CHAPTER 5

SEDITION AND ADVOCACY

Introduction

5.1 This chapter will outline the key provisions and issues raised in relation to the following two aspects of the Bill:

- the proposed sedition offences (Schedule 7 of the Bill); and
- the extension of the power to proscribe terrorist organisations under the Criminal Code to include organisations that advocate the doing of a terrorist act (Schedule 1 of the Bill).

5.2 The committee notes at the outset that the Attorney-General has committed, in his second reading speech, to review the sedition provisions in the future:

> The sedition amendments are modernising the language of the provisions and are not a wholesale revision of the sedition offence.
>
> However, given the considerable interest in the provisions, I would like to assure this House that I will undertake to conduct with my department a review of the sedition offences.[1]

5.3 It is not entirely clear from this speech whether the advocacy provisions in Schedule 1 would be included in this review. However, a representative of the Attorney-General's Department (Department) indicated that it was his understanding that the advocacy provisions would be 'looked at as well'.[2]

Sedition - outline of key provisions

Offence of sedition

5.4 Schedule 7 of the Bill proposes to repeal existing sedition offences in sections 24A to 24E of the *Crimes Act 1914* (Crimes Act). Instead, the Bill will insert updated sedition offences into Part 5.1 of the Criminal Code (which currently provides for treason offences). According to the Explanatory Memorandum:

> The inclusion of sedition in the Criminal Code is consistent with the general policy of moving serious offences to the new Criminal Code when they are updated. These offences have been update[d] in line with a number of recommendations of Sir Harry Gibbs in the Review of Commonwealth Criminal Law, Fifth Interim Report, June 1991 (the Gibbs Report).[3]

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1 The Hon Philip Ruddock MP, *House of Representatives Hansard,* 3 November 2005, p. 67.

2 *Committee Hansard*, 14 November 2005, p. 8.

3 p. 88.

5.5 Proposed section 80.2 of the Criminal Code sets out five new offences of sedition as follows:

- urging another person to overthrow by force or violence the Constitution or Government (subsection 80.2(1));[4]
- urging another person to interfere by force or violence in parliamentary elections (subsection 80.2(3));[5]
- urging a group or groups (whether distinguished by race, religious, nationality or political opinion) to use force or violence against another group or groups, where that would threaten the peace, order and good government of the Commonwealth (subsection 80.2(5));[6]
- urging another person to assist, by any means whatever, an organisation or country that is at war with the Commonwealth (whether declared or undeclared) (subsection 80.2(7)); and
- urging another person to assist, by any means whatever, those engaged in armed hostilities with the Australian Defence Force (subsection 80.2(8)).

5.6 Under proposed section 80.2, the standard of 'recklessness' would apply to the certain elements of the various offences. For example, in relation to the offence of interference with parliamentary elections, the standard of recklessness applies to the element that the interference is with lawful processes for election to a House of the Parliament.[7]

5.7 Each offence has a proposed maximum penalty of imprisonment for 7 years. This compares with the current penalty of 3 years for the existing sedition offences in the Crimes Act.[8]

Defences

5.8 Proposed section 80.3 provides a defence to the offences in sections 80.1 (relating to treason) and 80.2 (relating to sedition) for certain acts done in 'good faith'.[9] According to the Explanatory Memorandum:

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4 The Explanatory Memorandum suggests that this offence 'is similar in effect to paragraph 24A(d) and section 24D of the Crimes Act': p. 89.

5 The Explanatory Memorandum states 'this is a new aspect of the offences recommended by the Gibbs Report': p. 90.

6 The Explanatory Memorandum states that 'new subsection 80.2(5) modernises the language [of the current Crimes Act offences] from classes or groups as recommended by the Gibbs Report': p. 90.

7 Proposed subsection 80.2(4), Explanatory Memorandum, p. 90; see also proposed subsections 80.2(2) and 80.2(6). Section 5.4 of the Criminal Code defines 'recklessness'.

8 Explanatory Memorandum, pp 89-90.

9 Note that the Bill does not define 'good faith'.

> This section effectively mirrors the defence of good faith contained in section 24F of the Crimes Act, which applied to the sedition offences in that Act, and the treason offence in section 80.1 of the Criminal Code…The only substantive difference between section 24F of the Crimes Act and new section 80.3 of the Criminal Code is that the new provision gives more discretion to a court in considering whether an act was done in good faith.[10]

5.9 The defendant would bear the evidential burden in relation to the defence for acts done in good faith (see the note to new subsection 80.3(1)).

5.10 Proposed subsection 80.2(9) also provides a defence for the offences under subsections 80.2(7) and 80.2(8) for conduct for the purposes of the provision of aid of a humanitarian nature. Again, the defendant would bear the evidential burden in relation to this defence (see the note to new subsection 80.2(9)).

Other aspects

5.11 Other aspects of the amendments in Schedule 7 include:

- extended geographical jurisdiction (section 80.4) – the application of Division 80 extends to conduct which occurs outside Australia, and in relation to any person, whether or not they are an Australian resident or citizen;
- proceedings for an offence against Division 80 must not be commenced without the Attorney-General's written consent (section 80.5); and
- provision for concurrent operation of state and territory laws (section 80.6).

Seditious intention and unlawful associations

5.12 Finally, Item 4 of Schedule 7 of the Bill proposes to include a 'modernised' version of the definition of 'seditious intention' in subsection 30A(3) of Part IIA of the Crimes Act. According to the Explanatory Memorandum, this is a consequential amendment that 'maintains the substance of the existing definition of seditious intention', which is removed because of the repeal of section 24A of the Crimes Act.[11] Existing paragraph 30A(1)(b) of the Crimes Act provides that an 'unlawful association' includes any body which advocates or encourages the doing of any act having, or purporting to have, as an object the carrying out of a 'seditious intention'. New subsection 30A(3) will update the definition of 'seditious intention' to mean:

- bring the Sovereign into hatred or contempt;
- urge disaffection against the Constitution, the Commonwealth Government or either House of the Parliament;
- urge another person to attempt to procure a change, otherwise than by lawful means, to any matter established by law of the Commonwealth; or

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10 p. 91.

11 p. 87.

- promote feelings of ill-will or hostility between different groups so as to threaten the peace, order and good government of the Commonwealth.

Sedition – key issues

5.13 This section will first outline the general reaction to the sedition provisions in submissions and evidence received by the committee. This is followed by a discussion of key issues raised in relation to the proposed sedition offences including:

- the Attorney-General's proposed review of the sedition offences;
- background and history of sedition (including the Gibbs Report);
- the need for sedition laws;
- freedom of speech issues;
- specific issues, including fault elements and links to violence;
- proposed defences, safeguards and penalties; and
- the 'unlawful associations' provisions.

General reaction

5.14 Submissions and evidence received by the committee were overwhelmingly opposed to the sedition provisions in Schedule 7 of the Bill. The critics of these provisions came from a broad range of organisations and individuals, including a large number who expressed concern about the impact of the provisions on their professions, particularly media organisations[12] and members of the arts and entertainment industry.[13] As with the advocacy and other provisions of the Bill, submissions suggested that these amendments would have a particular impact on the Muslim community.[14]

5.15 In addition, as Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, told the committee:

> The sedition provisions have now been opposed publicly by over 30 senior and eminent lawyers, legal academics and retired judges. You may have noted that the editorials in both the *Australian* and the *Age* have now called

12 See, for example, APC, *Submission 143*; Australian Centre for Independent Journalism, *Submission 184*; Special Broadcasting Service Corporation (SBS), *Submission 164*; ABC, *Submission 196*; Free TV Australia, *Submission 149*; Fairfax and others, *Submission 88.*

13 See, for example, Australian Publishers Association, *Submission 151*; Representatives of the Arts and Creative Industries of Australia, *Submission 153*; National Association for the Visual Arts (NAVA), *Submission 166;* Australian Screen Directors Association, *Submission 146*; Media, Entertainment and Arts Alliance, *Submission 198;*and see also the National Tertiary Education Union (NTEU), *Submission 159*, for the potential impact on academics.

14 See, for example, Dr Ben Saul, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 14 November 2005, p. 60; Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, p. 22 and AMCRAN, *Submission 157*, p. 29.

> for their removal. Additional support has come from three state premiers, territory leaders and backbenchers on all sides of politics.[15]

5.16 John Fairfax Holdings Limited, News Limited, Western Australian Newspapers Limited, the Australian Press Council (APC) and AAP (Fairfax and others) described the sedition provisions as 'the gravest threat to publication imposed by the Government in the history of the Commonwealth'.[16]

5.17 The Gilbert and Tobin Centre of Public Law, despite raising numerous concerns in relation to the sedition provisions, noted that the provisions had some positive features. For example, it acknowledged that the Bill 'simplifies the convoluted existing law of sedition, and narrows it in some respects' and that:

> 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.[17]

5.18 However, Dr Ben Saul of the Gilbert and Tobin Centre of Public Law qualified these comments during the committee's hearings:

> A modernised law of sedition is better than an older one, which may not be as appropriate to modern circumstances, but our view is that sedition offences are unnecessary and should be taken out of the bill.[18]

5.19 Further, other submissions were concerned that, in 'modernising' the law of sedition, the provisions extend its scope in many ways.[19] For example, Mr John North, President of the Law Council of Australia (the Law Council), told the committee that the sedition offences had been broadened:

> …to such an extent that we think they will accidentally catch members of the media and…legitimate protesters and even peace activists. And the moment Australia moves down that path then we really are in trouble.[20]

5.20 The Castan Centre for Human Rights Law took a slightly different approach, welcoming the repeal of the sedition offences in the Crimes Act, stating that this was:

> …a significant step forward in protecting freedom of political speech in Australian law, and bringing Australia further into line with its obligations

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15 *Committee Hansard*, 17 November 2005, p. 3.

16 *Submission 88*, p. 6.

17 *Submission 80*, p. 18; see also Mr Cameron Murphy, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 31.

18 *Committee Hansard*, 14 November 2005, p. 66.

19 See, for example, Mr Laurence Maher, *Submission 275A*, p. 16; Mr Chris Connolly, *Submission 56*, p. 13; Australian Screen Directors Association, *Submission 146*, pp 2-3; Representatives of the Arts and Creative Industries of Australia, *Submission 153*, p. 5.

20 *Committee Hansard*, 14 November 2005, p. 80.

> under international human rights instruments, notably article 19 of the ICCPR and article 19 of the Universal Declaration of Human Rights.[21]

5.21 However, its support was nevertheless qualified by its concerns about the impact of Schedule 7 on freedom of expression (which is discussed further below).[22]

5.22 Finally, Mr Chris Connolly argued that Schedule 7 of the Bill:

> …is a dangerous proposal that re-awakens an ancient and oppressive law in Australia. Sedition law is the sleeping giant of authoritarianism, and it has the potential to inhibit free speech and restrict open democracy.[23]

5.23 Many of these submissions suggested that Schedule 7 should be removed from the Bill altogether.[24] For example, Mr Jack Herman of the APC told the committee that:

> ….there are sections of the sedition law that are wider than the antiterrorism bill itself, inasmuch as they do address supposed offences which are, by their nature, not urging violence or not by violent means, which we would say is what a terrorism bill should be catching. So in that sense we do not think schedule 7 fits very well into this bill, and can be removed from it without damage to the main aim of the bill.[25]

Proposed review of the offences

5.24 As outlined above, the Attorney-General committed in his second reading speech to review the sedition offences in the future.[26] Submissions generally welcomed this review.[27] At the same time, many queried why Schedule 7 of the legislation should be passed *before* the review takes place, and suggested that

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21 *Submission 114*, p. 27; see also Mr Ibrahim Abraham, Castan Centre for Human Rights Law, *Committee Hansard*, 14 November 2005, pp 51-52.

22 *Submission 114*, p. 27; see also Mr Ibrahim Abraham, Castan Centre for Human Rights Law, *Committee Hansard*, 14 November 2005, pp 51-52.

23 *Submission 56*, p. 3.

24 See, for example, Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, p. 2 and *Submission 143*, p. 4; Mr Robert Connolly, Representatives of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 3; Mr Cameron Murphy, *Committee Hansard*, 17 November 2005, p. 31; ALHR, *Submission 139*, p. 20; Mr Laurence Maher, *Submission 175A*, p. 1.

25 *Committee Hansard*, 17 November 2005, p. 8.

26 The Hon Philip Ruddock MP, *House of Representatives Hansard,* 3 November 2005, p. 67. Note that it appears from departmental evidence that the advocacy provisions in Schedule 1 will be included in this review: the discussion in this section could therefore apply equally to the advocacy provisions.

27 See, for example, Mr Ibrahim Abraham, Castan Centre for Human Rights Law, *Committee Hansard*, 14 November 2005, p. 52; and Castan Centre for Human Rights Law, *Submission 114*, p. 26; Australian Screen Directors Association, *Submission 146*, p. 2; Free TV Australia, *Submission 149*, p. 2; NAVA, *Submission* 166, p. 3.

Schedule 7 should be removed from the Bill altogether, pending this review.[28] For example, the ACT Chief Minister, Mr Jon Stanhope, observed that:

> …to suggest that we will legislate now and review later does seem to me to be a less than rigorous approach to law reform on such a fundamentally important issue.[29]

5.25 PIAC expressed the view that:

> It is completely unacceptable that a government should propose to pass into law provisions that it knows before their passage into law warrant a review.[30]

5.26 Similarly, Professor Kenneth McKinnon of the APC suggested that to enact the sedition provisions, then review them later, would be putting the 'cart before the horse'.[31]

5.27 The Law Council believed that:

> …it is bad policy to introduce flawed legislation creating serious criminal offences for which offenders face terms of imprisonment when some doubt obviously exists about its appropriateness. The Law Council recommends that the existing sedition laws be reviewed to determine the need to have them in view of the number of new terrorist offences introduced. The new provisions ought to be deferred pending that review.[32]

5.28 In the same vein, Dr Ben Saul of the Gilbert and Tobin Centre of Public Law observed that:

> From a law reform perspective it makes much more sense to subject this to a more rational process of law reform, not in the heat of a very long and detailed antiterrorism bill.[33]

5.29 Indeed, the Gilbert and Tobin Centre of Public Law suggested that, if the sedition and advocacy offences are to be reviewed, the review should:

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28 See, for example, Mr Jon Stanhope, ACT Chief Minister, *Committee Hansard*, 17 November 2005, p. 90; APC, *Submission 143*, p. 3; NAVA, *Submission 166*, p. 3; Media, Entertainment and Arts Alliance, *Submission 198*, p. 4; PIAC, *Submission 142*, p. 41; Law Council, *Submission 140*, p. 23; Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 16; AMCRAN, *Submission 157*, p. 29.

29 *Committee Hansard*, 17 November 2005, p. 95.

30 *Submission 142*, p. 41; see also Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, pp 36 and 39.

31 *Committee Hansard*, 17 November 2005, p. 9.

32 *Submission 140*, p. 23.

33 *Committee Hansard*, 14 November 2005, p. 66.

- be independent of the government, either by referring the matter to the Australian Law Reform Commission (ALRC),[34] an independent expert committee, or to a parliamentary committee;
- consider all security offences in both the Crimes Act and the Criminal Code, 'since many offences overlap and some are redundant';
- consider the proper scope of defences to sedition, and the possibility of extending good faith defences to any other security offences that might be retained;
- consider the need for, and scope of, all security offences in light of the express constitutional protection of freedom of religion (section 116 of the Constitution), the implied freedom of political communication, and human rights standards on freedom of expression and association.[35]

5.30 Others noted the importance of public consultation as part of the review.[36]

5.31 In response to the committee's questions as to why Schedule 7 should be passed now if there is a need to review them, a representative of the Department suggested that Schedule 7 is:

> …an important component of this bill. Some of the urging of violence which is contained in the sedition offence is linked to preventing terrorist attacks. Consequently, government has given priority to it.[37]

5.32 In this context, the Department further submitted that:

> The Attorney-General recognises that the time to discuss the sedition offence and related issues such as Part IIA of the Crimes Act has been limited. Allowing for further consideration of the issues later does not mean the offence is not needed or suitable to enact now.[38]

Background and history of sedition – an archaic, 'dead letter' law?

5.33 Many submitters described laws of sedition as 'archaic' or 'outdated', and argued that Schedule 7 of the Bill would reinvigorate and legitimise archaic sedition laws that are not appropriate in a modern democracy. Many of these also pointed to

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34 See also Dr David Neal, *Submission 247*, p. 11.

35 *Submission 80*, p. 16; see also Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 4.

36 See, for example, Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 4.

37 *Committee Hansard*, 14 November 2005, p. 8 and also p. 22.

38 *Submission 290A*, Attachment A, p. 20.

the troubled history of sedition laws around the world, arguing that they are 'heavily politicised' and have 'a history of abuse'.[39]

5.34 Mr Laurence Maher submitted that he had in the past advocated the repeal of the existing sedition provisions under the Crimes Act because they are:

> …archaic and unnecessary and, more importantly, contrary to contemporary modern democratic principle as an unjustifiable burden on freedom of expression and freedom of association.[40]

Sedition around the world

5.35 Mr Chris Connolly submitted that 'sedition has a long and undignified history', and that important figures in history who have been charged and sometimes imprisoned for sedition, include both Ghandi and Nelson Mandela.[41] He argued that:

> …sedition charges are either the last desperate gasp of an authoritarian regime (eg Ghandi) or the extreme and sometimes ludicrous result of a regrettable moment in national history (eg McCarthyism).[42]

5.36 Mr Chris Connolly concluded:

> The clear lesson from the history of sedition laws is that they are used routinely by oppressive regimes, or are used by more liberal regimes at times of great national stress. Their use is nearly always the subject of considerable regret at a later date.[43]

5.37 In the same vein, Mr Laurence Maher observed that a survey of the history of sedition demonstrates that (among other matters) 'its only purpose and use has been to throttle political dissent'.[44]

5.38 The committee was told that many other countries have been moving away from crimes of sedition. For example, the Gilbert and Tobin Centre of Public Law submitted that:

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39 See, for example, Mr Chris Connolly, *Submission 56*, pp 3 and 16; Gilbert and Tobin Centre of Public Law, *Submission 80,* pp 18-19; Australian Screen Directors Association, *Submission 146*, p. 2; Media, Entertainment and Arts Alliance, *Submission 198*, pp 4-5; Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 4; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 32; APC, *Submission 143*, pp 2-3; Mr Laurence Maher, *Submission 275*, p. 2 and *Submission 275A*, p. 3.

40 *Submission 275*, p. 2 and *Submission 275A*, p. 1; see also Laurence Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287-316; Laurence Maher, 'Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case' (1994) 16 *Adelaide Law Review* 1-77.

41 *Submission 56*, p. 9 and see also p. 18.

42 *Submission 56*, p. 9; see also Media, Entertainment and Arts Alliance, *Submission 198*, p. 4.

43 *Submission 56*, p. 9.

44 *Submission 275A*, p. 3.

> 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.[45]

5.39 Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, highlighted the application of sedition laws outside Australia, telling the committee that:

> The countries that have repealed sedition laws, or made them inactive, are: Canada, Ireland, Kenya, New Zealand, South Africa, Taiwan, the United Kingdom and the United States. The countries that have active sedition laws that have been used or revised in recent years are: China, Cuba, Hong Kong, Malaysia, North Korea, Singapore, Syria and Zimbabwe. I imagine that it is perfectly clear to the majority of Australians which list we feel Australia should belong to.[46]

5.40 Similarly, Mr David Bernie of the NSW Council for Civil Liberties suggested that:

> Sedition is something that has generally been used by totalitarian and authoritarian regimes. It no longer has a place in democracy. Most democracies have done away with sedition laws.[47]

5.41 However, the Department submitted that:

> While some have commented on a trend in some other countries away from 'sedition' offences, this appears to be an observation in relation to the naming of such offences, rather than an observation that the substance of such offences are being removed from the Statute books.[48]

5.42 The Department further pointed to relevant offences in the UK, Canada and the US, and concluded that 'claims made to the Committee that sedition is no longer an offence in other western democracies appear to be incorrect.'[49]

Sedition in Australia

5.43 Submissions pointed out that the law of sedition has an equally troubled history in Australia, having been used against Eureka stockade rebels in the 1850s, anti-conscriptionists during World War I, and members of the Australian Communist

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45 *Submission 80*, p. 19; see also PIAC, *Submission 142*, p. 40; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 32.

46 *Committee Hansard*, 17 November 2005, p. 4; see also Mr Chris Connolly, *Tabled Document*, 17 November 2005, p. 4 and *Submission 56*, p. 9.

47 *Committee Hansard*, 17 November 2005, p. 32.

48 *Submission 290A*, Attachment A, p. 22.

49 *Submission 290A*, Attachment A, pp 22-23.

Party in the 1940s.[50] Mr Laurence Maher argued that recent Australian history demonstrates that 'sedition provisions have only ever been deployed to suppress dissident speech and highly unpopular groups'.[51] He also maintained that 'in most, if not all cases, the decision to prosecute was based on party political considerations'.[52]

5.44 Mr Chris Connolly concluded that the Bill 'reawakens this Cold War relic and breathes new life into it.'[53] Similarly, the Australian Screen Directors Association (ASDA) felt that the Bill 'dusts off' a 'dead-letter law', and that as a result, the ASDA could:

> ...no longer reassure its members, as it has been able to with a fair degree of certainty over the past 25 years, that sedition laws will not be invoked against directors making films that urge disaffection with the state or monarch.[54]

5.45 However, a representative of the Department argued that, with the advent of the Internet, sedition is 'more relevant now than in the postwar years of the 20th century'.[55] The Department later added that 'the web and computer technology has made it much easier to disseminate material that urges violence'.[56]

5.46 In contrast, the Gilbert and Tobin Centre of Public Law argued that:

> 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 counterproductively legitimise ordinary criminals as 'political' offenders.[57]

5.47 Mr Chris Connolly also queried the utility of sedition laws:

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50 See, for example, Mr Chris Connolly, *Submission 56*, pp 9-11; Fairfax and others, *Submission 88*, pp 6 and 8; Media, Entertainment and Arts Alliance, *Submission 198*, p. 5; Mr Laurence Maher, *Submission 275A*, pp 5-6 and 10; see also Laurence Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287-316; and Laurence Maher, 'Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case' (1994) 16 *Adelaide Law Review* 1-77.

51 *Submission 275A*, p. 5.

52 *Submission 275A*, p. 5.

53 *Submission 56*, p. 13; see also *Committee Hansard*, 17 November 2005, pp 8-9.

54 *Submission 146*, p. 2; see also Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 4.

55 *Committee Hansard*, 14 November 2005, p. 4; see also Attorney-General's Department, *Submission 290A*, pp 2-3.

56 *Submission 290A*, p 2.

57 *Submission 80*, pp 18-19.

> It is also difficult to find a single example of a sedition trial that resulted in a useful long-term outcome for the ruling authorities.[58]

5.48 Indeed, Mr Laurence Maher suggested that the law of sedition is actually self-defeating, because 'once the charge is laid in court, the media (and anyone else) is free to publish the dangerous words as part of an accurate court report'.[59]

The Gibbs Report

5.49 In 1991, Sir Harry Gibbs and others considered the sedition offences in the Crimes Act as part of a review of Commonwealth criminal law.[60] As noted earlier, the Explanatory Memorandum states that the Bill would update sedition offences 'in line with a number of recommendations' of the 1991 Gibbs Report.[61]

5.50 However, a number of submissions described this statement as 'disingenuous' or 'misleading'.[62] In particular, the Gilbert and Tobin Centre of Public Law pointed out that the amendments to the sedition offences in the Bill only selectively implement the Gibbs Report:

> 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 selective and 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).[63]

5.51 Dr Ben Saul of the Gilbert and Tobin Centre of Public Law reiterated this at one of the committee's hearings:

> …invocation of or reliance on the Gibbs review of federal criminal law in 1991 is very misleading because, of course, Gibbs recommended abolishing many of the archaic security offences in part II of the Crimes Act, abolishing some of them and narrowing some of them. The government

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58 *Submission 56*, p. 9.

59 *Submission 275A*, p. 11.

60 Gibbs Report, Chapter 32, pp 301-307.

61 p. 88.

62 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 16; Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 3; Mr Chris Connolly, *Submission 56*, p. 11; PIAC, *Submission 142*, p. 39; see also *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 8 as contained in *Submission 153*, Annexure B.

63 *Submission 80*, p. 16.

> seems to have picked up on only one aspect of that, the sedition offences, leaving everything else in there and, as a result, creating a very confusing array of duplicate liabilities for very similar kinds of conduct.[64]

5.52 The Gilbert and Tobin Centre of Public Law concluded that this selective implementation of the Gibbs Report would result in 'ad hoc law reform which preserves some very broad and archaic security offences.'[65]

5.53 Similarly, Mr Chris Connolly argued that the 'main thrust of the Gibbs recommendations was to limit and tighten the sedition offences'.[66] He interpreted the Gibbs Report as recommending that the Crimes Act should:

> …be amended to repeal sedition and to rely on the crimes of incitement and treason where there was a clear intention of violent interference with the democratic process. However, no amendment had been prepared until the current proposals – and the current proposals are a more substantial revision of the sedition laws than recommended by Gibbs – and largely contrary to the Gibbs recommendations.[67]

5.54 In advice to the Australian Broadcasting Corporation (ABC), Mr Bret Walker SC stated that the suggestion that the amendments are occurring in the way recommended by the Gibbs Report is 'disingenuous' because:

> …the recommendations were quite different in context, and certainly did not include any recommendation to enact laws to the effect stated in subsections (7) and (8) of s.80.2 of the current Bill. True it is though that some of the changes sought to be affected by the Bill adopt parts of what the Committee Report suggested.[68]

5.55 A representative of the Department disagreed with the suggestion that the Bill's sedition offences differed substantially from the recommendations of the Gibbs Report.[69] He noted that the Gibbs Report 'concluded that there was still a need for a sedition offence in the context of 1991'.[70]

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64 *Committee Hansard*, 14 November 2005, p. 66.

65 *Submission 80*, p. 16.

66 Tabled Document, 17 November 2005, p. 8.

67 *Submission 56*, p. 11.

68 *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 8.

69 *Committee Hansard*, 14 November 2005, p. 16; also *Submission 290A*, Attachment B, pp 24-25.

70 *Committee Hansard*, 18 November 2005, p. 23.

Need for sedition laws

5.56 However, many submissions queried whether the sedition offences are even necessary. In particular, it was suggested that the proposed offences duplicate existing law, such as the law of incitement to violence, which already adequately cover the relevant conduct.[71]

5.57 Further, in response to the committee's questioning, both Dr Saul of the Gilbert and Tobin Centre of Public Law and Professor McKinnon of the APC confirmed that they were confident that removal of Schedule 7 of the Bill would not weaken the Commonwealth's anti-terrorist capacity.[72]

5.58 Dr Saul argued that 'section 11.4 of the Criminal Code is sufficient to prosecute incitement to violence which has a specific connection to certain crime.'[73] The Gilbert and Tobin Centre of Public Law pointed out that, in relation to the first two new sedition offences (urging the overthrow of the Constitution or government, or interference 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).[74]

5.59 The committee questioned the Department as to the differences between the crime of incitement to commit an offence and the proposed sedition provisions (particularly subsections 80.2(1), (3) or (5)).[75] The Department responded that the crime of incitement was harder to prove because the crime of incitement requires the prosecution to prove not only that the person urged the commission of a criminal offence, but also that the person intended that the crime urged be committed.[76]

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71 See, for example, Mr Chris Connolly, *Submission 56*, pp 3 and 12; Gilbert and Tobin Centre of Public Law, *Submission 80*, pp 16-18; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, pp 32-33; APC, *Submission 143*, p. 3; NAVA, *Submission 166*, p. 2; HREOC, *Submission 158B*, pp 1-5.

72 Dr Ben Saul, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 14 November 2005, p. 67; and see also Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, p. 13.

73 *Committee Hansard*, 14 November 2005, p. 66; see also Mr Jack Herman, APC, *Committee Hansard*, 17 November 2005, p. 5; HREOC, *Submission 158B*, pp 1-5.

74 *Submission 80*, p. 16; see also HREOC, *Submission 158B*, p. 3.

75 *Committee Hansard*, 14 November 2005, p. 21.

76 *Committee Hansard*, 14 November 2005, pp 17 and 21 and also *Submission 290*, p. 5; see also HREOC, *Submission 158B*, p. 3.

5.60 However, for many submitters, this was precisely the problem with the sedition offences – that the provisions do not require an intention of causing violence. This is discussed further in the section on 'fault elements' later in this chapter.

5.61 As a representative of the Department stated: 'there is absolutely no doubt that this offence [of sedition] will be easier to establish than the incitement to commit an offence'.[77] However, the Department argued that this was justified because 'in this case the urging of the use of force and violence is in its own right dangerous and should be prohibited as a separate offence.'[78]

5.62 The Gilbert and Tobin Centre of Public Law suggested that the last two offences (urging a person to assist organisations or countries fighting militarily against Australia) are similarly redundant:

> …because such conduct is already covered by applying the existing law of incitement to the existing federal offences of treason (s80.1, *Criminal Code*), treachery (s 24AA, *Crimes Act 1914*) and offences in ss 6–9 of the *Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth)*.[79]

5.63 Indeed, the committee asked departmental representatives to compare the offences in subsections 80.2(7) and (8) to the treason provisions in paragraphs 80.1(1)(e) and (f) of the Criminal Code. The representative responded that the treason provisions are broader, and attract life imprisonment as a maximum penalty.[80] The committee then queried the utility of these additional sedition offences when the treason provisions already encompass the relevant conduct. The representative responded:

> The proposal in this bill is to make this law relevant…this offence is becoming more relevant with the advent of the internet and the capacity to have a situation where violence is being urged on a very large scale.[81]

5.64 The Gilbert and Tobin Centre of Public Law did welcome the offence in subsection 80.2(5) for urging violence within the community, but suggested that the offence was too narrow and would be more appropriately placed in anti-vilification laws.[82]

5.65 The AFP told the committee that the modernised sedition offences are designed to address situations where members of the community:

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77 *Committee Hansard*, 18 November 2005, p. 37; and also *Submission 290A*, p. 3.

78 *Submission 290A*, p. 3.

79 *Submission 80*, p. 18; see also HREOC, *Submission 158B*, p. 3.

80 *Committee Hansard*, 14 November 2005, p. 22.

81 *Committee Hansard*, 14 November 2005, p. 22.

82 See further *Submission 80*, p. 17; and also PIAC, *Submission 142*, p. 41.

> …urge others to undertake terrorist activity as there are impressionable people who could be influenced by this behaviour. The committee would recall media coverage this year of publications inciting violence for sale in Australia, which highlighted that there is currently no clear offence to deal with this situation.[83]

5.66 In response to the committee's questioning on this issue, the AFP stated that it had raised the issue of inciting terrorist violence during the July-August 2005 review of the Commonwealth counter-terrorism legal framework undertaken by the Commonwealth Counter-Terrorism Legal Working Group. The AFP explained that it was advised by the Department during this review that 'the situation where people from one group in the community may be indirectly encouraging terrorist activity by urging violence against other groups in the community' was not covered in the current legislative framework by an offence 'with sufficient penalties'. In particular, it was advised that:

> …there is no clear offence in the Criminal Code for possessing, publishing, importing or selling publications, recruitment pamphlets and videos that advocate terrorism. Similarly, the provisions in the *Crimes Act 1914* prohibiting sedition, especially defining seditious intention and seditious words, may not adequately address such publications as their fault elements and defences are not suited to countering terrorism.[84]

5.67 The AFP gave a hypothetical example of a leader of a small extremist group who was:

> …urging their followers to take violent action in Australia in opposition to Australia's involvement in foreign conflicts. The leader is not directing the group as to the specific action they should take but is urging them to take violent action in the name of their extreme ideology...the AFP was advised by the Attorney-General's Department that this situation is not covered by the existing offence in the Criminal Code...[85]

5.68 The committee also asked the Department as to whether the existing laws of treason, sedition and inciting violence are sufficient to fight terrorism. In particular, the committee asked the Department for an example of conduct which the new sedition laws would catch which would not be caught by either the existing sedition laws; the existing treason laws; the existing law of incitement of violence; or the new proposed law in Schedule 1 relating to praising terrorism.[86] The Department submitted an example of an overseas web page giving instructions on how to shoot foreigners in

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83 *Committee Hansard*, 17 November 2005, p. 55; see also, for example, D Crawshaw, 'Police to investigate stores over hate books', *The Canberra Times*, 19 July 2005, p. 4; 'Throwing the book at hatred', *The Australian,* 19 July 2005, p. 12.

84 *Submission 195A*, p. 5; see also p. 4; and *Committee Hansard*, 17 November 2005, p. 68.

85 *Submission 195A*, pp 5-6; see also p. 4.

86 See *Committee Hansard*, 18 November 2005, pp 36-37.

the streets.[87] The Department believed that proposed subsection 80.2(5) (of urging a group to use force or violence against another group) would capture the type of conduct outlined on the web page, whereas existing offences would not be adequate. In particular, the Department suggested that:

> Although the page depicts shooting foreigners it does not appear to focus much on the political motivations which would be necessary for proof of a 'terrorist act' offence (so charging for incitement to commit a terrorist act offence or a terrorist act offence itself would appear excluded, as would an individual advocating a terrorist act offence) and it is probably insufficiently specific in terms of the target to be prosecuted as incitement to commit murder. The threat to kill offences in the Criminal Code, do not apply because of lack of specificity about who is being threatened (see section 474.15 – using a carriage service to make a threat).[88]

5.69 The Department described subsection 474.17 of the Criminal Code (using a carriage service to menace or cause offence) as 'feasible', but noted that the maximum penalty is 'only' 3 years imprisonment. Finally, the Department submitted that the existing sedition offences are probably not applicable because of the definition of 'seditious intention' at paragraph 24A(g) of the Crimes Act, which refers to promoting feelings of ill-will and hostility between different 'classes' of Her Majesty's subjects and could be read down by the court because the historic context suggests it is only a reference to social classes. The Department concluded, once again, that 'this [proposed new sedition] offence is easier to prove than the alternatives – it would not have been put forward if it was not'.[89]

Freedom of speech issues

5.70 Another key objection to the sedition provisions in the evidence received by the committee was their potential to limit freedom of speech.[90] Submissions were concerned about this from international law,[91] constitutional[92] and general policy perspectives. Some submissions acknowledged that the defences proposed in

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87 *Submission 290*, p. 2; referring to 'Terror web site tells how to kill foreigners', *The Canberra Times,* 19 November 2005, p. 21.

88 *Submission 290*, p. 3.

89 *Submission 290*, p. 3; and also *Submission 290B*, p. 14.

90 See, for example, Mr Simeon Beckett, ALHR, *Committee Hansard*, 14 November 2005, p. 47; Mr Chris Connolly, *Submission 56*, p. 3; Gilbert and Tobin Centre of Public Law, *Submission 80*, pp 20-21; ABC, *Submission 196*, p. 3; Law Council, *Submission 140*, p. 21; Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 4; Mr Laurence Maher, *Submission 275A*, pp 14-15; Liberty Victoria, *Submission 221*, pp 24 and 27-28.

91 See, for example, HREOC, *Submission 158*, p. 27, which pointed to Article 19 of the ICCPR; ALHR, *Submission 139*, p. 222.

92 See, for example, Fairfax and others, *Submission 88*, pp 10-11; Law Council, *Submission 140*, pp 21-22; SBS, *Submission 164*, p. 3; Free TV Australia, *Submission 149*, p. 2.

Schedule 7 of the Bill might help to ameliorate the impact on freedom of speech.[93] However, criticisms of these defences are discussed further below.

5.71 Mr John North of the Law Council told the committee of the Law Council's concerns that the sedition amendments would:

> …not only cause journalists a great deal of problems but also will stop peace activists and other political protesters from being able to carry on in the normal course of events and thereby will affect freedom of speech.[94]

5.72 Indeed, many media organisations expressed concern about the sedition provisions. For example, Fairfax submitted its concern that:

> …there is a real risk, that a comment made, letter or advertisement published, wire service story or interview reproduced, factual report carried, video-tape footage published, editorial opinion expressed, or feature film or documentary screened might by reason of its subject matter, prominence, content, tone, wording, manner of promotion and ultimate authorship be held by a jury to amount to 'urging' within the meaning of the proposed section, particularly if it were perceived to form part of an ongoing campaign.[95]

5.73 In response to these concerns about the provisions, a departmental representative stated that there was no basis for concern, because the sedition offences focus on the intention to urge the use of force and violence:

> I do not think anyone is suggesting that Australia's media, and I just cannot think of any situations where our media, has urged violence.[96]

5.74 However, Mr Bret Walker SC, in his advice to the ABC, gave a number of examples of the types of speech which might be impacted on by the Bill, including:

> …offensive or emotional opinion about the significance of the events at 9-11, whether the terrorists involved had any justification for their acts, opinion about the validity of what terrorist leaders might be seeking to achieve, the desirability at an international level of victory against the American forces in Iraq (as expressed by John Pilger and dealt with later in this advice), or the inevitability of further terrorist acts, for example, in

93 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 21.

94 *Committee Hansard*, 14 November 2005, pp 77-78.

95 *Submission 88*, p. 7; see also, for example, APC, *Submission 143*, pp 2-3; SBS, *Submission 164*, pp 3-4; ABC, *Submission 196*, p. 4; Free TV Australia, *Submission 149*, p. 2; Media, Entertainment and Arts Alliance, *Submission 198*, p. 5.

96 *Committee Hansard*, 14 November 2005, p. 16.

> Bali, and as to whether Australian citizens should expect more of the same should they continue to be involved in the Iraqi war.[97]

5.75 Some submissions suggested that the sedition provisions could raise constitutional issues, and in particular, potentially breach the implied freedom of political communication in the Constitution.[98] The Gilbert and Tobin Centre of Public Law was more circumspect, noting that:

> …the Australian Constitution impliedly protects only *political* communication…and not speech more generally. This means that Australian courts are less able to supervise sedition laws for excessively restricting free expression.[99]

5.76 However, the Gilbert and Tobin Centre of Public Law also noted that there may be other constitutional issues:

> The express constitutional protection for freedom of religion in Australia (s116, 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'. There is little case law on the scope of this speech aspect of s116 and it remains to be seen whether the 'free exercise' of religion would protect religious speech.[100]

5.77 In response to concerns that the sedition offences may breach the implied constitutional freedom of political communication, the Department noted that it had obtained advice from the Australian Government Solicitor and was 'satisfied that the amended provisions do not breach the implied constitutional freedom of political communication.'[101] The Department also submitted that, in terms of freedom of expression under international law:

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97 *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 13 and see pp 14-15 for discussion of the Pilger interviews; see also, for example, Mr Ibrahim Abraham, Castan Centre for Human Rights Law, *Committee Hansard*, 14 November 2005, p. 55 and *Submission 116*, pp 31-35; and for other examples see Mr Laurence Maher, *Submission 275A*, pp 9-11. Others cast doubt on Mr Walker's interpretation: see for example, Sue Harris Rimmer, Ann Palmer, Angus Martyn, Jerome Davidson, Roy Jordan and Moira Coombs, Parliamentary Library, *Anti-Terrorism Bill (No. 2) 2005*, Bills Digest No. 64 2005-06, 18 November 2005 (Bills Digest), pp 45-46 and see also the discussion of fault elements later in this chapter.

98 See, for example, Fairfax and others, *Submission 88*, pp 10-11; Law Council, *Submission 140*, pp 21-22; SBS, *Submission 164*, p. 3; Free TV Australia, *Submission 149*, p. 2; several of these submissions cited *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

99 *Submission 80*, p. 22; see also Dr Ben Saul, Gilbert and Tobin Centre of Public Law, *Committee Hansard*, 14 November 2005, pp 60 and 67 for a discussion of problems with similar proposals in the UK and the US.

100 *Submission 80*, p. 23.

101 *Submission 290A*, Attachment A, p. 21.

> The right to freedom of expression under Article 19(2) of the ICCPR may be subject to restrictions provided by law, and that are necessary for the protection of national security and public order. The Government is satisfied that restrictions on communication imposed by the measures are necessary for the protection of national security. The Government is also satisfied that the defence of 'good faith' will adequately ensure that people who make comments without seeking to incite violence or hatred will not be deprived of the freedom of speech. Indeed, subsection 80.2(5) is in part implementation of Article 20 of the ICCPR which requires State parties to prohibit advocacy that incites violence, discrimination or hostility.[102]

5.78 A representative of the Department also noted that the offences would need to be proven beyond reasonable doubt, and that the Director of Public Prosecutions would need to be convinced that any such cases would be worth prosecuting.[103]

5.79 Dr Saul of the Gilbert and Tobin Centre of Public Law acknowledged the need to be realistic about the potential operation of the legislation:

> Of course these laws are subject to prosecutorial discretion, in the ordinary way that crimes are. I think that many of the statements which people have suggested might fall within the laws may well fall within the laws, but of course they will never be prosecuted. Prosecutors are realistic about this. The Attorney-General having to sign off on prosecutions is a good additional protection.[104]

5.80 At the same time, he questioned:

> Why are you putting a law on the books which allows fairly innocuous statements to be, potentially, subject to prosecution? The good faith defences are too narrow, as people have pointed out. Why do you even need a good faith qualification? How do you protect things like satire and comedy, artistic expression and so forth, which may not intend to be constructive and pointing out errors or mistakes in government, but may simply want to express a point of view?[105]

Self-censorship

5.81 Indeed, many submissions suggested that 'self-censorship' could become an issue if the provisions were to be enacted.[106] That is, people might 'err on the side of

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102 *Submission 290A*, Attachment A, p. 6.

103 *Committee Hansard*, 14 November 2005, p. 9.

104 *Committee Hansard*, 14 November 2005, p. 68.

105 *Committee Hansard*, 14 November 2005, p. 68.

106 See, for example, Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, pp 2 and 5 and also *Submission 143*, p. 3; Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, pp 5 and 11; NAVA, *Submission 166*, p. 6; Liberty Victoria, *Submission 221*, p. 27; Castan Centre for Human Rights Law, *Submission 116*, p. 35.

caution and limited themselves in what they say'.[107] For example, the National Association for Visual Arts (NAVA) submitted that, if Schedule 7 were enacted:

> …self-censorship is the likely course of action for many artists, galleries and other art organisations. For fear of possible misinterpretation of their work or abuse of power by government or police, artists and galleries will be under pressure. The result could be the stifling of free inquiry and expression with a consequent quelling of expression of opinion, censorship of any perceived form of dissent and the resulting blandness of contemporary cultural production.[108]

5.82 Similarly, Mr Beckett of ALHR commented that:

> There may not be a specific prosecution, or it might be a while before a specific prosecution occurs and the law is clarified, and a number of people may seek advice and the advice may be— as it has been in the last couple of weeks—that what they are doing is arguably sedition within the definitions that are currently there. So there is a fear, a legitimate fear, that somebody may have committed an offence or be proposing to do a painting or organise a skit or produce and broadcast a particular show on TV that is an offence punishable by seven years imprisonment.[109]

5.83 The ABC submitted that its key concern was that:

> …legitimate discussion and debate in the media about terrorism and related issues is likely to be stifled as no media organisation or personnel could, at the risk of imprisonment for 7 years, confidently predict what would pass the test and would, therefore, err on the side of extreme caution.[110]

5.84 As the Law Council stated, 'such caution is not in the interests of informed political debate.'[111]

5.85 Mr Abraham of the Castan Centre for Human Rights Law observed along the same lines: 'our concern is not only with what convictions it might bring about but also whether this legislation will effect a demonstrative change in people's behaviour.'[112]

5.86 In response to concerns about self-censorship, the Department submitted that:

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107 Ms Agnes Chong, AMCRAN, *Committee Hansard*, 17 November 2005, p. 22.

108 *Submission 166*, p. 6.

109 *Committee Hansard*, 14 November 2005, p. 49.

110 *Submission 196*, p. 3.

111 *Submission 140*, p. 21.

112 *Committee Hansard*, 14 November 2005, p. 52.

> The policy is to 'chill' comments where they consist of urging the use of force or violence against our democratic and generally tolerant society in Australia.[113]

Counterproductive

5.87 As with other aspects of the Bill, some submitters were concerned that the sedition offences could actually be counterproductive, because they may simply drive terrorism underground and/or fuel terrorism further.[114] For example, the Islamic Council of Victoria submitted that:

> …punishing individuals for having or even expressing views that, while they may be radical, extreme, inflammatory, misguided, or otherwise unpopular politically, but do not cross the threshold into direct incitement to physical violence, is likely to be extremely counterproductive…such views should be tackled by positive and proactive measures such as engagement and dialogue…the use of anachronistic sedition offences will only harden the stances of those who already feel alienated and disenfranchised by government policies.[115]

5.88 Similarly, the Gilbert and Tobin Centre of Public Law warned that:

> There is a danger that criminalising the general 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…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…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.[116]

5.89 The Gilbert and Tobin Centre of Public Law concluded that 'a robust and mature democracy should be expected to absorb unpalatable ideas without prosecuting them.'[117]

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113 *Submission 290*, p. 2.

114 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 21; Mr Joo-Cheong Tham and others, *Submission 81*, p. 8; APC, *Submission 143*, p. 3; Liberty Victoria, *Submission 221*, pp 28-29.

115 *Submission 226*, p. 7.

116 *Submission 80*, p. 21.

117 *Submission 80*, p. 21.

Racial vilification

5.90 A representative of the Department, in arguing that the Bill is non-discriminatory, pointed out that:

> Even in the elements of sedition it is about protecting groups in our society regardless of their race, religion, nationality or political opinion.[118]

5.91 However, the Islamic Council of Victoria contrasted the Bill with Victoria's *Racial and Religious Tolerance Act 2001* (RRTA), stating that:

> [T]he RRTA protects citizens from discrimination and vilification on the basis of race or religion by providing a mechanism for hate speech to be curtailed in public judicial proceedings, while the Bill's sedition provisions expose a wide-ranging section of the community to criminal prosecution under secretive, draconian security measures on the basis of their political or religious views.[119]

5.92 As noted earlier, the Gilbert and Tobin Centre of Public Law welcomed the offence in subsection 80.2(5) for urging violence within the community, because it would criminalise the incitement of violence against racial, religious, national or political groups, as required by Australia's human rights treaty obligations.[120] However, at the same time, it suggested that the offence was too narrow and would be more appropriately placed in anti-vilification laws.[121]

5.93 Similarly, HREOC noted that 'it has been suggested that the proposed [sub]section 80.2(5) strays into the area of discrimination and vilification law'. HREOC advised the committee that it:

> …has previously called for the introduction of comprehensive religious discrimination and vilification laws at the federal level, consistent with Australia's international human rights obligations under article 20(2) of the ICCPR and article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination*. The Commission considers the enactment of such legislation to address discrimination and vilification against Arab and Muslim Australians is crucial to combating terrorism. However, rather than attempt to do this under the umbrella of sedition laws, Parliament should address the topic in separate legislation so as to allow for a proper consideration of the interests and issues involved.[122]

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118 *Committee Hansard*, 14 November 2005, p. 4.

119 *Submission 226*, p. 8.

120 For example, Article 20(2) of the ICCPR and Article 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination 1969*.

121 *Submission 80*, p. 17; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 35; and Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 38 and PIAC, *Submission 142*, p. 41.

122 *Submission 158*, p. 31; see also Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, p. 29.

Other specific issues

5.94 Specific issues raised in relation to the sedition provisions discussed in this section include:

- the definition of 'urging';
- fault elements; and
- the requirements for links to violence.

Definition of 'urging'

5.95 Several submitters noted that there is no definition of 'urging' in the Bill or in the Criminal Code, and were concerned that it could be defined very broadly.[123] However, the Department submitted that:

> …the incitement offence in section 11.4 of the Criminal Code uses the word 'urge'. This language was recommended as a plain English way of capturing the essence of the offence, by the Commonwealth, State and Territory offices on the Model Criminal Code Officers Committee…Some courts have interpreted 'incites' as only requiring that a person causes rather than advocates the offences. The use of the word 'urge' is designed to avoid this ambiguity.[124]

Fault elements

5.96 There was considerable debate and indeed, confusion, during the committee's inquiry over the fault elements required under the proposed sedition provisions. The committee received a large amount of evidence expressing concern about the use of the standard of 'recklessness' in the provisions, rather than 'intention'.[125] Many submissions were also concerned that, unlike the existing sedition offences in the Crimes Act, the new offences would not require an intention to cause violence.[126]

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123 For example, ABC, *Submission 196*, pp 3-4; Law Council, *Submission 140*, p. 22; Liberty Victoria, *Submission 221*, p. 26.

124 *Submission 290*, p. 4.

125 See, for example, ABC, *Submission 196*, p. 3; Law Council, *Submission 140*, p. 21 and also Mr John North, Law Council, *Committee Hansard*, 17 November 2005, p. 79; Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, pp 2 and 10 and also *Submission 143*, p. 3; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, pp 33 and 37-38; ALHR, *Submission 139*, p. 20; Mr Laurence Maher, *Submission 275A*, p. 16; PIAC, *Submission 142*, p. 40.

126 See, for example, Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 19; Fairfax and others, *Submission 88*, pp 7-8; Free TV Australia, *Submission 149*, p. 2; HREOC, *Submission 158A*, p. 3; Liberty Victoria, *Submission 221*, p. 25; see also *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 7 (citing *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* [1991] 1 QB 429) as contained in *Submission 153*, Annexure B. Also available at: http://abc.net.au/mediawatch/img/2005/ep34/advice.pdf (accessed 21 November 2005).

5.97 In the context of the fault elements required by the sedition provisions, many submissions referred to advice provided by Mr Bret Walker SC to the ABC.[127] In this advice, Mr Walker argued that under the proposed offences:

> …it is no longer a requirement to prove an intention to promote feelings of ill-will and hostility to establish seditious intention. It will be enough, in some cases, that one did an act which might promote those feelings if one acted recklessly and that result followed. Secondly, the requirement that there be not only proof of an incitement to violence, but actual violence or resistance or defiance for the purpose of disturbing the constituted authority, is no element of the offence. It is enough that there is the urging of 'another person' to do any of the categories of acts prohibited.[128]

5.98 Mr Walker further advised that:

> There is no reference within the proposed s.80.2 to any requirement that the person doing the urging have any particular intention, such as the previous requirement for the intention to cause violence or create public disorder or disturbance. Notwithstanding the reference to application of principles of recklessness, to 3 of the proposed new offences, apart from an intention that the offender be required to intentionally engage in the act which amounts to the urging, it is not required that he be shown to intend the result. On one view of it at least, one could make a statement intentionally, and which might be seen as amounting to urging another to use force or violence against another group, without intending that result at all.[129]

5.99 In response a departmental representative noted that he respectfully disagreed 'absolutely and entirely'[130] with advice provided by Mr Bret Walker SC to the ABC (that urging may be unintentional or inadvertent). He argued that such urging would have to be intentional.[131]

5.100 Mr Walker subsequently noted the representative's comments, but suggested that it was important to be:

> …very cautious about applying the rather remarkable abstract and highly conceptualised provisions of sections 5.1 to 5.6 of the Criminal Code to the

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127 See *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, available at: http://abc.net.au/mediawatch/img/2005/ep34/advice.pdf (accessed 21 November 2005). Referred to, for example, in the following submissions: Representatives of the Arts and Creative Industries of Australia, *Submission 153*, Annexure B; Federation of Community Legal Centres (Vic), *Submission 167*, p. 42; ALHR, *Submission 139*, p. 23; Liberty Victoria, *Submission 221*, p. 36.

128 *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 10.

129 *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 11.

130 *Committee Hansard*, 14 November 2005, p. 17.

131 *Committee Hansard*, 14 November 2005, p. 17.

> sedition proposals…the only element of intention that those provisions require, in my opinion—at least arguably so—is that you mean to urge, which is quite different from meaning that there be an outcome from the intermediaryship of two, three, four or however many other people in relation to violent effects not only in this country but elsewhere.[132]

5.101 The Gilbert and Tobin Centre of Public Law contrasted the fault elements for the existing sedition offences in the Crimes Act and the law of incitement (in section 11.3 of the Criminal Code) with the sedition offences proposed by Schedule 7 of the Bill. It suggested to the committee that the existing sedition offences in the Crimes Act require, first, 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.[133] In noting that the existing law of incitement could cover much of the conduct falling within the new sedition offences, the Gilbert and Tobin Centre of Public Law noted that the law of incitement also required both intentional urging and a further ulterior intention that the offence incited be committed.[134] The Gilbert and Tobin Centre of Public Law suggested that:

> Requiring that an inciter intend that the offence be committed reflects the vital 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.[135]

5.102 However, according to its analysis:

> …unlike existing offences of both sedition and incitement, the Bill imposes no further requirement of an ulterior intention that the specified conduct actually be committed by the persons urged. The offences are thus wider than the scope of the existing offences of sedition and incitement.[136]

5.103 The Gilbert and Tobin Centre of Public Law therefore concluded that proposed offences:

> …criminalise indirect incitement or generalised expressions of support for terrorism, without any specific intention to encourage violence or any connection to a particular offence.[137]

5.104 However, the Gilbert and Tobin Centre of Public Law argued that 'only incitements which have a direct and close connection to the commission of a specific crime are justifiable restrictions on speech'.[138]

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132 *Committee Hansard*, 17 November 2005, p. 83.

133 Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 19; see also *Submission 80A,*p. 1.

134 Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 19; see also *Submission 80A*, p. 1.

135 Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 19.

136 *Submission 80A*, p. 2.

137 Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 20; see also *Submission 80A*, p. 2.

138 *Submission 80*, p. 20.

5.105 Similarly, HREOC also came to the conclusion that the proposed sedition provisions do not require a specific intention that the third person use force or violence.[139] HREOC also agreed that the existing law of incitement clearly requires 'that the inciter intend that the incitee use force or violence'.[140] However, on HREOC's interpretation of the Department's evidence, this was the difficulty which the new sedition offences were designed to overcome, because under these provisions:

> The prosecution may, of course, face difficulties in proving that in uttering particular words a person intended that the person or people to whom they were uttered would commit a particular crime. That would be a significant obstacle in the case of words that are more general in nature.[141]

5.106 However, HREOC expressed the view that:

> ….that is an entirely appropriate limitation, which will ensure that the Criminal Code is not used to prosecute those whose words (while distasteful) are in the sphere of legitimate free speech which attracts the protection of article 19 of the ICCPR. As noted above, that was also the view expressed by the Criminal Law Officers Committee in its final report into the Model Criminal Code.[142]

5.107 However, a representative of the Department claimed that some of the opinions provided on the sedition provisions:

> …exhibited a misunderstanding of the fact that the urging behaviour is conduct and has to be intentional. Some of the people with those opinions are not familiar with [the] Criminal Code and so do not understand how the Criminal Code and fault elements apply.[143]

5.108 The representative responded to the concerns raised in relation to 'intention' and 'recklessness' by explaining to the committee that the 'urging' under proposed section 80.2 must be intentional because it is a conduct element of the offence.[144] The representative pointed to section 5.6 of the Criminal Code, which provides for offences that do not specify fault elements as follows:

> (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

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139 *Submission 158A*, pp 2-3. Note that HREOC's reasoning was slightly different to that of the Gilbert and Tobin Centre of Public Law; and see also Attorney-General's Department, *Submission 290*, p. 2, which suggests that HREOC's interpretation is 'not supported by the construction of the offences'.

140 *Submission 158B*, p. 5.

141 *Submission 158B*, p. 5.

142 *Submission 158B*, p. 5; see also Gilbert and Tobin Centre of Public Law, *Submission 80A*, p. 2.

143 *Committee Hansard*, 14 November 2005, p. 10.

144 *Committee Hansard*, 14 November 2005, pp 10, 16-17 and *Submission 290*, p. 5.

> (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

5.109 The representative also suggested that:

> In fact, recklessness is only applying to the elements of the offence that are about understanding that it is about overthrowing our Constitution and understanding that in fact you are calling for the overthrow of our government and all lawful authority of the government. The intention still remains the fault element for the urging part of it—that is, urging another to overthrow by force or violence. Urging, of course, is conduct under the Criminal Code. Intention is the fault element for that.[145]

5.110 In other words, the representative argued that the conduct – that is the urging of violence – has to be intentional, whereas the consequence of that conduct is reckless.[146] In response to the committee's questioning as to whether words could be inserted into section 80.2 to clarify that the urging was required to be intentional, a representative of the Department conceded that this could be done.[147]

5.111 In response to the committee's questions as to whether these fault requirements were broader than the existing Crimes Act provisions, the representative replied that they were 'probably slightly' broader.[148] The Department also provided further information to the committee to explain that:

> Like the incitement offences [in section 11.4 of the Criminal Code] the prosecution must prove that the person intended to urge the conduct. As mentioned above, 'urging' is intentional because it is a conduct element of the offence. However, unlike the incitement offences sedition does not require the prosecution to prove that the person intended the crime urged be committed.[149]

5.112 The Department continued:

> The prosecution must prove that the person was reckless as to whether the thing against which the person urged the use of force or violence as, for example a group distinguished by race, religious, nationality or political opinion.[150]

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145 *Committee Hansard*, 14 November 2005, p. 8; see also *Committee Hansard*, 18 November 2005, pp 37-39.

146 *Committee Hansard*, 18 November 2005, p. 38; cf HREOC, *Submission 158A*, p. 3; Mr Bret Walker SC, *Committee Hansard*, 14 November 2005, p. 17.

147 *Committee Hansard*, 18 November 2005, p. 39.

148 *Committee Hansard*, 14 November 2005, p. 9.

149 *Submission 290*, p. 5.

150 *Submission 290*, p. 5.

5.113 However, Mr Walker argued that there were contradictions in the evidence from the departmental representative:

> …he agreed—and here I strongly agree with him, respectfully—that aspects of the proposed new sedition offences made the prosecution's task less difficult than the pre-existing and continuing to exist offences in relation to incitement to violence et cetera…He would not be right in saying that, according to his own lights, if it is true that for all urging offences you have to intend the outcome of somebody else's actions. That is true of incitement to violence. You have to intend that the violent offence be committed. But I do not believe it is anywhere near as clear as he thought in his evidence that that is true of urging in the new provisions.[151]

5.114 Several submissions suggested that the fault elements of the provisions were ambiguous. For example, HREOC submitted that:

> At the very least, the matters outlined above indicate that the reach of the proposed offences, as currently drafted, is ambiguous. This is highly undesirable given that the proposed offences encroach upon the right to freedom of expression.[152]

5.115 Similarly, Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, suggested to the committee:

> Freedom of speech and expression is a fundamental part of the Australian way of life. In the absence of a bill of rights, any proposed law that in any way impacts on this freedom enjoyed by all Australians needs significant scrutiny and must, in our view, have absolute clarity of intention and application…It is our view that there should be no room at all for misinterpretation on matters that deal with freedom of speech in a democracy. The law needs to be much clearer than it is. Regardless of individual opinions on the application of the proposed laws, it is our view that the scale of debate on how they will be applied is evidence enough of the danger that their lack of clarity poses.[153]

5.116 And again, in this context, it was suggested that any lack of clarity could lead to over-caution, and, in turn, self-censorship (as discussed earlier in the section on freedom of speech).[154]

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151 *Committee Hansard*, 17 November 2005, p. 83.

152 *Submission 158A*, p. 3; *Submission 158*, pp 27-30; see also Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 39.

153 *Committee Hansard*, 17 November 2005, p. 4; see also p. 5.

154 See, for example, Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 5 and p. 11; Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, p. 5.

Links to violence

5.117 Many submissions pointed out that, unlike the current sedition offences, two of the proposed offences in subsections 80.2(7) and (8) (relating to assisting the enemy) do not require any link to force or violence, but simply support of 'any kind' for the enemy.[155] It was suggested to the committee that these provisions in particular, were not a mere update of existing laws, but represented two completely new offences which 'considerably expand existing sedition laws'.[156] Some submissions also argued that the offences in subsections 80.2(7) and (8) conflict with the Gibbs Report recommendation that new sedition offences should be linked to the incitement of violence.[157]

5.118 Others were also concerned at the breadth of the terminology used in these proposed subsections, such as the terms 'assist, by any means whatever'. For example, Mr Simeon Beckett of ALHR argued that the term:

> …'by any means whatever' is so remarkably broad that you start to question what is the policy intent of that. Obviously, the idea is any means of assistance to a terrorist organisation, but it includes that 'any means whatever'. It includes rhetorical support for a particular organisation.[158]

5.119 Similarly, the Law Council commented that these offences 'go well beyond the traditional common law understanding of sedition [and] could be construed to include peace activists and protestors'.[159]

5.120 Indeed, many submissions felt that these provisions were too broad, and would cover certain statements relating to, for example, the war in Iraq. For example, Fairfax and others submitted that:

> We are concerned that published opinion which might be seen to support or lend sympathy to claims made by terrorist leaders (or leaders of groups which might encounter the ADF in the course of peace-keeping operations

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155 See, for example, Chris Connolly, *Submission 56*, pp 3 and 14 and *Committee Hansard*, 17 November 2004, p. 6; Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 19; Australian Screen Directors Association, *Submission 146*, p. 3; NAVA, *Submission 166*, p. 7; ALHR, *Submission 139*, p. 21.

156 HREOC, *Submission 158*, p. 29; see also Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 3; PIAC, *Submission 142*, p. 40.

157 See, for example, Liberty Victoria, *Submission 221*, p. 24; Mr Chris Connolly, *Submission 56*, p. 14.

158 *Committee Hansard*, 14 November 2005, p. 48; see also Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 36; HREOC, *Submission 158*, p. 29; PIAC, *Submission 142*, p. 40; NAVA, *Submission 166*, p. 8; Liberty Victoria, *Submission 221*, pp 24-25; *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 12.

159 *Submission 140*, p. 22; see also APC, *Submission 143*, p. 3.

> overseas) about what they are seeking to achieve, the just nature of their cause, that victory against the 'Coalition of the willing' in Iraq would be a good thing, or even that Australians should expect a terrorist attack if the Commonwealth continues to support the Iraq war, all risk falling foul of the section.[160]

5.121 Similarly, Mr Bret Walker SC, in his advice to the ABC, expressed the opinion that proposed subsection 80.2(8) would 'conceivably extend to providing verbal support or encouragement for insurgent groups who might encounter the Australian Defence Force which is present in their country.'[161]

5.122 However, the Department responded to concerns about the offences in proposed subsections 80.2(7) and (8), by stating that these offences:

> …were clearly contemplated by the existing sedition offence in section 24A of the Crimes Act [which] was intended to capture assisting enemies or those engaged in combat against the Defence Force. That is because subsection 24F(1) created an exception to the sedition offences while subsection 24F(2) created an exception to that exception that refers to assisting enemies or those engaged in combat against the Defence Force.[162]

Defences, safeguards and penalties

5.123 Other issues raised in relation to the sedition offences include:

- proposed defences;
- the burden of proof for the defences;
- other safeguards in the provisions; and
- the penalty increase.

Defences

5.124 Submissions were also critical of the defences to, and penalties for, the proposed sedition offences. In particular, many submissions argued that the defence in

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160 *Submission 88*, p. 8; see also, for example, Free TV Australia, *Submission 149*, p. 2.

161 *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, p. 13.

162 *Submission 290A*, Attachment A, p. 21.

proposed section 80.3 for acts done in 'good faith' is too limited and narrow.[163] Indeed, some questioned the concept and meaning of 'good faith'.[164]

5.125 Mr Bret Walker SC, in his advice to the ABC, expressed the opinion that the operation of the defence in section 80.3 is:

> …limited to demonstrating attempts to point out errors or mistakes in policy by Australian Governmental institutions, Governments or persons responsible for them from other countries, achieving lawful changes to the legal status quo or matters which are intending to create ill will or hostility between groups in order to bring about the removal of that hostility.[165]

5.126 It was suggested that this defence would only protect certain political expression, but not academic, educational, artistic, scientific, religious, journalistic or other public interest purposes.[166]

5.127 The Gilbert and Tobin Centre of Public Law expressed the view that this was required because:

> The range of human expression worthy of legal protection is much wider than that protected by the Bill's narrow defences, which are more concerned with not falling foul of the implied constitutional freedom of political communication than with protecting speech as inherently valuable.[167]

5.128 Similarly, Mr Jack Herman of the APC observed that 'the good faith provision probably provides no greater protection than already exists under the Lange defence [the implied freedom of political communication]'.[168]

5.129 The Gilbert and Tobin Centre of Public Law also noted that the defence does not include an immunity for journalists who merely report, in good faith, views expressed by others.[169]

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163 See, for example, Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, p. 2 and APC, *Submission 143*, p. 3; Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 39; Mr Chris Connolly, *Submission 56*, p. 14; Fairfax and others, *Submission 88*, pp 9-10; Free TV Australia, *Submission 149*, p. 2; HREOC, *Submission 158*, p. 30; ALHR, *Submission 139*, p. 20; Liberty Victoria, *Submission 221*, p. 27; Castan Centre for Human Rights Law, *Submission 116*, p. 35.

164 See, for example, Mr Bret Walker SC, *Committee Hansard*, 17 November 2005, p. 87.

165 *Memorandum of Advice from Bret Walker SC and Peter Roney to ABC Legal*, 24 October 2005, pp 11-12; see also Mr Chris Connolly, *Committee Hansard*, 17 November 2005, p. 12.

166 See, for example, Mr Chris Connolly, *Committee Hansard*, 17 November 2005, p. 5 and also *Submission 56*, pp 14-15; Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 21; Liberty Victoria, *Submission 221*, p. 27; Castan Centre for Human Rights Law, *Submission 116*, pp 31 and 35.

167 *Submission 80*, p. 21.

168 *Committee Hansard*, 17 November 2005, p. 5; and see also *Submission 143*, p. 3.

169 *Submission 80*, p. 21; see also Fairfax, *Submission 80*, p. 9; ABC, *Submission 196*, p. 4.

5.130 Similarly, Professor Kenneth McKinnon of the APC was concerned that:

> Even third-hand reporting of a dissident group somewhere in Australia or abroad or what might appear to be support for dissident groups in Iraq is really problematic and cannot be defended.[170]

5.131 In response to the committee's questioning as to whether the 'good faith defence' would cover, for example, people who had advocated during the Vietnam war that they wanted the North Vietnamese to win, Mr Bret Walker SC responded:

> My guess, as a professional advocate, is yes, you would win that argument. Could you be sure in advance? No. Would you be nervous as you waited for the outcome of the no case submission? You bet. Would you be nervous if it got to the jury? Very...[I]n considering the good faith defence, the jury or the court could take into account the fact that the urging, say, of the Australian troops to leave South Vietnam could be regarded as having been done with the intention of assisting an organisation engaged in armed hostilities. I would have thought that it clearly was, because I do not actually accept that there is a distinction between the North Vietnamese winning and the allies leaving.[171]

5.132 Several submissions suggested that, at the very least, there should be a media-specific exception to the sedition provisions.[172] Fairfax and others pointed to precedents for such media exemptions in the *Trade Practices Act 1974* and in the *Privacy Act 1988*.[173]

5.133 Mr Jack Herman of the APC pointed out that the sedition provisions appear to criminalise even 'expressions of an artistic, satirical or humorous nature.'[174] For this reason, he suggested a further exemption for artistic expression.[175]

5.134 HREOC (and many others) went broader, suggesting that, if the sedition provisions remain in the Bill at all, a broad defence along the lines of the defence contained in section 18D of the *Racial Discrimination Act 1975* should be

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170 *Committee Hansard*, 17 November 2005, p. 2.

171 *Committee Hansard*, 17 November 2005, p. 86.

172 Fairfax and others, *Submission 88*, p. 12; Law Council, *Submission 140*, p. 21; Mr John North, Law Council, *Committee Hansard*, 14 November 2005, p. 79; ABC, *Submission 196*, p. 4; Mr Jack Herman, APC, *Committee Hansard*, 17 November 2005, pp 3 and 7.

173 *Submission 88*, p. 12; see also, for example, Free TV Australia, *Submission 149*, p. 2.

174 *Committee Hansard*, 17 November 2005, pp 3 and 7; see also APC, *Submission 143*, p. 3; Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 21 and HREOC, *Submission 158*, p. 30.

175 *Committee Hansard*, 17 November 2005, p. 3; cf Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, who simply opposed the sedition provisions altogether: *Committee Hansard*, 17 November 2005, p. 7.

considered.[176] Section 18D provides a defence to certain provisions of the *Racial Discrimination Act 1975* for anything said or done reasonably and in good faith:

> (a) in the performance, exhibition or distribution of an artistic work; or
>
> (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
>
> (c) in making or publishing a fair and accurate report of any event or matter of public interest; or a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

5.135 However, the Department was not convinced of the merits of such a defence:

> …the offence is always to do with intentionally urging violence (either directly or indirectly by assisting an enemy). It is difficult to understand why [HREOC] would consider such conduct to be appropriate in the context of the defences they suggest as opposed to others, particularly given that urging violence against other groups in the community would appear to be consistent with the objects of Article 20 of the International Covenant on Civil and Political Rights. It far more preferable for the whole community to rely on the same defences as proposed in s.80.3 – to do otherwise is discriminatory. The danger with using special defences is that the terrorists will attempt to use education, the arts and journalism as a shield for their activities in much the same way some involved with child porn have attempted to justify their conduct.[177]

5.136 Indeed, a representative of the Department argued that the defences under the Bill were broader than the existing defences under the Crimes Act:

> In considering the defence, the court talks about taking into account whether it was intended to assist the enemy, to cause violence, to create public disorder and so on. What we have done with that part of the defence, if anything, is give it more teeth than it had before.[178]

5.137 In response to the committee's suggestions that the 'good faith' concept could be removed from the defence, the Department suggested that removing this would:

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176 HREOC, *Submission 158*, p. 30 and Recommendation 21; see also Mr Simeon Beckett, ALHR, *Committee Hansard*, 14 November 2005, p. 48 and also ALHR, *Submission 139*, pp 23-24; Mr Ibrahim Abraham, Castan Centre for Human Rights Law, *Committee Hansard*, 14 November 2005, pp 52 and 55 and *Submission 116*, p. 35 (making a similar suggestion based on the *Racial and Religious Tolerance Act 2001* (Vic)); ABC, *Submission 196*, p. 3; Media, Entertainment and Arts Alliance, *Submission 198*, p. 5; SBS, *Submission 164*, p. 4.

177 *Submission 290A*, p. 4; see also AFP, *Submission 195A*, p. 4.

178 *Committee Hansard*, 14 November 2005, p. 10.

> …open the door to people suggesting it was legitimate to urge the use of force or violence to procure changes in policy. The 'good faith' defence points to the real motivation of the person and should be retained.[179]

Defences – burden of proof

5.138 Many submissions were also concerned that the burden of proof for the defences under the sedition provisions would be on the defendant.[180] For example, the APC argued that 'it is in practice extremely difficult for defendants to prove that they acted in good faith'.[181] Similarly, the Australian Screen Directors Association argued that the provisions place an 'undue burden' on people accused of sedition to prove their innocence.[182]

5.139 Mr Chris Connolly submitted that:

> An allegation of sedition requires the accused to prove beyond reasonable doubt that they are acting in good faith. This is a rare and dangerous reversal of Australia's normal assumption that a person is innocent until proven guilty, and that the burden for proving guilt falls on the prosecution.[183]

5.140 Mr Connolly elaborated on this concern at one of the committee's hearings:

> It is quite unusual for someone such as an artist or a journalist to have to rely on a defence where the onus [of] proof is on them…It is not an impossible burden to bear—no-one is suggesting that. In fact, there are lots of crimes where if you raise a defence you do have to carry the onus of proof, but most of those crimes are incredibly difficult [to] prove in the first place, such as murder.[184]

5.141 Similarly, Mr Simeon Beckett of ALHR observed that:

> …it is quite easy to be engaged in some form of seditious conduct as a result of this bill. So you are then hauled before the courts and you are effectively required to prove your defence, be it the good faith defence in this example or perhaps a redrafted defence. If that is the case then that still has a fundamental unfairness which goes to the heart of the sedition laws. That is, effectively, the person has to prove their innocence rather than the Commonwealth or the DPP [Director of Public Prosecutions] proving that

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179 *Submission 290A*, p. 3.

180 See, for example, Liberty Victoria, *Submission 221*, p. 29; Mr Chris Connolly, *Submission 56*, p. 15; APC, *Submission 143*, p. 3; Australian Screen Directors Association, *Submission 146*, p. 3; Fairfax and others, *Submission 88*, p. 10.

181 *Submission 143*, p. 3.

182 *Submission 146*, p. 3.

183 *Submission 56*, p. 15.

184 *Committee Hansard*, 17 November 2005, p. 6.

> the person has committed a particular seditious act taking into account those freedoms that we all enjoy at the moment.[185]

5.142 Mr John North of the Law Council pointed out the problems in a media context:

> You can publish and be damned because you are going to be charged and then you can rely on good faith. How ridiculous is that for a media organisation? Will we print this? Will we publish it? We might be charged—but we have a defence…That will automatically make our media more circumspect and we do not want to see that in Australia…[T]he whole object is not to have to publish and then wonder whether you are going to be charged. The object is to have a free and robust press in this country that can question government decisions and not fear that they might be charged and then have to rely on a broadened defence.[186]

5.143 Similarly, Fairfax and others were concerned that:

> The requirement that the defendant demonstrate 'good faith' is also extraordinarily difficult if not impossible to satisfy in practice, particularly in relation to republication of third-party statements, as it may readily be negatived by, for example, a perceived lack of proportion or congruence between the opinion expressed and the facts within the publisher's knowledge at the time of publication.[187]

5.144 The committee notes that the ACT Director of Public Prosecutions, in advice to the ACT Chief Minister on an earlier draft of the Bill commented in relation to the burden of proof for these defences as follows:

> Because of the burden placed on the defendant, it is always possible that the fact will pertain but the burden will not be discharged. That is to say, the person will be found guilty although innocent. I am of the view, however, that the burden should not be very difficult to discharge in these cases, as the burden is an evidential one, then if discharged, the prosecution retains the burden of proving that the defence is not made out and must do so beyond reasonable doubt. Accordingly the offences proposed by the Bill do not appear to compromise the right to a fair trial or the rule of law.[188]

5.145 However, in response to concerns about the burden of proof for the defence, the Department submitted that:

> …the defences do not shift the legal burden of proof to the defence. The defence has to satisfy the evidential burden. This means the burden of

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185 *Committee Hansard*, 14 November 2005, p. 48.

186 *Committee Hansard*, 14 November 2005, pp 79-80.

187 *Submission 88*, p. 10.

188 ACT Director of Public Prosecutions, *Advice to the ACT Chief Minister on the Anti-Terrorism Bill 2005*, 20 October 2005, http://www.chiefminister.act.gov.au/docs/DPPadvice.pdf, p. 5 (accessed 18 November 2005).

> adducing or pointing to evidence that suggests a reasonable possibility that the defence exists (s.13.3(6) of the Criminal Code). Once the defence establishes that this reasonable possibility exists, the prosecution has to prove the defence does not exist beyond reasonable doubt. The prosecution takes this into account when making the initial decision to prosecute. No prosecutor goes to court without being in a position to counter defences of this nature.[189]

Other safeguards

5.146 As noted earlier, under proposed section 80.5, proceedings for an offence against Division 80 must not be commenced without the Attorney-General's written consent. However, this safeguard did not reassure some submitters.[190] Indeed, Mr Laurence Maher referred to this requirement as 'an illusory safeguard against prosecutorial abuse'.[191]

5.147 For example, the Justice and International Mission Unit of the Uniting Church in Australia was concerned that:

> ...this opens the legislation to being used by a Government against certain groups, while other groups that are politically aligned to the Government of the day may be able to commit sedition offences with impunity. The Unit believes that it would be better if the decision to prosecute rested with a body independent of the Government.[192]

5.148 Likewise, Mr David Bernie of the NSW Council for Civil Liberties argued that:

> We do not think the so-called safeguard about the Attorney-General's consent is a safeguard in relation to this or anything else. Unfortunately the Attorney-General…now acts as a minister in the government. In fact, having that provision in relation to sedition, rather than being a safeguard, is a matter of concern because it means that prosecutions would be politically sanctioned. In other words, for people who say things against the government which might fall under these provisions that the government of the day—be it a left-wing or a right-wing government—broadly agrees with, the prosecutions will not proceed, but for people who the government do not particularly like, they will give their imprimatur to proceed.[193]

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189 *Submission 290A*, pp 3-4.

190 See, for example, Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 39; Fairfax and others, *Submission 88*, p. 10; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, pp 32-33; Castan Centre for Human Rights Law, *Submission 116*, p. 35; ABC, *Submission 196*, p. 3; Professor Kenneth McKinnon, APC, *Committee Hansard*, 17 November 2005, p. 2.

191 *Submission 275A*, p. 6; Mr Maher suggested this was a 'weakening of the Attorney-General's consent provision', presumably when compared to the existing section 24E of the Crimes Act.

192 *Submission 259*, p. 5.

193 *Committee Hansard*, 17 November 2005, p. 33.

5.149 In contrast, Dr Ben Saul of the Gilbert and Tobin Centre of Public Law commented that the requirement under proposed section 80.5 is 'good additional protection.'[194]

5.150 Mr Bernie of the NSW Council for Civil Liberties suggested that a statutory director of public prosecutions would be a more appropriate and independent person to determine whether a prosecution should proceed.[195] Mr John von Doussa QC, President of HREOC, agreed with this proposal, suggesting that another compelling reason for adopting such a proposal would be that:

> …it is the nature of sedition that you are dealing with speech that is potentially in the political sphere. In that context maybe it is highly desirable to remove it from somebody who is perceived to be involved in that sphere.[196]

5.151 However, a representative of the Department pointed out that the Director of Public Prosecutions (DPP) is independent, and has been since 1983. He suggested that 'the Attorney is a political safeguard on the DPP and the DPP is a safeguard on the Attorney. So where you have the Attorney's consent it is a dual process'.[197]

5.152 The Castan Centre for Human Rights Law raised concerns about the lack of guidelines for the Attorney-General under these provisions:

> We recognise that there is, in a sense, a stopgap measure on the Attorney-General having to authorise any prosecution under this legislation. Our concern is that the legislation, as outlined here, does not actually contain precise guidelines for the Attorney-General to follow. It may well be that you end up going down to issues of popularity. John Pilger might not get prosecuted, but some obscure extremist religious figure might. In terms of governance by rule of law, issues come up when you do not actually have precise and predictable legal regimes for the administration of criminal law.[198]

5.153 A representative of the Department acknowledged that such guidelines could be considered in the future review of the provisions.[199] However, the representative argued that the safeguards and defences in the legislation would be sufficient to protect situations where the focus is on criticism of government policy and

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194 *Committee Hansard*, 14 November 2005, p. 68.

195 *Committee Hansard*, 17 November 2005, p. 33.

196 *Committee Hansard*, 17 November 2005, p. 50; see further HREOC, *Submission 158B*, pp 6-8 for discussion of the UK position.

197 *Committee Hansard*, 18 November 2005, p. 19.

198 Mr Ibrahim Abraham, Castan Centre for Human Rights Law, *Committee Hansard*, 14 November 2005, p. 53; see also *Submission 116*, p. 35.

199 *Committee Hansard*, 14 November 2005, p. 10.

decisions.[200] Indeed, the representative argued that the safeguards in the Bill are 'clearer and better than they were under the old offences'.[201]

5.154 As to other safeguards, the Law Council pointed out that the Bill does not contain a requirement, currently set out under subsection 24D(2) of the current sedition provisions in the Crimes Act, that a person cannot be convicted of sedition upon the uncorroborated testimony of one witness.[202]

Penalty increase

5.155 Finally, many submissions suggested that the penalty increase for sedition offences from three years to seven years imprisonment is excessive.[203] Mr Chris Connolly pointed out that the ACT Director of Public Prosecutions has questioned the need for 'such severe penalties':

> It does not seem to me, however, that the penalty for sedition should be increased as the essence of the offence consists only of urging another to act, and does not involve any actual act of violence in itself.[204]

5.156 The committee notes that the penalty increase is in line with the recommendations of the Gibbs Report, as discussed above.[205] Further, in response to concerns about the penalty increase, the Department also submitted that:

> The Australian Government regards the conduct that is captured by the amended sedition offences as sufficiently serious as to warrant an increase in the penalty from 3 years to 7 years imprisonment.[206]

5.157 A representative of the Department pointed out that the recent UK terrorist legislation also contains a penalty of seven years imprisonment for the offence of 'encouragement of terrorism'.[207] However, the committee notes that that offence is

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200 *Committee Hansard*, 14 November 2005, pp 9-10.

201 *Committee Hansard*, 14 November 2005, p. 10.

202 *Submission 140*, p. 21; see also Mr Patrick Emerton and Mr Joo-Cheong Tham, *Submission 152*, p. 56.

203 Mr Chris Connolly, *Submission 56*, p. 15; Law Council, *Submission 140*, p. 21; Liberty Victoria, *Submission 221*, pp 29-30.

204 *Submission 56*, p. 15; quoting ACT Director of Public Prosecutions, *Advice to the ACT Chief Minister on the Anti-Terrorism Bill 2005*, 20 October 2005, http://www.chiefminister.act.gov.au/docs/DPPadvice.pdf, p. 5 (accessed 18 November 2005).

205 Gibbs Report, p. 307; Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 16; Attorney-General's Department, *Submission 290A*, Attachment A, p. 23 and Attachment B, p. 25.

206 *Submission 290A*, Attachment A, p. 23.

207 *Committee Hansard*, 18 November 2005, p. 36; also *Submission 290A*, Attachment A, p. 23 and Attachment B, p. 25.

phrased quite differently to the proposed sedition offences in Schedule 7 of this Bill.[208]

Unlawful associations

5.158 As outlined above, Item 4 of Schedule 7 of the Bill amends section 30A of the Crimes Act to provide a definition of 'seditious intention' in the provisions relating to 'unlawful associations'. The committee notes that this definition is based on the definition of 'seditious intention' currently contained in section 24A of the Crimes Act.

5.159 Nevertheless, several submissions were concerned at this proposed amendment.[209] The Gilbert and Tobin Centre of Public Law submitted that:

> 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…This results in two inconsistent meanings of sedition in federal law (one in the Crimes Act, and another in the Criminal Code).[210]

5.160 Mr Chris Connolly raised several objections to the ability to ban 'unlawful associations' under Part IIA of the Crimes Act, including that it:

- does not require any link whatsoever to force, violence or assisting the enemy;
- is not subject to any 'good faith defence' or humanitarian defence;[211]
- appears to have no link at all to terrorism; and
- is linked to an archaic definition of 'seditious intention' that covers practically all forms of moderate civil disobedience and objection (including boycotts and peaceful marches).[212]

5.161 Mr Chris Connolly concluded the unlawful associations provisions in section 30A of the Crimes Act:

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208 See clause 1 of the UK Terrorism Bill 2005, available at: http://www.publications.parliament.uk/pa/cm200506/cmbills/055/2006055.pdf (accessed 21 November 2005).

209 See, for example, Fairfax and others, *Submission 88*, p. 11; Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 19; Mr Chris Connolly, *Submission 56*, p. 4; Uniting Church in Australia, *Submission 192*, pp 5-6; Australian Screen Directors Association, *Submission 146*, p. 3; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, pp 32-33; APC, *Submission 143*, p. 4; NAVA, *Submission 166*, p. 8; Liberty Victoria, *Submission 221*, p. 29; Castan Centre for Human Rights Law, *Submission 114*, pp 27-31.

210 *Submission 80*, p. 19.

211 See also Uniting Church in Australia, *Submission 192*, p. 5; and Bills Digest, pp 47-48, which suggests at p. 48 that 'if this is to be remedied, the provisions of section 24F [of the Crimes Act] need to be expressed to apply to subsection 30A(1)(b)'.

212 *Submission 56*, p. 4.

> …provide the Government with the ability to ban any organisation that opposes a Government decision and encourages protest or dissent that falls outside the law, no matter how slight or technical the breach.[213]

5.162 Similarly, the Uniting Church in Australia concluded that the definition of 'seditious intention' to be inserted by the Bill includes:

> …nonviolent civil disobedience as exemplified by religious and political leaders such as Mohandas Gandhi, Rev Dr Martin Luther King Jr, Archbishop Desmond Tutu, and a great many other prophets of history.[214]

5.163 As the Gilbert and Tobin Centre of Public Law observed, 'the law on unlawful associations is a remnant of an anti-democratic colonial era'.[215] Indeed, the committee notes that the Gibbs Report recommended the repeal of Part IIA of the Crimes Act in its entirety, including the provisions on 'unlawful associations' in section 30A.[216]

5.164 In response to the committee's questioning about the amendments to section 30A, a representative of the Department argued that Part IIA was not being 'refreshed' by the Bill, pointing out that Part IIA has 'been on the statute books for the whole time. It could have been prosecuted at any time'.[217] He further noted that 'there is no declared unlawful association that I am aware of and I do not think it has been used for a long time; I am not even aware of when it has been used.'[218] The representative also noted that an organisation declared to be an unlawful association has to be approved by the Federal Court.[219]

5.165 The Department further submitted that:

> …whether or not schedule 7 is enacted the unlawful association provisions will remain on the statute book. Schedule 7 simply preserves a definition so that the status quo is maintained. Suggestions that preserving the definition in some way re-invigorates the provisions are mistaken.[220]

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213 *Submission 56*, p. 4 and see p. 13 for examples of organisations that could potentially be banned under these provisions; see also Castan Centre for Human Rights Law, *Submission 114*, p. 28; and Fairfax and others, *Submission 88*, pp 11-12.

214 *Submission 192*, p. 6.

215 *Submission 80*, p. 19.

216 Gibbs Report, p. 335; see also Gilbert and Tobin Centre of Public Law, *Submission 80*, pp 16 and 19; Mr Robert Connolly, representative of the Arts and Creative Industries of Australia, *Committee Hansard*, 17 November 2005, p. 3.

217 *Committee Hansard*, 18 November 2005, p. 23 and also p. 41.

218 *Committee Hansard*, 18 November 2005, p. 41; also *Submission 290A*, Attachment A, p. 21.

219 *Committee Hansard*, 18 November 2005, p. 41.

220 *Submission 290A*, p. 4.

5.166 In any case, the representative stated that he expected that this issue would be examined as part of the review promised by the Attorney-General.[221] The representative further explained that a decision had been made that this Bill 'would not deal with the unlawful associations provisions in section 30A of the Crimes Act', but the repeal of the sedition provisions in the Crimes Act meant that a consequential amendment to section 30A of the Crimes Act was required.[222] The Department also later added that 'the Government has not fully considered the need for the retention of section 30A of the Crimes Act'.[223]

Sedition - the committee's view

5.167 The committee received an overwhelming amount of evidence in relation to the sedition provisions in Schedule 7 of the Bill. With the exception of the evidence from the Department and the AFP, this evidence indicated strong opposition to the sedition offences from all sectors of the community.

5.168 The committee agrees with many of the concerns raised in relation to the sedition provisions. The committee recognises that Schedule 7 is an attempt to update and modernise the existing offences of sedition already contained in the Crimes Act. However, the committee agrees with the evidence received that the removal of Schedule 7 from this Bill, pending the review foreshadowed by the Attorney-General, would not weaken Australia's anti-terrorist capacity given the nature of the existing law in this area. In particular, the committee is not convinced of an urgent need for the provisions in light of existing laws such as the offence of treason (in section 80.1 of the Criminal Code) and the crime of incitement (in section 11.4 of the Criminal Code).

5.169 The committee acknowledges concerns about the potential impact of the sedition provisions on freedom of speech in Australia. Despite the Department's various reassurances on this issue during the committee's inquiry, the committee is troubled by evidence of the potential for 'self-censorship' by a community cautious of the potential breadth of the provisions. The committee also notes the extensive expert legal evidence to this inquiry raising serious concerns about the provisions, including the clarity of various aspects, such as the fault elements and defences.

5.170 The committee acknowledges that the Attorney-General has committed to reviewing the sedition (and advocacy) provisions of the Bill next year. In that light, the committee agrees with the evidence received that it is inappropriate to enact legislation which is considered to be in need of review.

5.171 The committee therefore recommends that Schedule 7 be removed from the Bill in its entirety, pending a full and independent review. The committee suggests this review be carried out by the ALRC. This review should examine, among other

221 *Committee Hansard*, 14 November 2005, p. 8.

222 *Committee Hansard*, 14 November 2005, p. 8.

223 *Submission 290A*, Attachment A, p. 21.

matters, the appropriate legislative vehicle for addressing the issue of incitement to terrorism. The ALRC review should also consider the need for sedition laws such as those contained in Schedule 7, as well as the existing sedition offences in Part II of the Crimes Act.

5.172 The committee also notes the concerns raised about the 'unlawful associations' provisions in Part IIA of the Crimes Act, but accepts the evidence from the Department that the amendments in the Bill are simply consequential amendments to existing provisions of the Crimes Act. Nevertheless the committee recommends that the proposed ALRC review should also examine Part IIA of the Crimes Act.

Recommendation 27

5.173 The committee recommends that Schedule 7 be removed from the Bill in its entirety.

Recommendation 28

5.174 The committee recommends that the Australian Law Reform Commission conduct a public inquiry into the appropriate legislative vehicle for addressing the issue of incitement to terrorism. This review should examine, among other matters, the need for sedition provisions such as those contained in Schedule 7, as well as the existing offences against the government and Constitution in Part II and Part IIA of the *Crimes Act 1914*.

5.175 While the committee recommends the removal of Schedule 7 of the Bill, the committee makes an alternative set of recommendations if this recommendation is not accepted. These recommendations are designed to address some of the key concerns raised in evidence in relation to the sedition provisions. In particular, the committee recommends that:

- proposed subsections 80.2(7) and 80.2(8) should be amended to require a link to force or violence and to remove the phrase 'by any means whatever';
- all offences in proposed section 80.2 should be amended to expressly require intentional urging; and
- proposed section 80.3 (the defence for acts done 'in good faith') should be amended to remove the words 'in good faith' and extend the defence to include statements for journalistic, educational, artistic, scientific, religious or public interest purposes (along the lines of the defence in section 18D of the *Racial Discrimination Act 1975*).

Recommendation 29

5.176 If the above recommendation to remove Schedule 7 from the Bill is not accepted, the committee recommends that:

- **proposed subsections 80.2(7) and 80.2(8) in Schedule 7 be amended to require a link to force or violence and to remove the phrase 'by any means whatever';**

- **all offences in proposed section 80.2 in Schedule 7 be amended to expressly require intentional urging; and**
- **proposed section 80.3 (the defence for acts done 'in good faith') in Schedule 7 be amended to remove the words 'in good faith' and extend the defence to include statements for journalistic, educational, artistic, scientific, religious or public interest purposes (along the lines of the defence in section 18D of the *Racial Discrimination Act 1975*).**

Advocacy - outline of key provisions

5.177 Schedule 1 of the Bill expands the power to proscribe terrorist organisations under the Criminal Code by including organisations that 'advocate' the doing of a terrorist act.

5.178 Under the amendments proposed by this schedule, the Minister will have a discretion to proscribe an organisation under section 102.1 of the Criminal Code if he or she is satisfied on reasonable grounds that the organisation advocates the doing of a terrorist act — whether or not the terrorist act has occurred or will occur.

5.179 New subsection 102.1(1A) will define the term 'advocates' to include situations where an 'organisation':[224]

(a) directly or indirectly counsels or urges the doing of a terrorist act; or

(b) directly or indirectly provides instruction on the doing of a terrorist act; or

(c) directly praises the doing of a terrorist act.[225]

5.180 The Explanatory Memorandum states that:

> The definition [of 'advocates'] recognises that such communications and conduct are inherently dangerous because it could inspire a person to cause harm to the community. This could be the case where it may not be possible to show that the organisation intended that a particular terrorism offence be committed or even intended to communicate the material to that particular person. Accordingly, the definition is not limited to circumstances where a terrorist act has in fact occurred, but is available whether or not a terrorist act occurs.[226]

5.181 Advocating terrorism in itself will not attract criminal liability under these provisions. Rather, it may only be a ground for listing an organisation.[227] However, as a representative of the Department acknowledged during the committee's hearings, the

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224 Subsection 100.1(1) of the Criminal Code defines 'organisation' as a body corporate or an unincorporated body, whether or not the body (a) is based outside Australia; or (b) consists of persons who are not Australian citizens; or (c) is part of a larger organisation.

225 Note that section 100.1 of the Criminal Code defines 'terrorist act'.

226 p. 7.

227 p. 8.

effect of the advocacy amendments in Schedule 1 of the Bill is that 'membership and providing assistance to a listed organisation will become a serious offence in its own right.'[228] That is, if an organisation is listed as a terrorist organisation under these provisions, a range of offences relating to terrorist organisations become relevant, such as offences of:

- membership of a terrorist organisation;[229]
- providing training to, or receiving training from, a terrorist organisation;[230] or
- supporting, or associating with, a terrorist organisation.[231]

5.182 These offences contain penalties of up to 25 years imprisonment.[232]

Advocacy - key issues

5.183 Key concerns raised during the committee's inquiry about the proposed amendments relating to advocacy include:

- the impact of, and need for, the provisions;
- the breadth of the definition of 'advocate' and the nexus to terrorist activities;
- accountability of members for actions of others in their organisation; and
- concerns with the listing regime for 'terrorist organisations'.

Impact of, and need for, advocacy provisions

5.184 As with other aspects of the Bill, several submissions queried the need and justification for these provisions.[233] For example, ALHR suggested that, where a specific terrorist act is contemplated, then an organisation that directly incites another to do the act would fall within the current law prohibiting incitement, under section 11.4 of the Criminal Code.[234] The offence of incitement is discussed earlier in this chapter in the section on sedition.

5.185 AMCRAN also argued that there are already extensive offences relating to terrorist organisations, and that there is a lack of justification for the measures:

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228 *Committee Hansard*, 14 November 2005, p. 4.

229 Criminal Code, s. 102.3.

230 Criminal Code, s. 102.5.

231 Criminal Code, ss. 102.7 and 102.8.

232 See also Bills Digest, pp 7-8.

233 See, for example, Mr Joo-Cheong Tham and others, *Submission 81*, p. 32; PIAC, *Submission 142*, p. 28; Division of Law, Macquarie University, *Submission 168*, p. 6; Federation of Community Legal Centres (Vic), *Submission 167*, p. 10; AMCRAN, *Submission 157*, p. 11.

234 *Submission 139*, p. 6.

> …no evidence has been put forward to show that it would provide any measure of safety to the Australian people. Specifically, no clear justification has been given as to why the addition of 'advocating terrorism' as a listing criterion is necessary to prevent ideologically or religiously motivated violence or to strengthen security.[235]

5.186 The Federation of Community Legal Centres (Vic) noted the Explanatory Memorandum's justification, as outlined earlier in this chapter, that the communications and conduct covered by the definition of 'advocates' are 'inherently dangerous' because they could inspire a person to cause harm to the community.[236] However, in the Federation's view:

> …to say that such conduct 'could' inspire a person to commit terrorist acts actually indicates a tenuous link to actual terrorist acts. It does not, therefore, warrant the characterisation of 'inherently dangerous'. In turn, it is not justifiable to ban any organisation that has such tenuous links to actual terrorist activity.[237]

5.187 The Department further elaborated on the justification contained in the Explanatory Memorandum by providing examples of the type of conduct that the legislation is aimed at, including:

> …where the organisation has arranged for the distribution of a book that tells young people that it is their duty to travel overseas and kill Australian soldiers stationed in another country. Another [example] might be where the organisation puts a message on a web site following a terrorist act stating that it was a brave act that should be repeated.[238]

5.188 However, many submissions were also concerned that the consequences of an organisation being listed under the proposed provisions could result in potentially severe penalties for members under the offences relating to terrorist organisations.[239] As outlined above, some of these offences provide for penalties of up to 25 years imprisonment. As the Federation of Community Legal Centres (Vic) pointed out:

> These offences attract very serious sentences and most of them do not require actual knowledge, mere recklessness is enough. The possibility that people may be charged with such serious offences for simply being reckless in their connections with an organisation that merely praises the doing of a

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235 *Submission 157*, p. 11; see also Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, p. 21.

236 Explanatory Memorandum, p. 7.

237 *Submission 167*, p. 10; see also Division of Law, Macquarie University, *Submission 168*, p. 6.

238 *Submission 290A*, Attachment A, p. 7.

239 See, for example, Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, pp 21-22; Federation of Community Legal Centres (Vic), *Submission 167*, p. 11.

> terrorist act is an unjustifiable extension of Australia's counter-terrorism laws.[240]

5.189 Similarly, Mr Joo-Cheong Tham and others questioned the proportionality of the measures, arguing that if an organisation is listed under the provisions:

> This seems to impose a 'blanket' punishment that could affect hundreds of people, not on the basis of involvement in any terrorist act, but merely on the basis of a connection to an organisation that has, for example, a stated policy that people of occupied lands have the right to resist occupation.[241]

5.190 A representative of the Department told the committee that:

> Once an organisation is listed in the regulations as a terrorist organisation and that is gazetted, if you are a member of that organisation you need to cease that membership…otherwise you do find yourself committing an offence.[242]

5.191 Several submissions also criticised these amendments on the policy basis that they would limit freedom of speech.[243] For example, the Federation of Community Legal Centres (Vic) expressed its view that:

> In a liberal democracy it is not desirable that the executive be empowered to ban organisations for simply expressing praise for certain acts (however abhorrent those acts may seem to the broader public). It is the fundamental basis of any open, democratic society that its members be able to freely express their opinions, regardless of the content of those opinions. This amendment seriously jeopardises this fundamental precept.[244]

5.192 Similarly, Ms Agnes Chong of AMCRAN told the committee that:

> Our view is that criminal measures are a crude tool to use against such points of view and it is likely to be seen by the community as the government suppressing legitimate points of view that it could not oppose on the basis of reason or logic.[245]

5.193 PIAC submitted that:

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240 *Submission 167*, p. 11.

241 *Submission 81*, p. 33; see also, for example, AMCRAN, *Submission 157*, p. 13.

242 *Committee Hansard*, 18 November 2005, p. 25.

243 See for example, ALHR, *Submission 139*, p. 5; Mr Joo-Cheong Tham and others, *Submission 81*, p. 32; PIAC, *Submission 142*, p. 28; Islamic Women's Welfare Council of Victoria, *Submission 150*, p. 3; AMCRAN, *Submission 157*, pp 11-12 and see also Ms Agnes Chong, AMCRAN, *Committee Hansard*, 17 November 2005, pp 19-20; Federation of Community Legal Centres (Vic), *Submission 167*, pp 9-10; Division of Law, Macquarie University, *Submission 168*, p. 6; Liberty Victoria, *Submission 221*, p. 35. Note also that freedom of speech issues are discussed further in the section on sedition earlier in this chapter.

244 *Submission 167*, pp 9-10.

245 *Committee Hansard*, 17 November 2005, p. 20.

> …the approach of proscription on expanding bases is not an effective approach. It over-criminalises ordinary acts, including critical or dissenting speech, and criminalises, by association, others who may not be aware of or share the views expressed.[246]

5.194 PIAC suggested that Schedule 1 be amended to require the Minister to consider the effect of any such proscription upon certain human rights, such as freedom of expression and freedom of association. They further suggested that any regulation that proscribes an organisation as a terrorist organisation should be accompanied by a Human Rights Impact Statement.[247]

5.195 The Division of Law at Macquarie University also queried the constitutional validity of the provisions due to their impact on freedom of speech.[248] First, citing the Communist Party Case,[249] the Division argued that:

> A law that criminalises organisations challenges fundamental constitutional protections of freedom of speech contained in the rule of law and the separation of powers, both of which limit the extent of Commonwealth legislative power.[250]

5.196 It also argued that it could breach the implied constitutional freedom of political communication, on the basis that 'expressing opinions about the merits of terrorist activity in the name of a political or ideological cause is, by its nature, political.'[251]

5.197 The Gilbert and Tobin Centre of Public Law made no comment on the implied constitutional freedom of political communication, but did suggest that the provisions may infringe the express constitutional protection of the free exercise of religion in section 116 of the Constitution. It also felt that they could violate Australia's obligation to protect freedom of association under Article 22 of the ICCPR, since 'it is disproportionate to restrict the association of the harmless many to suppress the association of a harmful few.'[252]

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246 *Submission 142*, p. 28; see also Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 33.

247 *Submission 142A*, pp 9-10; see also Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 33; PIAC, *Submission 142*, p. 28.

248 *Submission 168*, pp 5-6.

249 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

250 *Submission 168*, p. 5.

251 *Submission 168*, p. 5; see also Mr Joo-Cheong Tham and others, *Submission 81*, p. 7.

252 *Submission 80*, p. 6.

5.198 As with other aspects of the Bill, it was also suggested that these amendments may have a particular impact on Muslim community groups.[253] For example, AMCRAN put forward the argument that Muslim community groups:

> …may wish to express solidarity with Muslims who are under the thumb of either oppressive regimes or various kinds of occupying forces. This is particularly the case, as the definition of a terrorist act makes no distinction between legitimate liberation and independence movements and terrorism. Examples of such situation would include commentary on Palestinian oppression at the hands of Israeli occupiers; and groups calling, on the basis of things like the torture in Abu Ghraib, that America and its allies be forced out of Iraq by any means necessary. It is our view that the above point of view, while unpalatable to some, should not be limited.[254]

5.199 However, Dr Waleed Kadous of AMCRAN acknowledged, in response to the committee's questioning, that 'there is not a clear line or a distinction between resistance movements and terrorism'.[255] Nevertheless, Dr Kadous told the committee that the current definition of 'advocates' is 'too broad' and:

> The perception in the Muslim community will be that the reason the laws are being introduced is to prevent open discussion because they cannot be handled through the normal course of debate and logic that occurs…When I met with approximately 10 religious leaders on Saturday to discuss the sedition offences, it was their perception that these laws were tailored to them. I had to convince them that they were not tailored to them. I was in the unusual position of having to defend this particular legislation and say that I really do not think this is targeted at the Muslim community. It has an undue impact on the Muslim community but that is not the same thing as saying it is targeted at the Muslim community.[256]

Definition of 'advocates' and nexus to terrorist activities

5.200 Submissions variously described the proposed definition of 'advocates' in Schedule 1 as 'too broad', 'vague', 'uncertain' and 'unclear'.[257] Proposed paragraph (c), which refers to an organisation that directly praises the doing of a terrorist act, was

253 See, for example, Islamic Women's Welfare Council of Victoria, *Submission 150*, p. 3; AMCRAN, *Submission 157*, p. 12.

254 *Submission 157*, p. 12.

255 *Committee Hansard*, 17 November 2005, p. 20.

256 *Committee Hansard*, 17 November 2005, p. 21.

257 See, for example, Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 33 and also *Submission 161*, p. 16; AMCRAN, *Submission 157*, p. 12; Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, pp 20-21; Liberty Victoria, *Submission 221*, p. 35.

particularly criticised for being 'too broad' and for not requiring clear connection to terrorist-related activities.[258]

5.201 For example, the Federation of Community Legal Centres (Vic) was concerned that the amendments would sever 'the link between proscription and concrete acts of political violence, particularly insofar as indirect counselling of a terrorist act or mere praise of a terrorist act may trigger proscription.'[259]

5.202 The NSW Council for Civil Liberties expressed concern that the provisions would cover:

> …organisations not involved in any terrorist activity but [which] are expressing opinions about terrorist activity. This is clearly unacceptable. Any Tamil or Palestinian support organisations could be banned under these provisions… The present proposals have a flavour of political suppression about them which is unacceptable in any democracy. Banning of organisations on the basis of alleged advocacy rather than activities is fraught with danger.[260]

5.203 In the same vein, AMCRAN argued that:

> A particular concern with any broadening of the existing grounds for the listing of organisations as 'terrorist' would be the severing of any required nexus between proscription, and the organisation's link to acts of political violence. For example, an organisation may become liable to proscription simply on the grounds that it has voiced support for a political struggle somewhere in the world.[261]

5.204 Mr Patrick Emerton and Mr Joo-Cheong Tham were similarly concerned that:

> Given the very large number of community, religious and political organisations in Australia and around the world which from time to time express praise for acts of political violence – whether that be commending the United States on its invasion of Iraq, or expressing support for organisations resisting oppressive regimes – this is a very real power to target organisations and their members on the basis of nothing more than their political or religious orientation.[262]

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258 See, for example, the Gilbert and Tobin Centre of Public Law, *Submission 80*, p. 6; PIAC, *Submission 142*, p. 28; Mr Patrick Emerton and Mr Joo-Cheong Tham, *Submission 152*, p. 51; Federation of Community Legal Centres (Vic), *Submission 167*, p. 10; Division of Law, Macquarie University, *Submission 168*, p. 3; Dr Ameer Ali, Australian Federation of Islamic Council, *Committee Hansard*, 17 November 2005, p. 28; Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 33.

259 *Submission 167*, p. 10.

260 *Submission 161*, p. 17.

261 *Submission 157*, p. 11.

262 Mr Patrick Emerton and Mr Joo-Cheong Tham, *Submission 152*, p. 51.

5.205 In contrast, the committee notes that the Explanatory Memorandum states that 'the advocacy would need to be about [a terrorist] act, not generalised support of a cause'.[263] Indeed, a representative of the Department told the committee that broad, general statements supporting resistance movements would not come under the proposed provisions – the statements would advocating terrorism would need to praise a specific, violent terrorist act.[264]

5.206 Indeed, the Department submitted that the definition of 'advocates' 'achieves the right balance, and is not too broad'.[265]

5.207 However, the committee notes that recent similar proposals in the UK would enable the proscription of organisations that promote or encourage terrorism, including activities which 'glorify' acts of terrorism (which includes any form of praise or celebration). However, it was pointed out to the committee that the UK proposal is limited to circumstances where a reasonable person would infer the act should be emulated.[266]

5.208 In relation to concerns that the definition of 'advocates' is too broad, the Department submitted that:

> It should be borne in mind that the definition of 'advocates' (and the offences that rely on that definition) only relates to the process for listing a terrorist organisation in regulations, a process that contains significant safeguards and limitations, including requiring consultation with the States and with the leader of the Opposition. In contrast with the other types of terrorist organisations under the Criminal Code, it is not possible to prove an offence of, for example, association with a terrorist organisation that advocates terrorism, unless that organisation has been listed in regulations. This is regarded as a significant additional safeguard relating to the advocacy definition.[267]

5.209 The committee asked the Department whether the provisions, particularly paragraph (c) of the definition of 'advocates', could be amended to include some qualifying words. One suggestion for qualifying words was to require that the praise is made with the intention, or in circumstances where it is likely to have the effect, of creating a substantial risk of a terrorist act occurring. A representative of the

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263 p. 7.

264 *Committee Hansard*, 18 November 2005, pp 20-21; also *Submission 290A*, Attachment A, p. 7.

265 *Submission 290A*, Attachment A, p. 7.

266 NOWAR SA, *Submission 255*, p. 3; see also Dr Ameer Ali, Australian Federation of Islamic Council, *Committee Hansard*, 17 November 2005, p. 28 and clause 21 of the UK Terrorism Bill 2005, available at: http://www.publications.parliament.uk/pa/cm200506/cmbills/055/2006055.pdf (accessed 21 November 2005).

267 *Submission 290A*, Attachment A, p. 7.

Department responded that such an amendment would probably be within the scope of the policy of the provision.[268]

Accountability of members for actions of others in their organisation

5.210 Several submissions suggested that the advocacy provisions in Schedule 1 raise issues of accountability of members for the statements of others in their group – statements which other members may not even agree with.[269] For example, AMCRAN submitted that:

> …there is vagueness as to what is meant for an organisation to 'advocate' terrorism. Does it mean that the leader of the organisation has made comments on one occasion publicly 'advocating terrorism'? Is there a requirement that the comments be made on multiple occasions? Is it sufficient for someone on the forums of a web site to have made statements advocating terrorism? Or is advocacy limited to it being stated as one of the doctrines of the organisation? This is very different from the doing of a terrorist act, which clearly requires logistical support and coordinated acts, rather than the speech of a single individual.[270]

5.211 In the same vein, Mr Bernie of the NSW Council for Civil Liberties pointed out that the advocacy provisions do 'not indicate at what level an organisation would be said to be advocating terrorism. Is it because one member says it? Is it because a leader says it? Or is it if it is in the aims of the organisation?'[271]

5.212 Likewise, PIAC was concerned that:

> An organisation risks being proscribed on the basis that a member, who is not necessarily representative of the organisation, advocates the doing of a terrorist act or praises the commission of such an act. This then has a flow on effect to other members of the organisation through the fact that membership of a proscribed organisation is, in itself, a criminal offence.[272]

5.213 The Gilbert and Tobin Centre of Public Law described the amendments in Schedule 1 of the Bill as:

> …an extraordinary extension of the power of proscription and of criminal liability, since it collectively punishes members of groups for the actions of

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268 *Committee Hansard*, 18 November 2005, p. 16; see also *Submission 290A*, Attachment A, p. 7.

269 See, for example, AMCRAN, *Submission 157*, pp 12-13 and also Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, p. 22; NTEU, *Submission 159*, p. 5; Mr David Bernie, NSW Council for Civil Liberties, *Committee Hansard*, 17 November 2005, p. 33 and also *Submission 161*, pp 16-17; Division of Law, Macquarie University, *Submission 168*, p. 3; Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 33; PIAC, *Submission 142*, p. 28.

270 *Submission 157*, p. 12.

271 *Committee Hansard*, 17 November 2005, p. 33.

272 *Submission 142*, p. 28.

> their associates beyond their control. It is also misapplication of criminal law to trivial harm, when criminological policy presupposes that criminal law should be reserved for the most serious social harms.[273]

5.214 The Gilbert and Tobin Centre of Public Law submitted that:

> 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 specific 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.[274]

5.215 The Centre raised the following example as a problematic possibility:

> …places of religious worship…may be closed down merely because someone in it praised a terrorist act, such as where a preacher asks God to grant victory to the mujahedeen in Iraq. This would collectively punish all worshippers for the view of a wayward leader.[275]

5.216 As the Parliamentary Library's Bills Digest pointed out:

> It is not clear from the amendments whether or under what circumstances direct praise by a member of an organisation would be treated as direct praise by the organisation.[276]

5.217 AMCRAN suggested in its submission that, at the very least, the criteria for 'advocating' on behalf of an organisation should be clarified. AMCRAN suggested that possible criteria could include that:

> (i) the statements are made by the acknowledged leader of the organisation; and
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> (ii) the statements are made on official material distributed or speeches given by the leader; and
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> (iii) the statements are made in public conversation; and
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> (iv) the statements are made on more than 5 occasions.[277]

5.218 In response to the committee's questioning on this issue, a representative of the Department responded that all the circumstances would need to be carefully considered, and that a range of evidence would be required to establish 'whether there

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273 *Submission 80*, p. 6.

274 *Submission 80*, p. 6.

275 *Submission 80*, p. 6.

276 p. 9.

277 *Submission 157*, p. 13; see also Dr Waleed Kadous, AMCRAN, *Committee Hansard*, 17 November 2005, p. 24.

was a similarity of mind about a particular organisation'.[278] The representative suggested that the comments of an individual alone would not result in an organisation becoming listed, even if that person were the leader of the organisation. Rather, the whole conduct of the organisation would need to be examined to determine whether the advocacy was an 'organisational position'.[279]

5.219 A representative of the Department further explained that the sedition offences (in Schedule 7) are offences aimed at individuals, whereas the amendments to section 102.1 target organisations who advocate sedition.[280]

5.220 The committee queried whether an individual offence of advocating terrorism (with appropriate defences) could be included in Schedule 1 of the Bill, instead of the proposed new sedition offences in Schedule 7 of the Bill.[281] A representative of the Department raised some concerns with this proposal, noting that, unlike the sedition provisions, it would require a reference of power from the states because it would then come within the terrorism provisions. However, he acknowledged that this issue could be considered in the Attorney-General's review of the proposed provisions.[282]

5.221 The committee also notes that, in the Bill's second reading speech, the Attorney-General appears to indicate that the Security Legislation Review Committee could have this matter referred to it for consideration and review:

> I will be asking that committee to examine some issues relevant to individual advocacy which have been raised with me.[283]

Concerns with the existing proscription regime

5.222 The Division of Law at Macquarie University expressed concern that amendments in Schedule 1 give the Minister a broader power to proscribe a wide range of organisations, without sufficient safeguards and guidance in the legislation to ensure that the Minister will exercise his or her discretion responsibly.[284]

5.223 However, a representative of the Department pointed out that, under the process for proscribing terrorist organisations:

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278 *Committee Hansard*, 18 November 2005, p. 21; see also AFP, *Committee Hansard*, 17 November 2005, p. 75; and AFP, *Submission 195A*, p. 9.

279 *Committee Hansard*, 18 November 2005, pp 16-17 and 25.

280 *Committee Hansard*, 14 November 2005, pp 4 and 8.

281 Senators Mason and Brandis had queried whether, instead of seeking to revise sedition laws, it would be more effective to criminalise incitement or advocacy by both organisations and individuals of the doing of a terrorist act: *Committee Hansard*, 18 November 2005, p. 22.

282 *Committee Hansard*, 18 November 2005, p. 23 and see also p. 22.

283 The Hon Philip Ruddock MP, *House of Representatives Hansard,* 3 November 2005, p. 68.

284 *Submission 168*, p. 4.

> The listing does not occur without consultation with the states and the making of regulations, which can be disallowed.[285]

5.224 The Bills Digest also notes that the Parliamentary Joint Committee on ASIO, ASIS and DSD may review a regulation specifying an organisation as a terrorist organisation.[286]

5.225 Nevertheless, several submissions were critical of the existing proscription regime under the Criminal Code, and for them, these provisions simply compounded their existing concerns.[287] For example, Mr Joo-Cheong Tham and others suggested that:

> The proposal to extend the listing criteria to cover organisations that advocate terrorism would only exacerbate the problems that have been persistently identified in relation to the existing proscription regime.[288]

5.226 Mr Joo-Cheong Tham and others concluded:

> The proposal to extend the criteria would substantially increase this confusion and lack of transparency. In particular, the adoption of vague concepts such as 'advocating' terrorism would only serve to exacerbate the arbitrary nature of the proscription regime.[289]

5.227 Similarly, the Federation of Community Legal Centres (Vic) stated that it:

> …is in principle opposed to the proscription of organisations by the Executive, particularly with such broad discretion, expansive criteria and limited judicial oversight as result from the legislative regime around proscription. Broadening the proscription power only heightens these concerns.[290]

5.228 The Federation of Community Legal Centres (Vic) also raised concerns about the breadth of the existing definition of 'terrorist act' in section 100.1 of the Criminal Code when combined with the proposed amendments. It argued that:

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285 *Committee Hansard*, 14 November 2005, p. 4; see also Bills Digest, p. 7, which notes that subclause 3.4(3) of the *Inter-Governmental Agreement on Counterterrorism Laws* states that the Commonwealth will provide the states and territories with the 'text of the proposed regulation and will use its best endeavours to give the other parties reasonable time to consider and comment on the proposed regulations'.

286 p. 7; see also Attorney-General's Department, *Committee Hansard*, 18 November 2005, p. 25.

287 See, for example, Mr Joo-Cheong Tham and others, *Submission 81*, p. 31; AMCRAN, *Submission 157*, p. 10; Federation of Community Legal Centres (Vic), *Submission 167*, pp 9-11.

288 *Submission 81*, p. 31.

289 *Submission 81*, p. 32.

290 *Submission 167*, p. 9.

> The expansiveness of this definition [of 'terrorist act'] coupled with the Minister's wide discretion to proscribe means that [any further] extension of this power is of serious concern.[291]

Advocacy - the committee's view

5.229 The committee acknowledges that the Attorney-General has committed to reviewing the advocacy provisions in Schedule 1 of the Bill (along with the sedition offences proposed by Schedule 7 of the Bill). Once again, the committee queries the wisdom of enacting provisions which are already considered to be in need of review. However, in the case of the advocacy provisions in Schedule 1, the committee accepts that advocating terrorism will not in itself attract criminal liability under these provisions, but is merely a ground for listing an organisation as a 'terrorist organisation'. The committee further recognises that this listing is subject to parliamentary scrutiny under the existing provisions for listing terrorist organisations under the Criminal Code.

5.230 The committee notes concerns about the process for listing 'terrorist organisations' under the Criminal Code, but considers that the concerns with these existing provisions are outside the scope of this inquiry. Further, the committee recognises that this is a matter which can be considered by the Security Legislation Review Committee in its review of existing counter-terrorism laws.

5.231 However, the committee acknowledges the concerns raised in evidence and submissions about Schedule 1 of the Bill, including in relation to the potential breadth of the definition of 'advocates'. Therefore, the committee recommends that the amendments in Schedule 1 of the Bill be included in the proposed review by the ALRC, as recommended in relation to Schedule 7 above.

5.232 The committee also supports suggestions that individual advocacy could be included in this Schedule, but notes that the Attorney-General has stated in his second reading speech that this matter will be considered by the Security Legislation Review Committee in its review of existing counter-terrorism laws.

Recommendation 30

5.233 The committee recommends that the amendments in Schedule 1 of the Bill, relating to advocacy of terrorism, be included in the proposed review by the Australian Law Reform Commission as recommended above in relation to Schedule 7.

5.234 However, as an interim measure pending this ALRC review, the committee recommends two amendments be made to the provisions. First, the committee acknowledges concerns raised about the breadth of the definition of 'advocates' and

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291 *Submission 167*, p. 9; see also Ms Jane Stratton, PIAC, *Committee Hansard*, 14 November 2005, p. 33 and PIAC, *Submission 142*, p. 28; Liberty Victoria, *Submission 221*, p. 35.

the fact that only a distant nexus to actual terrorist activities appears to be required under the provisions. In this context, the committee is particularly concerned that paragraph (c) of the definition of advocates merely refers to situations where an organisation 'directly praises the doing of a terrorist act'.

5.235 The committee therefore recommends that paragraph (c) of the definition of 'advocates' in the Bill be qualified to require that the praise is made with the intention, or is made in circumstances where it is likely to have the effect, of creating a substantial risk of a terrorist act occurring. The committee notes that the Department acknowledged in its evidence that this proposal would be consistent with the policy objectives of the provisions.

Recommendation 31

5.236 The committee recommends that proposed paragraph (c) of the definition of 'advocates' in Item 9 of Schedule 1 be amended to require that the praise be made with the intention, or in circumstances where it is likely to have the effect, of creating a substantial risk of a terrorist act occurring.

5.237 The committee also recognises concerns about the lack of clear criteria for determining the circumstances under which advocacy of terrorism can be attributed to an organisation. The committee particularly notes concerns that members of an organisation might be accountable for actions of others in their group which are beyond their control. The committee therefore recommends that the definition of 'advocates' in Schedule 1 be amended to include criteria to clarify the circumstances to be taken into account in deciding whether the advocacy of terrorism is an 'organisational position'. In this context, the committee notes the suggestion by AMCRAN that possible criteria could include, for example, that the statements advocating terrorism are made by the acknowledged leader of the organisation; are made on official material distributed or speeches given by the leader or organisation; and the statements are made on multiple occasions.

5.238 The committee considers that this is consistent with the evidence from the Department that these sorts of matters would be considered in any case before an organisation could be listed under these provisions. For example, the Department told the committee that single statements by individual members would be unlikely to be attributed to the organisation as a whole. However, the committee believes that this should be clarified by expressly including relevant criteria in the legislation.

Recommendation 32

5.239 The committee recommends that the proposed definition of 'advocates' in Item 9 of Schedule 1 be amended to include criteria to clarify the circumstances to be taken into account in determining whether an 'organisation' may be considered to 'advocate terrorism'. This criteria could include, for example, that the statements advocating terrorism are made by the acknowledged leader of the organisation; are made on official material distributed or speeches given by the leader or organisation; and the statements are made on multiple occasions.