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Committee Secretary
Senate Legal and Constitutional Committee

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Dear Committee Secretary

Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010.

I am an academic specialising in the area of sedition and free speech. I will confine my comments to those part of the National Security Legislation Amendment Bill 2010 that concern amendments to two areas of the law:
1. the urging violence offences (the repeal of s 80.2(5) of the *Criminal Code* and its replacement with the new proposed ss 80.2A and 80.2B), and
2. amendments to the *Classification (Publications, Films and Computer Games) Act 1995*.

I congratulate the government on the adoption of many of the recommendations of the Australian Law Reform Commission in relation to the sedition offences created in 2005. Specifically, this includes the removal of the word 'sedition' from these offences and the adoption of the recommendation to repeal the obsolete provisions allowing for the proscription of 'unlawful associations' in s 30A of the *Crimes Act 1914* (Cth).

I also congratulate the government on the drafting of ss 80.2A and 80.2B. They represent a marked improvement on the current criminal law. The introduction of ss 80.2A(2) and 80.2B(2) also represents the introduction for the first time of a discrete criminal vilification offence in federal law. This will for the first time fulfil Australia's obligations under Article 20 of the International Covenant on Civil and Political Rights, and Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination.

Nevertheless, some further improvements could be made to proposed ss 80.2A and 80.2B to fulfil more appropriately the government's stated policy intentions, and to improve policy coherence.

1. Offences against the Commonwealth: the nature of the connection to a threat to the Commonwealth

In proposed ss 80.2A(1) and 80.2B(1) the connection to the threat to the Commonwealth is conjunctive, and not determinative.

The nature of the offence is that a person must intend to urge a person or group to use force against a targeted group or person, and must intend that force or violence will occur. There is a conjunctive connection to a threat to the Commonwealth, with the use of the word 'and'. This means that the threat to the Commonwealth could be purely coincidental; the construction of the provision emphasises that it be established that the activity would threaten the Commonwealth, not that it was intended to do so (notwithstanding the provisions in s 5.6 of the *Criminal Code*).

There is an advantage in the offence being clearer on this point.

To constitute a criminal offence of this nature, with a penalty of imprisonment for 7 years, these offences ought to be more closely connected with the threat to the Commonwealth. They ought to be premised on an intention to threaten the peace, order and good government of the Commonwealth. This could be achieved by replacing the word 'would' with the phrase 'is intended to' before the word 'threaten' in paragraph (d) in s 80.2A(1), and in paragraph (e) s 80.2B(1).

Recommendation 1: The word 'would' should be replaced with the phrase' is intended to' before the word 'threaten' in paragraph (d) in s 80.2A(1), and in paragraph (e) s 80.2B(1).

2. Offences against the community: placement of proposed ss 80.2A(2) and 80.2B(2)

Despite the significant improvement in the urging violence offences contained in the Bill, elements of the constructions of the proposed ss 80.2A and 80.2B demonstrate a confusion that arose in s 80.2(5) and has not yet been resolved. That is a confusion between the two distinct concepts of sedition and vilification.

Sedition is, by definition, expression directed against constitutional authority. It is therefore speech directed against the most powerful institution in society, an institution that ought to tolerate a high degree of expression directed against it, even where that expression may be trenchant. Vilification, by contrast, is expression directed against marginalised and vulnerable individuals and/or groups on the basis of specified characteristics. I have developed this argument in detail in Gelber, K 2009. 'The False Analogy Between Vilification and Sedition', *Melbourne University Law Review* 33(1): 270-291.

In disaggregating the offences in proposed ss 80.2A(1) and 80.2B(1) from the offences in proposed ss 80.2A(2) and 80.2B(2), this distinction has been greatly clarified.

Nevertheless, the issue of placement of the offences remains a problem. Under the proposed changes, Part 5.1 and Division 80 of the *Criminal Code* will be entitled, 'Treason and Urging Violence'. This Part and this Division will remain in Chapter 5 of the *Criminal Code*, which is devoted to 'The Security of the Commonwealth'.

From a policy perspective, the proposed new offences in ss 80.2A(2) and 80.2B(2) ought not to be placed in this Chapter of the *Criminal Code*, because doing so will compromise their effectiveness and utility. It is likely that the police might be confused about the heading under which these charges sit, and may shy away from considering charging people who act in a manner that might fall under these provisions where those actions do

not also threaten the Commonwealth. It is also likely that should such activities occur, the police would consider applying other criminal provisions against violence more generally. This will significantly dilute the impact of the introduction of a criminal vilification offence both, symbolically and practically.

Additionally, retaining both offences in the Chapter devoted to security of the Commonwealth could significantly reduce the currently existing, long standing support for anti-vilification laws that exists in the broader community. If anti-vilification laws become equated with a criminal offence against the Commonwealth, they become more vulnerable to charges that they constitute impermissible restrictions on freedom of speech. If this were to occur, the support that currently exists for anti-vilification laws could be undermined, and it may be more difficult to justify the enactment of a new criminal anti-vilification law.

The creation of a freestanding provision would resolve these policy problems.

I recommend that in order to strengthen the policy coherence and importance of these provisions, they be moved out of the Division concerned with the security of the Commonwealth. Instead, the currently proposed ss 80.2A and 80.2B could be placed in Chapter 9 of the *Criminal Code* which is concerned with dangers to the community. Alternatively, they could be created as criminal offences in Part IIA of the *Racial Discrimination Act 1975* (Cth).

Recommendation 2: The offences in ss 80.2A(2) and 80.2B(2) should be removed from Chapter 5 of the *Criminal Cod*e and instead placed in Chapter 9 of the *Criminal Code*, or elsewhere.

3. Offences against the community: the ground of religion

The ground of religion has been retained in the proposed new ss 80.2A(2) and 80.2B(2). This is consistent with the wording of Article 20(2) of the ICCPR, which requires State Parties to prohibit 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'.

However, it is not consistent with the CERD which relies on the terms 'race or group of persons of another colour or ethnic origin'. The wording of the CERD forms the basis for current federal anti-vilification laws in s 18c of the *Racial Discrimination Act 1965* (Cth). When the *Racial Hatred Act 1995* (Cth) amended the *Racial Discrimination Act 1975* (Cth) to include racial anti-vilification provisions, the Explanatory Memorandum to the Bill specified that the intention of the new legislation was to be inclusive of groups such as Sikhs, Jews and Muslims under the nomenclature of 'ethnic origin'. However, the AHRC in a publication entitled 'Islam and the RDA' has concluded that 'if a person feels they have been discriminated against solely because they are of the Islamic faith then, on the basis of the current case law, it is unlikely that they are covered by the grounds in the RDA'.

The creation of a new criminal anti-vilification offence that includes the ground of religion is inconsistent with the current federal civil anti-vilification provisions that do not.

Additionally, it is noted that the inclusion of religion as an explicitly protected ground in anti-vilification laws is highly controversial. The inclusion of religion is inconsistent across Australian jurisdictions, being explicitly protected in anti-vilification laws only in Queensland, Tasmania and Victoria. In other jurisdictions the courts' interpretation of the meaning of 'race' has sometimes led to the protection afforded racial identities being

extended to include some religious identities where there is an intersection between the racial and religious identity of the complainant. However, this does not provide comprehensive protection.

The Human Rights and Equal Opportunity Commission's 1998 report *Article 18: Freedom of Religion and Belief* recommended the enactment of new federal laws to prohibit religious vilification. Yet New South Wales, South Australia and Western Australia have each rejected proposals to introduce specific religious anti-vilification legislation. Scholarly research in this area has also highlighted problems with the extension of anti-vilification laws to the ground of religion (eg McNamara, Lawrence 2007. 'Salvation and the State: Religious Vilification Laws and Religious Speech' in Gelber & Stone eds. *Hate Speech and Freedom of Speech in Australia*, Federation Press, Sydney; Ahdar, Rex 2007. 'Religious vilification: confused policy, unsound principle and unfortunate law', *University of Queensland Law Journal* 26(2): 293-316; Feenan, Dermot 2006. 'Religious vilification laws: quelling fires of hatred?', *Alternative Law Journal*, 31(3): 153-158).

I therefore recommended that the ground of religion be retained in the two proposed new offences against the Commonwealth (ss 80.2A(1) and 80.2B(1)), but that it *not* be included in the two new offences against urging violence in the community.

Recommendation 3: Remove the ground of religion from the proposed new offences in ss 80.2A(2) and 80.2B(2).

4. Offences against the community: the ground of political opinion

All four proposed new offences, namely ss 80.2A(1), 80.2A(2), 80.2B(1) and 80.2B(2) include political opinion as a nominated ground for the targeted group.

The inclusion of this ground in all four offences is further evidence of the confusion between a criminal vilification offence and an offence against the Commonwealth, to which I referred earlier.

There is an argument that the offences in ss 80.2A(1) and 80.2B(1) could logically include the ground of political opinion as a targeted group, given that they are offences against the Commonwealth. This would especially be the case if the offence were to be amended in the way I recommend in Recommendation 1.

However the inclusion of political opinion as a ground in an offence of urging violence within the community in proposed ss 80.2A(2) and 80.2B(2) is inconsistent with the phenomenology of vilification, inconsistent with the international instruments from which our obligation to implement criminal vilification laws derives (as cited above), and inconsistent with all other State, Territory and federal anti-vilification laws in Australia. It should therefore be removed.

Recommendation 4: Remove the ground of political opinion from proposed ss 80.2A(2) and 80.2B(2).

5. The classification system

In 2007 the *Classification (Publications, Films and Computer Games) Amendment (Terrorist Material) Act 2007* (Cth) amended the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) to add s 9A, which allows for refusal of classification to a publication, film or computer game that advocates the doing of a terrorist act. The

definition of advocacy includes an act that 'directly or indirectly counsels or urges the doing of a terrorist act'; 'directly or indirectly provides instruction on the doing of a terrorist act'; or (in s 9A(2)(c))'directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3 of the Criminal Code) that the person might suffer) to engage in a terrorist act'.

The draft bill recommends a consequential amendment to s 9A of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth), namely the addition of the word 'substantial' before the word 'risk' in s 9A(2)(c).

Despite this consequential amendment, difficulties remain with this provision.

Firstly, the provision does not rely upon the usual 'reasonable adult test utilised by the Classification Review Board in its decision making. Instead, it relies upon the idea of a person of any age or with any mental impairment who may be led to engage in a terrorist act. This definition is far too broad, could potentially capture an enormous range of materials, and is unworkable. In its submission in May 2007 to the then Attorney-General's Discussion Paper on this amendment, the CRB expressed particular concern at this departure from the reasonable adult test. This problem remains in the provision as it stands.

Secondly, in the CRB's submission of May 2007, it argued that the distinction introduced by the addition of this provision between advocacy of terrorist acts in the *Act*, and the pre-existing prohibition on material that promotes, incites or instructs in matters of crime or violence in the *National Classification Code*, was unclear. It argued that the provisions provided insufficient direction to the CRB in making determinations. Other submissions raised similar issues (see http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_MaterialthatAdvocatesTerroristActs-PublicConsultation). It is not at all clear that, or how, s9A can operate to prohibit material that would otherwise not be refused classification under the previously-existing prohibition on material that promotes, incites or instructs in matters of crime or violence.

Finally, the classification regime in Australia is premised on the general assumption, as stated in the *National Classification Code* (s 1(a)) that adults should be able to read, hear and see what they want. In the area of classification, there is a particularly strong freedom of speech argument that people ought to be able to make up their own minds as to the value of material they read, hear or see. Governments should be cautious about preventing people's access to materials they deem dangerous. Indeed, trying to prevent them may increase their desirability.

It is also to be noted that during discussions surrounding the introduction in 2007 of s9A, it was reported that the then Attorney-General conceded that an exception should be included in the provision to permit access to such materials for the purpose of genuine scholarly research. Despite this agreement, no such exception was introduced.

The prohibition of the kinds of materials likely to be captured by s 9A is unworkable. An internet search for the materials that were refused classification on the ground that they promoted, incited or instructed in matters of crime and that instigated the introduction of s 9A, namely *Defence of the Muslim Lands* and *Join the Caravan*, reveals that they are able to be accessed in full within seconds.

Given the breadth of the provisions in s9A, the difficulties of making determinations under s9A, the coverage of relevant materials in other aspects of the classification system, and the unworkability in practice of s9A, it ought to be repealed.

Recommendation 5: Repeal s 9A of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth).

Yours sincerely

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