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Dear Executive Director

Thank you for the opportunity to make this late submission. These brief comments are supplementary to my earlier materials provided to this ALRC reference, in particular: Ben Saul, 'Speaking of Terror: Criminalizing Incitement to Violence' (2005) 28 UNSW Law Journal 868.

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?***

That the law of sedition has been misused in the past is not, of itself, a sufficient reason for eliminating the offence altogether – just as miscarriages of justice in the law of homicide are no reason to abolish that offence. Moreover, the recent modernisation of federal sedition offences (but not State or territory offences) has removed some of the vague and oppressive concepts in the old law, such as exciting 'disaffection', promoting feelings of 'ill-will', or 'contempt' of the Sovereign. (Conversely, it has widened the old offences by dispensing with the idea of public disorder/disturbance).

Nonetheless, a combination of factors suggests that the law of sedition has become so thoroughly discredited in modern democratic societies that modernising it would not be sufficient to retrieve and restore its irreparably tarnished public image. These factors include: its manipulative use against legitimate political opponents such as Irish rebels, conscientious objectors, journalists and communists; the prosecution of trivial statements which lack any real connection to violence; its propensity to unjustifiably interfere with freedom of expression and opinion; its historically vague, uncertain and unpredictable scope and mental elements; its origins in protecting monarchical reputation (rather than any genuinely important public interest in preserving political authority and institutions from violence); its modern redundancy in light of numerous overlapping (but more precisely framed) offences; its disuse over many decades; and widespread public unease about – and considerable ridicule of – sedition offences.

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The law of sedition is a foreign anachronism ill-suited to modern Australian democratic conditions, since the historical and cultural conditions under which it developed are no longer apposite. Sedition offences should be removed from Australian law not least because they undermine public confidence in, and respect for, the neutral and apolitical content and application of the criminal law.

Paradoxically, the danger in modernising these offences is that prosecutors may seek to use them more often, since the new offences are considered better adapted to modern conditions and thus more legitimate. A better approach is to abandon old-fashioned security offences altogether in favour of using the ordinary criminal law, particularly since such offences may counter-productively mark out and legitimise perpetrators as 'political' offenders rather than ordinary criminals. As the Gibbs Review observed, the UK Law Commission found that a crime of sedition was unnecessary, since seditious conduct is already captured by the ordinary offence of incitement to crime.

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'?*

Sedition is an inappropriate term for the reasons described above. It is not possible to mask the inappropriateness of sedition offences in modern democratic circumstances through terminological sophistry or rhetorical sleight of hand. To the extent that modernising sedition offences makes them more palatable, this is precisely because the offences have been transformed into new legal concepts and can no longer be accurately described as sedition.

Furthermore, it is not obvious why five quite disparate offences need to be bundled under the rubric of a single overarching, homogenizing category – even under a modernised description such as 'urging or inciting politically motivated violence'. It may be preferable to classify each offence as a separate crime reflecting the distinct purposes of each. Thus, the offences could be separated as distinct offences of:

- ***Urging the violent overthrow of the Constitution, a government or lawful governmental authority***: this offence could be renamed 'inciting the violent overthrow of democratic government';
- ***Urging unlawful interference in elections***: this offence could be renamed 'inciting violent interference in democratic elections' and relocated to electoral law;
- ***Urging inter-group violence***: this scope of this offence should be revised and relocated to anti-vilification law;
- ***Urging others to assist those fighting Australia***: it is difficult to see how these two offences are practically distinguishable from treason or treachery (see question 8), unless these offences are intended to replace those older crimes. If not, there is little justification for preserving these two sedition offences as distinct categories, regardless of what they might be called.

The benefit of this approach is to clearly differentiate the specific social harms targeted by each offence, rather than conflating and subsuming them within a singular, vague, reductionist and confusing category. Precision and intelligibility in legal nomenclature are necessary to ensure the fairness and predictability of the law and to maintain public confidence in, and understanding of, legal rules.

If an overarching classification is still thought desirable, the term 'sedition' should, in my view, be replaced with the simple phrase 'inciting unlawful violence against democratic authority'. Such a concept is more likely to gain public acceptance because it clearly indicates that **democracy** (rather than any political authority, however oppressive) is the relevant social value or public good being protected, and that only **unlawful** violence is being targeted by the offences. The reference to democracy also signals a departure from protecting monarchical interests, which are historically associated with generating legitimate political grievances during the long struggle in English history for parliamentary supremacy over the monarchy.

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?*

See examples previously provided.

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

This may depend on how the courts interpret the fault requirements of these offences, as well as the proximity, likelihood and imminence of violence being connected to seditious urgings. The new offences do not require an intention to urge **unlawful** force or violence, such that they may criminalize statements which encourage others to use force or violence which is otherwise excusable or justifiable under statute or by pleading criminal defences. The new offences also do not require an intention to urge **serious** force or violence, such that minor property damage may suffice (rather than harm to people). The use of the term 'force' in addition to 'violence' would seem to further widen the scope of the offences. It would be preferable to delete reference to 'force' and to require an intention to urge **serious, unlawful violence**.

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?*

There is a great deal of confusion in the community about the fault elements required by these offences and it would seem sensible to clarify or simplify the requirements. The fault elements of the old definition of sedition also gave rise to difficulty and controversy in the courts.¹ For detailed analysis of the fault elements, see the submission made by my colleague, Alex Steel.

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?*

Both the federal law of incitement (**Criminal Code**, s 11.4) and the sedition offences employ the identical term 'urges'. This expression was chosen during the drafting of the **Criminal Code** in order to narrow the common law meaning of incitement (thus limiting its common law meaning which extended to counselling, commanding or advising).² There must be proof that a person intended to encourage or induce an offence; the person must advocate, rather than merely cause, the offence.³

¹ See, eg, J Smith, **Smith and Hogan: Criminal Law** (10th ed, Butterworths, London, 2002), 759.

² Commonwealth Attorney-General's Department, **The Commonwealth Criminal Code: A Guide for Practitioners**, Australian Institute of Judicial Administration (2002) 271. In various jurisdictions, the courts interpreted incitement by its ordinary textual (or dictionary) meaning, such as to urge, spur on, stir up, prompt to action, instigate or stimulate: **R v Crichton** [1915] SALR 1 (Way CJ); **Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)** [2004] VCAT 2510 (Unreported, Higgins VP, 22 December 2004) [18]; **Brown v Classification Review Board of the Office of Film and Literature Classification** (1998) 50 ALD 765, 778; or to request or encourage: **R v Massie** [1999] 1 VR 542, 547.

³ **The Commonwealth Criminal Code: A Guide**, *ibid*, 271–2.

Neither s 80.2(1) or (3) is necessary, since similar conduct can largely already be prosecuted by combining the law of incitement with the offences of:

- **treachery**, which includes doing anything to overthrow the Constitution by revolution or sabotage, or to overthrow by force or violence a Commonwealth or State government (*Crimes Act 1914* (Cth), s 24AA(1)(a));
- **interfering with political liberty** – by hindering or interfering with the free exercise of performance, by any other person, of any political right or duty under electoral law (*Commonwealth Electoral Act 1918* (Cth) s 327);
- **interfering with political liberty** – by violence or threats or intimidation, hindering or interfering with the free exercise of performance, by any other person, of any political right or duty (*Crimes Act 1914*, s 28);

In addition, a further federal offence overlaps with s 80.2(1) without any need to combine the offence with the law of incitement:

- **advocating or inciting crime** – by advocating or encouraging by speech or writing:
 - (a) the overthrow of the Constitution revolution or sabotage;
 - (b) the overthrow by force or violence of a state or federal government or foreign government; or
 - (c) the destruction or injury of Commonwealth property (*Crimes Act*, s 30C).

The scope of sedition offences is, of course, wider than many of these offences for the reasons explained in the answer to question 4 above.

To the extent that seditious urgings involve directions to commit specific offences such as assault, murder, arson, terrorism and so forth, the existing law of incitement could also be applied to the full range of ordinary criminal offences. The principal differences in prosecuting for sedition rather for incitement to other criminal offences are the applicable penalties and the symbolic or normative significance of a sedition charge. In addition, it is probable that the expression to ‘overthrow’ a government or Constitution implies more than a single act or isolated series of acts, and requires a more durable, sustained, organized and serious campaign of violence that has some real prospect of overturning the government as a whole.

Considering the broad definition of terrorism in federal law (s 100.1, *Criminal Code*) and the extensive array of terrorism offences (ss 101–102), the existing law of incitement already covers a wide range of facilitative or preparatory conduct. Thus it is already an offence to incite someone to: train for terrorism (ss 101.2 and 102.5); possess ‘a thing’ connected with terrorism (s 101.4); collect or make a document connected with terrorism (s 101.5); or do acts preparatory to terrorism (s 101.6). Since a ‘terrorist act’ includes **threats** to commit terrorism (s 100.1), the above offences are considerably widened; thus it is an offence to incite a person to train to threaten to commit terrorism, or to collect a document for use in such a threat. As indicated above, incitement can also be applied to the many federal security offences.

In addition, it is already a crime to incite offences concerning terrorist organisations: directing them, being a member, recruiting for them, funding them, providing support or resources to them, or associating with them: *Criminal Code*, ss 102.2–102.8.

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?**

In criminalizing people who urge others merely to 'assist' those fighting Australia, these two offences are not synchronised with the remaining three sedition offences, which require the urging of 'force or violence'. There does not appear to be a rational explanation for the different threshold of harm criminalized in these two offences. A person who urges another to 'assist' a group seeking to overthrow the Constitution may be no less dangerous than a person urging others to 'assist' those fighting Australia.

However, criminalizing those who urge others merely to assist such groups is attenuating criminal responsibility too far. While it may be justifiable to criminalize those who urge others to directly 'assist' in violence against Australia, it is not justifiable to stretch liability to cover urging any assistance to groups fighting Australia when the person urged is not being encouraged to assist personally in the violence itself.

Sections 80.2(7) and (8) should be amended to align with the other three offences, by requiring that a person must urge others to use force or violence against Australia during a war on armed hostilities (subject to the answer to question 14 below).

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)?

These two offences are largely redundant (subject to the qualifications in the answer to question 4 above) because such conduct is already covered by applying the law of incitement to the offences of treason (*Criminal Code* s 80.1) and treachery (*Crimes Act* s 24AA) and offences in ss 6–9 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). Those offences are defined widely and cover much preparatory conduct. For example:

- **treason** already covers levying or preparing war against Australia; assisting 'by any means whatever' an enemy at war with Australia or a country or organisation fighting Australian forces, and **instigating** a non-citizen to invade Australia (section 80.1 of the *Criminal Code* (Cth));
- **treachery** includes assisting 'by any means whatever' a person opposing Australian forces overseas, or even assisting persons specified by proclamation (*Crimes Act* 1914 (Cth), s 24AA(2)). Within Australia, it is treachery to levy war or to prepare to levy war against a proclaimed country; to assist a proclaimed enemy; or to instigate a person to make an armed invasion of a proclaimed country (s 24AA(1)(b));
- under the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth), it is an offence to engage in, or intend to engage in, hostile activities in a foreign State (s 6(1)); to commit acts preparatory to hostile activities (s 7); or to recruit persons to join organisations or armed forces engaged in hostile activities against foreign States (ss 8–9) – which includes doing any act with intent to facilitate or promote the recruitment of persons to serve with such an armed force (s 9(1)(d));
- **harming Australians** (Criminal Code, Division 115) includes offences of murder, manslaughter, or serious harm to Australian citizens or residents outside Australia;
- some of the acts covered by s 80.2(7) and (8) overlap with the various terrorism offences in the Criminal Code, which also attract extended geographical jurisdiction – category D and thus apply regardless of whether the offence occurs in Australia.

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.)*

No. In the absence of any entrenched protection of human rights in Australia, it would not be appropriate to enact offences of this nature, which have the potential to unjustifiably and arbitrarily infringe freedom of expression, without showing any proximate connection to an imminent likelihood of unlawful violence occurring. Responsibility for criminal harm should lie primarily with the perpetrators, who are free agents not bound to act on the words of others; liability should not be unduly attenuated.

It is significant that the drafters of the Council of Europe's 2005 *Convention on the Prevention of Terrorism* agreed to criminalise 'provocation' of terrorism only because European human rights remedies were available to protect free expression from undue interference.⁴ (See also Ben Saul, 'Speaking of Terror: Criminalizing Incitement to Violence' (2005) 28 UNSW Law Journal 868.) Debate in Britain has similarly centred on the potential incompatibility of such measures with human rights law. Despite its apparent breadth, the Council of Europe Convention still requires a specific intent to incite an offence and credible danger that an offence will be committed.

UN Security Council resolution 1624 is not binding on Australia and, in any event, provides no definition of incitement or justification/glorification, terms which are, in my view, too vague to base criminal liability on such conduct. See also my previous comments on the Council of Europe, UN Security Council and British initiatives.

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

Please see the submission by my UNSW colleague, Alex Steel.

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?*

See answer to question 12 below.

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?*

Yes. The new offence seeks to criminalise – for the first time in federal law – incitement to violence against racial, religious, national, or political groups. The Gibbs Review of 1991 explained such a provision as supported by Australia's human rights treaty obligations to criminalise incitement to violence on national, racial or religious grounds.⁵ In principle, this is a welcome development for a number of reasons.

First, while racial hatred has been *unlawful* under federal law since 1995,⁶ incitement to racial discrimination or vilification was not hitherto a federal *crime*, as required by article 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination 1969*.⁷

⁴ Explanatory Report to the *Council of Europe Convention on the Prevention of Terrorism*, [27], [30] <<http://conventions.coe.int/Treaty/EN/Reports/Html/196.htm>> at 13 November 2005.

⁵ Gibbs Review (1991), 306–7. See generally Louis Henkin, 'Group Defamation and International Law' in Monroe Freedman and Eric Freedman (eds), *Group Defamation and Freedom of Speech* (1995) 123.

⁶ It is unlawful to publicly do an act which 'is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people' for reasons of 'race, colour or national or ethnic origin': *Racial Discrimination Act 1975* (Cth) s 18C(1), as amended by the *Racial Hatred Act 1995* (Cth). It is also unlawful to incite

Second, *religious* vilification had not otherwise been made unlawful at the federal level⁸ or in New South Wales, even though the *International Covenant on Civil and Political Rights*⁹ ('*ICCPR*') requires States to prohibit 'by law': 'Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' (art 20(2)).¹⁰ The ICCPR does not explicitly mention whether the requirement that such conduct be 'prohibited by law' also requires a criminal penalty, although criminalization is arguably implied. Religious prejudice against Muslim Australians increased significantly after 11 September 2001,¹¹ and prohibiting incitement to violence against religious groups sends a vital normative message to the community that religious hatred is unacceptable.¹²

On the other hand, the offence is also too narrow and does not go far enough in protecting groups from harm. First, it only protects religious (or other) groups from incitements which urge *other* groups to violence, and so excludes incitements aimed to provoke individuals, or groups not mentioned in the legislation.

Second, requiring that the incitement must also threaten the peace, order and good government of the Commonwealth leaves groups unprotected from incitements which do *not* threaten peace, order or good government. For example, sporadic or isolated incitements to violence might not rise to a level of intensity or prevalence which threatens peace, order or good government – even though such incitements profoundly affect their victims. Neither Gibbs nor international law supports such a limitation.

The qualification may, however, have a different limiting effect in Australian law. In *Sharkey*, it was observed that the reference in sedition law

to endangering the peace, order or good government of the Commonwealth should be read as a reference to that peace, that order and that government which the Commonwealth may lawfully protect, maintain or undertake; that is, to peace, order and good government as lawfully established under the Constitution. In my opinion there is no ground whatever for treating these words as intended to cover everything, lawful or unlawful, which the Commonwealth by any of its organs may attempt to

racial discrimination under the *Racial Discrimination Act 1975* (Cth) s 17(a). See Sally Reid and Russell Smith, *Regulating Racial Hatred, No 79: Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology (1998).

⁷ In contrast, NSW made serious racial vilification an offence in 1989: 'A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group' by means such as threatening physical harm towards the person, group or their property, or by inciting others to threaten such harm: *Anti-Discrimination Act 1977* (NSW) s 20D. There have been no prosecutions to date, despite referrals.

⁸ Federally, while the Human Rights and Equal Opportunity Commission ('HREOC') can inquire into and conciliate complaints about religious discrimination in employment or by the Commonwealth, there is no such protection in other contexts (such as against private perpetrators), and even HREOC's limited powers do not provide binding rights or remedies.

⁹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁰ In contrast, Queensland, Victoria and Tasmania have prohibited such incitement: Human Rights and Equal Opportunity Commission, Race Discrimination Unit, *Racial Vilification Law in Australia* (October 2002) <http://www.hreoc.gov.au/racial_discrimination/cyberracism/vilification.html> at 4 November 2005.

¹¹ Human Rights and Equal Opportunity Commission, *Isma 7 – Listen: National Consultations on Prejudice against Arab and Muslim Australians* (2004); Scott Poynting and Greg Noble, *Living with Racism: The Experience and Reporting by Arab and Muslim Australians of Discrimination, Abuse and Violence since 11 September 2001* (2004); Tanja Dreher, "'Targeted": Experiences of Racism in NSW after September 11, 2001' (2005) *UTS: Shopfront Monograph Series No 2* <<http://www.shopfront.uts.edu.au/news/targeted.pdf>> at 11 November 2005.

¹² HREOC has also recommended that religious vilification be made unlawful in Australia: Human Rights and Equal Opportunity Commission, above n 39, 6; Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998) 137, 139; see generally Mark Walters, 'Hate Crimes in Australia: Introducing Punishment Enhancers' (2005) 29 *Criminal Law Journal* 201.

accomplish. The "good government" of the Commonwealth can only be a government in accordance with law.¹³

In other words, those who incite one group to violence against another group may not fall within the scope of this sedition offence where the use of force or violence threatens something unlawfully established by the Commonwealth. If, for example, the Commonwealth attempted to ban an opposition political party in contravention of the implied constitutional freedom of political communication, members of that party (a group based on 'political opinion' within the meaning of s 80.2(5)) could not be prosecuted for urging violence against members of the government, since such violence would threaten an **unlawfully** established peace, order or good government.

Clearly, the statutory use of the phrase 'peace, order and good government' may have an operative legal effect, in contrast to the use of the phrase prefacing the grant of federal powers in s 51 of the **Australian Constitution**, which the courts have found does not limit an otherwise valid exercise of a federal power.¹⁴

Third, the offence is confined to criminalising **incitement** to group-based violence, but there is no attempt to criminalise **actual** group **violence**. While violence against group members can always be prosecuted as ordinary crime under state, territory or federal law, treating group-based violence or 'hate crimes' as ordinary offences fails to recognise the additional psychological element and social harm involved in such cases. It is not sufficient to merely consider racial or religious motives as aggravating factors in sentencing, since that approach does not stigmatise the offending conduct as adequately as **naming** the conduct a racial or religious crime.

Finally, while incitement to **racial** discrimination and vilification is unlawful in federal law, even after the new offence there remains no federal (or NSW) protection from **religious** discrimination or vilification, where such conduct does not incite to violence. The case of **Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)**¹⁵ in Victoria illustrates the utility of broader laws against religious hatred. An evangelical Christian group and two pastors incited 'hatred against, serious contempt for, or revulsion or severe ridicule of' Victorian Muslims, contrary to s 8 of the **Racial and Religious Tolerance Act 2001** (Vic). They did so by claiming that Muslims are violent, terroristic, demonic, seditious, untruthful, misogynist, paedophilic, anti-democratic, anti-Christian and intent on taking over Australia.¹⁶ The statutory exemptions for conduct engaged in reasonably and in good faith were unavailable, since the respondents had made fun of Muslims in a 'hostile, demeaning and derogatory' way, not in a balanced or serious discussion,¹⁷ and had not distinguished moderate from extremist beliefs. The case is currently on appeal.

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

Characterising incitement to group violence as sedition is an error of classification. The essence of 'sedition' is the promotion of rebellion against, or subversion of, political or monarchical authority, beyond the more limited challenge to order presented by ordinary crime. In contrast, protecting groups from communal incitement to violence finds its justification in international human rights law. The appropriate place for such an offence is within the framework of anti-vilification legislation, as suggested by the Labor Opposition's Crimes Act Amendment

¹³ *Sharkey*, para 14.

¹⁴ *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9.

¹⁵ [2004] VCAT 2510 (Unreported, Higgins VP, 22 December 2004).

¹⁶ *Ibid* [383].

¹⁷ *Ibid* [383]–[384].

(Incitement to Violence) Bill 2005 (Cth) proposed in response to the sedition proposals in the Anti-Terrorism Bill 2005 (Cth).

Moreover, presenting this offence as a counter-terrorism law falsely stigmatises group-based violence as terroristic, when it is a conceptually distinct harm which should be treated separately by the criminal law. Collapsing these categories can only reinforce the stereotyping of certain ethnicities or religions as terrorists. The rationale for protecting one group from violence by another is not to prevent sedition or terrorism, but to guarantee the dignity of members of human groups in a pluralist society.

The external affairs power in the Commonwealth Constitution supports such a provision in anti-vilification law to the extent that it implements a treaty obligation and is a permissible restriction on the implied freedom of political communication.¹⁸ In this sense it is doubtful whether incitement to violence against groups based on 'political opinion' could be supported as a genuine implementation of human rights treaties, since no such protection is found in those treaties.

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?

The new offences in s 80.2(7) and (8) of the Criminal Code potentially interfere with the operation of international humanitarian law in armed conflicts. Extended geographical jurisdiction – category D applies to these offences, meaning that the offence applies (a) whether or not the conduct constituting the alleged offence occurs in Australia; and (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia (see s 15.4, Criminal Code).

(These are offences where a person urges another person to engage in conduct intended to assist an organization or country either at war with Australia, or engaged in hostilities against Australian forces.)

Under these laws, commanders of enemy forces who order their troops to attack Australian forces in armed conflicts outside Australia may be liable to prosecution for sedition under Australian law. Such orders would amount to urging another person to engage in conduct intended to assist an organization or country at war with Australia or engaged in hostilities against Australian forces (s 80.2(7) and (8)).

Such offences gives rise to a plain conflict with international humanitarian law, under which combatants participating lawfully in an international armed conflict are entitled to **combatant immunity** and Prisoner of War (POW) status upon capture. Combatant immunity essentially prevents the prosecution of enemy forces for conduct which is permitted under the laws of war but which might otherwise amount to ordinary criminal offences under domestic law. (Combatant immunity does not, of course, prevent prosecution for war crimes, crimes against humanity or genocide.)

Under international law, Australia is not lawfully entitled to criminalize enemy commanders for directing their forces to fight in conformity with international law. Indeed, international law

¹⁸ By analogy, see *Toben v Jones* (2003) 74 ALD 321 (the Full Federal Court found that the prohibition of 43 racial hatred in the *Racial Discrimination Act 1975* (Cth) Pt IIA was a valid exercise of the external affairs power, since it was reasonably capable of being considered as appropriate and adapted to implementing the *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)). See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, upholding ss 9 and 12 of the same Act under the external affairs power.

does not support the kind of extended jurisdiction Australian is seeking to exercise over such conduct, precisely because of the potential conflict with the law on combatant immunity in armed conflict.

A real and practical consequence is that Australian forces are endangered by these laws because of the likelihood of reciprocal treatment. If enemy forces know that they will not be treated as POWs upon capture and instead will be prosecuted under Australian domestic law for fighting lawfully as combatants, such forces will be less likely to confer POW status on Australian forces and may even resort to prosecuting Australian forces for their (internationally lawful) participation in armed conflict. Moreover, enemy forces will be more likely to resort to extreme measures (which violate humanitarian law) in order to avoid capture at all costs.

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?*

Yes. The Attorney-General's consent is a welcome additional protection against spurious, vexatious, oppressive or inappropriate prosecutions. The initial decision to prosecute must, of course, be made by the Commonwealth Director of Public Prosecutions and at this stage there should be an explicit safeguard against any political interference or pressure by the Attorney-General in initiating prosecutions.

The consent requirement may be particularly beneficial where there is considerable public sympathy for political offenders and a strict application of the criminal law would not be in the public interest – for example, because prosecution would inflame rather than quell the political unrest or communal disharmony which was incited.

Defences

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?*

While these defences seem wide, protecting some legitimate free expression, most of the defences are directed towards protecting political speech, at the expense of other types of expression. The range of human expression worthy of legal protection is much wider than these narrowly drawn exceptions, which appear more concerned about not falling foul of the implied constitutional freedom of political communication than about protecting speech as inherently valuable.

By contrast, good faith defences commonly found in state and federal anti-vilification legislation typically protect statements made in good faith for academic, artistic, scientific, religious, journalistic or other public interest purposes. Such statements may not aim to criticise the mistakes of political leaders, the errors of governments or laws, matters causing ill-will between groups, or industrial issues. Such statements may be neither constructive nor in good faith, such as satirical art, theatre or comedy.

The defences are also anachronistic, since they are based closely on the defences to English common law crimes of sedition. They are defences for a different era – less rights-conscious, and eager to protect the reputation of Queen Victoria. Such narrow defences have no place in a self-respecting modern democracy.

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

Journalists and media organizations are entitled to raise the ordinary good faith defences as well as a special defence for statements published in good faith and 'in the public interest'.

However, the latter defence may be too narrow because it allows judges to second-guess expert journalists on what matters are thought to be in the public interest, as well as to uphold restrictions on publications not in 'good faith'.

The 1995 *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* argue that: 'Expression may not be prevented or punished merely because it transmits information issued by or about an organisation that a government has declared threatens national security'.

At the same time, the European Court of Human Rights has stressed that journalists have special responsibilities and duties in situations of political conflict because they can become 'a vehicle for the dissemination of hate speech and violence'.¹⁹ At the same time, in *Jersild v Denmark*,²⁰ the European Court of Human Rights held that hate speech could not legitimately be restricted in the particular circumstance of the case. A Danish television programme had broadcast a documentary in which racist youths made offensive remarks about black people, and the presenter and head of the news section were prosecuted and convicted. The restriction was not justified because the court was satisfied that the intention behind presenting the racist views was informing the public, which intention was evidenced by the fact that the program was part of a serious news schedule, for a well-informed audience.

Johannesburg Principle 6 provides that punishing expression as a threat to national security is only permitted where the government can demonstrate the expression is intended to incite violence and that there is a direct and immediate connection between the expression and the likelihood of occurrence of such violence.

In a series of cases, the ECHR examined prosecutions for offences against the state by Turkish newspaper editors and owners who had published articles and letters criticising the country's policy towards Kurdish people. The Court stressed the importance of safeguarding the right of the press to impart information on political issues. There was only a violation of article 10 where the publication genuinely amounted to an incitement to separatist violence.²¹ Even in the case in which there was held to be no breach of article 10, six of eighteen judges dissented, arguing there was an insufficient factual link between the published letters and some incitement to violence.

Clearly, publications which are neither 'in good faith' nor 'in the public interest' may still lack a direct and immediate or imminent connection to the occurrence of violence. In such cases, the sedition offences may not amount to a necessary or proportionate restriction on freedom of expression under ECHR jurisprudence.

If journalists are thought entitled to a special defence, it raises a serious question as to whether other groups or professions should be similarly specially protected – for example, academics, artists, politicians, religious leaders and so forth. These groups have equally valid (if differently justified) claims to protected speech. Granting all such groups the benefit of special protection raises a further challenge to equal treatment before the law, in that ordinary citizens are not entitled to similarly privileged treatment and thus become over-criminalized as a result. There is also the danger of exempting so many occupation-specific categories of speech that the offence itself becomes shot through with exceptions and rendered ineffective. Nonetheless, these categories are generally accepted as providing good reasons for certain kinds of otherwise impermissible speech (as long as the categories are not abused or manipulated for ulterior criminal purposes).

¹⁹ *Erdogdeu and Ince v Turkey* (Apps. 25067/94 and 25068/94); *Surek and Ozdemir v Turkey* (Apps. 23927/94 and 24277/94).

²⁰ *Jersild v Denmark*, Judgment of September 24, 1994, Series A, No. 298; (1994) 19 EHRR 1.

²¹ *Surek v Turkey (No 1)* (App. 26682/95); *Surek v Turkey (No 3)* (App. 24735/94), Judgments of 8 July 1999.

Otherwise, criminalising general statements of support for terrorism risks unjustifiably criminalising a range of legitimate expression in a democratic society, including attempts by academics, journalists and religious leaders to fathom (and hence to reduce) the causes of, and motivations for, terrorism. There is also a real danger that criminalising the expression of support for terrorism will drive such beliefs underground. Rather than exposing them to public debate – which allows erroneous or misconceived ideas to be corrected and ventilates their poison – criminalisation risks aggravating the grievances often underlying terrorism, and thus increasing, not reducing, its likelihood.

It is true that some speech (the illogical, the absurd, or the fundamentalist) cannot be rationally countered by other speech, and it is plain that this is not an ideal world of deliberative and respectful public reason. Yet, the place for combating stupid or ignorant ideas, or even blood fantasies, lies in the cut and thrust of public debate, and more broadly in the political, social, cultural, religious and private realms. The criminal law is ill-suited to reforming expressions of poor judgment, bad taste, or odious beliefs. Suppressing *public* incitement may succeed only in intensifying *private* incitement, which may be more damaging precisely because of the atmosphere of secrecy and the psychological pressure which can be applied in close relationships.

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?*

The preservation of the old definition of a 'seditious intention' for the purpose of banning unlawful associations creates two different and inconsistent meanings of sedition in federal law. The confusion generated by this peculiar approach was evident in the public debate prior to the adoption of the legislation, where the definition of 'seditious intention' was commonly mistaken by groups and individuals in the community as forming the definition of the criminal offences of sedition. It is also strange that the government argued that sedition should be modernised and yet much of the old definition was retained for the limited purpose of group proscription. Its retention in this context directly conflicts with the Gibbs Report's recommendation to repeal the provisions on 'unlawful associations' altogether – and not to extend them. Terrorist groups can already be banned as terrorist organisations and a second track of collective proscription is confusing, odd, and unnecessary.

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?*

The unlawful association provisions are little used and have been effectively superseded for contemporary purposes by the power to proscribe terrorist organizations. No compelling justification has been presented for retaining two separate tracks for banning organizations, particularly given the breadth of the power to ban terrorist organizations (including for praising terrorism). The grounds on which unlawful associations can be proscribed are even wider and, in my view, inappropriately broad.

Similar bases for banning unlawful associations are found in s 84 of the Defence (Emergency) Regulations 1945 in British Palestine (and earlier in imperial India and insurrectionist Ireland). The location of this power in wartime emergency regulations indicates its exceptional character; such powers are not appropriate in a democracy in peacetime, not faced by the kind of widespread collective violence which might justify such severe restrictions on freedom of association.

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.)*

See answer to question 12.

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?*

International law does not require States to enact criminal offences protecting themselves from seditious violence or political rebellion. Such matters fall within the reserved domain of domestic jurisdiction and States enjoy the sovereign freedom to enact laws protecting their political authority, as long as they do not infringe international human rights law or refugee law (eg, by persecuting political opponents). Ensuring law and order within its territory is a fundamental function of Statehood, without which a State is unable to implement its international obligations.

States also have obligations to counter terrorism (see UN Security Council resolution 1373 and the various sectoral anti-terrorism treaties adopted since 1963), which may encompass incitement of some forms of political violence. The emphasis in these instruments is, however, on terrorism of an international character, rather than violence solely directed against Australian interests by Australians. The UN has, however, failed to define terrorism, rendering vague the scope of Security Council resolutions. In September 2005, the UN Security Council adopted Resolution 1624 calling on States to: 'Prohibit by law incitement to commit a terrorist act or acts', prevent incitement, and deny safe haven or entry to inciters.²² This resolution is not legally binding.

See also the answers to question 12, 14 and 22.

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)?*

In international law, it is recognised that freedom of expression 'carries with it special duties and responsibilities' and may be limited by law if necessary to secure 'respect of the rights or reputations of others' or to protect 'national security ... public order ... public health or morals'.²³ While incitement to racial or religious hatred is specifically prohibited by art 20 of the *ICCPR*,²⁴ prohibiting ordinary criminal incitement may be a permissible restriction on free expression on public order grounds (to prevent crime).²⁵

²² *Threats to International Peace and Security (Security Council Summit 2005)*, SC Res 1624, UN SCOR, 5261st mtg, UN Doc S/Res1624 (2005) 3.

²³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 19(3) (entered into force 23 March 1976).

²⁴ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 20 (entered into force 23 March 1976). Article 20(1) further requires that '[a]ny propaganda for war shall be prohibited by law'. See also UN Human Rights Committee, *General Comment No 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Art 20)*, CCPR General Comment No 11 (19th session, 1983) [2]. The *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277, art 3(c) (entered into force 12 January 1951), prohibits direct and public incitement to genocide against racial, national, religious or ethnic groups.

²⁵ Andrew Ashworth, *Principles of Criminal Law* (1999) 481.

Suppressing speech which proximately encourages violence is a justifiable restriction in a democratic society, since the protection of life is a higher normative and social value which momentarily trumps free expression – but only to the extent strictly necessary to prevent the greater harm. Human rights law does not permit one person to exercise their rights to destroy the rights of another,²⁶ but any restriction on freedom of expression must not jeopardise the right itself.²⁷

In its jurisprudence interpreting article 10 of the European Convention on Human Rights, the European Court of Human Rights has held that a provision seeking to restrict freedom of speech will breach the Convention unless certain conditions are satisfied. Any restriction must be: (i) prescribed by law; (ii) well-defined; (iii) provide for predictability in application; (iv) necessary in a democratic society; (v) proportionate to its legitimate aim and purpose; (vi) enacted in the circumstance of pressing social need; and (vii) the grounds for restriction of the freedom must be relevant and sufficient.²⁸

The ECHR has established the following general principles concerning article 10:²⁹

- Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.
- 'Necessary', within the meaning of Article 10 § 2, implies the existence of a "pressing social need". States have a certain margin of appreciation in assessing whether such a need exists.
- The Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made.
- The interference should be 'proportionate to the legitimate aims pursued' and the reasons adduced by the national authorities to justify it should be 'relevant and sufficient'.
- The nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference.
- There is little scope under Article 10(2) of the Convention for restrictions on political speech or on debate on questions of public interest. Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen, or even a politician.³⁰ Similarly, the legitimate bounds of criticism of politicians are wider than those for private citizens.³¹ Conversely, Politicians and other public figures must act responsibly because of their power to influence the public mood.³²
- The dominant position which a government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries.

²⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 5 (entered into force 23 March 1976).

²⁷ UN Human Rights Committee, *General Comment No 10: Freedom of Expression (Art 19)*, CCPR General Comment No 10 (19th session, 1983) [4].

²⁸ See, e.g., *Sunday Times v the United Kingdom* (Hudoc reference REF00000169; Application number 00006538/74; 26/04/1979); *Handyside v the United Kingdom* (Hudoc reference REF00000084; Application number 00005493/72; 07/12/1976); *Open Door & Dublin Well Woman v Ireland* (Hudoc reference REF00000374; Application numbers 00014234/88 and 00014235/88; 29/10/1992); *Otto-Preminger-Institut v Austria* (Hudoc reference REF00000482; Application number 00008734/79; 24/03/1985); *Muller and others v Switzerland* (Hudoc reference REF 00000072; Application number 00010737/84; 24/05/1988); *Barfod v Denmark* (Hudoc reference REF 00000015; Application number 00011508/85; 22/02/1989); *Lingens v Austria* (Hudoc reference REF 00000108; Application number 00009815/82; 08/07/1986).

²⁹ See *Sener v Turkey* (Application number 26680/95) § 39-43.

³⁰ *Surek v Turkey (No 1)* (App. 26682/95); *Surek v Turkey (No 3)* (App. 24735/94), Judgments of 8 July 1999, [61].

³¹ *Lingens v Austria* (Application number 9815/82) § 42.

³² *Zana v Turkey* (App. 18954.91), Judgment of 25 November 1997; (1999) 27 EHRR 667.

- Where such remarks incite people to violence, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.
- The impugned interference must also be seen in the context of the essential role of the press in ensuring the proper functioning of a political democracy.
- The press must be particularly cautious when consideration is being given to the publication of views which contain incitement to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence.

In my view, prosecuting intentional incitement to commit a violent criminal offence may amount to a necessary, proportionate and justifiable restriction on freedom of expression. The narrow scope of incitement also reflects the normative proposition that responsibility for criminal harm should primarily lie with the perpetrators, who are free agents not bound to act on the words of others. Federal law is largely consistent with the meaning of incitement (or *instigation*) in international criminal law, which requires direct and explicit encouragement,³³ along with a direct intent to provoke the offence (or an awareness of the likelihood that the crime would result).³⁴ The incitement must aim to cause a specific offence,³⁵ and vague or indirect suggestions are not sufficient.³⁶ There must be a 'definite causation' between the incitement and a specific offence.³⁷

At the same time, the law on incitement is not impractically narrow. Plainly, a person who tells another to kill a third person and intends that result will be liable for incitement to murder, but so too will a person who less specifically incites another to 'take care of' a victim where such a statement implies that the person should be killed. For example, the International Criminal Tribunal for Rwanda found that the expression 'go to work' in the context of the Rwandan genocide really signified 'go kill the Tutsis and Hutu political opponents'.³⁸ Incitement may be implicit where its meaning is not in doubt, in light of the cultural and linguistic context and the audience's understanding of the message.³⁹

On the other hand, prosecuting statements which may tend to encourage violence in a general sense (rather than a specific offence) are less likely to constitute lawful restrictions on freedom of expression – in particular, when there is no requirement of a proximate connection to the likelihood of imminent violence actually occurring. While the right of free speech is not absolute and may be limited to prevent serious social harms, it cannot be restricted because of mere speculation that it leads to terrorism. Only incitements which have a direct and close connection to the commission of a specific crime are justifiable restrictions on speech.

This view is also reflected in the US constitutional jurisprudence. In *Brandenburg v Ohio*⁴⁰ ('*Brandenburg*'), the United States Supreme Court found that the First Amendment to the *United States Constitution* did not 'permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'.⁴¹ The twin requirements of the imminence and likelihood (or probability) of crime ensure that speech is not prematurely restricted; there must be a sufficiently proximate connection or causal link between the

³³ Antonio Cassese, *International Criminal Law* (2003) 189.

³⁴ *Kordi and erkez* ICTY IT-95-14/2-T (2001) [387].

³⁵ *Akayesu* ICTR-96-4-T (1998) [557]; see also Kriangsak Kittichaisaree, *International Criminal Law* (2002) 247.

³⁶ *Akayesu* ICTR-96-4-T (1998).

³⁷ *Ibid.*

³⁸ *Ruggi* ICTR-97-32-I (2000).

³⁹ *Akayesu* ICTR-96-4-T (1998) [557]; Kittichaisaree, above n 60, 247–8.

⁴⁰ 395 US 444 (1969).

⁴¹ *Ibid* [6]. See generally Steven Heyman (ed), *Hate Speech and the Constitution, Volume 2* (1996); Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (1995); Ronald Dworkin, 'The Coming Battles of Free Speech', *New York Review of Books*, 11 June 1992, 190.

advocacy and the eventuality of crime. Such a test would likely invalidate attempts to criminalise indirect incitement or *apologie* of terrorism in the US. Whereas the ordinary criminal law of incitement aims to protect against imminent criminal harm, there is no comparable proximity between indirect incitement/*apologie* and actual terrorist harm.

The US test is not ideal, however, since it permits speech to be restricted to prevent *any* lawless action. Arguably, the *Brandenburg* test should be supplemented by a requirement that only very serious criminal harms should permit the restriction of free speech; a proportionality element might allow that free speech could be restricted more readily where the consequences of an incitement are greater. Not all acts of terrorism are equally serious, particularly acts of preparation or support; for example, it is difficult to see why, under Australian law, inciting a person to collect a document to be used in a threat to commit terrorism should be criminalised.

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

In the absence of a charter of rights, the *Australian Constitution* impliedly protects only *political* communication (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520), and not speech more generally. This means that Australian courts are less able to supervise sedition or incitement laws for excessively restricting free expression. While the implied freedom was invoked in *Deen v Lamb*⁴² to shield a Queensland election campaign leaflet which vilified Muslims, that decision is at odds with subsequent case law. In *Jones v Scully*,⁴³ Hely J found that freedom of communication is not absolute, but 'is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*'. Justice Hely applied the test for the validity of restrictions on free communication laid down in *Lange v Australian Broadcasting Corporation*⁴⁴ ('*Lange*'), and found that (1) the legislative object of eliminating racial discrimination is compatible with maintaining responsible and representative government, and (2) the law is reasonably appropriate and adapted to eliminating racial discrimination.

Further, in *Brown v Classification Review Board of the Office of Film and Literature Classification*,⁴⁵ the Full Federal Court found that a law prohibiting the classification of a publication that 'instructs in matters of crime' was a permissible restriction on the implied freedom. Applying *Lange*, the law was compatible with representative and responsible government and appropriate and adapted to that end.⁴⁶ There was, however, controversy about whether the publication (an article advising how to shoplift) was even part of *political* discussion.⁴⁷

The problem in these cases is that the question of whether a law is compatible with representative and responsible government is too narrowly drawn to supply general guidance as to when incitement or sedition laws may legitimately restrict freedom of expression generally. The Australian test protects speech only as an incident of protecting the constitutional system, whereas American constitutional law values and protects speech as an end in itself, even where it is unrelated to politics – a matter of vital relevance given the limited scope of the good faith defences to sedition crimes.

Moreover, not only does Australian law fail to protect non-political speech, under this more subjective and deferential test even political communication could be restricted by laws criminalising indirect incitement, since it would be open to the courts to find that such a law is

⁴² [2001] QADT 20 (Unreported, Sofronoff P, 8 November 2001).

⁴³ (2002) FCA 1080 (Unreported, Hely J, 2 September 2002).

⁴⁴ (1997) 189 CLR 520, 561–2.

⁴⁵ (1998) 50 ALD 765.

⁴⁶ Ibid [238E], [246G], [258C]–[258D].

⁴⁷ Ibid [246A]–[246B], [258B]–[258C] (Heerey and Sundberg JJ) (finding that the article was not political), [238D]–[238E] (French J) (finding that it was).

both compatible with responsible and representative government and appropriate and adapted to preventing terrorism.

Moreover, the express constitutional protection for freedom of religion in Australia (*Constitution*, s 116) raises a different challenge to the offence of incitement to *religious* violence. The Commonwealth cannot make any law 'for prohibiting the free exercise of religion', which may be interpreted to include freely communicating religious ideas – even those urging violence. While such a challenge is in uncharted waters due to the scarcity of case law, even express constitutional rights are not absolute and proportional restrictions on violent religious speech may be upheld by the High Court.⁴⁸ Indeed, the freedom has been interpreted more narrowly than the equivalent provision in the US Constitution.

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?

There is a possibility that the opinions of minority groups within the community may be overly-criminalized due to cultural misunderstandings about the nature and intention of those opinions by mainstream police and prosecutors. Whether this risk is significant will depend on the sensitivity of law enforcement authorities towards other cultures and religions, which may be enhanced through appropriate training of officials and through mechanisms of community consultation which engage those groups.

Yours sincerely



⁴⁸ For an overview of the cases, see George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, Oxford, 2002), 110-119.