Executive Council of Australian Jewry Inc.

הועד הפועל של יהודי אוסטרליה

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By email: legcon.sen@aph.gov.au

Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Committee Secretary

Re: National Security Legislation Amendment Bill 2010

The Executive Council of Australian Jewry (ECAJ), the elected representative organisation of the Jewish community in Australia, presents the following submission on behalf of the Australian Jewish community, in response to your call for submissions in relation to the above Bill. We have no objection to a copy of this document being posted on the Committee website

Schedule 1 – Parts 1 and 2: Proposed amendments to Criminal Code – Part 5.1 - Division 80 - Proposed insertion of new Subdivision C – Offences of urging violence against groups and members of groups

1. The Australian Jewish community supports the introduction of offences of "urging violence against groups" and "urging violence against members of groups" which is proposed in sections 80.2A and 80.2B to the Criminal Code. These offences would replace the offence of urging violence within the community, which is currently provided for in ss.80.2(5) and (6) of the *Criminal Code*, and their introduction is the Government's response to Recommendations 10-1 to 10-5 and related recommendations in Report 104 of the Australian Law Reform Commission ("ALRC") in 2006.

2. Whilst the introduction of the proposed new offences would be an improvement upon the current legislation, our principal concerns are that:

(a) the elements of the proposed offences have been formulated so restrictively that it will be effectively impossible for a prosecutor to secure a conviction; and

(b) the availability of defences under section 80.3 to charges under these sections is completely misconceived.

Elements of the Proposed Offences

3. **Proposed section 80.2A** is in the following terms:

80.2A Urging violence against groups

Offences

*(1) A person (the **first person**) commits an offence if:*

*(a) the first person intentionally urges another person, or a group, to use force or violence against a group (the **targeted group**); and*

(b) the first person does so intending that force or violence will occur; and

(c) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion; and

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

Penalty Imprisonment for 7 years.

Note.
For intention, see section 5.2.

*(2) A person (the **first person**) commits an offence if:*

*(a) the first person intentionally urges another person, or a group, to use force or violence against a group (the **targeted group**); and*

(b) the first person does so intending that force or violence will occur; and

(c) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion

Penalty: Imprisonment for 5 years.

Note:
For intention, see section 5.2.

(3) The fault element for paragraphs (1)(c) and (2)(c) is recklessness.

Note:
For recklessness, see section 5.4

Alternative verdict

*(4) Subsection (5) applies if, in a prosecution for an offence (the **prosecuted offence**) against subsection (1), the trier of fact*

(a) is not satisfied that the defendant is guilty of the offence; but

*(b) is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the **alternative offence**) against subsection (2).*

(5) The trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

Note:
There is a defence in section 80.3 for acts done in good faith.

Proposed section 80.2B - Urging violence against members of groups is in very similar terms to proposed section 82A:

Offences

*(1) A person (the **first person**) commits an offence if:*

*(a) the first person intentionally urges another person, or a group, to use force or violence against a person (the **targeted person**); and*

(b) the first person does so intending that force or violence will occur; and

*(c) the first person does so because of his or her belief that the targeted person is a member of a group (the **targeted group**), and*

(d) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion, and

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

Penalty: Imprisonment for 7 years.

Note:
For intention, see section 5.2.

*(2) A person (the **first person**) commits an offence if:*

*(a) the first person intentionally urges another person, or a group, to use force or violence against a person (the **targeted person**), and*

(b) the first person does so intending that force or violence will occur, and

*(c) the first person does so because of his or her belief that the targeted person is a member of a group (the **targeted group**), and*

(d) the targeted group is distinguished by race, religion, nationality, national or ethnic origin or political opinion

Penalty: Imprisonment for 5 years.

Note:
For intention, see section 5.2.

(3) For the purposes of paragraphs (1)(c) and (2)(c), it is immaterial whether the targeted person actually is a member of the targeted group.

(4) The fault element for paragraphs (1)(d) and (2)(d) is recklessness.

Note
For recklessness, see section 5.4.

Alternative verdict

*(5) Subsection (6) applies if, in a prosecution for an offence (the **prosecuted offence**) against subsection (1), the trier of fact:*

(a) is not satisfied that the defendant is guilty of the offence, but

*(b) is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the **alternative offence**) against subsection (2)*

(6) The trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt

Note
There is a defence in section 80 3 for acts done in good faith

4. This submission is addressed to both proposed sections.

5. In respect of each section, the offence proposed in subsection (1) and the alternative offence proposed in subsection (2) have identical elements, save that the alternative offence does not require proof that "*the use of the force or violence would threaten the peace, order and good government of the Commonwealth.*" Both of the proposed offences would require proof *inter alia* of two elements, namely that the accused:

(i) intentionally urged another person, or a group, to use force or violence against the targeted group or supposed member of the targeted group; and
(ii) did so intending that force or violence will occur.

Intention is therefore an essential component of both elements. In practice it will be virtually impossible for a prosecutor to prove the second element to the criminal standard. A person who urges other persons to commit acts of violence focuses on influencing the state of mind and behaviour of those other persons without laying bare the urger's own intentions. Even in history's most extreme and paradigmatic examples of the evil of incitement to racially-motivated violence, evidence of the second element, to the criminal standard, has usually been missing. If the legislation is to be effective, it needs to be formulated in a way that will allow a prosecutor the practical prospect of success in the circumstances that the legislation seeks to address.

6. It is difficult to conceive of a situation in which a person intentionally urges another person, or a group, to use force or violence against a targeted group ***without*** also intending that force or violence will occur. If, for example, the alleged urging occurs in the performance of a film or play or satire in which the accused is merely acting out a role, then the element of intent to urge others to use force or violence (the first element) is clearly missing. This would also be the case if the alleged urging consists of a good faith explication, in an academic context or a political discussion, of a violent ideology or other belief system. Yet

in construing the legislation, the Courts will assume that the second element of intent has been included for a reason and that it has some work to do. The Courts are therefore likely to construe it as imposing a far more stringent evidentiary onus on the prosecutor than appears to have been contemplated.

7. A situation in which a person intentionally urges another person, or a group, to use force or violence against a targeted group, or a supposed member of the group, without intending the urging to be acted upon and for force or violence to occur, comes very close to being a logical absurdity. If such a situation could occur it would necessarily entail recklessness on the part of the urger. In the case of most criminal offences, recklessness is also proscribed but attracts a lesser penalty. However, the use of the term "intentionally" and "intending" in each section would most likely be construed by a Court to exclude criminal liability for reckless indifference to consequences

8. If the intention of Parliament is to criminalize the urging of racially motivated violence, then the intentional urging of force or violence against a targeted group, or a supposed member of the group, with reckless indifference as to whether force or violence will occur, should also be proscribed. It would be unacceptable for a person who has intentionally urged others to use force or violence against a targeted group or a supposed member of a targeted group, and is recklessly indifferent to the consequences, to escape criminal responsibility for his or her actions. If such behaviour is not criminalised, the principal social evil at which the draft section is directed (namely the urging of racially-motivated violence) will not be effectively addressed.

Recommendation 1:
Amend paragraph (b) of subsections (1) and (2) of section 80.2A and paragraph (b) of subsections (1) and (2) of section 80.2B to read:

> ***(b) the first person does so intending that force or violence will occur, or is recklessly indifferent as to whether force or violence will occur.***

Defences

9. We are gravely concerned that the Bill provides that the defences in existing section 80.3 will be available in respect of the proposed new offences in sections 80.2A and 80.2B. The defences in existing section 80.3 were in large part carried over from the repealed section 24F of the *Crimes Act 1914* (Cth) and drafted specifically to apply to the offence of sedition. Such defences are fundamentally misconceived in relation to offences based on the urging of violence against groups distinguished by race, religion, nationality, national or ethnic origin or political opinion, or supposed members of such groups. Indeed the existence of

such defences might well be seen as formally justifying the advocacy of racially-motivated violence, including terrorism, as legitimate free speech.

10. The sorts of defences that are provided for in sub-section 80.3(1) and proposed sub-section 80.3(3) originate in the legislation of the various States and in Part IIA of the *Racial Discrimination Act 1975* (Cth) ("the RDA"), which impose ***civil prohibitions*** against incitement to racial ***hatred***. But such defences are not available in any legislation that provides for the ***criminal proscription*** of incitement to racial hatred, and it would be completely misconceived and inappropriate to make such defences available in the context of the ***criminal proscription*** of incitement to racial ***violence***. Such defences would merely create an opportunity for persons charged with urging violence against their fellow Australians to use the ensuing trial, with impunity, as a platform to promote their views and to engage in further incitement. This is precisely what was attempted by the defendant in *Jones v Toben* [2002] FCA 1150 (17 September 2002), in proceedings under Part IIA of the RDA in the Federal Court of Australia.

11. Each of the defences in s 80.3(1)(a)–(f) requires that the conduct be "in good faith". Case law provides little guidance on the meaning of good faith in the context of urging of violence against groups distinguished by race, religion, nationality, national or ethnic origin or political opinion, or supposed members of such groups. Some guidance on the meaning of good faith is available by analogy from current anti-vilification law but, as noted in the previous paragraph, that law deals with incitement to racial hatred, not incitement to racial violence.

12 At the very least, the establishment of a defence based on good faith would seem to require that the accused not be motivated by ill-will or other improper motive The matter is analysed in detail in section 12 of ALRC Report 104 of 2006

13. We submit that there are ***no circumstances*** in which a person:

(i) intentionally urges another person, or a group, to use force or violence against a group distinguished by race, religion, nationality, national or ethnic origin or political opinion, or a supposed member of the that group; and

(ii) does so **intending that force or violence will occur**,

and does so "in good faith". The intention that "force or violence will occur" in the context of urging force or violence against groups distinguished by race, religion, nationality, national or ethnic origin or political opinion, or against supposed members of such groups, denotes both ill-will and an anti-social motive. An intention that "force or violence will occur" in that context is therefore incompatible with the act having been done in "good faith". Reckless indifference as to whether force or violence will occur in that context is also incompatible with the act having been done in "good faith". Every conceivable

circumstance in which a "good faith" excuse might apply is one in which one or both of the requisite elements must necessarily be absent.

14. For example, there are ***no circumstances*** in which a person "points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters" (in terms of paragraph (d) of sub-section 80.3(1)) and in doing so:

(i) intentionally urges another person, or a group, to use force or violence against a group distinguished by race, religion, nationality, national or ethnic origin or political opinion, or a supposed member of that group; and
(ii) does so **intending that force or violence will occur.**

The intention that "force or violence will occur" in the context of urging force or violence against a group distinguished by race, religion, nationality, national or ethnic origin or political opinion, or against a supposed member of that group, denotes both ill-will and an anti-social motive. An intention that "force or violence will occur" in that context is simply incompatible with the requirement that the "pointing out" be done in "good faith". For the same reason, reckless indifference as to whether force or violence will occur in that context is also incompatible with the act having been done in "good faith". If the "pointing out" is done in "good faith", one or both of the requisite elements must necessarily be absent.

15. Similarly, there are ***no circumstances*** in which a person "publishes in good faith a report or commentary about a matter of public interest" (in terms of paragraph (f) of sub-section 80.3(1)) and in doing so:

(i) intentionally urges another person, or a group, to use force or violence against a targeted group or supposed member of the targeted group; and
(ii) does so **intending that force or violence will occur**,

The intention that "force or violence will occur" in the context of urging force or violence against a group distinguished by race, religion, nationality, national or ethnic origin or political opinion, or against a supposed member of that group, denotes both ill-will and an anti-social motive. An intention that "force or violence will occur" in that context is simply incompatible with the requirement that the publishing of the report or commentary be done in "good faith". For the same reason, reckless indifference as to whether force or violence will occur in that context is also incompatible with the act having been done in "good faith". If the publishing is done in "good faith", one or both of the above elements is necessarily absent.

16 It follows that in respect of an offence under either of proposed sections 80.2A and 80, the good faith defence is not needed because, in the circumstances in which it could be established, the elements of the offence would not have been made out in the first place.

17. Accordingly, if the Government is concerned to protect freedom of expression in the form of acts done in good faith that would otherwise be lawful, then the appropriate place for that to be addressed in the Bill is in the definition of the elements of the offences, and not by the misconceived application of section 80.3.

18. For these very reasons, the ALRC in Report 104 (2006) recommended [12.71] that s 80.3 of the *Criminal Code* be amended so that the good faith defences do not apply to "urging of violence" offences (see Recommendation 12–1) and that instead "the focus should be on proving that a person intentionally urges the use of force or violence (in the specified circumstances), with the intention that the force or violence urged will occur" (see Recommendation 8–1). The ALRC thus clearly proposed that the introduction of a second element of intent (being an "intention that force or violence will occur") to the definitions of urging-of-violence offences would be ***an alternative to*** the availability of s.80.3 defences to a charge that such an offence has been committed.

19 Earlier in this submission we expressed our concern that the proposed introduction of such a second element of intent would effectively render the proposed new offences unprovable, and would leave unaddressed the intentional urging of force or violence against a group distinguished by race, religion, nationality, national or ethnic origin or political opinion, or against a supposed member of that group, with reckless indifference as to whether force or violence will occur. By introducing such a second element of intent ***as well as*** preserving the availability of s 80.3 defences in respect of offences under proposed sections 80.2A and 80.2B, the legislation, if passed, will incorporate the worst of both worlds.

Recommendation 2: The defences provided for in sub-section 80.3(1) and the provisions of proposed sub-section 80.3(3) be expressly excluded from applying to the new offences proposed in sections 80.2A and 80.2B.

Attorney General's consent

20. We submit that the Attorney-General's consent should not be required before proceedings for an offence against proposed sections 80.2A or 80.2B can commence. Whether or not to prosecute an alleged offence of urging violence against a group distinguished by race, religion, nationality, national or ethnic origin or political opinion, or against a supposed member of such a group, ought to be entirely a matter for the office of the Commonwealth Director of Public

Prosecutions to decide on the merits, without the intrusion of political considerations or the appearance of any such intrusion

If the Attorney-General's consent is required, the Federal Government will be seen as the ultimate maker of any decision to prosecute or not to prosecute. If the consent is granted, the Government will be identified with the prosecution side in the proceedings. If the prosecution fails, the failure will be laid at the door of the Government. Alternatively, if the Commonwealth Director of Public Prosecutions is of the view that a prosecution is warranted based on an assessment of the available evidence, and the Attorney General's consent is with-held, it will appear that, for political reasons, justice has not been allowed to take its course.

Such results can only be avoided if the matter is treated as an ordinary criminal prosecution, and the decision to prosecute is that of the Commonwealth Director of Public Prosecutions, based solely on the available evidence.

<u>Recommendation 3:</u> Amend sub-section 80.5(1) to read:

> ***Proceedings for an offence against this Division (other than an offence under section 80.2A or section 80.2B) must not be commenced without the Attorney-General's written consent.***

<u>Intentional incitement to racial hatred and hostility</u>

21. We note that the Bill makes no provision for the introduction of a criminal offence of intentional incitement to racial hatred and hostility.

22. In its 1992 report, *Multiculturalism and the Law*, a minority of Commissioners of the ALRC recommended that intentional incitement to racial hatred and hostility should be made a criminal offence on the basis that this is required to fulfill Australia's international obligations pursuant to art 4(a) of Convention on the Elimination of All Forms of Racial Discrimination and art 20(2) of the International Covenant on Civil and political Rights ("the Conventions").

> *Such ideas are the root cause of racism. To leave the propagation of hatred to be dealt with under 'offensive behaviour' or similar provisions is to ignore the quite different insidious effects of this kind of speech*
> (Australian Law Reform Commission, *Multiculturalism and the Law*, ALRC 57 (1992), [7.48])

The minority therefore recommended the inclusion of the following offence in the *Crimes Act*:

> *A person must not publish, by any means, anything that is based on ideas or theories of superiority of any race or group of persons of one colour or ethnic origin over another, or promotes hatred or hostility between such*

races or groups, if the person intends that the publication will incite hatred or hostility towards an identifiable group and is likely to have that effect.

23. In introducing the Racial Hatred Bill to Parliament in 1994, the Keating government attempted to introduce a new criminal offence of "doing an act otherwise than in private that is reasonably likely to incite racial hatred" (Racial Hatred Bill 1994 (Cth) cl. 60).

24 In 2003, the then federal Opposition introduced a Bill to create offences for racial and religious vilification—substantially the same offences as those proposed in the original Racial Hatred Bill 1994. (Racial and Religious Hatred Bill 2003 (Cth); Racial and Religious Hatred Bill 2003 [No 2] (Cth)).

25 The Australian Jewish community continues to support the original recommendations of the minority of commissioners in ALRC Report 57 as referred to in paragraph 22 above. Their position has been vindicated by subsequent events, including the racial incitement that preceded the riot at Cronulla in 2005 and the revenge attacks the following day. Our community will continue to advocate the introduction of legislation to criminalize intentional and reckless incitement to racial hatred and hostility, and supports complete compliance by Australia with the provisions of the Conventions.

Yours sincerely

Robert M Goot AM SC
President

cc The Attorney General of Australia