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Dear Executive Director

Please accept this short submission in response to the ALRC's Discussion Paper 71 on the Review of Seditious Laws.

In my view, the Discussion Paper and its list of proposals reflect a measured, rigorous and thorough approach to the issues, effectively balancing the competing interests of freedom of expression and national security. On the whole, the proposals would help to protect the institutions of Australian democracy without unjustifiably restricting legitimate expression or chilling dissent. While I support most of the proposals, there are a number of ways in which they could be improved.

A *TERMINOLOGY AND CLASSIFICATION OF OFFENCES*

1. As a matter of classification, the inclusion of offences against "political liberty" and "public order" in the same s 80.2 is confusing and unnecessary. Both of those categories targets distinct public harms and there is some artificiality in preserving this connection between them. Further, it is not clear that the titular description "offence against public order" adds anything useful to the characterisation of the actual offence of urging inter-group force or violence. Nothing is gained by blurring this offence with the well-known categories of public order offences in the regular criminal law.

Existing s 80.2(5) should be relocated to a discrete provision and its title modified as follows: "80.3 Offence of urging inter-group violence" (assuming the repeal, as proposed, of existing s 80.3 on good faith defences).

B FORCE OR VIOLENCE

2. The reference to “force or violence” in s 80.2 appears to contain unnecessarily repetitive elements, since it may be that the term “violence” covers the full scope of conduct amounting to “force”. That this phrase may be used in other criminal statutes and thus ensures consistency with those laws is not sufficient reason to preserve the expression if there is no other justification for its inclusion – much like the phrase “last will and testament” contains obviously redundant parts. A rational process of law reform should strip away encrusted words to ensure statutory language is as clear and plain as possible.
3. If there are good reasons for preserving the use of both terms, then those reasons should be more fully explained by the ALRC. If, for example, the term “force” is intended to encompass lesser conduct than that amounting to “violence”, it is highly questionable whether the new offences should criminalize those who urge conduct less than violence, given the gravity of a conviction for special offences of this kind.
4. In this regard, I again refer the ALRC to the earlier submission of my colleague, Alex Steel, on this point, following his review of the applicable case law: “While violence implies that there is some degree of strength or severity that must be satisfied before an act can be characterised as violent, such restrictions are not applicable to force.” I annex the relevant part Mr Steel’s submission.
5. Since the offences contain no requirement that the conduct intentionally urged be likely to occur, there is a danger that criminalizing urgings of “force” will capture conduct which neither genuinely encourages nor results in violence.

The term “force” should be omitted from the phrase “force or violence” and s 80.2 should require that intentional urgings be “by violence” alone.

C UNLAWFULNESS OF VIOLENCE

6. I reiterate my concern that the relevant offences should require the urging of “unlawful” violence, given that some force or violence may be lawfully justified or excused by criminal law defences. While the absence of an unlawfulness requirement may not give rise to difficulties concerning s 80.2(1) or (3), it may create problems in relation to s 80.2(5). To give one example, if a person urged one group to defend itself against violent attacks by another, and the violence was sufficiently widespread to threaten the peace order or good government of the Commonwealth, then that person could be prosecuted for urging others to commit lawful violence (ie, in self-defence). The person urging would not necessarily be able to plead self-defence, particularly where the person is not a member of the group being attacked.

In s 80.2, urgings should be by “unlawful” or “criminal” violence. This would not reduce these offences to incitement offences, since it would be possible to specify a range of possible unlawful conduct rather than having to identify a specific criminal offence incited.

D LIKELIHOOD OF VIOLENCE OCCURRING

7. It is not accurate to assert that strengthening the intention requirement (as per Proposal 8-1) “adequately addresses the concerns expressed about the need for a closer connection between the urging and the increased likelihood of violence eventuating” (DP, para 8.64). Whether a person intends violence to occur is but one factor in evaluating whether violence is likely to occur; indeed, a person may intend violence and yet that result may be quite unlikely.
8. It is acknowledged that the Criminal Code criminalized incitement even where the offence incited is impossible (s 11.4(3)). However, given the seriousness of the stigma attaching to special offences against political liberty, and the significant criminal penalties involved, it is appropriate to impose a higher threshold in relation to such offences. In particular, the threshold should ensure that freedom of expression is not restricted unless an urging has some degree of likelihood of actually resulting in violence (consistent with ***Brandenburg***). This degree of likelihood could be formulated in different ways.

Each offence in s 80.2 should require, as an element of the offence, that the urging is: Option 1 – “reasonably likely to result in violence” (a stricter test) or Option B – “capable of resulting in violence” (a wider test).

E LAWFUL PROCESSES FOR AN ELECTION

9. Section 80.2(3) refers to urging interference with “lawful” election processes but there is no similar requirement in relation to a referendum.

For the sake of consistency, it is logical to similarly require that an offence is committed only where interference is urged in a “lawful” referendum.

F URGING INTER-GROUP VIOLENCE

(i) Scope of Protected Groups

10. I welcome the inclusion in s 80.2(5) of groups based on “national origin” and the preservation of groups based on “political opinion”. While international human rights law does not explicitly protect political groups, for reasons related to the Cold War, it is noteworthy that the 1951 Refugee Convention does identify and protect groups based on “political opinion”.
11. In the same vein, it is notable that “social” groups are not included in s 80.2(5) (in contrast to the protection of “particular social groups” in the Refugee Convention). In my view, it would be prudent to extend the protection of s 80.2(5) to “social” groups, which might find themselves subject to the same kind of urging to group violence as the other identified groups.

12. For example, violence could well be urged against people with disabilities; conscientious objectors (whose opinions are a more fundamental matter of conscience rather than “mere” political opinions, in the view of some courts); members of particular economic class (though this category may fall within political opinion); or abortion doctors (whose actions are not driven by political opinion so much as medical ethics and professional responsibilities). While any category of “social” group would possess a degree of vagueness, which is generally undesirable in a criminal law context, the rich jurisprudence on the meaning of “social” groups in refugee law could be usefully drawn upon.

Section 80.2(5) should be amended to add “social characteristics” to the distinguishing features of a group for the purposes of the offence.

(ii) Peace, Order and Good Government

13. The archaic expression “peace, order and good government of the Commonwealth” is ripe for modernisation, particularly since it appears to have no operative connection to the constitutional usage of the phrase, nor is it apparently connected to any body of extensive interpretive jurisprudence. The phrase is vague and ill-defined, and although it may be intended to operate as a provision limiting the applicability of the offence, in practice it need not be construed that way if the courts take an expansive view of its meaning. In my view, two options for reform present themselves:

A. The expression could be substituted for a more modern generic one such as where the use of force or violence would threaten “vital Commonwealth interests” or “the capacity of the Commonwealth to govern or maintain order”.

B. The reference to “peace, order and good government” could be retained but the circumstances in which it might be threatened could be non-exhaustively particularised (possibly in an explanatory Note), as follows:

Note: The peace, order and good government of the Commonwealth may be threatened where the use of force or violence would: (a) harm Commonwealth officers; (b) extensively damage or destroy Commonwealth property; (c) occur in more than one State or Territory; (d) inhibit the capacity of the Commonwealth to govern or maintain order; or (e) impair the defence of the Commonwealth.

(iii) Connection to Vilification

14. For reasons expressed earlier, I maintain that the offence of urging inter-group violence should be widened and reconceptualised as an anti-vilification offence. I accept that existing anti-vilification legislation may not be the appropriate place for such an offence. However, there may still be a place for an anti-vilification offence in federal criminal law. At a minimum, the ALRC should recommend further review and inquiry in this area.

The ALRC should recommend that the government consider an independent review of the need for anti-vilification offences in federal criminal law.

G ***MATERIALLY ASSISTING AN ENEMY***

15. I welcome the proposal to limit the application of s 80.1 to Australian citizens or residents, which avoids the conflict with humanitarian law earlier identified. I also welcome the higher threshold for “materially” assisting the enemy.

(i) ***Impact on Freedom of Expression***

16. It does not follow, however, that the term “materially” means that “mere rhetoric or expressions of dissent are not sufficient” (Proposal 8-9). A useful analogy is provided by US law, which has an offence of providing “material support or resources” to terrorists (18 USC 2339A(a)), defined as follows:

...the term “material support or resources” means currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials. (18 USC 2339A(b))

17. US courts have criticized the unconstitutional vagueness of the terms “personnel” and “training”. The provision of “expert advice or assistance” in the definition was inserted by s 805 of the ***PATRIOT Act***, and has also given rise to concern that protected speech is unconstitutionally criminalized: ***Humanitarian Law Project v Ashcroft*** (HLP), 309 F Supp 2d 1185, 1200 (CD Cal 2004). Subsequently, more detailed definitions of these three terms were provided by the ***Intelligence Reform and Terrorism Prevention Act 2004***.
18. The US experience raises two issues. First, without further definition (as in the US), the idea of materially assisting an enemy in s 80.1 remains vague and renders uncertain the prospective scope of criminal liability. Indeed, US courts have identified vagueness notwithstanding the definition of “material support”, whereas the proposed Australian law contains no further definition at all.

The term “materially assist” should be further defined by law, drawing on (but not necessarily following) the US definition in 18 USC 2339A(b).

(ii) ***Material is Not Substantial***

19. Second, the application of US law suggests that “material” assistance need not be significant or substantial assistance. The case of ***In re S-K, Respondent***, 23 I&N Dec 936 (BIA 2006) involved the statutory bar to asylum in cases of “material support” for terrorism (8 USC §1182(a)(3)(B)). The respondent had donated 1,100 Singaporean dollars to a Burmese opposition group over an 11 month period and argued that this relatively small amount was not “material”.
20. While the Board of Immigration Appeals found the respondent’s “argument that ‘material’ should be given independent content is by no means frivolous”, it noted that Congress had not “expressly indicated its intent to provide an exception for contributions which are de minimis”.

21. Further, the Board thought that S\$1,100 was actually “material” since it was one-eighth of the respondent’s monthly income and was “sufficiently substantial by itself to have some effect on the ability of the CNF to accomplish its goals, whether in the form of purchasing weaponry or providing routine supplies to its forces, for example.” In another case, a US federal court found that providing very modest amounts of food and shelter was material support: *Singh-Kaur v Ashcroft*, 385 F 3d 293 (3d Cir 2004).
22. In the Australian context, it is arguable that the offences in s 80.1 should require that assistance to the enemy is both “material” (in the sense of real or concrete) and “substantial” (in the sense of the level or degree of material assistance provided). Imposing this additional requirement would prevent the criminalisation of those who urge trivial assistance to an enemy, reflecting that special security offences of this kind should be reserved for the most serious conduct and should not prematurely curtail free speech.
23. The term “substantial” is preferable over other qualifiers (such as “significant”) because it is already used widely throughout the Criminal Code and thus consistency and supplies interpretive jurisprudence. For example:
- “substantial risk”: ss 5.4 (recklessness), 135.1 (general dishonesty);
 - “substantially attributable”: ss 12.1 (negligence), 12.5 (mistake of fact);
 - “substantial disruption”: s 132.8 (dishonest taking of property);
 - conduct “substantially contributes to... harm”: ss 71.23, 115.9;
 - “substantially assist” in preventing terrorism: s 104.2 (control orders).

The treason offences in s 80.1 should be amended to provide that conduct must “materially” and “substantially” assist an enemy.

H DEFENCES

24. Although the notion of “good faith” has been deleted from the defences, to an extent the concept (and thus its criticisms) survives under another name – in the requirement that the trier of fact consider whether an urging was made for any “genuine” academic, artistic, scientific or other public interest purpose. A question arises whether the idea of genuineness imports a subjective or objective standard, both of which give rise to different difficulties.
25. On one hand, a person may subjectively believe that urging violence is a genuine academic, artistic or scientific endeavour, given that none of those disciplines are inherently pacifist or ideologically committed to democracy. Moreover, it is partially true that academics, artists and scientists define the boundaries of their own disciplines, particularly those working at the margins, so a subjective approach may be appropriate. Yet, a purely subjective approach amounts to licensing any violence thought by an individual to be justifiable within the (elastic) parameters of their discipline.

26. On the other hand, a purely objective approach to assessing genuine purposes risks imposing the trier of fact's own beliefs about the appropriate content of art, academia or science. In particular, there is a danger that the urging of violence may be too readily discounted as inherently alien to these disciplines, based on an external appreciation, and resulting in inappropriate convictions.

Genuineness is ultimately a question of fact for the trier of fact, but must be subject to appropriate judicial direction and expert guidance on the nature and methodology of the relevant field. Both subjective and objective standards are relevant factors in evaluating whether a purpose is genuine.

Please be in touch if you require any further assistance.

Yours sincerely

Ben Saul

ANNEX: Extract from submission by Alex Steel: Force or violence

There is a significant overcriminalisation in the use of the terms “force or violence” in these offences. The interpretation of the terms in robbery offences provide strong evidence that the terms capture much activity that should fall outside the scope of the sedition offences. Whereas violence was the term used in the common law definition of robbery “violence done or threatened to the person” (see *R v Foster* (1995) 78 A Crim R 517 at 522; *Smith v Desmond* (1965) AC 960), the *Criminal Code* (s 132.2) follows the English *Theft Act* 1968 in describing the element as “force”.

While violence implies that there is some degree of strength or severity that must be satisfied before an act can be characterised as violent, such restrictions are not applicable to force.

In *R v Dawson and James* (1976) 64 Cr App R 170 it was held that whether force was used was a question of fact and that a use of force sufficient to establish robbery could be found when one of the defendants nudged the victim in an attempt to distract him from noticing that the other defendant was picking the victim’s pocket. JC Smith has suggested: “Force denotes exercise of physical strength against another whereas violence seems to signify a dynamic exercise of strength as by striking a blow”.¹

This is however in the context of robbery and such a characterisation might appear artificial if applied to the outcome of seditious urgings. Force is a value-neutral word that implies impersonal laws of physics, violence in this context implies a human actor with an unlawful intent (or the personification of natural event – eg a violent wind, an angry sea) and suggests that not all physical contact satisfies the requirement. Violence is also a concept that is well understood by the courts in this context and has been interpreted to include the pushing over of a person.

Violence also has the advantage that it is a characteristic given to an act, rather than an examination of the act itself. Thus it is possible to judge an act as violent not only on the degree and nature of force used, but also on the effect that it produces. Filling a room with toxic fumes can be easily seen as an act that has a violent effect on the victim, but it may be difficult to see it as an act of force.

Additionally, there are many acts of force and even violence which are entirely legal, or at least non-criminal. The offence of battery assault has always accepted that not all non-consensual touching of another person amounts to a crime (though it may well be forceful). Clear exceptions exist for the “exigencies of everyday life”, and one can consent to forms of violence ranging from surgery to boxing (see eg *Fitzgerald v Kennard* (1995) 38 NSWLR 184, *R v Brown* [1994] 1 AC 212).

If the activity, despite its use of force, is lawful then the offence criminalises an otherwise lawful activity because of an ulterior motive. This is unlikely to be a major practical concern in relation to s80.2(1) where the use of the force must be with (at least) an awareness of the risk that it would overthrow the Constitution, etc. However it is much more problematic in relation to s80.2(3) and (5).

Given the minimal nature of “force” it could be an offence under s80.2(3) to maintain a picket line outside a polling booth if voters were jostled. Depending on the extent to which “peace, order and good government” is expansively interpreted, similar issues of overcriminalisation could occur under s80.2(5) where any action by one group that involves a degree of physical touching of the other group could be seen as a use of force.

Violence is also a problematic term. This is because the adoption of the term in defining assault has lead to findings that activities such as the making of silent phone calls can amount to an act of violence (*R v Ireland and Burstow* [1997] 4 All ER 225). This may mean that a court could accept that the making of threatening telephone calls or the yelling of threatening statements of intent could amount to acts prohibited by these sections.

In light of these problems it is submitted that the use of the term “force or violence” be replaced with the term “significant criminal violence” and that the term be defined to refer to either the nature of the act or its effect.

¹ Smith, *The Law of Theft*, 8th ed 1997, p88.