Act 1988* (Cth).
32 *Criminal Code* (Cth) s 80.1(7).
33 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) Sch 1.
34 *Criminal Code* (Cth) ss 101.1(2); 101.2(5); 101.4(4); 101.5(4); 101.6(3); 102.9; 103.1(3) and 104.8. See also the discussion below regarding terrorist organisations.
35 By the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000* (Cth). There are four jurisdictional categories (A–D) now provided for in ss 15.1–15.4 of the *Criminal Code*.

suspected of these offences, anywhere in the world, 'creating what is in essence a universal jurisdiction'.[36]

3.54 Dr Ben Saul also has expressed concern about the extension of the geographical scope of these offences

> to create a quasi-universal jurisdiction, even though international law does not support universal jurisdiction over such conduct … because of the potential conflict with the law on combatant immunity in armed conflict.[37]

3.55 This issue will be examined in greater detail during this ALRC inquiry.

Requirement of Attorney-General's consent

3.56 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.[38]

3.57 A person may be arrested, charged and remanded into custody without the prior consent of the Attorney-General.[39] As with any other criminal matter, the investigating authority, such as the Australian Federal Police, will provide the Commonwealth Director of Public Prosecutions (DPP) with a brief of evidence, on which the DPP will determine—according to its published guidelines[40]—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.

3.58 A number of other federal offences require the Attorney-General's written consent to prosecute, such as the treachery and sabotage offences in the *Crimes Act*;[41] treason under s 80.1 of the *Criminal Code*; and the sexual servitude offences under Division 270 of the *Criminal Code*. Consent is required where the conduct constituting an offence occurs in a foreign country and the person to be charged is not an Australian citizen, resident or body corporate incorporated in Australia.[42] In such cases, the purpose of the consent requirement is to allow regard to be had to considerations of

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36 B Walker, *Memorandum of Advice to Australian Broadcasting Corporation*, 24 October 2005.

37 B Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28 *University of New South Wales Law Journal* 868, 873.

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

39 *Criminal Code* (Cth) ss 80.5(2)(a) and (b).

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

41 *Crimes Act 1914* (Cth) ss 24AA–24AC.

42 See s 16.1 of the *Criminal Code*, which requires the Attorney-General's consent for prosecution if alleged conduct occurs wholly in a foreign country in certain circumstances.

'international law, practice and comity, international relations, prosecutions action that is being or might be taken in another country, and other public interest considerations'.[43]

3.59 A number of submissions to the 2005 Senate Committee inquiry suggested that the political nature of the sedition offences meant 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.[44] However, those submissions did not acknowledge the independent role of the DPP in this process.

3.60 The Australian Attorney-General's Department argued before the 2005 Senate Committee inquiry that 'the Attorney is a political safeguard on the DPP and the DPP is a safeguard on the Attorney'.[45]

3.61 On first impression, the ALRC is inclined to agree with the Attorney-General's Department that the requirement of the Attorney-General's written consent is intended as an additional safeguard rather than an attempt to 'politicise' this area further. 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.

3.62 The ALRC will consider this matter further during the course of the inquiry.

Defences

Scope of the defence

3.63 Section 80.3 of the *Criminal Code* provides for a specific defence to treason (s 80.1) and to the sedition offences created in s 80.2, where the acts in question were done 'in good faith'.

3.64 The provisions in s 80.3 substantially replicate those in the old s 24F of the *Crimes Act*. According to the Explanatory Memorandum to the Bill:

> The section effectively mirrors the defence of good faith contained in section 24F of the *Crimes Act*, which applied to sedition offences in that Act, and the treason offence in s 80.1. The only substantive difference between s 24F of the *Crimes Act* and the new s 80.3 of the *Criminal Code* is that the new provision gives more discretion to a court in considering whether an act was done in good faith.[46]

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43 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.

44 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.146]–[5.151].

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

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

3.65 As noted in the Explanatory Memorandum, 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.[47]

3.66 It was suggested to the 2005 Senate Committee inquiry that the requirement to demonstrate good faith might be very difficult for a defendant to manage, especially in the context of media reports. The Fairfax media group argued that

> The requirement that a defendant demonstrate 'good faith' is also extraordinarily difficult if not impossible to satisfy in practice, particularly in relation to republication of third-party statements, as it may readily be negatived 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.[48]

3.67 The Government also responded to the concerns expressed by media organisations that they might fall foul of s 80.2 when reporting the views of others by inserting an additional good faith defence provision into s 80.3, which permits publication in good faith of 'a report or commentary about a matter of public interest'.[49]

3.68 The nature and scope of the defence provisions in s 80.3 will receive further attention during the ALRC Inquiry.

Burden of proof

3.69 Some submissions to the 2005 Senate Committee inquiry expressed concern that the wording of the defence in s 80.3 might shift the burden of proof onto the defendant.[50]

3.70 However, the Australian Attorney-General's Department submitted 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

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47 *Criminal Code* s 80.3(2).

48 John Fairfax Holdings and others, *Submission 88 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, (undated).

49 *Criminal Code* s 80.3(f).

50 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.138].

> 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.[51]

3.71 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.

3.72 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.[52]

3.73 The published policy of the Australian Attorney-General's Department 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.[53]

3.74 The ALRC believes that the submission of the Australian Attorney-General's Department to the 2005 Senate Committee inquiry correctly analyses the burden of proof position under s 80.3, and that this position complies with Government policy. However, the ALRC would consider any advice or submissions that can make a good argument to the contrary.

A better model?

3.75 A number of submissions to the 2005 Senate Committee inquiry suggested that the more elaborated good faith defence under s 18D in the *Racial Discrimination Act*

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51 Australian Government Attorney-General's Department, *Submission 290A to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, 3–4.

52 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.145].

53 Australian Government Attorney-General's Department, *A Guide to Framing Commonwealth Offences: Civil Penalties and Enforcement Powers* (2004), Part 4.6.

1975 (Cth) (RDA) provides a better model.[54] In particular, a preference was expressed for the specific mention given to artistic work in the RDA provisions.[55]

3.76 Section 18D creates a defence for things said and acts 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.

3.77 Similarly, the racial vilification provisions of the *Anti-Discrimination Act 1977* (NSW) state that the 'public act' in question is not unlawful if it is:

> (a) a fair report …, 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.[56]

3.78 The Senate Committee recommended that, should the new sedition offences be introduced, the defence for acts done in good faith should 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 s 18D of the *Racial Discrimination Act 1975*).[57]

3.79 During this Inquiry, the ALRC will explore further the adequacy of the defence provided in s 80.3 of the *Criminal Code*, including whether there may be better models available.

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54 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.134].

55 Ibid, [5.134].

56 *Anti-Discrimination Act 1977* (NSW) s 20C(2).

57 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.175], Rec 28.

Unlawful associations

Unlawful associations under the Crimes Act

3.80 The Terms of Reference direct the ALRC to consider the operation of Part IIA of the *Crimes Act* dealing with unlawful associations. These provisions initially were 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.[58]

3.81 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.

3.82 Without limiting the effect of s 30A(1), 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.[59] 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.[60]

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58 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.

59 *Crimes Act 1914* (Cth) s 30AA.

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

3.83 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*.[61] 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—however, it now applies only to the unlawful associations provisions that the Gibbs Committee recommended should be abolished (see below), rather than to the sedition offences now found in s 80.2 of the Code.

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

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

3.85 If a body is an unlawful association, whether by virtue of ss 30A(1), (1A) or (2), a number of criminal offences may apply.[62] To summarise, these offences include:

- failure to provide information relating to an unlawful association upon the request of the Attorney-General;[63]
- being an officer, member or representative of an unlawful association;[64]
- giving contributions of money or goods to, or soliciting donations for, an unlawful association;[65]

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

62 *Crimes Act 1914* (Cth) ss 30AB–30FC.

63 Ibid s 30AB, with a maximum penalty of imprisonment for six months.

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

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

- printing, publishing or selling material issued by an unlawful association;[66] or
- allowing meetings of an unlawful association to be held on property owned or controlled by a person.[67]

3.86 Section 30C contains 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.

3.87 The 2005 Senate Committee inquiry observed that the Gibbs Committee recommended the repeal of Part IIA of the *Crimes Act* in its entirety,[68] since the unlawful associations provisions had been 'little used since their introduction in 1926', and that the Gibbs Committee 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.[69]

3.88 Only one person has ever been convicted of an offence under the unlawful associations provisions—and that conviction was overturned on appeal.[70] Douglas writes that:

> 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.[71] 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.[72]

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66 Ibid ss 30E, 30F and 30FA.
67 Ibid s 30FC, imprisonment for up to six months.
68 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.163].
69 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [38.2]–[38.9].
70 R Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth Crimes Act' (2001) 22 *Adelaide Law Review* 259, 261.
71 *Crimes Act* s 30E.
72 R Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth Crimes Act' (2001) 22 *Adelaide Law Review* 259, 261.

3.89 Reflecting the industrial origins of Part IIA, s 30J also 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. It appears that such a proclamation only has been made once, in 1951.[73] These days, industrial disputes of this nature almost certainly would be handled under the *Workplace Relations Act 1996* (Cth), rather than the *Crimes Act*.

3.90 Other concerns were expressed about the unlawful associations provisions during the course of the 2005 Senate Committee inquiry. These included that Part IIA does not require any link to the use of force or violence, assisting the enemy or to terrorism and is not subject to any good faith or humanitarian defence. A particular concern related to the potential role of 'seditious intention' in the declaration of bodies as unlawful associations. 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).[74]

3.91 It was also 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)'.[75]

3.92 A comprehensive survey of the history and use of the Part IIA provisions on unlawful associations by Dr Roger Douglas concludes that the case for retention is weak.[76] 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'.[77] However, these laws were not even effective against the Communist Party of Australia once it had 'abandoned hopes of imminent revolution'.[78]

> 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

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73 *Government Gazettes* 1951, 623 and 802.

74 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.

75 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.

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

77 Ibid, 261 and 295.

78 Ibid, 261 and 295.

against a movement lacking the highly bureaucratised structure of the Communist Party.[79]

Terrorist organisations under the Criminal Code

3.93 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.[80]

3.94 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. Division 101 creates a number of serious offences, including:

- engaging in a terrorist act;[81]
- providing or receiving training connected with terrorist acts;[82]
- possessing things connected with terrorist acts;[83]
- collecting or making documents likely to facilitate terrorist acts;[84] or
- doing other acts in preparation for, or planning, terrorist acts.[85]

3.95 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.

3.96 There are two ways in which a body of people 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

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79 Ibid, 261 and 295.
80 *Security Legislation Amendment (Terrorism) Act 2002* (Cth), Sch 1.
81 *Criminal Code* s 101.1, punishable by a maximum of life imprisonment.
82 *Criminal Code* s 101.2, punishable by imprisonment for up to 15 or 25 years, depending upon the circumstances.
83 *Criminal Code* s 101.4, punishable by imprisonment for up to 10 or 15 years, depending upon the circumstances.
84 *Criminal Code* s 101.5, punishable by imprisonment for up to 10 or 15 years, depending upon the circumstances.
85 *Criminal Code* s 101.6, punishable by a maximum of life imprisonment.

fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).[86]

3.97 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[87] An organisation may be re-listed after two years by making a new regulation.[88] Since 2004, regulations also are subject to review by the Parliamentary Joint Committee on ASIO, ASIS and DSD—which may recommend disallowance.[89] There are currently 19 organisations officially listed as terrorist organisations.[90]

3.98 After an organisation is designated a 'terrorist organisation', it becomes offence:

- to direct the activities of the organisation;[91]
- intentionally to be a member of that organisation;[92]
- to recruit persons to the organisation;[93]
- to receive training from, or provide training to, the organisation;[94]
- to receive funds from, or provide funds to, the organisation;[95]
- to provide support or resources to the organisation;[96] or

86 *Criminal Code* s 102.1(2).
87 Ibid s 102.1(3)–(4).
88 Ibid s 102.1(3)(c).
89 Ibid s 102.1A.
90 The full list may be found on the website of the Australian Government Attorney-General's Department, *Listing of Terrorist Organisations* <www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/> (12 March 2006).
91 *Criminal Code* s 102.2, punishable by imprisonment for up to 10 or 15 years, depending upon the circumstances.
92 *Criminal Code* s 102.3, punishable by imprisonment for up to 10 years.
93 *Criminal Code* s 102.4, punishable by imprisonment for up to 15 or 25 years, depending upon the circumstances.
94 *Criminal Code* s 102.5, punishable by imprisonment for up to 25 years.
95 *Criminal Code* s 102.6, punishable by imprisonment for up to 15 or 25 years, depending upon the circumstances.
96 *Criminal Code* s 102.7, punishable by imprisonment for up to 15 or 25 years, depending upon the circumstances.

- 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.[97]

3.99 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 Security Council of the United Nations—or else a dedicated piece of legislation would have to be passed by the Australian Parliament in each case. The Government argued that this mechanism was too restricted and cumbersome to meet Australia's particular security needs. For example, the Security Council might be slow to act in the case of an organisation that mainly posed a regional, rather than an international, threat, or the Security Council might be influenced by political considerations that are not shared by Australia. As noted above, listing now proceeds through the making of a regulation, and no longer relies on Security Council resolutions.

3.100 Prior to these changes, it could have been argued that there was a need to retain the unlawful association 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 criticism.

3.101 During this inquiry, the ALRC will consider further the interaction between the unlawful associations provisions the *Crimes Act* and the terrorist organisations provisions in the *Criminal Code*, and examine whether the former should be retained, (and, if so, in what form).

Related federal legislation

Incitement

3.102 Section 11.4 of the *Criminal Code* provides, in relevant part, that:

> (1) A person who urges the commission of an offence is guilty of the offence of incitement.
>
> (2) For the person to be guilty, the person must intend that the offence incited be committed.

3.103 The penalty for incitement is linked to the penalty available for the offence that has been incited, with a sliding scale included in the provision: if the ultimate offence is punishable by life imprisonment, then incitement of that offence can lead to imprisonment for ten years; if the ultimate offence is punishable by l4 years or more, then incitement can lead to imprisonment for seven years, and so on.[98]

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97 *Criminal Code* s 102.8, punishable by imprisonment for up to three years.
98 *Criminal Code* s 11.4.

3.104 In common with the sedition offences in s 80.2, the conduct element of incitement under s 11.4(1) is to 'urge' another person or persons to commit an offence. However, there is a further requirement in s 11.4(2) that the person 'must intend that the offence incited be committed'. This is sometimes referred to as a 'specific intention' or an 'ulterior intention'—engaging in conduct with intention to achieve some further objective or result.[99] The requirement that the prosecution prove an ulterior intention arguably is equivalent to a requirement of proof of purpose.[100] In the context of the offence of incitement, the requirement of an ulterior intention requires proof that it was the offender's object to induce commission of the offence incited.[101]

3.105 While some conduct covered by the offences in ss 80.2(1) and (3) of the *Criminal Code* will overlap with conduct that constitutes incitement to commit other offences—for example, the terrorism offences under Part 5.3 of the *Criminal Code*—the new sedition offences impose a requirement that the accused person be recklessly indifferent to the circumstances surrounding his or her urging of force or violence (as specified in s 80.2(2), (4) and (6)), rather than an ulterior intention that particular crimes be committed.[102]

3.106 Concerns were expressed about the lack of connection between the new sedition offences and the use of force or violence or the commission of acts of terrorism. In the course of the 2005 Senate Committee inquiry,[103] for example, the Gilbert and Tobin Centre of Public Law argued that the absence of a requirement of ulterior intention rendered the new sedition offences overly broad:

> Requiring that an inciter intend that the offence be committed reflects the vital normative idea that responsibility for criminal harm should primarily lie with the perpetrators, who are free agents not bound to act on the words of others.[104]

3.107 The Gilbert and Tobin Centre went on to criticise the new sedition offences, which they said effectively 'criminalise 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

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

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

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

102 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.

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

104 Ibid, [5.101]–[5.102]; Gilbert & Tobin Centre of Public Law, *Submission 80 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 10 November 2005.

have a direct and close connection to the commission of a specific crime are justifiable restrictions on speech'.[105] Other submissions made similar criticisms.[106]

3.108 The new sedition offences are framed to avoid any need for a connection between urging and a specific terrorist or other crime. They do not differ in this respect from the repealed sedition offences in the *Crimes Act*. It appears to have been a deliberate policy decision to retain this distinction between sedition and incitement. The framing of the new sedition offences was aimed at overcoming the obstacle posed by the requirement to show a connection to a *particular* terrorist act or a *particular* terrorist organisation in order to prove incitement to commit a terrorism offence.[107]

3.109 In evidence before the 2005 Senate Committee inquiry, the Attorney-General's Department stated that 'there is absolutely no doubt that this offence [of sedition] will be easier to establish than the 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'.[108]

3.110 During this inquiry, the ALRC will explore further the relationship between incitement in s 11.4 and the sedition offences in s 80.2 of the *Criminal Code*, including the fault elements prescribed by law.

Treason

3.111 The offence of treason was moved from the *Crimes Act* to the *Criminal Code* in 2002.[109] Section 80.1 substantially replicates the former treason offence in s 24 of the *Crimes Act*, although some amendments were made in accordance with the recommendations of the Gibbs Committee, as well as to modernise the language and make it consistent with the drafting style used in the *Criminal Code*.[110]

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

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

106 See 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.

107 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> (12 March 2006).

108 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.

109 *Security Legislation Amendment (Terrorism) Act 2002* (Cth) Sch 1.

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

- 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'; or

- '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'.

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

3.114 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', with the accused bearing the evidential onus under s 13.3. In common with the sedition offences, the defence of 'good faith' is available under s 80.3.

3.115 During this inquiry, the ALRC will explore further the relationship between treason in s 80.1 and the sedition offences in s 80.2 of the *Criminal Code*.

Other 'offences against the government'

3.116 Even with 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'.

3.117 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.

3.118 Under s 24AB, a person commits an act of 'sabotage' if he or she destroys, damages or impairs any article used by the Australian Defence Forces 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 imprisonment for 15 years.

3.119 In common with the new sedition offences, a prosecution for treachery or sabotage may be instituted only with the consent of the Attorney-General.[111]

3.120 Other offences retained in Part II of the *Crimes Act* relate to:

- 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;[112]
- assisting prisoners of war to escape;[113]
- 'unlawful drilling'—which involves training or drilling others 'to the use of arms or the practice of military exercises, movements, or evolutions', contrary to a proclamation of the Governor-General;[114] and
- intentionally damaging or destroying Commonwealth property.[115]

3.121 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 an offence punishable by imprisonment for three years, where a person

> by violence or by threats or intimidation of any kind, hinders or interferes with the free exercise or performance, by any other person, of any political right or duty … .

3.122 A related but less serious 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 6 months, or both.

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111 *Crimes Act 1914* (Cth) s 24AC.
112 Ibid s 25, punishable by up to life imprisonment. The 'Queen's forces' is defined to mean the Australian Defence Force or 'the armed forces of the United Kingdom or any British possession'.
113 Ibid s 26, punishable by up to life imprisonment.
114 Ibid s 27, punishable by imprisonment for up to five years.
115 Ibid s 29, punishable by imprisonment for up to ten years.

3.123 During this inquiry, the ALRC will explore further the relationship between the sedition offences in s 80.2 of the *Criminal Code* and the somewhat similar offences remaining in Part II of the *Crimes Act*.

Racial vilification

3.124 As noted above, there are some parallels between federal, state and territory racial vilification laws *and* the new sedition offence of urging inter-group force or violence under s 80.2(5) of the *Criminal Code*.

3.125 Section 18C(1) of the *Racial Discrimination Act 1975* (Cth) (RDA) renders it unlawful for a person to do an act (otherwise than in private), if the act:

> (a) … is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) … is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

3.126 Unlike some of the state and territory racial vilification provisions,[116] s 18C does not include the concept of inciting another person to hatred or ridicule towards a person or group. Further, the Commonwealth legislation does not currently contain a *criminal* offence of serious vilification—for example, as found in the *Anti-Discrimination Act 1977* (NSW).[117]

3.127 The RDA provisions deal with racial and ethnic origin, but not religious vilification. In contrast, in Victoria, religious vilification is unlawful and serious religious vilification is a criminal offence.[118]

3.128 On 5 December 2005, the Federal Opposition introduced the Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth), which aims to criminalise threats of and incitements to racially or religiously motivated violence. A key difference between the offences under the Bill and the new sedition offences is that the latter only apply when the violence urged would 'threaten the peace, order and good government of the Commonwealth', whereas these proposed offences could be prosecuted when the offences are directed at a more specific or local level.[119]

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116 State and territory racial vilification laws are described further in Ch 4.
117 *Anti-Discrimination Act 1977* (NSW) s 20D.
118 *Racial and Religious Tolerance Act 2001* (Vic) ss 8, 25. See Ch 4.
119 Explanatory Memorandum, Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth).

3.129 As discussed above, it was put to the 2005 Senate Committee inquiry that the good faith defence created under s 18D might provide a better model than s 80.3 of the *Criminal Code*, which applies to the new sedition offences.[120]

3.130 During this inquiry, the ALRC will explore further the relationship between the sedition offences in s 80.2 of the *Criminal Code* and the law relating to (including the defences to) racial vilification laws.

120 Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.134].

4. State and Territory Sedition and Related Laws

Contents

Introduction

4.1 This chapter describes state and territory sedition laws. Legislation in some states and territories[1] creates sedition offences similar to those that applied at federal level under the recently repealed provisions of the *Crimes Act 1914* (Cth).[2] Some states and territories have no sedition legislation and have abolished the common law offence.[3] In other states, the common law offence of seditious libel remains in effect.[4]

4.2 This chapter also describes other state and territory legislation that is closely related to sedition, such as laws dealing with treason, unlawful associations, and racial and other vilification.

Sedition laws in the federal system

4.3 Federal sedition law proscribes, among other things, urging the overthrow by force or violence of 'the Government of the Commonwealth, *a State or a Territory*'.[5] However, the Commonwealth does not intend to 'cover the whole field'[6] in relation to

1 Queensland, WA, Tasmania and NT.
2 *Crimes Act 1914* (Cth) s 24A–24F, repealed *Anti-Terrorism Act (No 2) 2005* (Cth), Sch 7.
3 ACT and SA.
4 NSW and Victoria.
5 *Criminal Code* (Cth) s 80.2(1)(b) (emphasis added).
6 See *Viskauskas v Niland* (1983) 153 CLR 280.

sedition—which might render state and territory law inoperative under s 109 of the *Australian Constitution*.[7]

4.4 The sedition provisions of the *Criminal Code* are not intended to exclude state or territory law. The *Criminal Code* states that the treason and sedition provisions of Division 80 are 'not to apply to the exclusion of a law of a State or a Territory to the extent that the law is capable of operating concurrently' with them.[8]

4.5 Commonwealth, state and territory sedition legislation proscribe different acts. For example, some state laws seek to protect the Sovereign, Government and Constitution of the United Kingdom from seditious conduct.[9] In contrast, the equivalent sedition offences under the *Criminal Code* apply only to sedition against the Commonwealth constitution or the government of the Commonwealth or an Australian state or territory.[10]

State and territory sedition laws

4.6 In NSW and Victoria, the common law offence of seditious libel remains in effect.[11] In NSW, 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 …[12]

4.7 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.[13]

4.8 In Victoria, the *Crimes Act 1958* (Vic)[14] 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.

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

8 *Criminal Code* (Cth) s 80.6.

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

10 *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.

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

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

13 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.

14 *Crimes Act 1958* (Vic) s 316.

4.9 Queensland, Western Australia (WA), Tasmania and the Northern Territory (NT) 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) provisions[15]—which were based on similar provisions in the Queensland *Criminal Code*. 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.[16]

4.10 In Queensland, sedition offences are contained in the *Criminal Code* (Qld).[17] 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).[18] The definition of 'seditious intention' refers to sedition directed at the Sovereign, Government or Constitution of the United Kingdom or of Queensland, or against the Parliaments of the United Kingdom or Queensland, or against the administration of justice.[19]

4.11 In WA, the *Criminal Code* (WA) provides for the offences of conspiring to carry into execution a seditious enterprise and publishing seditious words.[20] The offences are punishable by imprisonment for a maximum of three years.[21] The definition of 'seditious intention' refers to sedition directed against the Sovereign or the Constitution or Government of the United Kingdom, the Commonwealth or WA; the Parliament of the United Kingdom, the Commonwealth or WA; or against the administration of justice.[22]

4.12 The Tasmanian *Criminal Code* (Tas) provides for the offences of carrying into execution a seditious intention and publishing words or writing expressive of a seditious intention.[23] 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.[24]

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

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

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

18 Ibid s 52(1)–(2).

19 Ibid s 44(b).

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

21 Ibid s 52.

22 Ibid s 44.

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

24 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

4.13 In addition, Chapter V of the Tasmanian legislation, dealing with treason,[25] 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 …[26]

4.14 NT legislation provides for offences in relation to engaging in a seditious enterprise or publishing seditious words.[27] Both offences are punishable by imprisonment for a maximum of three years.[28] The definition of 'seditious intention' refers to sedition directed at the NT government or legislative assembly, or at the administration of justice in the Territory—but there is no reference to the Sovereign.[29]

4.15 South Australia (SA) and the ACT have no sedition legislation and both have abolished the common law offence. In SA, the common law offence of seditious libel, along with a number of other common law offences, was abolished in 1992.[30] The ACT abolished the common law offence of seditious libel in 1996 as part of a measure intended to remove 'outdated common law rules'.[31]

4.16 The abolition of seditious libel in the ACT was a by-product of defamation law reform.[32] 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'.[33]

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the people or government of any foreign State, or any officer or representative thereof: *Criminal Code 1924* (Tas) s 68.

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

26 Ibid s 62.

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

28 Ibid s 24E.

29 Ibid s 44 cf *Crimes Act 1914* (Cth) s 24A.

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

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

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

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

Related state and territory legislation

Treason

4.17 Queensland, WA, the ACT and the NT have repealed legislative treason provisions.[34] These were similar to the repealed provisions of the *Crimes Act 1914* (Cth).

4.18 Other states and territories still have treason laws. In the case of NSW and SA, this consists of saved provisions of Imperial legislation, in conjunction with state legislation that both supplements and limits the operation of the Imperial Acts.[35]

4.19 The *Crimes Act 1900* (NSW)[36] expressly continues the operation of the *Treason Act of 1351* (Imp).[37] This legislation of Edward III, among other things, extends the offence of treason to those who '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'.

4.20 In Victoria and Tasmania, treason is an offence under the *Crimes Act 1958* (Vic) and *Criminal Code* (Tas) respectively.[38] Both offences are similar to those in the repealed provisions of the *Crimes Act 1914* (Cth).[39]

4.21 *Halsbury's Laws of Australia* observes that while state treason legislation is substantially similar to provisions of the *Crimes Act 1914* (Cth), there are several differences.[40] These include that the NSW, SA and Tasmania laws have provisions designed to protect the genetic integrity of the royal line,[41] and extend to protecting institutions in all of the Sovereign's dominions. Only Victoria,[42] in common with the federal legislation,[43] proscribes the levying of acts of war against the Commonwealth or assisting an enemy at war with the Commonwealth.

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34 *Criminal Law Amendment Act 1997* (Qld) s 120, sch 1; *Criminal Law Amendment Act 1988* (WA) s 8(1); *Crimes Ordinance 1968* (ACT) s 4; *Criminal Code Act 1983* (NT) s 3, sch II: See Butterworths, *Halsbury's Laws of Australia*, vol 21 Human Rights, [130–12005].

35 See Butterworths, *Halsbury's Laws of Australia*, vol 21 Human Rights, [130–12005].

36 *Crimes Act 1900* (NSW) s 16.

37 *Treason Act of 1351* 25 Edw III c 2.

38 *Crimes Act 1958* (Vic) s 9A; *Criminal Code 1924* (Tas) s 56.

39 *Crimes Act 1914* (Cth) s 24.

40 See Butterworths, *Halsbury's Laws of Australia*, vol 21 Human Rights [130–12005].

41 That is, by proscribing the violation of female members of the Sovereign's family.

42 *Crimes Act 1958* (Vic) s 9A(1)(c)–(e).

43 *Criminal Code* (Cth) s 80.1(d)–(g).

Other offences against the government

4.22 As discussed in Chapter 3, Part II of the *Crimes Act 1914* (Cth), which previously contained the treason and sedition offences, retains a range of other offences against the government. These other offences include treachery,[44] sabotage,[45] inciting mutiny,[46] assisting prisoners of war to escape,[47] unlawful drilling,[48] and interfering with political liberty.[49]

4.23 Some state and territory legislation contains similar provisions. For example, Queensland law provides for the offence of unlawful drilling (that is, the unauthorised practice of military exercises)[50] and interference with political liberty.[51] WA and the NT also penalise interference with political liberty—interfering with the free exercise by any other person of any political right or duty by violence, threat or intimidation.[52]

Unlawful associations

4.24 There are no direct state or territory equivalents of the *Crimes Act 1914* (Cth) provisions dealing with unlawful associations, discussed in the preceding chapter.[53] However, NT legislation makes it an offence to belong to or support an 'unlawful organization'. This is defined as 'an organization that uses, threatens to use or advocates the use of unlawful violence in the Territory to achieve its ends'.[54]

4.25 There are no similar provisions in the other state and territories, although the conduct covered by unlawful association legislation also may amount to sedition or incitement to another criminal offence.[55]

Racial and other vilification

4.26 Most states and territories have anti-discrimination laws or other legislation that make racial vilification (or incitement to racial hatred) 'unlawful'.[56] In most jurisdictions, some serious forms of racial vilification amount to a criminal offence. In others, as at Commonwealth level, the behaviour is not a criminal offence but is a civil wrong and allows a complaint to an anti-discrimination commissioner.[57] It has been held that, under provisions that make the behaviour complained of a civil wrong, it is

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44 *Crimes Act 1914* (Cth) s 24AA.
45 Ibid s 24AB.
46 Ibid s 25.
47 Ibid s 26.
48 Ibid s 27.
49 Ibid s 28.
50 *Criminal Code 1899* (Qld) s 51.
51 Ibid s 78.
52 *Criminal Code 1913* (WA) s 75; *Criminal Code Act 1983* (NT) s 71.
53 *Crimes Act 1914* (Cth) ss 30A–30R.
54 *Criminal Code 1993* (NT) ss 50–53.
55 Butterworths, *Halsbury's Laws of Australia*, vol 21 Human Rights, [130–12155].
56 The NT is the only exception.
57 For example, *Anti-Discrimination Act 1998* (Tas) ss 19, 60; *Anti-Discrimination Act 1991* (Qld) ss 124A, 134.

not necessary to prove an intention to incite hatred, contempt or ridicule, as would normally be required for a criminal conviction.[58]

Racial vilification

4.27 In NSW, the *Anti-Discrimination Act 1977* (NSW) provides that it is unlawful (a civil wrong, but not an offence) for a person:

> by a public act, to 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.[59]

4.28 In addition, 'serious racial vilification'—where the incitement is by means that include inciting or threatening physical harm to persons or property—is an offence punishable by fine or imprisonment for six months.[60] The consent of the NSW Attorney General is required in order to initiate a prosecution.

4.29 In Victoria, the *Racial and Religious Tolerance Act 2001* (Vic) makes racial vilification unlawful.[61] It also creates an offence of serious racial vilification, punishable by a fine or imprisonment for six months.[62] Prosecution requires the consent of the Victorian Director of Public Prosecutions (DPP). The definition of racial vilification is similar to that in NSW; however, unlike in NSW and most other states and territories, the behaviour complained of need not be a public act. Instead, the Victorian legislation provides an exception if the parties to the conduct desired the conduct to be heard or seen only by themselves.[63]

4.30 In Queensland, the *Anti-Discrimination Act 1991* (Qld) renders racial vilification unlawful.[64] The provision is framed in similar terms to the NSW, Victorian and Tasmanian legislation, but racial vilification is not a criminal offence.

4.31 In WA, the *Criminal Code* (WA) creates a number of relevant criminal offences. Section 77 deals with 'conduct intended to incite racial animosity or racist harassment', providing that:

> Any person who engages in any conduct, otherwise than in private, by which the person intends to create, promote or increase animosity towards, or harassment of, a racial group, or a person as a member of a racial group, is guilty of a crime and is liable to imprisonment for 14 years.

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58 Law Book Company, *The Laws of Australia*, vol 21 Criminal Law, 21.9, Ch 8, [139] citing *Wagga Wagga Aboriginal Action Group v Eldridge* [1995] EOC [92–701].
59 *Anti-Discrimination Act 1977* (NSW) s 20C.
60 Ibid s 20D.
61 *Racial and Religious Tolerance Act 2001* (Vic) s 7.
62 Ibid s 24.
63 Ibid s 12.
64 *Anti-Discrimination Act 1991* (Qld) s 124A.

4.32 There are separate offences in relation to conduct: likely to incite racial animosity or racist harassment;[65] intended to racially harass;[66] or likely to racially harass.[67] The offences are punishable by terms of imprisonment of 12 or 24 months. A prosecution must not be commenced without the consent of the state DPP.[68]

4.33 In SA, the *Racial Vilification Act 1996* (SA) provides that racial vilification by threatening physical harm to persons or property, or inciting the same, is an offence punishable by fine or imprisonment for three years.[69] Prosecution requires the consent of the state DPP.[70] In addition, the *Civil Liability Act 1936* (SA) makes acts of racial victimisation actionable as a tort.[71]

4.34 In Tasmania, the *Anti-Discrimination Act 1998* (Tas) makes racial vilification unlawful,[72] but not a criminal offence. The prohibition on inciting hatred is framed in similar terms to the NSW, Victorian and Queensland provisions.

4.35 In the ACT, the *Discrimination Act 1991* (ACT) provides that racial vilification is unlawful.[73] In addition, serious vilification is a criminal offence punishable by fine.[74] The offence is committed if: the person intentionally carries out an act and is reckless about whether the act is a public act; the act is threatening; and the person is reckless about whether the act incites hatred.[75]

Other vilification laws

4.36 Some state and territory legislation prohibits vilification on other than racial grounds. In NSW, transgender,[76] homosexual[77] and HIV/AIDS[78] vilification are unlawful. Serious vilification on these grounds also constitutes a criminal offence.

4.37 In Victoria, religious vilification is unlawful and serious religious vilification is a criminal offence.[79] In Queensland, vilification is unlawful on the grounds of religion, sexuality or gender identity.[80] In Tasmania, it is unlawful to incite hatred on the grounds of disability, sexual orientation or activity, or religion.[81] In the ACT,

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65 *Criminal Code 1913* (WA) s 78.
66 Ibid s 80A.
67 Ibid s 80B.
68 Ibid s 80H.
69 *Racial Vilification Act 1996* (SA) s 4.
70 Ibid s 5.
71 *Civil Liability Act 1936* (SA) s 73.
72 *Anti-Discrimination Act 1998* (Tas) s 19.
73 *Discrimination Act 1991* (ACT) s 66.
74 Ibid s 67.
75 Ibid s 67.
76 *Anti-Discrimination Act 1977* (NSW) ss 38S, 38T.
77 Ibid ss 49ZT, 49ZTA.
78 Ibid ss 49ZXB, 49ZXC.
79 *Racial and Religious Tolerance Act 2001* (Vic) ss 8, 25.
80 *Anti-Discrimination Act 1991* (Qld) s 124A.
81 *Anti-Discrimination Act 1998* (Tas) s 19(b)–(d).

vilification is unlawful on the grounds of sexuality, trans-sexuality or HIV/AIDS status.[82] Serious vilification on these grounds constitutes a criminal offence.[83]

Defences

4.38 The NSW legislation provides that its vilification provisions do not render unlawful:

> (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 (whether under the Defamation Act 2005 or otherwise) in proceedings for defamation, or
>
> (c) a public act, 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.[84]

4.39 Vilification legislation in Victoria, Queensland, WA and the ACT takes a similar approach.[85] For example, the *Racial and Religious Tolerance Act 2001* (Vic) provides an exception if the person establishes that the conduct was engaged in 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, or any other conduct engaged in, for—
>
> (i) any genuine academic, artistic, religious or scientific purpose; or
>
> (ii) any purpose that is in the public interest; or
>
> (c) in making or publishing a fair and accurate report of any event or matter of public interest.[86]

4.40 Such defences do not apply to the offences of serious vilification set out in the NSW, Victorian, WA or ACT legislation—only to conduct that is stated to be unlawful, rather than constituting a criminal offence.

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82 *Discrimination Act 1991* (ACT) s 66.
83 Ibid s 67.
84 *Anti-Discrimination Act 1977* (NSW) ss 20C(2), 38S(2), 49ZT(2), 49ZXB(2).
85 *Racial and Religious Tolerance Act 2001* (Vic) s 11; *Anti-Discrimination Act 1991* (Qld) s 124A(2); *Criminal Code 1913* (WA) s 80G; *Discrimination Act 1991* (ACT) s 66(2). The SA and Tasmanian legislation does not provide similar defences.
86 *Racial and Religious Tolerance Act 2001* (Vic) s 11.

5. Sedition and the International Framework

Contents

Introduction

5.1 This chapter analyses how the Australian law on sedition intersects with international law. Section 24(1)–(2) of the *Australian Law Reform Commission Act* 1996 (Cth) requires that in performing its functions the ALRC must have regard to all of Australia's international obligations, and that ALRC recommendations 'do not trespass unduly on personal rights and liberties' and are consistent (as far as practicable) with the International Covenant on Civil and Political Rights'.

5.2 Two issues arise in relation to international law. First, international law permits—and in some circumstances obliges—Australia to take action to counter the threat of terrorism. Secondly, international law requires Australian domestic law to balance anti-terrorism measures with other concerns, most notably respect for human rights. This chapter assesses how each of these issues relates to the Australian domestic law on sedition.

International law and Australian domestic law

Status of international law

5.3 Australia's international law obligations—and especially its obligations under international human rights law—are relevant in two principal ways: in statutory interpretation and in terms of the consequences of non-compliance. It is necessary first

to identify the relationship between international law and Australian domestic law, as well as the legal status, in Australia, of treaties such as the *International Covenant on Civil and Political Rights*[1] (ICCPR).

5.4 In some jurisdictions, such as the United Kingdom, the Parliament and the courts must assess legislation before and after enactment to determine whether it is compatible with human rights, as articulated at international law and in international treaties.[2] In contrast, the Australian Parliament is not explicitly required to undertake any such process.[3] Nor can a court refuse to recognise or apply an Australian statutory provision by reason of the court finding that the provision is inconsistent with a principle of international law, or an international treaty to which Australia is a party.[4]

5.5 The next issue is the legal status of a treaty to which a country is a party. In the United States of America, the Constitution provides that the President 'shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur'.[5] Because the legislative branch is involved in the ratification process, the treaty provisions automatically become part of domestic law.

5.6 By way of contrast, in Australia, a treaty must be incorporated into domestic law *by specific enactment*. The situation in respect of the ICCPR illustrates this principle. Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980. However, as Mason CJ and McHugh J made clear in *Dietrich v The Queen*, this is not the same as Australia having incorporated the ICCPR into domestic law:

> Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions.[6]

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

2 In the UK, this occurs by operation of the *Human Rights Act 1998* (UK), which requires Parliament and the courts to assess legislation against the human rights enshrined in the European Convention on Human Rights. For an explanation of how this process operates, see D Feldman, 'Standards of Review and Human Rights in English Law' in D Feldman (ed) *English Public Law* (2004) 373. In Australia, only the ACT has a similar law: see the *Human Rights Act 2004* (ACT).

3 Of course, while no such obligation is imposed on it by ordinary statute or the *Australian Constitution*, Parliament can and sometimes does scrutinise draft legislation to determine whether it conforms to international human rights law. This can occur as part of the usual process of parliamentary debates as well as in specialised committees, such as the Senate Scrutiny of Bills Committee and the Senate Legal and Constitutional References and Legislation Committees.

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

5 United States *Constitution* Article II, s 2.

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

Mason CJ and McHugh J noted that such legislation had not been passed[7]—and this remains the case.

Statutory interpretation

5.7 Australia's international law obligations offer some assistance in statutory interpretation and in the development of the common law.[8] For instance, the *Acts Interpretation Act 1901* (Cth) provides that courts may refer (among other things) to 'any treaty or other international agreement that is referred to in the Act' where a statutory provision is 'ambiguous', 'obscure' or where the ordinary process of construction would give rise to 'a result that is manifestly absurd or … unreasonable'.[9] Brennan, Deane and Dawson JJ gave further substance to this principle of construction, stating that the courts

> should, in a case of ambiguity, favour a construction of a Commonwealth statute which accords with the obligations of Australia under an international treaty.[10]

5.8 It should be noted that ambiguity, while an important (though not the only) trigger for the use of international law in statutory construction, is generally thought to raise a low bar. For instance, NSW Chief Justice James Spigelman has written that 'ambiguity applies to any case of doubt as to the proper construction of a word or phrase'.[11]

5.9 Assuming for the moment that there is a convincing argument that aspects of the Australian legislation on sedition do not comply with international human rights law, this does not the end the analysis. That is, this conclusion may be reached on one construction of the relevant legislation—even the construction that best conforms to the ordinary meaning of the words. Nevertheless, the *correct* construction may in fact be one which best reconciles the sedition provisions with the relevant principles of international human rights law. Gleeson CJ's comment in *Plaintiff S157/2002 v Commonwealth* is relevant, since Australian courts

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7 The fact that the ICCPR is included as Schedule 2 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) has been found to be a legislative step falling short of incorporation: *Dietrich v The Queen* (1992) 177 CLR 292, 305–306.

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

9 *Acts Interpretation Act 1901* (Cth) s 15AB.

10 *Lim v Minister for Immigration* (1992) 176 CLR 1, 38.

11 J Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141, 149, citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287–288. However, note also Callinan J's obiter dictum in *Western Australia v Ward* (2002) 213 CLR 1, [956]: 'Where legislation is not genuinely ambiguous, there is no warrant for adopting an artificial presumption as the basis for, in effect, rewriting it.'

> do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for 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. As Lord Hoffmann recently pointed out in the United Kingdom, for Parliament squarely to confront such an issue may involve a political cost, but in the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'.[12]

Consequences of non-compliance

5.10 If there is inconsistency between an Australian statutory provision and Australia's international obligations, this may have consequences at the international level. It may, for instance, lead to proceedings being commenced against Australia in a United Nations tribunal or committee. If a complaint is successful, Australia may be required to make 'reparations to any State, person, or persons suffering damage or injury as a result of the operation of the law'.[13]

5.11 An illustration of this is the mechanism established by the First Optional Protocol of the ICCPR, which became effective in Australia as of 25 December 1991. Under the Optional Protocol, the Human Rights Committee (a United Nations body) can receive and consider communications from individuals subject to Australia's jurisdiction and who claim to be victims of a violation by Australia of the rights articulated in the ICCPR.[14] If it upholds the claim, the Human Rights Committee can recommend, among other things, changes to Australian law. While there is no mechanism available to *compel* compliance with such recommendations, countries like Australia go to great pains to avoid being seen as non-compliant—which could have adverse consequences for Australia's international standing and could become a political issue domestically.[15]

The anti-incitement and anti-terrorism imperative

United Nations response to the threat of terrorism

5.12 Particularly since the terrorist attacks in New York and Washington on 11 September 2001, there has been an increasing focus, at the level of international law and international relations, on the threat of terrorism. The United Nations (UN) Security Council has called on all UN member states to take anti-terrorism measures, some of which may be relevant to sedition.

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12 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 [30], citing *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115, 131.

13 Sydney Centre for International and Global Law, *Submission 188 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 17 November 2005, [56].

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

15 See, for example, Sydney Centre for International and Global Law, *Submission 188 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 17 November 2005, [58].

5.13 Security Council *Resolution 1456* states that all UN Members 'must take urgent action to prevent and suppress all active and passive support of terrorism'.[16] 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.[17]

5.14 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.[18]

5.15 Decisions of the UN Security Council are binding on Australia as a member state of the United Nations.[19] Therefore, one possible effect of these resolutions may be to confer some added legitimacy—if this is needed—at the international law and constitutional levels for the enactment of legislation dealing with sedition. That is, 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

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16 United Nations Security Council, *Resolution 1456*, UN SC, 4688th mtg, UN Doc S/Res/1456 (2003), [1].
17 United Nations Security Council, *Resolution 1624*, UN SC, 5261st mtg, UN Doc S/Res/1624 (2005).
18 Ibid, [1].
19 See *Charter of the United Nations*, 26 June 1945, [1945] ATS 1, (entered into force generally on 1 November 1945) art 25. For a detailed discussion of the nature and effect of Security Council Resolutions, see B Simma, *The Charter of the United Nations: A Commentary* (2nd ed, 2002), Volume 1, 453–460.

affairs' head of power in s 51(xxix) of the *Australian Constitution* to the extent that it is ensuring the implementation of Australia's obligations under international law.[20]

5.16 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, in its terms, provides justification for breaching existing international law norms.[21] *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 … [22]

5.17 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* 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'.[23]

5.18 Similarly, the UN General Assembly and the UN Commission on Human Rights (UNCHR) have issued a number of resolutions stating that anti-terrorism measures must not violate human rights.[24] For instance, the UNCHR urges 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 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 … [25]

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20 Given that the earlier statutory offence of sedition was found to be within the Commonwealth's constitutional power to enact, it is unlikely that the amended sedition offences would be found to be unconstitutional: see *R v Sharkey* (1949) 79 CLR 121. See also Ch 3.

21 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.

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

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

24 See, for example, 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).

25 United Nations Commission on Human Rights, *Resolution 2003/37*, 58th mtg, UN Doc Res/2003/37 (2003) [5].

Article 20 of the ICCPR: incitement

5.19 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 Attorney-General's Department asserts that some of the sedition provisions—and especially the new 'urging' offence in s 80.2(5) of the *Criminal Code*—fall within the ambit of art 20 of the ICCPR.[26] 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.

5.20 The Attorney-General's Department 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'.[27] The 1991 *Review of Commonwealth Criminal Law* (the Gibbs Committee report) 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.[28] Section 80.2(5) is substantially similar to the offence proposed by the Gibbs Committee.

5.21 In its submission to the 2005 Senate Committee inquiry, Australian Lawyers for Human Rights accepted that if 'the Government's purpose is to limit speech o[r] conduct capable of inciting violence', this would be 'legitimate' and 'consistent with Australia's obligations under Article 20(2) of the ICCPR'.[29] However, it implies 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'.[30] But even if this is so, two points should be borne in mind: first, as explained below, the critical provision in the ICCPR to determine whether the sedition provisions conform to international law is art 19, rather than art 20; and secondly, the Attorney-General's Department has not itself relied heavily on art 20 in justifying the sedition provisions.

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26 Australian Government Attorney-General's Department, *Submission 290A to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, 4, and Attachment A, 6.

27 Ibid, Attachment A, 6.

28 H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), [32.17]–[32.18].

29 Australian Lawyers for Human Rights, *Submission 139 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 23. See also: Gilbert & Tobin Centre of Public Law, *Submission 80 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 10 November 2005, 17.

30 Australian Lawyers for Human Rights, *Submission 139 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 23.

5.22 Dr Ben Saul makes a different criticism, arguing that the offence in s 80.2(5) does not go far enough in implementing art 20(2) of the ICCPR. He observes 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.[31]

Article 4 of the ICCPR: derogation

5.23 The issue of 'derogation' from human rights obligations arose in testimony before and submissions to the 2005 Senate Committee inquiry.[32] 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 ICCPR-recognised rights. Professor Nihal Jayawickrama explained the purpose of derogation as follows:

> 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.[33]

5.24 The power to derogate is subject to several qualifications and exceptions and international law requires a state to follow an established procedure if it wishes to derogate from its obligations under the ICCPR.[34] The rules regarding derogation are contained in art 4 of the ICCPR, which states:

> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
>
> 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
>
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

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31 B Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28 *University of New South Wales Law Journal* 868, 877.

32 The Senate Legal and Constitutional Legislation Commission, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (November 2005), [2.26]–[2.31] and 203.

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

34 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.

5.25 Courts have been reluctant to allow derogation based on the heightened awareness of national security concerns—even since the events of 11 September 2001. In 2004, the House of Lords rejected the UK government's claim that the indefinite detention of a foreign national could be justified based on the threat of terrorism.[35] While acknowledging the fraught national security environment and the formal promulgation of a Derogation Order by the Home Secretary in November 2001, the House of Lords concluded that the UK was not legally entitled to derogate from its obligations under the *European Convention on Human Rights*. The House of Lords based this decision on the fact that the Convention had been given domestic effect by the *Human Rights Act 1998* (UK), and it could not be said that the UK was 'at war', or was facing 'a public emergency that threatens the life of the nation'.[36]

5.26 It is important to note the Attorney-General's Department'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) 1995.[37] 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 United Nations under art 4(3). Rather, the Attorney-General's Department 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'.[38]

International human rights law

5.27 International human rights law articulates fundamental obligations with which Australian legislation must conform. There is concern that certain aspects of the Australian sedition provisions may be incompatible with Australia's international human rights law obligations and especially its obligations arising under treaties to which Australia is a party.

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35 *A (FC) v Secretary of State for the Home Department* [2004] UKHL 56. See also Ibid, 300–302.
36 Ibid, [95].
37 Australian Government Attorney-General's Department, *Submission 290B to Senate inquiry into Anti-Terrorism Bill (No 3) 2005*, 24 November 2005, 3–4.
38 Ibid.

The ICCPR

The test of necessity

5.28 When the Anti-Terrorism Bill (No 2) 2005 was introduced and then considered by the 2005 Senate Committee inquiry, concerns were expressed that the new sedition offences might be inconsistent with art 19 of the ICCPR,[39] which provides that:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
>
> (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

5.29 It is common ground that the sedition provisions encroach on an *absolute* conception of freedom of expression. That is, in criminalising certain categories of expression, the relevant statutory provisions must necessarily reduce the scope of lawful expression. 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, where it can be said to be defamatory (civil liability), indecent or obscene (criminal liability). The Privy Council, hearing an appeal from the High Court of Australia, noted that:

> 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 … [40]

5.30 As far as international law is concerned a restriction on, for example, defamatory speech, is permissible only if that restriction:

- is 'provided by law'; and
- satisfies the test of necessity in art 19(3)(a) of the ICCPR.

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39 Human Rights and Equal Opportunity Commission, *Submission 158 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 29–30; Australian Lawyers for Human Rights, *Submission 139 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 22–24; Law Council of Australia, *Submission 140 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 26; Sydney Centre for International and Global Law, *Submission 188 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 17 November 2005, [10]–[11]; Castan Centre for Human Rights Law, *Submission 114 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 19; Australian Capital Territory Human Rights Office, *Letter of advice to Chief Minister and Attorney-General of the Australian Capital Territory*, 19 October 2005.

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

5.31 The test of necessity is crucial. For example, a restriction on defamatory speech must be necessary 'for respect of the rights or reputations of others'. The test of necessity for sedition derives from art 19(3)(b). Thus, the sedition provisions must be necessary 'for the protection of national security or of public order … or of public health or morals'.

5.32 The UN Human Rights Committee (UNHRC) considered art 19(3) of the ICCPR 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 … [41]

5.33 The question whether the sedition provisions satisfy the test of necessity in art 19(3)(b) of the ICCPR 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.[42] The Human Rights and Equal Opportunity Commission (HREOC), in its submission to the 2005 Senate Committee inquiry, framed the question as follows:

> The sedition provisions will … only constitute a permissible restriction on freedom of expression to the extent that they can be said to be necessary for the purposes of protecting public order or national security. The word 'necessary' imports the principle of proportionality, which requires that any restriction must be proportionate to the legitimate ends sought to be achieved … [T]he restriction must represent the least restrictive means of achieving the relevant purpose. This is to ensure that the restriction does not jeopardise the right itself.[43]

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

42 See: Australian Government Attorney-General's Department, *Submission 290A to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, Attachment A, 6; Australian Lawyers for Human Rights, *Submission 139 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 23; Gilbert & Tobin Centre of Public Law, *Submission 80 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 10 November 2005, 17; Castan Centre for Human Rights Law, *Submission 114 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 29; 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).

43 Human Rights and Equal Opportunity Commission, *Submission 158 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 28.

Do the Australian sedition provisions satisfy the test of necessity?

5.34 Divergent views have been expressed about whether the Australian sedition provisions satisfy the test of necessity in art 19(3)(b) of the ICCPR. Of the participants in the 2005 Senate Committee inquiry who commented on this question, only the Attorney-General's Department expressed the view that all of the sedition provisions satisfy this test.[44] The Senate Committee did not itself express an opinion on this specific question in its report but, in recommending that Schedule 7 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'.[45]

5.35 HREOC stated that ss 80.2(7) and (8) 'considerably expand existing sedition laws' in creating an offence merely upon proof that a person urged another to commit conduct that is intended to assist, by any means whatever (except by humanitarian aid), any organisation or country that is at war with Australia or engaged in armed hostilities with the Australian Defence Forces.[46]

5.36 The Castan Centre for Human Rights Law at Monash University argued that, in order to satisfy the test of necessity in art 19 of the ICCPR, the expression being restricted must urge or incite violence or other criminal behaviour.[47] Any restriction of 'non-violent but strident opposition to a state's constitutional arrangements' would violate art 19.[48]

5.37 The Law Council of Australia went further, implying that the sedition provisions could not satisfy the test of necessity in art 19(3) of the ICCPR. It stated:

> [R]estrictions on communication under the proposed changes are disconnected from the real issue of the threat of terrorist acts and are unwarranted and unnecessary. Measures which have the effect of chilling free speech are highly unlikely to reduce the occurrence of a terrorist incident.[49]

5.38 In advice to the Chief Minister of the Australian Capital Territory (ACT), the ACT Human Rights Office stated that the new definition of sedition:

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44 See: Australian Government Attorney-General's Department, *Submission 290A to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, Attachment A, 6; Australian Government Attorney-General's Department, *Submission 290B to Senate inquiry into Anti-Terrorism Bill (No 3) 2005*, 24 November 2005, 3.

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

46 Human Rights and Equal Opportunity Commission, *Submission 158 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 29. HREOC also expressed concern that the term 'assist, by any means whatever' may be too broad and restrict freedom of expression beyond that which is permissible under the test of necessity—and those words were subsequently deleted by the Government.

47 Castan Centre for Human Rights Law, *Submission 114 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 29.

48 Ibid, 30.

49 Law Council of Australia, *Submission 140 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 26. See also Law Council of Australia, *Submission 140A to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 23 November 2005, 6–7.

> may be too broad to satisfy article 19 of the ICCPR … and so overreaching as to be disproportionate to the objectives of the law. For example the newly defined offence may catch a journalist's article where it inadvertently triggers a terrorist act, capture opinions that do not lead to terrorist acts, and critics have suggested that it may cover private conversations.[50]

5.39 It remains to be seen whether the ACT Human Rights Office would maintain that view in light of the alterations made to the Bill prior to enactment. In any event, during the course of this inquiry, the ALRC will explore in greater depth how the test of necessity ought to be applied in relation to the sedition provisions.

Convention on Elimination of Racial Discrimination

5.40 The *International Convention on the Elimination of all Forms of Racial Discrimination*[51] (CERD) is relevant to sedition in two ways. First, there is a connection between the new crime of incitement to violence on the basis of race, religion, nationality or political opinion (in s 80.2(5) of the *Criminal Code*) and art 4 of CERD. Article 4 states:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in Article 5 of this Convention, *inter alia*:
>
> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

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50 Australian Capital Territory Human Rights Office, *Letter of advice to Chief Minister and Attorney-General of the Australian Capital Territory*, 19 October 2005.

51 *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). On 30 September 1975, Australia entered the following reservation to art 4: 'The Government of Australia furthermore declares that Australia is not at present in a position specifically to treat as offences all the matters covered by Article 4(a) of the Convention. Acts of the kind there mentioned are punishable only to the extent provided by the existing law dealing with such matters as the maintenance of public order, public mischief, assault, riot, criminal libel, conspiracy and attempts. 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)'.

> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

5.41 Dr Saul observed that s 80.2(5) of the *Criminal Code* might be seen as an attempt to implement art 4 of CERD, but he was concerned by the form of the provision. He argues that it is inaccurate to characterise such conduct as 'terrorist' in nature and that the offence, as drafted, is 'too narrow and does not go far enough in protecting groups from harm'.[52]

5.42 The second issue is that some of the offences in s 80.2 of the Code might lend themselves to selective application. That is, certain groups—whether identified as ethnic or religious groups—might fear that their members will be unfairly and disproportionately targeted in the enforcement of these new laws. This would violate their right not to be subjected to discrimination on the basis of their membership of such a group (in contravention of CERD itself).[53]

5.43 However, it is necessary to balance against this criticism the fact that the *Criminal Code* contains some internal safeguards designed to prevent the sedition provisions from being applied unfairly. For instance, any prosecution would require the concurrence of the Australian Federal Police (the body responsible for undertaking an initial investigation into whether the offence of sedition has been committed), the Commonwealth Director of Public Prosecutions (itself a body independent of the government and possessing prosecution guidelines) and the Australian Attorney-General (who remains accountable through Parliament, by operation of established constitutional conventions).[54]

5.44 Both of these issues, which relate to the interaction between CERD and the sedition provisions, will be examined in greater detail during the course of this ALRC inquiry.

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52 B Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28 *University of New South Wales Law Journal* 868, 876–877.

53 See *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) art 1(1), 2, 5.

54 See *Criminal Code* (Cth) s 80.5, which provides that the Attorney-General's consent is required for sedition proceedings to be commenced under Division 80 of the *Criminal Code*.

6. Comparative Law: Sedition in Foreign Jurisdictions

Contents

Introduction

6.1 This chapter analyses how a number of foreign jurisdictions deal with sedition. In the report of the Senate Legal and Constitutional Legislation Committee (the 2005 Senate Committee inquiry), and in commentary on the new sedition laws, frequent reference has been made to the approach to sedition employed in other jurisdictions.[1]

6.2 Concern has been expressed that Australia is out-of-step with other comparable jurisdictions in re-invigorating its sedition provisions and enacting new ones. For instance, some submissions to the 2005 Senate Committee inquiry stated that, historically, those jurisdictions that have expressed an urgent need to create sedition offences, have then often used them to prosecute people in a way that was 'oppressive'[2] and intended to 'throttle political dissent'[3]. David Bernie of the NSW

1 See Senate Legal and Constitutional Committee—Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005), [5.33]–[5.42].
2 C Connolly, *Submission 56 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 7 November 2005, 9.
3 L Maher, *Submission 275A to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, 3.

Council for Civil Liberties submitted that sedition 'no longer has a place in a democracy'.[4]

6.3 The approach taken in this chapter is based on the comparative law principle that useful lessons can be drawn from studying how other jurisdictions approach common problems.[5] While accepting that 'incomparables cannot usefully be compared'[6]—and without ignoring the differing geo-political and constitutional landscapes in other jurisdictions—some general lessons can be learned from how other countries have dealt with the issue of sedition. The primary focus here is not on the precise form of words used elsewhere, but rather on how other jurisdictions seek to reconcile the need to proscribe seditious conduct with the requirements of international law.[7]

Europe and sedition

European treaty law

6.4 There are two particularly important European treaties relevant to sedition. The first, the *Council of Europe Convention on the Prevention of Terrorism* (the European Convention on Terrorism) was adopted in 2005.[8] It provides some impetus for member countries to enact legislation covering seditious conduct. Article 5 of the Convention provides:

> 1. For the purposes of this Convention, 'public provocation to commit a terrorist offence' means 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.
>
> 2. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.

6.5 The explanatory report accompanying the European Convention on Terrorism makes clear that the measures referred to in art 5 should apply only where there is 'a specific intent to incite the commission of a terrorist offence' and this must result in a danger that a terrorist offence might be committed.[9] The explanatory report also provides examples of indirect advocacy of, or incitement to, commit terrorist offences that are intended 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

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4 Senate Legal and Constitutional Committee—Australian Parliament, *Anti-Terrorism Bill (No 2) 2005: Transcript of Public Hearing*, 17 November 2005, 45 (D Bernie).

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

6 See, eg, K Zweigert and H Kötz, *An Introduction to Comparative Law* (3rd ed, 1998), 34.

7 Ibid, 34–35.

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

9 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), [99]–[100].

funding for terrorist organisations or other similar behaviour'[10] and 'presenting a terrorist offence as necessary and justified'.[11]

6.6 Dr Ben Saul's analysis of the European Convention on Terrorism suggests that, as art 5 only applies where there is both specific intent and a danger that a terrorist offence will be committed, this 'substantially narrow[s] the scope of the offence, such that merely justifying or praising terrorism, without more, is not criminalised'. Moreover, he notes that the European human rights remedies to protect free expression from undue influence remain available.[12]

6.7 By way of illustration, a recent legislative attempt by the United Kingdom (UK) to implement the *Council of Europe Convention on the Prevention of Terrorism* is analysed later in this chapter.

6.8 The second relevant treaty is the Council of Europe's *Convention for the Protection of Human Rights and Fundamental Freedoms* (commonly referred to as the European Convention on Human Rights or ECHR).[13] Although Australia is not a party to this convention, art 10 of the ECHR is substantially similar to art 19 of the *International Covenant on Civil and Political Rights*[14] (ICCPR). Thus, analysis of how European jurisdictions have approached sedition, particularly in light of art 10 of the ECHR, is instructive in the Australian context. 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.

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10 Ibid, [95].

11 Ibid, [98].

12 B Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28 *University of New South Wales Law Journal* 868, 869–870.

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

14 *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 5.

Jurisprudence relating to the European Convention on Human Rights

6.9 In Europe, and particularly in the context of the ECHR, sedition (along with the crimes of treason and espionage) is viewed as a 'pure political crime'. This means that, at international law, the crime is 'directed at the security and structure of the state or the regime in official power'.[15] Thus, an element of the crime of sedition must be that there is a nexus between the defendant's conduct and the intention or effect of jeopardising the security or integrity of the state. For this reason, it is best characterised as a public order offence.

6.10 No direct challenge to the legitimacy of domestic sedition legislation on ECHR grounds has come before the European Court of Human Rights or European Commission of Human Rights.[16] The case of *Piermont v France* raised (albeit indirectly) the issue of the interaction between domestic offence provisions dealing with sedition and the freedom of expression guarantees in art 10 of the ECHR.[17] The approach of the European Commission of Human Rights seemed to indicate that, to the extent that a domestic statute makes sedition a public order offence and that only people who are threatening public order are prosecuted, it will not infringe art 10.[18]

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 characterising the interaction between art 10 of the ECHR (and, by implication, art 19 of the ICCPR) and sedition provisions such as Australia's. Taking the jurisprudence as a 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.[19]

6.12 A number of decisions of the European Court of Human Rights have been particularly protective of political speech.[20] For example, *Vereinigung Demokratischer Soldaten Osterreichs and Gubi v Austria* involved the refusal by the Austrian military

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15 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.

16 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.'

17 *Piermont v France* (1993) 15 EHRR 76, 76. The issue is raised indirectly because the applicant (the defendant at first instance) did not explicitly argue that the relevant 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'.

18 Ibid, 76.

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

20 See, for example, *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 (a case dealing with criticism of candidates for elective office); *Open Door Counselling and Dublin Well Woman Centre v Ireland* (1992) 15 EHRR 244 (a matter concerning publication of information in the Republic of Ireland about abortion services available in foreign jurisdictions).

to authorise the distribution of a publication, aimed at Austrian soldiers, which often included items critical of military life.[21] The authorities claimed that the publication was prejudicial to national security; however, the European Court of Human Rights held that the publication did not go far enough to justify such a claim. The Court found that Austria was unable to avail itself of the exception in art 10(2) of the ECHR.[22]

6.13 In contrast to the protection afforded political expression, domestic legislation proscribing racial hatred is much less likely to fall foul of art 10 of the ECHR. Professor David Feldman notes that:

> The weakest protection of all is accorded [by art 10 of the ECHR] to racist expression and the promulgation of racial hatred.[23]

6.14 On the whole, states have been able to use art 10(2) of the ECHR to control publicity given to racist views and hate speech, so long as the tests of legality, necessity and proportionality are satisfied.[24]

6.15 Racial hatred legislation is not a new phenomenon. For example, legislation making it an offence to deny the Holocaust or to glorify Nazism has existed for many years in a number of European countries. Germany, Austria and France are among a group of countries that make it a criminal offence to publish material denying that the Jewish Holocaust took place.[25] To date, there has been no definitive ruling on this legislation by the European Court of Human Rights.[26] However, in a number of cases raising this issue, the Court has found that where a law prevents a person from denying the Holocaust, this does not contravene art 10 of the ECHR, provided that the law satisfies the test of proportionality.[27] This legislation is of contemporary significance, particularly in light of the recent conviction in Austria of the English self-described 'historian' David Irving for Holocaust denial.[28]

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

22 This provision parallels art 19(3) of the ICCPR: for further discussion, see Ch 5.

23 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.

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

25 See, for example, 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 Gayssot is discussed in Human Rights and Equal Opportunity Commission, Human Rights Brief No 4: Lawful Limits on Fundamental Freedoms (2006), available at <http://www.hreoc.gov.au/Human_RightS/briefs/brief_4.html#hr4.30> (14 March 2006).

26 A Marshall Williams and J Cooper, 'Hate Speech, Holocaust Denial and International Human Rights Law' (1999) 6 *European Human Rights Law Review* 593, 603.

27 A good summary of the relevant case law can be found in Ibid, 603–609.

28 A summary of this case and its background is available at R Boyes, 'Fears of Clashes as Irving Faces Trial', *The Australian* (Sydney), 21 February 2006.

United Kingdom

The common law offence of sedition

6.16 The UK does not have a statutory offence of sedition, but sedition (often referred to as 'seditious libel') remains a common law offence. The elements of the offence are uncertain—a fact recognised by numerous commentators.[29] Professor Eric Barendt describes the 'classic definition' as follows:

> the publication of a speech or writing with intent to bring into hatred or contempt, or excite hostility towards, the Crown, government, Parliament, and administration of justice, or with the aim of inducing reform by unlawful means or of promoting class warfare. Taken literally, this would cover much political argument and oratory, and frequent prosecution and conviction would surely have the effect of stifling any serious criticism of government and other institutions.[30]

6.17 This definition is consistent with that accepted in the UK Law Commission's working paper on the codification of the criminal law.[31] It is also important to add that the modern incarnation of the offence must involve an element of incitement to cause violence or disorder.[32] Professor Feldman argues that that this gives the offence 'a public-order aspect', which in turn means that it is 'probably now not incompatible' with art 10 of the ECHR.[33]

6.18 Nevertheless, the Law Commission expressed the view in 1977 that 'there is no need for an offence of sedition in the criminal code' because the conduct thought to fall within the ambit of this offence would be caught anyway under the ordinary offences of 'incitement or conspiracy to commit' the relevant offence.[34] Furthermore, the Law Commission stated that:

> 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'.[35]

To date, this recommendation has not been implemented.

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29 See, for example, L Leigh, 'Law Reform and the Law of Treason and Sedition' (1977) (Sum) *Public Law* 128, 145; E Barendt, *Freedom of Speech* (revised ed, 1996), 152; D Feldman, *Civil Liberties and Human Rights in England and Wales* (2nd ed, 2002), 900.

30 E Barendt, *Freedom of Speech* (revised ed, 1996), 152–153.

31 The Law Commission (UK), *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), [68]–[69].

32 Ibid, [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.

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

34 The Law Commission (UK), *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.

35 The Law Commission (UK), *Working Paper No 72 Second Programme, Item XVIII Codification of the Criminal Law—Treason, Sedition and Allied Offences* (1977), [78].

6.19 There have been relatively few prosecutions for sedition in the UK during the twentieth century—fewer even than in Australia.[36] Professor Feldman argues that it has been 'superseded by public-order legislation, including the statutory crime of inciting racial hatred'.[37] The most recent significant case on point in the UK is *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury*.[38] The applicant had applied for summonses accusing the defendant of contravening the common law offence of seditious libel for distributing Salman Rushdie's book, *The Satanic Verses*. The applicant argued that by publishing and distributing the book, the defendant raised 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.[39]

6.20 More generally, it has been held that where a public order offence has the effect of detracting from freedom of expression, this must be shown to be 'strictly necessary' if it is to avoid contravening art 10 of the ECHR.[40]

Recent developments

6.21 The UK's anti-terrorism legislation, the Terrorism Bill 2005 (UK) and the Racial and Religious Hatred Bill 2005 (UK) do not contain an offence of sedition per se, although there are some similar offences. This fact was noted in a number of submissions to the 2005 Senate Committee inquiry.[41] Most relevant are the recent UK legislative proposals dealing with 'glorification' or 'encouragement' of terrorism.

6.22 The legal impetus for the Racial and Religious Hatred Bill 2005 (UK) and the Terrorism Bill 2005 (UK) came, in part, from the European Convention on Terrorism (discussed above). The Racial and Religious Hatred Bill 2005 (UK) was designed to extend the offence of incitement to racial hatred so that it would include incitement to

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36 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.

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

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

39 Ibid, 453.

40 See, for example, *Percy v DPP* [2002] Crim LR 835, 835.

41 Human Rights and Equal Opportunity Commission, *Submission 158B to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, 8; Australian Government Attorney-General's Department, *Submission 290A to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, Attachment A, 22.

religious hatred and, in its original form, it contained a new offence of condoning or glorifying terrorism.[42] However, that proposed offence was abandoned prior to enactment.[43]

6.23 The notion of glorification of terrorism was nevertheless taken up in the new offence of 'encouragement' of terrorism which included glorification within its ambit:

> (1) A person commits an offence if—
>
> > (a) he publishes a statement or causes another to publish a statement on his behalf; and
> >
> > (b) at the time he does so—
> >
> > > (i) he knows or believes, or
> > >
> > > (ii) he has reasonable grounds for believing,
> >
> > that members of the public to whom the statement is or is to be published are likely to understand it as a direct or indirect encouragement or other inducement to the commission, preparation or instigation of acts of terrorism or Convention offences.
>
> (2) 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 in existing circumstances.
>
> (3) For the purposes of this section the questions what it would be reasonable to believe about how members of the public will understand a statement and what they could reasonably be expected to infer from a statement must be determined having regard both—
>
> > (a) to the contents of the statement as a whole; and
> >
> > (b) to the circumstances and manner in which it is or is to be published.
>
> (4) It is irrelevant for the purposes of subsections (1) and (2)—
>
> > (a) whether the statement 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.

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42 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, 895.

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

> (5) In proceedings against a person for an offence under this section it is a defence for him to show—
>
> > (a) that he published the statement in respect of which he is charged, or caused it to be published, only in the course of the provision or use by him of a service provided electronically;
> >
> > (b) that the statement neither expressed his views nor had his endorsement (whether by virtue of section 3 or otherwise); and
> >
> > (c) that it was clear, in all the circumstances, 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.
>
> (6) 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;
> >
> > (c) on summary conviction in Scotland or Northern Ireland, to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum, or to both. …[44]

6.24 The Terrorism Bill 2005 (UK) was passed in the House of Commons on 15 February 2006. However, the 'glorification' clause was rejected by the House of Lords on 28 February 2006 (by a majority of 160 to 156) and the Bill has gone back to the House of Commons for further debate.[45]

6.25 The proposals were highly controversial, particularly the proposed offence of glorification or encouragement of terrorism.[46] Much of the disapproval of the new offence has centred on the view that the offence will impact too heavily on freedom of expression, with the result that some forms of speech that ought not to be outlawed—even if it is considered inappropriate or undesirable by many people. This point was made by a number of people involved in the parliamentary debates on this question,

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44 Terrorism Bill 2005 (UK) cl 1.

45 Under the UK's constitutional arrangements, if a Bill is duly passed by the House of Commons in three successive sessions but it is rejected each time by the House of Lords, s 2 of the *Parliament Act 1949* (UK) can be invoked by the House of Commons to over-ride those objections, thereby allowing the Bill to become law. See *R (Jackson) v Attorney General* [2005] 4 All ER 1253.

46 See, for example, Amnesty International, *UK: Human Rights: A Broken Promise, 23 February 2006* (2006) <http://web.amnesty.org> (14 March 2006).

such as the member of the House of Lords, Ralf Dahrendorf, who stated that 'rants should be rejected with argument, not with police and prisons'.[47]

6.26 The UK Parliament's Joint Committee on Human Rights was also critical of the Bill, expressing concern that the new offence of encouragement was not sufficiently certain to satisfy art 10 of the ECHR, which requires interferences with freedom of expression to be prescribed by law. The Committee highlighted 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.[48]

6.27 Professor Barendt identified four further problems with the Bill. First, in relation to the incitement to religious hatred provisions, he distinguishes between religious and racial hatred, arguing that it is 'much less plausible to regard a vicious attack on a religious group as wounding to its members' individual dignity, than it is to treat such an attack on a racial group in this way'. Secondly, 'there are no common standards to determine whether speech directed at a particular religious group is abusive or insulting'. Thirdly, in relation to the glorification of terrorism offence, Professor Barendt is concerned that the government 'will become the judge of acceptable history'. Finally, he believes that the Bill blurs the line 'between extremist political speech … and criminal speech'.[49]

6.28 Even though it remains the subject of strong criticism on freedom of expression grounds, the Bill that was eventually passed in the House of Commons was the result of considerable debate and legislative refinement. As the Public Interest Advocacy Centre (PIAC) observed in its submission to the 2005 Senate Committee inquiry, the Bill has been 'the subject of lengthy negotiations, Parliamentary scrutiny and compromise by the Blair Government'.[50]

United States of America

Background to US sedition laws

6.29 The United States (US) has long possessed legislation proscribing sedition, beginning with the *Sedition Act of 1798*. However, the offence has been removed from the statute books from time to time and fallen into disuse at other times.[51] It has been

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

48 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.

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

50 Public Interest Advocacy Centre, *Submission 142 to Senate inquiry into Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 40.

51 For a detailed account of the history of US sedition legislation, see 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, 1241–1245; Z Chafee, *Free Speech in the United States* (2nd ed,

stated that, except for a few notable cases, 'modern-day sedition trials are almost unheard of' in the US.[52]

6.30 The critical issue in determining the validity of US sedition laws has been whether or not the sedition offence is compatible with the First Amendment to the *United States Constitution*.[53] Professor Chafee has stated that a common defect in sedition laws, and one that is arguably not limited to the US, 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.[54]

6.31 The most recent US Supreme Court authority dealing with the constitutionality of sedition law is *Brandenburg v Ohio*.[55] In this case, the Supreme Court refined and clarified earlier tests of constitutionality, finding that for a law criminalising the advocacy of illegal conduct to be valid, three elements must be present: 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.[56] More generally, the US Supreme Court has tended to invalidate criminal legislation that detracts from freedom of expression—and especially political expression—unless it is 'inherently likely to cause violent reaction'.[57]

Modern sedition offence

6.32 More recently, there have been some limited moves to use sedition legislation to deal with the peculiar threat of modern terrorism. J A Cohan observes that while 'seditious conspiracy is a crime against the security of the state', circumstances have changed:

> Religious sermons by religious clerics have rarely imperiled the nation's security … [However] events of the past few years, particularly in the terrorist attacks of

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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).

52 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.

53 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.'

54 Z Chafee, *Free Speech in the United States* (2nd ed, 1954), 459.

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

56 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.

57 *Cohen v California* 403 US 15 (1971), 20.

> September 11, 2001, suggest that the threat posed by religious extremists against the United States is real.[58]

Chan concludes that 'prosecutions of seditious conspiracy are more likely to occur in a climate of society's heightened apprehension about terrorist plots against the nation.'[59]

6.33 There is a federal offence of 'seditious conspiracy' in the US 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.[60]

6.34 There are three principal elements to the US offence. First, there must be a 'conspiracy' (involving two or more persons, occurring within US territory or jurisdiction). Second, the conspiracy must, at least, oppose the US government or threaten its laws or property. Third, the use of force must be part of the conspiracy plot. The term 'seditious' is only referred to in the title, and not in the text, of § 2384. This may be 'because the word "seditious" in and of itself does not sufficiently convey what conduct it forbids'.[61]

6.35 Vagueness was certainly a problem with an earlier provision proscribing sedition, considered by the US Supreme Court in *Keyishian v Board of Regents*.[62] The majority found that an offence of uttering 'seditious words' was so potentially broad, in that the 'the possible scope of "seditious" utterances or acts has virtually no limit', that the provision fell foul of the First Amendment protection of free speech.[63] Such a provision was said to cast 'a pall of orthodoxy',[64] enabling selective prosecution of people who articulate views critical of the government. This has been described in the US literature as 'viewpoint discrimination'.[65]

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58 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, 200.

59 Ibid, 203.

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

61 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.

62 *Keyishian v Board of Regents* 385 US 589 (1967).

63 Ibid, 598–599, per 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.

6.36 A modern example of a prosecution for sedition, which proceeded under § 2384, was the case of Sheik Omar Abdel Rahman. Rahman was convicted in 1994 of seditious conspiracy and was given a life sentence. That sentence was affirmed by the Court of Appeals for the Second Circuit, as was the constitutionality of § 2384.[66] This case was precipitated by the actions of Rahman's group. It was alleged that they had been involved in a number of crimes including the assassination of Rabbi Meir Kahane in 1990 and plots to blow up the headquarters of the United Nations and various other buildings in New York City.

6.37 Raman was said to have incited these actions in sermons in which he told his followers, among other things, to 'do jihad with the sword, with the cannon, with the grenades, with the missile … against God's enemies'.[67] Further, he stated that 'being called terrorists was fine, so long as they were terrorizing the enemies of Islam, the foremost of which was the United States and its allies'.[68] The Court of Appeals held:

> The fact that his speech or conduct was 'religious' does not immunize him from prosecution under generally-applicable criminal statutes.[69]

The Smith Act

6.38 The so-called 'Smith Act' may be seen as the 'companion statute' to the law on seditious conspiracy.[70] Significantly, the Smith Act does not use the term 'sedition' but it does create an advocacy or urging offence. The relevant provision states:

> **Advocating overthrow of Government**
>
> 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

66 *United States v Rahman* 189 F 3d 88 (1999).
67 Ibid, 104.
68 Ibid, 107.
69 Ibid, 117.
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, 230–231.

> 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.
>
> If two or more persons conspire to commit any offense named in this section, each 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.
>
> As used in this section, the terms 'organizes' and 'organize', with respect to any society, group, or assembly of persons, include the recruiting of new members, the forming of new units, and the regrouping or expansion of existing clubs, classes, and other units of such society, group, or assembly of persons.[71]

6.39 The Smith Act has been interpreted in a similar manner to the seditious conspiracy provisions, such that it applies 'only to concrete violent action as distinguished from the teaching of abstract principles related to the forcible overthrow of the government'.[72] Purely 'academic discussion', therefore, is not enough to support a prosecution.[73] 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 also 'the mere teaching or advocacy of the violent overthrow of the government'.[74] The constitutionality of the Smith Act was affirmed by the US Supreme Court in a 1951 case that considered the prosecution of a group of people charged with being Communist Party members.[75] The Court refined the meaning of advocacy in a subsequent case, 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'.[76]

Canada

6.40 It has been suggested that the trend in most comparable jurisdictions is towards the repeal of sedition offences.[77] However, it appears that when a sedition provision is presumed to have died in a particular jurisdiction, it subsequently turns out that the provision was merely dormant. As discussed below, the position in Canada is illustrative of this phenomenon.

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

72 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.

73 Ibid, 235.

74 Ibid, 231.

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

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

77 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 US have repealed or are in the process of repealing sedition legislation: C Connolly, 'Five Key Facts on Sedition' (2005) (November/December 2005) *Human Rights Defender (Special Issue)* 20, 20.

6.41 In its submission to the 2005 Senate Committee inquiry, the Australian Attorney-General's Department stated that in order to determinine whether other jurisdictions have a 'sedition' offence, it is necessary to focus on the *substance* of the offence, rather than mere nomenclature:

> 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.[78]

6.42 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]?[79]

6.43 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*,[80] 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.[81]

6.44 Nevertheless, sedition remains a part of Canadian criminal law,[82] even if these provisions are rarely utilised—there is no evidence of a prosecution for sedition in that country since the 1950s. This is perhaps surprising given the Supreme Court of Canada's finding that the sedition provisions do not have any reach beyond those allied offences noted by the LRCC.

Hong Kong SAR

6.45 As part of the transitional arrangements that followed China resuming 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

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

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

80 *Boucher v The Queen* [1951] SCR 265.

81 Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49 (1986), 36 (emphasis in original).

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

Basic Law) was enacted. Its effect largely 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 with the Basic Law itself (art 8). Article 23 of the Basic Law is relevant for the purposes of sedition and 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.

6.46 In September 2002, the Hong Kong government published its proposals to implement art 23. On 25 February 2003, these proposals were crystallised in the National Security (Legislative Provisions) Bill. The reaction has been described as 'deafening and swift', with 500,000 people marching against the Bill on 1 July 2003[83]—'the largest protest march ever held against the Hong Kong government'.[84] Ultimately, the Bill was withdrawn from the Legislative Council. However, this is unlikely to be the end of the matter, particularly while art 23 remains active.[85]

6.47 The present position is that Hong Kong is left with the old colonial era offence of sedition, which criminalises any seditious act, seditious words or dealings with a seditious publication,[86] and had been used by the colonial authority to suppress internal dissent.[87] The term 'seditious intention' is defined in s 9 to mean:

> (1) 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

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83 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.

84 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.

85 R Wacks, 'National Security and Fundamental Freedoms: Hong Kong's Article 23 under Scrutiny—A Review' (2006) *Public Law* 180, 183; T Kellogg, 'Legislating Rights: Basic Law Article 23, National Security, and Human Rights in Hong Kong' (2004) 17 *Columbia Journal of Asian Law* 307, 309; 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.

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.

(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.

(2) An act, speech or publication is not seditious by reason only that it intends:

(a) to show that Her Majesty has been misled or mistaken in any of Her measures; or

(b) to point out errors or defects in the government or constitution of Hong Kong as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(c) to persuade Her Majesty's subjects or inhabitants of Hong Kong to attempt to procure by lawful means the alteration of any matter in Hong Kong as by law established; or

(d) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of Hong Kong.

6.48 Kellogg describes the articulation of this offence as 'archaic' and out of step with 'a narrower definition to comport with the stability of most modern states'.[88] The provision has also been described as 'draconian', with a 'chilling effect on free speech'.[89] Certainly, the relevant provisions date largely from 1938 (except for ss 9(1)(f) and (g), which were added in 1970). The offence was used as recently as the 1960s, but rarely thereafter.[90]

6.49 It has been observed that, unlike most Commonwealth statutes dealing with sedition, the Hong Kong law does not require proof of an intention to incite violence, thereby placing a relatively low bar to prosecution.[91] The Bill that was proposed to

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 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.

91 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.

implement art 23 of the Basic Law similarly did not incorporate such a requirement, a factor contributing to the disquiet that led to the Bill's abandonment.[92]

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, 328.

7. List of Questions

History and reform of sedition law (see Ch 2–4)

1. Given the controversial history of sedition law over several centuries—in particular the apparently selective and political nature of its prosecution history—is it appropriate to 'modernise' sedition law to enable its use in contemporary circumstances?

2. Is 'sedition' the appropriate term to identify the conduct proscribed under s 80.2 of the *Criminal Code* (Cth)? Would it be better to remove the link with the old sedition offences by using a more contemporary description such as 'urging or inciting politically motivated violence'?

3. In what broad circumstances, and in relation to what specific conduct, are prosecutions for the offences in s 80.2 of the *Criminal Code* most likely to be brought?

4. Is there any 'seditious' conduct that could not be prosecuted successfully under other criminal offence provisions, such as laws relating to incitement to violence or conspiracy?

Framing the sedition offences (see Ch 3)

5. It has been suggested that the fault elements in ss 80.2(1), (3) and (5) of the *Criminal Code* are not sufficiently clear. Should those sections be amended to provide expressly that it must be proved that the defendant intended to urge the use of force or violence?

6. To what extent does conduct covered by the offences in ss 80.2(1) and (3) of the *Criminal Code* overlap with conduct that constitutes incitement to commit other offences, such as the terrorism offences under Part 5.3 of the *Criminal Code*?

7. Sections 80.2(7) and (8) of the *Criminal Code* 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 Australian Defence Force. Does the term 'assist' need clarification to indicate the range of conduct to which it applies?

8. To what extent does conduct covered by the offences in ss 80.2(7) and (8) of the *Criminal Code* overlap with conduct that constitutes incitement to commit other crimes; for example, treason, treachery, sabotage and interfering with political liberty under the *Crimes Act 1914* (Cth) or offences under the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)?

9. Is there a need for a new offence dealing directly with the 'glorification' or 'encouragement' of terrorism along the lines currently being considered in the United Kingdom? (See Ch 6.)

10. Are the maximum penalties for the offences in s 80.2 of the *Criminal Code* appropriate?

Urging group-based violence (see Ch 3, 4 and 6)

11. To what extent does conduct covered by the offence in s 80.2(5) of the *Criminal Code* overlap with conduct that constitutes serious racial or other vilification under Commonwealth, state or territory laws?

12. Is there a need for the federal offence (in s 80.2(5) of the *Criminal Code*) of urging the use of force or violence against another group defined on the basis of race, religion, nationality or political opinion?

13. Is it preferable to address the problem of urging group-based violence through the sedition offences, or through anti-vilification legislation?

Extraterritorial application (see Ch 3)

14. Section 80.2 of the *Criminal Code* applies (by way of s 80.4) to conduct that occurs outside Australia, including by non-citizens. What problems, if any, are raised by this extraterritorial application?

15. The Attorney-General's consent is required for any prosecution under these provisions (s 80.5 of the *Criminal Code*) Should this be the case?

Defences (see Ch 3)

16. Are the 'good faith' defences provided by s 80.3 of the *Criminal Code* defined with sufficient clarity and are they adequate to protect freedom of expression and other interests? If not, how should the defences be framed?

17. Are journalists and media organisations adequately protected by the defences in s 80.3 of the *Criminal Code*?

Unlawful associations (see Ch 3)

18. The unlawful associations provisions still rely on the concept of 'seditious intention'. Is this appropriate, given that this concept is no longer used in connection with the offences in s 80.2 of the *Criminal Code*?

19. To what extent do the unlawful associations provisions of Part IIA of the *Crimes Act 1914* (Cth) overlap with the more recent terrorist organisations provisions of Division 102 of the *Criminal Code*? Are the unlawful associations provisions still necessary?

International framework (see Ch 5)

20. Does the new offence of 'urging violence within the community' in s 80.2(5) of the *Criminal Code* implement effectively Australia's obligations under international law to proscribe incitement of national, racial or religious hatred? (See, in particular, *International Covenant on Civil and Political Rights* art 20 and *International Convention on the Elimination of all Forms of Racial Discrimination* art 4. See also Ch 3–4 regarding group-based violence.)

21. Are ss 80.2 to 80.4 of the *Criminal Code* compatible with Australia's obligations under international law? If not, on what legal basis is Australia non-compliant?

22. Article 19 of the *International Covenant on Civil and Political Rights* recognises the right to freedom of expression and the right to hold opinions without interference, subject to certain restrictions. 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)?

Human rights and civil liberties

23. Are any aspects of ss 80.2 to 80.6 of the *Criminal Code* inconsistent with domestic legislation protecting human rights?

24. Concerns have been raised that some of the new offences (especially s 80.2(5) of the *Criminal Code*) may be applied disproportionately or unfairly to the disadvantage of particular groups within the Australian community. If this is a problem, what legal or administrative steps should be taken to address it?