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BRIEFING ON SEDITION OFFENCES IN THE ANTI-TERRORISM BILL 2005

1 November 2005

1. Overview of Proposals

The Anti-Terrorism Bill proposes to repeal existing sedition offences (ss 24A–D, *Crimes Act* 1914 (Cth)) and replace them with five new offences. The new offences partly implement the Gibbs Review of federal criminal law in 1991, including increasing the penalty from three to seven years in prison. Invoking the Gibbs Review is nonetheless misleading, since Gibbs also recommended modernising (and narrowing) many of the other archaic 'offences against the government' in Part II of the *Crimes Act* 1914, including treason, treachery, sedition, inciting mutiny, unlawful (military) drilling, and interfering with political liberty. Gibbs further urged repeal of the offence of assisting prisoners of war to escape and the offences in Part IIA of the *Crimes Act* 1914 (relating to 'unlawful associations' and industrial disturbances). The government has not acted on these recommendations, resulting in ad hoc law reform which preserves some broad and archaic security offences.

The first two new sedition offences occur where a person encourages another to violently overthrow the Constitution or any Australian government, or to violently interfere with federal elections. Neither offence is necessary, since such conduct can already be prosecuted by combining the existing law of incitement to commit an offence (s 11.4, *Criminal Code* (Cth)) with the existing offence treachery (s 24AA, *Crimes Act* 1914 (Cth)) or the offence of disrupting elections (s 327, *Commonwealth Electoral Act* 1918).

The third new offence is where a person urges a racial, religious, national or political group to use violence against another group, where the violence threatens 'peace, order and good government'. This is welcome because it would criminalise, for the first time in federal law, incitement to violence against racial, religious, national, or political groups, as required by Australia's human rights treaty obligations (article 20(2), *International Covenant on Civil and Political Rights* 1966; article 4, *International Convention on the Elimination of all Forms of Racial Discrimination* 1969). The Human Rights and Equal Opportunity Commission has long argued that incitement to religious hatred should be made unlawful, particularly since prejudice against Muslim Australians increased after 9/11 (HREOC, *Isma*ع *(Listen): National consultations on prejudice against Arab and Muslim Australians*, 2004; HREOC, *Article 18: Freedom of Religion and Belief* (1998)).

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Even so, the new offence is too narrow for a number of reasons:

- it only covers incitement to religious *violence*, and not to religious hatred or vilification;
- it only protects groups from incitements which urge *other* groups to violence, and so excludes incitements aimed to provoke individuals, or groups not mentioned in the Bill;
- requiring that incitement must threaten peace, order and good government leaves groups unprotected from incitements which do *not* threaten these interests, such as sporadic, isolated, or less intense incitements;
- it 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 under ordinary criminal law, treating group-based violence or 'hate crime' as ordinary crime ignores the additional psychological or motive element involved.

Presenting this offence as a counter-terrorism law stigmatises group violence as terroristic, stereotyping certain ethnicities or religions as terrorist. It is also an error to classify this offence as sedition, which is more about rebellion against political authority than inter-group or communal violence. The Bill manipulates international human rights protections for groups by recasting them as efforts against sedition and terrorism. The appropriate place for such an offence is within anti-vilification law.

Whereas incitement to *racial* discrimination and vilification is unlawful in federal law, even after the adoption of the new sedition offence there would remain no federal (or NSW) protection from *religious* discrimination or vilification, where such conduct does not incite to violence. The *Catch the Fire Ministries* case [2004] VCAT 2510 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 (s 8, *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. 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, and had not distinguished moderate from extremist beliefs. (The case is on appeal.)

The final two new offences involve urging a person to assist organisations or countries fighting militarily against Australia – even if Australia has invaded another country unlawfully. Countries or organizations need not be formally proclaimed as enemies. If opposing Australian aggression is interpreted to constitute 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. The new offences are also redundant because such conduct is already covered by applying the existing law of incitement to the existing federal offences of treason (s 80.1, *Criminal Code*), treachery (s 24AA, *Crimes Act* 1914) and offences in ss 6–9 of the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth).

Thus it is already an offence to incite a person to commit *treason*, which covers levying or preparing war against Australia; assisting 'by any means' an enemy at war with Australia or a country or organisation fighting Australian forces; and instigating a non-citizen to invade Australia (s 80.1, *Criminal Code*). It is also an offence to incite *treachery*, which includes assisting 'by any means' a person opposing Australian forces overseas, or assisting proclaimed persons (s 24AA(2), *Crimes Act* 1914). Inciting treachery also covers urging someone to do anything to overthrow the Constitution by revolution or sabotage, or to overthrow by force or violence an Australian government or a proclaimed country (s 24AA(1)(a)).

Further, within Australia, inciting treachery includes urging a person to levy war against a proclaimed country; to assist a proclaimed enemy; or to instigate a person to invade a proclaimed country (s 24AA(1)(b)). It is also a crime to incite a person to commit any of the offences under the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth), which include 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 recruitment to such forces (s 9(1)(d)).

2. Positive Features

The Bill is positive in that it simplifies the convoluted existing law of sedition, and narrows it in some respects. Presently, it is an offence to engage in a seditious enterprise (s 24B-C) or to write, print, utter or publish any seditious words (s 24D), with the intention of causing violence or creating a public disorder or disturbance. Both of these offences require a *seditious intention* (s 24A) to: (a) bring the Sovereign into hatred or contempt; (d) 'excite disaffection against' the Government, Constitution, or Parliament; (f) 'excite Her Majesty's subjects' to unlawfully alter 'any matter in the Commonwealth established by law'; or (g) 'to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth'.

The new sedition offences avoid the vague and oppressive concepts in the existing law of exciting 'disaffection', promoting feelings of 'ill-will', or 'contempt' of the Sovereign. Anyone who supports a republic could be prosecuted under existing law. It also narrows the existing scope of sedition by establishing statutory defences (below), which are currently unavailable. It is also notable that the United Nations Security Council recently encouraged all countries to prohibit incitement to terrorism and repudiate its justification or glorification (Resolution 1624 (2005)). A 2005 treaty of the Council of Europe has also required states parties to criminalise 'public provocation' of terrorism, which includes not only directly inciting terrorism, but even praising, supporting, or justifying it.

3. Need for Sedition Offences

Apart from the duplication of existing offences and the selective implementation of the Gibbs Review (both discussed above), the new offences raise important concerns. Old-fashioned security offences are little used because they are widely regarded as discredited in a modern democracy which values free speech. Paradoxically, the danger in modernising these offences is that prosecutors may seek to use them more frequently, since they are considered more legitimate. A better approach is to abandon archaic security offences altogether in favour of using the ordinary law of incitement to crime, particularly since security offences counter-productively legitimise ordinary criminals as 'political' offenders.

The Gibbs review observed that 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. Reviews of criminal law in Canada and New Zealand omitted sedition offences altogether. 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. *It is preferable to remove sedition offences altogether from Australian criminal law.*

It is very odd that the Bill effectively preserves the old definition of sedition in the *Crimes Act* for the purpose of declaring as unlawful associations which advocate a seditious intention (by inserting a new 30A into the *Crimes Act* 1914 (Cth)). This results in two inconsistent

meanings of sedition in federal law (one in the *Crimes Act*, and another in the *Criminal Code*). Further, it directly conflicts with the recommendation of the Gibbs review to repeal the provisions on 'unlawful associations' altogether – and not to extend them as this Bill does.

4. Removal of Intention to Cause Violence

The new sedition offences also widen the existing law of sedition in troubling ways. The existing offences require an intention to utter seditious words or engage in seditious conduct (with a seditious intention), with the further intention of causing violence or creating a public disorder or disturbance. *The new offences require no such further intention to cause violence.* The Bill expressly provides that the first three offences may be committed where a person *recklessly* urges others to commit violence, without any specific intent to cause violence.

The fourth and fifth offences in the Bill do not even require that a person urge violence, let alone intend its commission. It is sufficient that a person urges another to 'engage in conduct' that is intended 'to assist, by any means whatever' an organisation or country at war with Australia, or engaged in armed hostilities against Australia. The Bill also extends the geographical scope of the offences beyond Australia to create a quasi-universal jurisdiction, even though international law does not support universal jurisdiction over such conduct.

5. Existing Law of Incitement

The existing law of incitement can be applied to existing terrorism and security offences to prosecute much of the conduct falling within the new sedition offences. Currently, the federal offence of incitement (s 11.4, *Criminal Code*) is committed where '[a] person… urges the commission of an offence' and the person intends that the offence incited be committed, even if the offence is not actually committed. Requiring that an inciter intend that the offence be committed reflects the 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.

Federal law is consistent with the meaning of incitement (or *instigation*) under international law, which requires direct and explicit encouragement, along with a direct intent to provoke the offence (or an awareness of the likelihood that the crime would result) (see *Kordić and Čerkez*, ICTY-95-14/2-T (2001), para 387). The incitement must aim to cause a specific offence, and vague or indirect suggestions are not sufficient (*Akayesu*, ICTR-96-4-T (1998), para 557). There must be a 'definite causation' between the incitement and a specific offence.

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 Tribunal for the former Yugoslavia found that the expression 'go to work' in the context of the Rwandan genocide really signified 'go kill the Tutsis and Hutu political opponents' (*Ruggui* case, ICTR-97-32-I (2000)). Incitement may be implicit where its meaning is clear, in light of the cultural and linguistic context and the audience's understanding of the message.

6. Sedition and Indirect Incitement

In contrast, the Australian Attorney-General has stated that the new sedition offences aim to avoid the requirements under the existing law that a person 'intend' the offence to be committed, and that there be a connection between the incitement and a particular terrorist crime (Question & Answer Brief on Incitement, October 2005). This might criminalise

indirect incitement or generalised expressions of support for terrorism, without any specific intention to encourage violence or any connection to a particular offence.

Examples might include distasteful comments such as 'Osama is a great man', '9/11 was a hoax', or 'America had it coming'. It may also include genuine beliefs such as 'we must resist the occupiers', or Cherie Blair's view that some Palestinians believed they had 'ho hope' but to blow themselves up. Other statements which might be prosecuted include the 'barbaric ideas' identified by the British Prime Minister, such as calling for westerners to leave Muslim countries, the elimination of Israel, or establishing Islamic law.

Criminalising indirect or vague expressions of support for terrorism, which do not encourage a specific crime, unjustifiably interferes in legitimate free speech – including attempts to understand the causes of terrorism. 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.

Extending the law to cover reckless urgings which do not necessarily intend violence also runs counter to the development of the federal *Criminal Code*, which was adopted after a long, intensive and rational process of law reform. Its drafters deliberately excluded recklessness to limit the impact on free expression: 'Incitement does not extend to… recklessness with respect to the effects which speech or other communication might have in providing an incentive or essential information for the commission of crime' (Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, AIJA, March 2002, 271).

The drafters also narrowed the common law meaning of incitement (which extended to counselling, commanding or advising) by an exclusive reference to *urging* a crime. This is the same expression used in the new sedition offences. Previously, the broader concept of 'incitement' at common law had been interpreted by courts in various jurisdictions by its ordinary textual (or dictionary) meaning, such as to urge, spur on, stir up, prompt to action, instigate or stimulate (see *R v Crichton* [1915] SALR 1 (Way CJ); *Catch the Fire Ministries* case [2004] VCAT 2510, para 18; *Brown v Classification Review Board of the Office of Film and Literature Classification* (1998) 50 ALD 765 at 778); or simply to request or to encourage (*R v Massie* [1999] 1 VR 542 at 547).

7. Implications for Free Speech

There is a 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 underlying terrorism and thus increasing it. 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 in close relationships. While some extreme speech may never be rationally countered by other speech, the place for combating odious or ignorant ideas must remain in the cut and thrust of public debate. The criminal law is ill-suited to reforming expressions of poor judgment or bad taste.

Speech is the foundation of all human communities and without it, politics becomes impossible. Unless we are able to hear and understand the views of our political adversaries, we cannot hope to turn their minds and convince them that they are wrong, or even to change our own behaviour to accommodate opposing views that turn out to be right. At the same time, as Hannah Arendt argued, 'speech is helpless when confronted with violence' (*On Revolution* (Penguin, London, 1990), 19) and freedom of speech reaches its natural limit when

it urges unlawful violence against a democracy. Quite rightly, the criminal law has always allowed the prosecution of those who directly encourage another person to commit a specific crime, including terrorism.

In contrast, extending the law of incitement through these sedition proposals is a hasty and imprudent overreaction which inevitably criminalises valuable (and less valuable, but nonetheless worthy) contributions to public discussion. While every society has the highest public interest in protecting itself and its institutions from violence, no society should criminalise speech that it finds distasteful when such speech is remote from the actual practice of terrorist violence by others. A robust and mature democracy should be expected to absorb unpalatable ideas without prosecuting them.

8. Defences to Sedition

The danger of criminalising political opponents is reduced by the Bill's five 'good faith' defences. These protect speech that points out the mistakes of political leaders; errors in governments, laws, or courts; or issues causing hostility between groups. The defences also protect encouraging lawful attempts to change the law, or statements about industrial matters.

While these defences seem wide, they only protect political expression, at the expense of other speech, and some of them even require criticism to also be constructive ('with a view to reforming those errors or defects'). In contrast, wider defences in anti-vilification law expressly protect statements made in good faith for academic, artistic, scientific, religious, journalistic or public interest purposes. Such statements may not aim to criticise political mistakes, group hostility, or industrial issues, or offer constructive solutions. The range of human expression worthy of legal protection is much wider than that protected by the Bill's defences, which are more concerned about not falling foul of the implied constitutional freedom of political communication than about protecting speech as inherently valuable.

The defences are also anachronistic, since they are based closely on the defences to English common law crimes of sedition found in a famous English criminal law text book of 1887 (Sir James Fitzjames Stephen, *A Digest of the Criminal Law*, 3rd ed, 1887, article 93). 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.

Further, the defences provide no express immunity for journalists who simply report, in good faith, the views expressed by others (in contrast to those deliberately publishing hate-filled propaganda). This is contrary to the 1995 Johannesburg Principles on National Security, Freedom of Expression and Access to Information, which 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'.

9. Constitutional Issues

In the absence of a bill 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 laws for excessively restricting free expression. The absence of an Australian bill of rights has also hampered the evolution of a sophisticated jurisprudence on the circumstances in which the existing crime of *incitement* can legitimately restrict free expression.

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' (*ICCPR*, art 19(3)). Incitement to racial or religious hatred is specifically prohibited by article 20 of the ICCPR, while direct and public incitement to genocide is also prohibited (Genocide Convention 1948, art 3(c).
In addition, prohibiting ordinary criminal incitement may also be seen a permissible restriction on free expression on public order grounds (the prevention of crime: Andrew Ashworth, *Principles of Criminal Law* (3rd ed, Oxford University Press, Oxford, 1999), p 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 (ICCPR, art 5), but any restriction on free expression must not jeopardise the right itself (UN Human Rights Committee, General Comment 10 (1983), para 4).

In Australia, incitement has only been examined in relation to its impact on the more limited implied constitutional freedom of political communication. While the implied freedom was invoked in *Deen v Lamb* [2001] QADT 20 to shield a Queensland election campaign leaflet which vilified Muslims, that decision is at odds with subsequent case law. In *Jones v Scully* (2002) FCA 1080, Justice Hely 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* (at 561-562), 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 achieving the elimination of racial discrimination.

Further, in *Brown*, 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*, such a law was compatible with representative and responsible government and was appropriate and adapted to achieving that end (at paras 238E, 246G, 258C-D). There was, however, controversy about whether the publication (an article advising how to shoplift) was even part of *political* discussion (Heerey and Sundberg JJ (at paras 246A-B and 258B-C) found that the article was not political while French J found it was (at para 238D-E).

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 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. In the leading case of *Brandenburg v Ohio*, 395 US 444 (1969), the US Supreme Court found that the First Amendment to the US 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'. The twin requirements of the imminence and likelihood (or probability) of crime ensure that speech is not prematurely restricted; there must be a sufficiently proximate connection or causal link between the advocacy and the eventuality of crime.

Such a test would likely invalidate attempts to criminalise indirect incitement 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 and actual terrorist harm. In contrast, not only does Australian law fail to protect non-political speech,

under the more subjective and deferential Australian proportionality 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 both compatible with responsible and representative government and appropriate and adapted to preventing terrorism.

The US test is not, however, ideal, 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 terrorism; 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.

The express constitutional protection for freedom of religion in Australia (s 116, Constitution) may raise a different challenge to the third new sedition 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. Nevertheless, even express constitutional rights are not absolute and proportional restrictions on violent religious speech may be upheld by the High Court.

10. Schedule 1 – Definition of terrorist organisation

Related to the sedition proposals is Schedule 1 of the Bill, which adds a new ground for proscribing terrorist organisations under s 102.1(2) of the *Criminal Code* where an organisation 'advocates the doing of a terrorist act'. Advocating is defined as (a) counselling or urging it; (b) providing instruction for it; or (c) directly praising it.

The latter ground indicates an intention to cover *indirect* incitement of terrorism, or statements which, in a generalised or abstract way, somehow support, justify or condone terrorism. Advocating or praising terrorism is a basis for proscribing groups and does not, of itself, impose criminal liability. Nevertheless, since it is an offence to be a 'member' of a terrorist organisation or to 'associate' with one (ss 102.3 and 102.8, *Criminal Code*), a member or associate could be prosecuted merely because someone in their organisation praised terrorism – even if the organisation has no other involvement in terrorism; even if the praise did not result in terrorism; and even if the person praising terrorism did not intend to cause terrorism.

This is an extraordinary extension of the power of proscription and of criminal liability, since it collectively punishes members of groups for the actions of their associates beyond their control. It is also a misapplication of criminal law to trivial harm, when criminological policy presupposes that criminal law should be reserved for the most serious social harms.

While it may be legitimate to ban groups which actively engage in, or prepare for, terrorism, it is not justifiable to ban whole groups merely because someone in it praises terrorism. It is well-accepted that speech which directly incites a crime may be prosecuted as incitement. It is quite another matter to prosecute a third person for the statements of another, even more so when such statements need not be directly and specifically connected to any actual offence.

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1 November 2005