Australian Senate

Legal and Constitutional Legislation Committee

Inquiry into the *Anti-Terrorism (No. 2) Bill 2005*

A joint submission by

Representatives of the Arts and Creative Industries of Australia

11 November 2005

c- Arenafilm Pty Ltd, Level 2, 270 Devonshire Street, Surry Hills, NSW, 2010 tel (02) 9319 7011 fax (02) 9319 6906

11 November 2005

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Email: legcon.sen@aph.gov.au

Dear Committee Secretary and Senators,

Sedition offences in the *Anti-Terrorism (No. 2) Bill 2005*

On 31 October 2005 an extraordinary meeting of Australian writers, artists, filmmakers, publishers, composers and their representative organisations unanimously opposed the proposed sedition offences in the *Anti-Terrorism (No. 2) Bill 2005*, currently contained in Schedule 7 of the Bill.

Since that meeting, this group has campaigned against these offences. We are firmly of the opinion that the proposed changes go further than the Government's stated intention of modernising and updating existing sedition provisions in Australian law, and remain opposed to their enactment.

We are pleased to have the opportunity to make a written submission to the Committee that outlines the key areas of concern that we have in regards to the proposed changes to Australia's sedition laws.

We have also attached the following documents in support of this submission:

A. A list of the representatives of the Australian arts and creative industries who endorse this submission.

B. Brett Walker SC, legal opinion 24 October 2005 (Walker Opinion)

C. Peter Gray SC, legal opinion 28 October 2005 (Gray Opinion)

We would welcome the opportunity to appear before your Committee to support this submission.

Yours sincerely,

Robert Connolly

Filmmaker, Arenafilm Pty Ltd

(on behalf of representatives of the arts and creative industries of Australia)

c- Arenafilm Pty Ltd, Level 2, 270 Devonshire Street, Surry Hills, NSW, 2010 tel (02) 9319 7011 fax (02) 9319 6906

EXECUTIVE SUMMARY

- The proposed sedition offences in the *Anti-Terrorism (No 2) Bill 2005* are unnecessary, stifle legitimate debate, are too broad and are unfair. They pose a real threat to freedom of expression, including artistic and creative expression, in our democracy and accordingly they should be removed from the proposed Ant-Terrorist Bill in their entirety.

- Arguments about the limits of freedom of expression in our democracy must not be confused with arguments about powers that may be necessary to avert violent terrorist attack. Accordingly, the proposed sedition offences should be examined, debated and voted on separately from the other provisions of the Bill.

- If the proposed sedition offences are enacted in any form, the review of these offences promised by the Attorney-General should be independent of the Government; should invite, and allow reasonable time for, submissions from the Australian public in general and artists in particular; and its findings should be publicly available.

1. INTRODUCTION

The proposed sedition offences in the Anti-Terrorism Bill (no. 2) 2005 pose a genuine threat to freedom of expression, including artistic and creative expression, in our democracy.

Speaking as representatives of the arts community, we are concerned about not only how these proposed laws will affect the professional lives of artists, writers and filmmakers, but also anyone in the general public engaging in what they would consider as legitimate expression.

Given the serious potential implications of the Bill we are concerned that there has not been better consultation on the proposed sedition offences than has occurred to date. There has been insufficient time and opportunity for the Australian public to examine and debate these provisions.

We are happy to provide any further information about our position on these proposed offences, should this be of assistance to the inquiry.

We would also welcome the opportunity to appear before the Committee on this matter.

2. KEY CONCERNS

There are four key reasons why the proposed sedition offences in Schedule 7 of the *Anti-Terrorism (No 2) Bill 2005* should not pass into law. In our view they:

- Are unnecessary
- Stifle legitimate dissent
- Are too broad
- Are unfair.

2.1. The sedition offences are unnecessary

We can see no convincing argument to support the proposition that the new sedition offences included in the Bill are necessary to combat the threat of terrorism. As lawyer Chris Connolly of the University of New South Wales notes in section 4.1 of his own submission to this Senate Committee dated 7 November 2005 (Connolly Submission), sedition laws 'are not required to tackle terrorism as we already have appropriate laws in place to prohibit racial vilification, terrorist acts, terrorist funding and membership of (banned) terrorist organisations.' These laws include the Government's legislative response to the 9/11 events, the far-reaching *Security Legislation Amendment (Terrorism) Act 2002*.

See also the Walker Opinion (pages 2,3).

The Government has made no compelling argument outlining why these proposed sedition offences are necessary as additional measures - including as an alternative to existing or reformed anti-vilification laws.

2.2. The sedition provisions stifle legitimate dissent

Sedition is an archaic law that has not been used in Australia for decades. Historically however, in Australia and overseas, sedition laws have been used in a dangerously politicised way to suppress legitimate dissent.

Historically, sedition laws have been used against Mahatma Gandhi, Nelson Mandela, the supporters of the Eureka Stockade, the Sydney arm of the anti-conscription organisation Industrial Workers of the World (IWW) in World War I, and members of the Australian Communist Party during the Cold War. Even where sedition prosecutions have not succeeded, the threat of criminal sanction under these provisions has had a 'muffling' effect on legitimate dissent. We refer you to the Connolly Submission where these examples and others are set out in greater detail.

In his legal opinion dated 24 October 2005, Brett Walker SC puts it bluntly: 'Sedition has been described as a grotesque anachronism in a society which prides itself on being free and open and pluralist' (Annexure B, page 6,7).

A number of members of the Government apparently share this view - not just in relation to the proposed sedition provisions in the Bill, but also in relation to Australia's existing (and less far-reaching) sedition laws. For example, Senator George Brandis has reportedly stated that sedition laws are 'obsolete, dating from Elizabethan times' and 'should be off the law books entirely'.

Here the special democratic contribution of artists deserves mention. Historically, artists like Athol Fugard writing under South African apartheid, Vaclav Havel writing under Czech communism, and Arthur Miller attacking McCarthyism in *The Crucible*, have played a vitally important democratic role as dissenters from accepted, mainstream views. A more contemporary example is British playwright David Hare's *Stuff Happens*, a work that poses probing, difficult and vitally important questions about the current war in Iraq. We need our Fugards, Havels, Millers and Hares and their Australian equivalents, perhaps now more than ever.

2.3. The sedition offences are too broad

The proposed sedition offences claim to update and modernise Australia's existing, archaic sedition provisions. As currently drafted, however, the proposed sedition offences in the Bill can fairly be described as a regressive step. Their potential application is broader, and more restrictive of legitimate freedom of expression, than either the current sedition law or the desirable law in a modern Western democracy such as Australia.

The Connolly Submission notes that the definition of seditious intention is so broad as to include all forms of moderate civil disobedience including protests and peaceful marches. This leaves open the possibility that artists and media will be stifled and/or limited from political comment and debate.

Peter Gray SC also notes in his advice of 28 October that in some of the proposed offences it is not necessary to show that there was any subjective intention on behalf of the accused (Annexure C, pages 3, 4). In some cases the accused will not even need to be shown to have intended the end result.

2.4. The sedition offences are unfair

A detailed critique of the content of these proposed sedition provisions is contained in the Walker Opinion, the Connolly submission and the Gray Opinion. We share the concerns raised in this legal analysis, including concerns about the potential application of the sedition provisions to creative and artistic expression. We are particularly concerned about the following:

- the removal of the established requirement that seditious behaviour be linked to force or violence;
- the very limited nature of the good faith defence - which apparently does not cover artistic expression, satire, journalism, education and other forms of expression that are both legitimate and desirable in a democracy, and which does not protect associations;
- the reversal of the accepted onus of proof in Australian criminal law, so that the accused must prove their innocence; and
- the proposed power to ban 'unlawful associations' for expressions of seditious intention, as well as the extremely broad definition of seditious intention in this context.

3. FREEDOM OF EXPRESSION IN THE ARTS

We have welcomed the assurance by the Prime Minister that the provisions of this Bill are not intended to have an impact on the freedom of speech enjoyed by all Australians and valued as an important part of our way of life. Regardless of the current political intention behind this Bill, we cannot see how the poorly and broadly drafted sedition provisions in this Bill fulfil this important promise.

As Peter Gray SC puts it generally (Annexure C, page 6) -

> At the very least, it seems to me that the increased uncertainty about the scope of the new offences and the potential severity of the punishment for them would inevitably tend to stifle, or to drive underground, the free expression of opinion and of creative or artistic responses to public and governmental affairs.

More specifically, Gray outlines why an artistic work along the lines of Hare's *Stuff Happens* would arguably contravene these proposed sedition provisions, then continues (pages 5-6):

Risks of contraventions of provisions of the Bill would arise, perhaps in a more acute way, with for example:

- a play or film or television programme depicting in a sympathetic or even non-hostile way the policies and strategies or motivations of the Iraqi insurgents, or of al-Quaida, or of other groups which may from time to time be at war with or engaged in armed hostilities with Australia

- a newspaper or magazine article, or book, which took a similar non-critical or explanatory approach, even if based on factual material which as completely accurate

- a song, or picture, or written work, which expressed corresponding sentiments or which utilised the musical or artistic or literary traditions or styles associated with the culture of a hostile organisation or country in a way which signified sympathy with or admiration of that culture

- any imaginative/creative work (literary, visual or other) which repeated or included seditious views expressed by others

In all of these hypothetical cases, the play, or film, or book, or song, or picture, or television programme could well be found to constitute, objectively, the [unlawful] 'urging' of a person or persons exposed to it to engaged in proscribed conduct. In any such case, ordinarily all those involved in the dissemination of such works would potentially be guilty of sedition under the Bill: writers, directors, producers, actors, singers, painters, editors, publishers, distributors, broadcasters. All would arguably have 'urged' such conduct.

4. SEPARATE THE SEDITION DEBATE FROM THE BROADER SECURITY DEBATE

The full package of legal provisions in the *Anti-Terrorism Bill (No. 2) 2005* stands against the backdrop of considerable concern in the Australian community about security and terrorism. In turn, the provisions of the Bill itself have generated considerable community fear about the democratic implications of a radical new legal regime to combat terrorism. To an extent these fears have clouded rational debate about whether the provisions of this Bill are the best way to deal with terrorism.

The parts of this Bill that relate to control orders, preventative detention, ASIO powers and secret policing in general, raise many important questions about where to strike the balance between liberty and security so that our democracy is enhanced, not undermined.

The proposed sedition provisions in this Bill also raise questions about balancing liberty and security in our democracy, but in doing so engage a range of different interests and concerns. Arguments about the limits of freedom of expression in our democracy must not be confused with arguments about powers that may be necessary to avert violent terrorist attack.

Accordingly, as a procedural question the proposed sedition offences should be examined, debated and voted on separately from the other provisions of the Bill.

For the avoidance of any doubt, nothing in this submission - nor in our general opposition to the proposed sedition laws - should be read as implying support for the non-sedition provisions proposed in this Bill.

5. INDEPENDENT REVIEW

The Attorney General has recently promised a review of sedition, in order to address the concerns of people like us who are concerned about what these changes could mean.

We maintain that these proposed sedition offences should not be enacted, and that any review that takes place about the issue of sedition should be done prior to any updating of sedition law, rather than after its introduction.

Should Schedule 7 become legislation, however, in its current or any amended form, we recommend the following in relation to the review of these offences.

- the review should be independent of the Government
- the review should invite, and allow reasonable time for, submissions from the Australian public in general and artists in particular; and
- the findings of the review should be publicly available in a written form, within a reasonable time of the conclusion of the review.

ANNEXURE A

Australian Publishers Association (APA)
Australian Screen Director's Association (ASDA)
Australian Writers' Guild (AWG)
Australian Society of Authors (ASA)
Independent Producer's Initiative (IPI)
Screen Producer's Association Australia (SPAA)
Sydney PEN
The Australian Screen Editors Guild
PEN international, Melbourne
Sydney Theatre Company
The National Association for the Visual Arts (NAVA)
Currency Press
Arts Industry Council (Victoria)
Australian Library and Information Association
Australian Dance Council
Dr Natasha Cica, Writer
Robyn Nevin, AM
Margaret Pomeranz, Film Critic
Anthony Buckley AM, Film Producer
David Williamson, Writer
Geoffrey Atherden, Writer
Laura Jones, Writer
Hilary Bell, Playwright
Alana Valentine, Playwright
Simon Hopkinson, Writer
Stephen Sewell, Playwright
Errol O'Neill, Writer
Katherine Thompson, Writer
Paul Goldman, Film Director
Christopher Lee – Screenwriter
John Maynard, Producer
Jane Scott, Film Producer
Warren Coleman, Writer
John Coulter, Writer
Patricia Cornelius, Playwright
Dr Rosemary Creswell
Nicholas Hope, Actor
Genevieve Picot
Hannie Rayson, Playwright
Sue Smith, Scriptwriter
Roger McDonald, Author
Peter Poynton Barrister-at-Law
Peter Duncan, Writer/Director

Lisa Thompson, Writer

David Bradbury, Film-maker
Bill Garner, Writer
Verity Laughton, Playwright
Tim Pye, Writer
Tamara Asmar, Arenafilm
Louise Smith, Film Producer
Kath Shelper, Film Producer
Matthew Dabner, Film Producer
Tommy Murphy, Playwright
Sadie Chrestman, Film and Television Agent, The Cameron Creswell Agency
Jane Cameron, Film and Television Agent, The Cameron Creswell Agency
Lesley McFadzean, Literary Agent
Jeremy Saunders, Graphic Designer
Nick Meyers, film editor and lecturer AFTRS
Sarah Lambert, Lantern Pictures
Miles Roston
Linda Tizard, IPI
RealTime (Virginia Baxter, Keith Gallasch)
Liz Doran Scriptwriter
Dr Denise Leith
Roger Milliss, Author
Richard Harris, Executive Director, Australian Screen Directors Association
Catherine Zimdahl
Megan McMurchy
Victoria Treole
Justin Fleming, Playwright
Nick Hughes, Writer
Elizabeth Mars, Writer
Peter Moon, Writer
Greg Woodland, Writer
Paul Holland, Writer
Mac Gudgeon, Writer
Andrew Kelly, Writer
Rick KalowskiWriter
Alison Heather, Writer
Gina Roncoli, Writer
Jonathan Teplitzky, Film Director
Rob Wellington, Tantamount Productions
Lynn Hegarty - Director/Writer, (Swoop Films P/L)
Bec Smith
Emil Jeyaratnam, Student - Film and Television (University of Swinburne,Melbourne)
Alan Clay, Writer and Electronic Publisher

Dorla Gray
Venessa Paech Associate Editor The Dramatic Group P/L
Anni Zaikowski - retired
David Zaikowski - Musician & Head Teacher, Sydney Institute Technology
Bonnie Zaikowski
Georgia Zaikowski- university student
Dorotka Sapienska, Freelance Designer
Andrew L. Urban Editor, Urban Cinefile
Graeme Isaac, Film Producer, Mayfan P/L
Frank Chalmers, Writer
Lisa Noonan Australian Screen Directors Authorship Collecting Society
Glenda Hambly writer/director
David Rapsey producer
Schuyler Weiss
Susanne Larson
David Kelly
Jonathan Wald
David Elfick, Film Producer, Palm Beach Pictures
Janet Merewether - Director/Producer
Robert Humphreys, ACS
Rebecca Clarke Writer and Actor
Greg Holfeld Filmmaker, Illustrator, Author
Debra Oswald, Playwright and Children's Author
Stephen Corvini
Melina Chalmers, Arts/Law Student at LaTrobe University
Anna Jeffries
Nick Batterham
Martin Fabinyi, Producer, Mushroom Pictures
Peter Vaughan; Director Wait A While Films Pty Ltd.
Daniel Lee, Film Editor
Rachel Clausen Animator/Cartoonist
David McMahon, Multimedia Production Manager
Melissa Sheldrick Business Manager
Curtis Levy, Producer and Co-Director of The President Versus David Hicks.
Christine Olsen, Co-Producer and Writer of The Rabbit Proof Fence
Ray Argall, Piccolo Films Pty. Ltd
Lucinda Clutterbuck, Piccolo Films Pty. Ltd
Watch on Censorship
Jeanette Galyer
Matthew Galyer
Jade Galyer
Maryke Steffens Reporter, Catalyst Australian Broadcasting Corporation
Ritt Arthur
Eric Arthur

Yuri Arthur
Sandy Widyanata
Evan English, Writer- Producer
Victoria Chance, Currency Press
Abe Forsythe Actor/Writer/Director
Northern Rivers Screenworks Ltd Board Members 2005:
Andrew Bambach
Frank Coory
Deb Cox
James Dodd
Kate Ingham
Aliison Kelly
Larry Larstead
Catherine Marciniak
Lyn McCarthy
Roger Monk
Kerry Sunderland
John Weiley
Nick Torrens
Jane St Vincent Welch
Adam Broinowski
Michael Sharkey, Bongo Bus Productions
Dr Christine Asmar
Luke Mackay
Bill Mousoulis, film director
Teri Calder, Gil Scrine Films
Melissa Lee, Filmmaker
Fotis Kapetopoulos, KAPE Communications
Daryl Dellora Film Director
Heidi Fisher
Anna Kannava - Writer/Director
Della Churchill, Chilling pictures Pty Ltd.
James Verdon Lecturer, Film and Television Multimedia Design
John O'Brien, Scriptwriter
Lucy Maclaren, LM Films
Michael Forde: Playwright
Suzan Piper, Wot Cross-cultural Synergy
Sawung Jabo, Wot Cross-cultural Synergy

Kim Gleeson. Producer/ Publisher
Ian Barry - ASDA
Vicki Barry
Karen Hethey
Lisa Pieron, Cinema Programmer
Helen Newman, Filmmaker
Louisa Kirby, photographer
juliana engberg, artistic director ACCA
Ted Roberts (Writer/Producer)
Penny Campton-visual artist and documentary maker
Sara Peel, Administrator, Arts Industry Council (Victoria)
Dr Damien Kingsbury
Paul Summers
Ben Cobham
Damien Thomas
Damian Wyvill
Nicole Wyvill
Joel Becker, Director, Victorian Writers' Centre; President, Arts Industry Council (VIC)
Richard Watts, 3RRR Broadcaster & Board Member Melbourne Fringe
Ansuya Nathan Co-Artistic Director Tamarama Rock Surfers Theatre Company
Melanie Coombs Melodrama Pictures Pty Ltd
Marie Craven, Film-Maker
Jerril Rechter - Director Footscray Community Arts Centre
Miranda Brown, Miranda Brown Publicity
Amber Stranzen, Miranda Brown Publicity
Clea Woods, Miranda Brown Publicity
Rebecca Perovic, Miranda Brown Publicity
Rose Godde - arts industry worker
Rosemary Myers - Artistic Director Arena Theatre Company
Josef Brown (Performer) - Currently member on the NSW Ministry for the Arts, Dance Council.
Debra Annear Documentary Film Producer
Lynette Wallworth
Moira Fahy Documentary Filmmaker
Max Delany, Artistic Director, Monash University Museum of Art
Suzanne Davies (RMIT Gallery, Melbourne)
Helen Rayment (RMIT Gallery, Melbourne)
Sarah Morris (RMIT Gallery, Melbourne)
Helen Walpole (RMIT Gallery, Melbourne)
Vanessa Gerrans (RMIT Gallery, Melbourne)
Nick Devlin (RMIT Gallery, Melbourne)
Charles Parkinson Artistic Manager HotHouse Theatre
Mairead Hannan co-ordinator of small arts organisation

Yvonne Virsik
June Factor – writer
Christopher Scanlon co-editor Arena Magazine
Chris Thompson randomACTS
Barry Nixon Event Manager Gasser Special Events
Katherine Giovenalli, Playworks
Jan Chandler, Writer, Journalist Publicist
Phil Jones
Anna Tregloan Designer and Theatre Maker
Mimi Kelly, The Australian Network for Art and Technology
Jen Brazier, The Australian Network for Art and Technology
Sasha Grbich The Australian Network for Art and Technology
Heidi Angove The Australian Network for Art and Technology
Louise Fox Writer
Robert Adams, Writer
Natalie Vella - Filmmaker
Peta Manning – Filmmaker
Julian Rickert Co-Artistic Director of the bettybooke (performance ensemble)
Suzanne Kersten Co-Artistic Director of the bettybooke (performance ensemble)
Clair Korobacz, Actor
Priscilla Bracks, Artist
Gavin Sade (Lecturer, Faculty of Creative Industries QUT)
Gianni Montalto
Michael Docherty, Assoc. Professor, Head Comm Design Creative Industries Faculty, QUT
Peter Farnan, Freelance Composer and Musician
Julie Dyson, Australian Dance Council
Janine J Cowie Management
Jan Marie Clancy – Director, Monash University Institute of Performing Arts

ANNEXURE B

Bret Walker SC, legal opinion, 24 October 2005

Mr Stephen Collins

c/- ABC Legal

SYDNEY NSW 2000 24 October 2005

MEMORANDUM OF ADVICE

4.1. Re: The Anti-Terrorism Bill 2005, & the proposed amendments to the laws of sedition

We have been asked to urgently consider a number of questions which the producers of the program Media Watch wish answered for the purposes of preparation for the Media Watch program proposed to be shown next week. These questions critically involve an analysis of proposed amendments to the *Criminal Code Act* 1995 (Cth), the content of which was recently and controversially published on the website of the ACT Chief Minister & Attorney General, Mr John Stanhope. The Australian Government had planned to release the draft Bill on 31 October 2005, and had further planned a Senate Committee report to be prepared on the draft Bill by 8 November 2005 – thus allowing all of one week for public scrutiny of these new and highly significant laws.

This advice concerns the draft Bill published on the web on 14 October 2005. Schedule 7 of the Bill repeals the existing sedition offences in the *Crimes Act* 1914 (Cth). It then inserts five new sedition offences into the Criminal Code by adding a new section 80.2 to the existing offence of treason (s.80.1). The Bill is entitled *The Anti-Terrorism Bill* 2005 (Cth).

The questions which we have been asked to consider concern first, the extent to which the proposed amendments expand the offence of sedition as it is presently known. Secondly, we are asked to comment upon whether various opinions which have been expressed, inter alia, by John Pilger, a journalist and author, Sheikh Omran, a representative of the Islamic community in Australia, and Abu Bakir Bashir, would fall foul of the laws of sedition as they stood prior to this amendment, and whether they would be caught by the proposed laws. Thirdly, we are asked to consider whether a "good faith" defence provided under the proposed amendments would be available to those individuals. Fourthly, we are asked to consider whether media outlets that publish these comments may themselves be prosecuted for an offence under the Act, and whether a "good faith" defence under the Bill provides a defence to any charge brought. Finally, and less urgently, we are asked to consider to what degree there are restrictions on the reporting of cases of preventative detention and control orders made under the Bill, and the extent of exposure of journalists who possess information about control orders of persons subject to preventative detention. We will deal with this fifth question in a separate advice.

By way of background to the present legislation, it is worth mentioning briefly the history to the proposed enactment. Shortly after the events of September 11, the Government announced that new measures against terrorism would be introduced. The package which resulted was of 7 major legislative initiatives introduced in March 2002. Central to those legislative changes was the *Security Legislation Amendment (Terrorism) Act 2002*. That Act defined the concept of a terrorist act, created categories of terrorism offences, and introduced the means for the Executive to determine what would be a terrorist organisation. It also established for the first time the existence of crimes relating to association by way of membership or other connections with terrorist organisations. That Act was finally passed, although in a greatly amended form.

The second pillar of the package was the enactment of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*. This contained draconian provisions which permitted detention under warrant for a period up to 7 days, and allowed interrogation for up to 24 hours within that period of, inter alia, persons who may have information relating to a terrorism offence. Since then, there have been a raft of other security related enactments passed. These enactments have been described throughout the legal literature as typically marked by patterns which included: the expansion of Executive power and discretion outside the judicial process; the priority given to national security imperatives; limitation on the provision of independent legal advice; and departures from the presumptions of innocence, trial by jury, and freedom of association. They are typically characterised by the use of ambiguous and broadly defined key terms which are central to what were regarded as serious criminal offences (primarily terrorism) and the introduction of the notion of guilt by association in the context of acts of alleged recruitment, training or membership, or even informal membership of "terrorist organisations".

The 2002 Act, which effectively treated the *Commonwealth Criminal Code* as a mere vehicle for the inclusion of new terrorism offences, was passed and came into force on 6 July 2002 after the Senate Legal & Constitutional Legislation Committee received over 431 submissions in the 6 weeks given to scrutinise the Bills.

The present law of sedition

As the law presently stands, prior to the amendments proposed by the Bill, Chapter 5 of the *Criminal Code Act 1995* was concerned with what was described as "the security of the Commonwealth". It dealt with a range of offences of treason (Part 5.1), offences related to espionage and similar activities (Part 5.2) and terrorism (Part 5.3).

Since 1920 Australia has had, at the Commonwealth level, what amounts to a codified law of sedition, such provisions appearing in ss.24A-24E of the *Crimes Act 1914*. These provisions existed with what were generally thought to be obsolete state sedition laws. As we mention later in this advice, in 1991 the Commonwealth Criminal Law Revision Committee recommended the repeal of the existing sedition provisions in the *Crimes Act* and their replacement by a range of indictable offences. See Australia, Review of Commonwealth Criminal Law, 5th Interim Report 1991" (the "Fifth Interim Report").

The proposed Bill is one which repeals the existing codified law of sedition in Australia, namely the provisions in ss.24A-24F of the *Crimes Act 1914*. Those provisions presently provide as follows:-

4.1.1. 24A

Definition of seditious intention An intention to affect any of the following purposes, that is to say:

(a) to bring the Sovereign into hatred or contempt;
(d) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;

(f) to excite Her Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth; or

(g) to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth;

is a seditious intention.

4.1.2. ***24B***

Definition of seditious enterprise

(1) A seditious enterprise is an enterprise undertaken in order to carry out a seditious intention.

(2) Seditious words are words expressive of a seditious intention.

4.1.3. ***24C***

Seditious enterprises A person who engages in a seditious enterprise with the intention of causing violence, or creating public disorder or a public disturbance, is guilty of an indictable offence punishable on conviction by imprisonment for not longer than 3 years.

4.1.4. ***24D***

Seditious words

(1) Any person who, with the intention of causing violence or creating public disorder or a public disturbance, writes, prints, utters or publishes any seditious words shall be guilty of an indictable offence. Penalty: Imprisonment for 3 years.

(2) A person cannot be convicted of any of the offences defined in section 24C or this section upon the uncorroborated testimony of one witness.

4.1.5. ***24E***

Punishment of offences

(1) An offence under section 24C or 24D shall be punishable either on indictment or summarily, but shall not be prosecuted summarily without the consent of the Attorney-General.

(2) If any person who is prosecuted summarily in respect of an offence against section 24C or 24D, elects, immediately after pleading, to be tried upon indictment, the court or magistrate shall not proceed to summarily convict that person but may commit him for trial.

(3) The penalty for an offence against section 24C or 24D shall, where the offence is prosecuted summarily, be imprisonment for a period not exceeding 12 months.

4.1.6.

4.1.7. ***24F***

Certain acts done in good faith not unlawful

(1) Nothing in the preceding provisions of this Part makes it unlawful for a person:
  (a) to endeavour in good faith to show that the Sovereign, the Governor-General, the Governor of a State, the Administrator of a Territory, or the advisers of any of them, or the persons responsible for the government of another country, has or have been, or is or are, mistaken in any of his or their counsels, policies or actions;
  (b) to point out in good faith errors or defects in the government, the constitution, the legislation or the administration of justice of or in the Commonwealth, a State, a Territory or another country, with a view to the reformation of those errors or defects;
  (c) to excite in good faith another person to attempt to procure by lawful means the alteration of any matter established by law in the Commonwealth, a State, a Territory or another country;
  (d) to point out in good faith, in order to bring about their removal, any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different classes of persons; or
  (e) to do anything in good faith in connection with an industrial dispute or an industrial matter.

(2) For the purpose of subsection (1), an act or thing done:
  (a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth;
  (b) with intent to assist an enemy:
    (i) at war with the Commonwealth; and
    (ii) specified by proclamation made for the purpose of paragraph 80.1(1)(e) of the *Criminal Code* to be an enemy at war with the Commonwealth;
  (ba) with intent to assist:
    (i) another country; or
    (ii) an organisation (within the meaning of section 100.1 of the *Criminal Code*);
    that is engaged in armed hostilities against the Australian Defence Force;
  (c) with intent to assist a proclaimed enemy, as defined by subsection 24AA(4) of this Act, of a proclaimed country as so defined;
  (d) with intent to assist persons specified in paragraphs 24AA(2)(a) and (b) of this Act; or
  (e) with the intention of causing violence or creating public disorder or a public disturbance;
  is not an act or thing done in good faith."

Under the general (ie, non statutory) law there was no separate offence of sedition. Generically the term was conventionally used as shorthand for several distinct categories of common law misdemeanours or statutory offences, namely uttering seditious words, publishing or printing a seditious libel, or undertaking a seditious enterprise and seditious conspiracy. It has been seldom employed in peace time, although it was said to be primarily a peace time weapon, since in war times, other national security laws typically prevail.

Sedition has been described as a grotesque anachronism in a society which prides itself on bring free and open and pluralist.

The last State sedition prosecutions were in South Australia in 1960, and, before that, in Queensland in 1912 and 1930.

Both the Chifley and Menzies Governments resorted to the law of sedition as one element of their campaigns against the Communist Party in the late 1940s. The Chifley Government's action led to decisions which eventually reached the High Court in *Burns v Ransley* (1949) 79 CLR 101 and *R v Sharkey* (1949) 79 CLR 121. In those cases, 3 members of that party were given prison sentences for expressing unpopular political opinion. One occurred in an orderly public debate, the other in a number of conversations held with a journalist. Seemingly, the last sedition trial in Australia was an unsuccessful prosecution by the Menzies Government of another member of the Communist Party in *Sweeny v Chandler*, an action prosected in the Sydney Court of Petty Sessions, which resulted in dismissal of the charges on the 18th September 1953. The last attempt in the UK appears to have been an attempt to initiate a private prosecution against the author Salman Rushdie and the publisher of The Satanic Verses for seditious libel. See *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* [1991] 1 QB 429. The High Court of Australia last considered this area of the law in 1960 in a case from the then Australian territory of PNG in *R v Cooper* (1961) 105 CLR 177.

It can be readily seen from the provisions of the *Crimes Act* set out above that seditious words are those which are expressive of a seditious intention and a seditious enterprise is an enterprise undertaken in order to carry out that seditious intention. That seditious intention must, by s.24A, be one of 4 specific and relatively limited kinds. One can see that the intent typically is directed to bringing the Sovereign or the Government, the Constitution, Parliament itself into disrepute. Otherwise, in s.24(A)(f), it is unlawful to attempt to procure the alteration other than by lawful means of any matter in the Commonwealth established by its laws. By s.24(A)(g), it is unlawful to promote feelings of ill will and hostility between different classes of the populous so as to endanger the peace, order or good government of the country.

After the 1986 amendments to the *Crimes Act*, the concept of "mens rea" was redefined so as to reproduce the notion as it had existed at common law a century before. The result was that to succeed as the law presently stands, the prosecution must prove that the seditious conduct of the accused was carried out "with the intention of causing violence or creating public disorder or a public disturbance". See *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* [1991] 1 QB 429.

As the law stands under the *Crimes Act*, it is unclear whether it is sufficient that there be an intention to cause violence at some unspecified future time, or whether there must be proof of intention to cause immediate violence. That is not to say that the *Crimes Act* provision has clear or defined circumstances of aggravation. The concepts of "public disorder" and "public disturbance" are undefined and unclear. As one author has said: *"because of unprecedented changes in community attitudes about specific political issues, the statutory language will inevitably fluctuate in meaning across time. This is a totally unsatisfactory situation. Fifty years later, Chafee's criticism in that regard remains true. The definition of sedition "is so loose that guilt or innocence must obviously depend on public sentiment at the time of the trial". This will not be a source of concern when public opinion is supportive of vigorous free speech. But recent history demonstrates that public opinion can be manipulated to generate irrational fear of minority groups and attitudes."* See Lawrence W Maher, "The Use and Abuse of Sedition", 14 Syd LR 261, p 313.

The Fifth Interim Report of 1991 recommended the repeal of the *Crimes Act* provisions and the creation of the offence of inciting treason, interference with elections and racial violence. That recommendation was not acted upon at the time. The Attorney General has suggested recently that the proposed amendments to the sedition laws are occurring in the way recommended by the Fifth Interim Report. However, this seems 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.

The Proposed New Sedition Laws

The proposed s.80.2 of the *Criminal Code* creates a range of offences for which the maximum term of imprisonment is 7 years. We set it out below.

"**80.2 Sedition**

Urging the overthrow of the Constitution or Government

(1) A person commits an offence if the person urges another person to overthrow by force violence:

(a) the Constitution; or

(b) the Government of the Commonwealth, a State or Territory; or

(c) the lawful authority of the Government of the Commonwealth.

Penalty: Imprisonment for 7 years.

(2) Recklessness applies to paragraphs (1)(a), (b) and (c).

4.1.7.1.1.1. Urging interference in Parliamentary elections

(3) A person commits an offence if the person urges another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament.

Penalty: Imprisonment for 7 years.

(4) Recklessness applies to the element of the offence that it is lawful processes for an election of a member or members of a House of the Parliament that the first-mentioned person urges the other person to interfere with.

4.1.7.1.1.2. Urging violence within the community

(5) A person commits an offence if:-

(a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and
(b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

(6) Recklessness applies to the element of the offence that it is a group or groups that are distinguished by race, religion, nationality or political opinion that the first-mentioned person urges the other person to use force or violence against.

Urging a person to assist the enemy

(7) A person commits an offence if:

(a) the person urges another person to engage in conduct; and
(b) the first-mentioned person intends the conduct to assist, by any means whatever, an organisation or country; and
(c) the organisation or country is:
(i) at war with the Commonwealth, whether or not the existence of a state of war

has been declared; and
(ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth.

Penalty: Imprisonment for 7 years.

Urging a person to assist those engaged in armed hostilities

(8) A person commits an offence if:

(a) the person urges another person to engage in conduct; and
(b) the first-mentioned person intends the conduct to assist, by any means whatever, an organisation or country; and
(c) the organisation or country is engaged in armed hostilities against the Australian Defence Force.

Penalty: Imprisonment for 7 years.

Defence

(9) Subsections (7) and (8) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note 1: A defendant bears an evidential burden in relation to the matter in subsection (9). See subsection 13.3(3).

Note 2: There is a defence in section 80.3 for acts done in good faith."

The entirety of Schedule 7 is attached to this advice.

The first thing to be observed is that in relation to each of those 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. The Bill does not define what amounts to urging another to act in the prohibited ways. The Macquarie Dictionary definition of "urge" is "to endeavour to induce or persuade, as by entreaties or earnest recommendations". A secondary meaning refers "to press by persuasion or recommendation, as for acceptance, performance, or use; recommend or advocate earnestly". Other definitions invoke notions of pushing or forcing, pressing or insisting.

Inciting by urging another to commit an offence is already able to be prosecuted under the law in Australia. Section 11.4(1) of the *Criminal Code Act* 1995 creates the offence of incitement for '[a] person who urges the commission of an offence', as long as the person intends that the offence incited be committed (s.11.4(2)) and even if the offence incited is not actually committed. Courts have variously interpreted 'incitement' as meaning to urge, spur on, stir up, prompt to action, instigate or stimulate, *R v Crichton* [1915] SALR 1; *Islamic Council of Victoria v Catch the Fire Ministries* [2004] VCAT 2510; *Brown v Classification Review Board of the Office of Film and Literature Classification* (1998) 50 ALD 765 at 778 (Oxford Dictionary); or simply to request or encourage; *R v Massie* [1999] 1 VR 542 at 547.

It is a difficult question to determine when an opinion is expressed or a comment made which, by the manner in which it is made, might be one which in a particular context had sufficient forcefulness in its manner, delivery or content to evidence the act of urging. Of course, the proposed provisions do not reflect upon what the conduct of the person being urged to act in fact does. It is enough that a person urges another to act in any of those ways. In other words it is not necessary that there be an identified audience so that it can be demonstrated that that person intended his comments to affect.

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.

These comments must of course be read subject to a latter discussion concerning the defences provided in s.80.3 for acts done in good faith. However, suffice it to say at this point, that operation of that defence 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.

In relation to the offence of urging violence within the community (subsection (5)), violence need not be violence incited within the Australian community. It would be enough that the urging occurred to a group of persons of a different nationality or political opinion to use force against any other person in any other place, the effect of which would "threaten" the peace of the Commonwealth. "To threaten" is defined, inter alia, "to be a menace or source of danger" to something.

It is not difficult to see that a statement made which might invite the use of force by one Indonesian or to use force or violence against Australians in Bali might threaten peace within Australia itself and might be caught by subclause (7). It does not require the urging in question to be to use force or violence. It is enough that the urging be to "engage in conduct" and that conduct is intended by the person doing the urging to assist "by any means whatever" the organisation or country which is at war, whether or not declared, including terrorist organisations or organisations proclaimed under the Act to be an enemy at war with the Commonwealth. In short a person that urges anyone in the world, in a general sense, to engage in conduct which might tend to assist a proclaimed terrorist organisation commits the offence. Assistance need only be minimal. It need not, as we have said, involve inciting or urging violence.

This concept is taken in a slightly different direction under clause 8. Again the urging in question need only be to engage in conduct which might provide assistance and need not involve inciting or urging force or violence. A critical factor is that the urging is intended to provide assistance to an organisation engaged in armed hostilities against the Australian Defence Force. This need not necessarily involve any recognised or proclaimed organisations. It would involve any organisations that on a given day could be said to be engaged in armed hostilities. The concept 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. For the purposes of these legislative provisions, an organisation includes an unincorporated body either within or outside of Australia. An unincorporated body is a broad undefined concept in this legislation and might include a small number of individuals with a common purpose or goal, whether or not it has a constitution, recognised membership or any formal element.

Inciting terrorism is unlawful under existing law. Therefore, it is reasonable to conclude that the Bill is intended to operate so that it will now extend to covering indirect urging as well as condoning, justifying or glorifying acts of terrorism or conduct associated with it, or even abstract opinions about that conduct. These examples of indirect urging might include 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 Bali, and as to whether Australian citizens should expect more of the same should they continue to be involved in the Iraqi war.

4.1.7.1.1.2.1. ***Geographical operation of the offences***

Section 80.4 has the effect of extending the geographical jurisdiction for offences to Category D. Traditionally criminal laws limit their territorial effect to crimes which are local, that is where the offence was committed within the geographical boundaries of Australia. Sections 15.1-15.4 of the *Criminal Code*, which were inserted in 1999, set out four categories of extended geographic jurisdiction. Category A covers Australian citizens anywhere in the world, subject to a foreign law defence (that is it is an offence if there is no crime in the foreign jurisdiction which corresponds to the Commonwealth offence). Category B covers Australian citizens or residents anywhere in the world, subject to a foreign law defence. Category C covers anyone, anywhere, regardless of citizenship or residence, subject to a foreign law defence. Category D covers anyone, anywhere, regardless of citizenship or residence. The Explanatory Memorandum for the House of Representatives stated in relation to Category D that in relation to terrorist acts "the offence will be committed whether or not the conduct or the result of the conduct constituting the offence occurs in Australia". Section 15.4 however makes it clear that it goes far further than this to cover any person of any citizenship or residence. There is no foreign law defence. The possibility then is that the Commonwealth could launch a prosecution against anyone suspected of terrorism offences anywhere in the world. It creates what is in essence a "universal jurisdiction".

4.1.7.1.1.2.2. ***The Pilger Interviews***

The "Democracy Now" interview in question is one in which the speaker was acting within Australia. For the reasons we have mentioned above, the provisions of the *Anti-Terrorism Bill 2005* have effect no matter where the events occur.

The comments criticise what is described as a rapacious power. Although it is not clear, his remarks apparently refer to the United States. They do not appear to be directed at all to Australian activity and could not be said to manifest the seditious intention required by s.24A of the *Crimes Act*, which is primarily concerned with the activities of the Commonwealth of Australia. It suggests, although perhaps not with any great urging, that it is critical that insurgent resistance in Iraq, where Australian Armed Forces are engaged, succeed and that we depend upon that success, and indeed the rest of the world outside of Iraq depends upon it. These comments could well be seen as offending the provisions of s.80.2(8) of urging a person to assist those engaged in armed hostilities, and potentially urging a person to assist a proclaimed organisation which is at war.

4.1.7.1.1.2.3. *The Pilger Lateline comments amount to stating that both Australian Army troops as well as American or British troops who might be seen as occupiers, inter alia, of Iraq are legitimate targets on the part of the Iraqis to the extent that they are in Iraq. These comments have a more generalised application and probably say little more, at least in the context in which they are presented in our instructions, as stating that troops who invade the countries of others are legitimate targets from the point of view of the people of the country invaded. The comments made have similar characterisation to those made in the Democracy Now interview, suggesting as they do that defeat of the US is essential if one is to avoid other attacks of the US on other countries. It arguably suggests that the resistance to it in Iraq is legitimate. In our view it would be open to construe Pilger's words as urging or inviting any person to engage in the conduct of the forceful elimination of Australian troops and their defeat in Iraq. There would certainly be an arguable case sufficient to place the evidence and surrounding circumstances before a jury .The inevitable consequence of the Bill will be to stifle the making of those statements, or even the reporting or repetition of them by others legitimately involved in public debate on such issues.*

4.1.7.1.1.2.4.

4.1.7.1.1.2.5. ***The Omran Comments***

4.1.7.1.1.2.6. *The subject comments were, we presume, made within Australia and were broadcast on SBS in Australia. Omran's comment was to the effect that it was a good Muslim's duty to go and fight the coalition forces for jihad in Iraq. They might be seen as directed to Australian Muslims, or indeed any Muslims to be involved in the fight in Iraq against, inter alia, Australian forces. It is difficult to see how the* Crimes Act *definition of "seditious intention" could apply to this conduct, although the provisions in s.24AA of the* Crimes Act *which are concerned with treachery could have application in this context to the extent that the jihad was a proclaimed enemy within a proclaimed country. There is a high likelihood that clause 80.2(8) has application. The issue is whether the comments are sufficient to amount to urging another to engage in the subject conduct. This of course will be a question of fact. The suggestion that it is indeed one's duty might well be capable of satisfying the requirement of urging in the proposed amendments. Again, the inevitable consequence is that, because of the high degree of uncertainty about whether such comments are now seditious or not, the tendency will be to stifle the making of those statements, or even the reporting or repetition of them by others legitimately involved in public debate on such issues.*

The Comments of Bashir

The opinions of Abu Bashir, at least in the quotation provided to us describe in large part what might be thought to be Islamic customs or beliefs. That is the second part of the quote. The first part of the quote, which leads to a description of two types of martyrdom, may be capable of being seen as suggesting that a Muslim who committed martyrdom in support of Islam would die a noble death. His comments concerning infidel countries being visited and spied upon are perhaps confusing but on one view of them they appear to imply that those who wish Islam to be strong will need to come to countries which persecute them, and carry out some potentially hostile (though not necessarily violent) activities there. He does not say that they would do so with a view to executing suicide bombings, and it is really the journalist who has made that remark. To the extent that it could be treated as any kind of urging, and we think it problematical to argue that it is, it might tend to urge violence within the Commonwealth so as to offend s.80.2(5) of the amendments. The comments are not particularly directed to any particular organisation or country, least of all one engaged in armed hostilities because it refers in general terms to Islam. Although it might be seen to amount to uttering seditious words with the intention of causing violence or public disorder, so as to satisfy the existing law of sedition, we think it would be open, though by no means straightforward, to establish intent in the sense that we have discussed above.

On the other hand, those parts of his statement which praise in strongly religious terms the undertaking of what might be termed non-suicidal but nonetheless mortally risky conduct in the defence or advancement of the Islamic cause would present a considerably larger target for a prosecution.

4.1.7.1.1.2.7. ***Publication, re-publication, public debate, and the "good faith" defence***

The issue here is whether publication of these remarks themselves could amount to the commission of an offence under the provisions of the Bill to be enacted.

Of critical significance is that putting aside the question of reckless urging of another to act in any of the prohibited ways, the person who commits the offence must be the person who urges the other to do the acts in question. It is difficult to imagine that the publication by a legitimate media organisation of seditious remarks would attract the operation of the Act, unless it could be said that that publication itself amounted to urging the relevant overthrow of Government, violence, assistance to the enemy or assistance to those engaged in armed hostilities.

The precise remarks, how they are treated at the point of publication, whether they are accompanied by any other information such as a disclaimer, would be critical to whether it could be suggested that the publication amounted to the urging of another to act in the prohibited ways. It would be easy to see how opinion or comment by others (published, for example, on a Muslim or other ethnic media resource) could be seen to be endorsing "seditious" opinion by its mere publication.

The "targets" of such opinion might well be those who would be likely to act to give an effect to the opinion. Context is calculated in many cases to make all the difference.

In terms of any possible defences for acts done in good faith, it seems to us that they have relatively limited operation to media publication of "seditious" opinions. They would place any journalist or media organisation which intended to publish or republish material which might be capable of urging in any of the material respects we have mentioned, in the invidious position of having to decide whether it might be read by a person who could be urged to act upon it, for example by engaging in violent activity and whether in those circumstances its publication might be reckless even if in good faith.

The good faith provisions do not, in terms, allow any publication in good faith to be excused. It would have been a simple drafting exercise had it been sought to excuse, as the Attorney General suggests this Bill does, that the offences were not designed to prevent journalists from reporting in good faith. It seems to us that the Bill does not do anything to provide that assurance. Only good faith in the limited contexts referred to, amount to defences. None of those as it stands, specifically mentions publication in good faith by a legitimate public media organisation as a ground of defence by itself. The provisions which define and create the offences themselves do not, by their terms excuse acts which occur in the context of legitimate media reporting or public debate or comment.

In the context of media comment, and elsewhere as well, in broad terms the notion of urging or inciting conduct like violence, or the providing of assistance to an organisation is capable of many possible meanings in the legal context. There is no clear definition in this Bill of what amounts to urging in this context. It is a verb which attempts here to make some indirect relationship between some overt and expressive act, and some perceived evil, or indeed some benefit to an entity or person perceived to be evil.

To use examples which might apply here: if a commentator in the media expresses an opinion to the effect that defeat of US troops in Iraq by means of terrorist acts would be a good thing, does one necessarily urge upon those who might do those acts that they act accordingly. It is certainly arguable that a jury, properly instructed, could conclude that the commentator did so.

If a journalist or producer of a television program invited such a commentator onto a program knowing that such comments were likely to be made and directly or indirectly invited those comments by directed questions, the same could be said to apply. The producers of the program, if they knew the direction the questions would take, could be equally exposed.

Even media debate and public discussion concerning the comments of others which might be said to be seditious, could be exposed to prosecution under this Bill. Much would depend upon the precise circumstances of that debate. In the end, mere publication of the seditious remarks of others could easily be seen, by itself to manifest a sufficient intent to "urge" a result in conformity with those remarks.

No genuine commentator, religious or ethnic group leader wishing to participate, in legitimate debate on the topic of "terrorism" could be certain that his or her conduct would necessarily fall outside the ambit of the offences in this Bill.

The distinction between what might be genuinely held opinions by some person with genuine criticisms of the Government, or its actions, in places like Iraq will be difficult to separate from acts which might be seen as urging others to act in ways that are consistent with those opinions.

There is, of course, always the risk that, as one seeks to suppress public urging or incitement by the introduction of new criminal laws, what results is that the perceived grievances of those to whom those laws are directed are further aggravated, such persons are further excluded from public debate, and are more likely to work in subversive ways.

An argument we have considered which would be especially difficult to dismiss with any confidence (on the part of those in media) is that the seeking out or invitation to expression of such opinions may be seen as lending respectability or legitimacy to what would otherwise regarded as outrageous sentiments.

Support of that kind could well be seen, not as the ventilation of dissent merely, but as an implicit suggestion that some people might find the offending message persuasive. The risk is that this possibility may be found by a jury to be well within the worldly intelligence and experience of a competent journalist, and contribute to findings of recklessness of even intended urging in the relevant sense.

Another argument which we regard as perhaps considerably less risky for journalists and other media is the so-called "copy cat" syndrome. By this, we mean the occasional request by authorities and other commentators for the press and other broadcasters to refrain from description, or even any revelation of certain kinds of dangerous and (at least to some) fascinating conduct. We are sceptical as to whether there is any empirical support for the feared possibility of emulation by impressionable members of the readership or audience. But the notion is advanced from time to time.

It is sometimes related to the somewhat different notion, to use the cliché, that the press and broadcasters should not give the "oxygen of publicity" to obnoxious views for disgusting acts. On balance, we think it unlikely that any such argument would place reportage on a slippery slope towards "urging" in the relevant sense.

Apart from the consequences of the broad spectrum presented by the notion of "urging" in this Bill, there is the separate form of criminal involvement constituted by common law conspiracy. Could it be alleged that investigative journalism, or current affairs broadcasting, in most cases involving prior contact and leadup with the persons whose activities or opinions are to be discussed or exposed could itself amount to inadvertent assistance to such persons? If the opinion holders themselves are criminally urging, how confident could the press or broadcasters be that such hitherto unobjectionable journalism could not be left to the jury as subversive? We are unable to give clear answers to these questions. That uncertainty indicates a difficult and undesirable aspect of this latest proposed manifestation of anti-sedition laws – laws which have a long history of difficulty, and opposition.

With compliments

BRET WALKER SC PETER RONEY

ANNEXURE C

RE: THE ANTI-TERRORISM BILL 2005, SEDITION and CREATIVE AND ARTISTIC EXPRESSION

OPINION

I am asked to advise, urgently, on the likely impact of the Anti-Terrorism Bill 2005 ("the Bill") on the free expression of opinion, especially in relation to creative and artistic expression. The provisions in the Bill which are of particular relevance are those which would change the law of sedition in Australia.

At present, so far as the Commonwealth is concerned, the law of sedition is codified in sections 24A to 24F of the *Crimes Act 1914*. Those sections are reproduced as Appendix 'A' to this Opinion. The Bill would repeal those sections in their entirety. In their place the Bill would enact new provisions in Division 80 of the *Criminal Code Act 1995* ("the Criminal Code"). Division 80 comes within Chapter 5 of the Criminal Code, headed "The security of the Commonwealth". Division 80 as it presently stands deals with one subject-matter, namely s. 80.1, "Treason". The Bill would amend Division 80 so as to deal with two subjects, namely "Treason and sedition". It would insert in Division 80 a new section 80.2, "Sedition". Schedule 7 to the Bill, which contains *inter alia* the proposed new s. 80.2, is reproduced as appendix 'B' to this Opinion.

Sedition is an ancient offence. There have been only a handful of prosecutions in this country in the last century, and none for decades. Under the present definition of *seditious intention* in s. 24A of the *Crimes Act,* what would have to proved is an **intention** to bring about one of a number of quite specific purposes namely

(1) to bring the Sovereign into hatred or contempt
(2) to excite disaffection against [the Government]
(3) to excite [Australian citizens] to attempt to bring about change, otherwise than by lawful means, to any matter in Australia which has been established by law of the Commonwealth; or
(4) to promote feelings of ill-will and hostility between different classes [of Australian citizens] so as to endanger the peace, order or good government

of the Commonwealth

Seditious words are defined in s. 24B (to) as "words expressive of a seditious intention", while *seditious enterprise* is defined in s. 24B (1) as "an enterprise under taken in order to carry out a seditious intention".

Significantly, the conduct which is presently proscribed, the conduct which constitutes the actual offences, is engaging (oneself) in a seditious enterprise (s. 24C) or publishing (oneself) seditious words (s. 24D). Moreover, both those sections require, as well as the intention to bring about one of the four specific purposes identified in s. 24A, the **further** intention of "causing violence or creating public disorder or a public disturbance". *The Crimes Act* does not spell out, among other things, what "public disorder" or "public disturbance", mean, and whether a particular act amounted to sedition or not would inevitably be shrouded in uncertainty in many cases; however, it is at least clear that the prosecution would need to prove both the engaging in the conduct in question and the existence of the several "intentions" referred to above. Carelessness or recklessness would not be enough, nor would the mere encouraging of others to engage in the offending activities.

The proposed s. 80.2, to be introduced by the Bill into the Criminal Code, would change the law in numerous respects, including at least the following:

(1) The conduct proscribed will be, not the engaging in a seditious enterprise or the publishing of seditious words *oneself,* but the **"urging"** of *another person* to do various things. *f* Such "urging" is not defined in the Bill or the Criminal Code. Nor, so

far as I have been able to ascertain in the time available, has it been the subject of judicial explanation or consideration. The Macquarie Dictionary gives as the principal meaning of "urge", *"to endeavour to induce or persuade, as by entreaties or earnest recommendations; entreat or exhort earnestly",* and includes as one of a number of subsidiary meanings, *"to press by persuasion or recommendation, as for acceptance, performance, or use; recommend or advocate earnestly".* The Shorter Oxford yields similar meanings the first of which is *"present or state earnestly or insistently in argument,*

justification or defence".

f It would seem therefore that the term need not by any means be restricted to positive or express recommendation or persuasion, but could for example extend to cover indirect "urging", by way of analogy, or dramatisation, or imagery, or metaphor, or allegory, or allusion, or any of the myriad devices and techniques available to a creative artist.

(2) It will be enough that the accused "urges" such *other person* to do the act in question; that other person will not need to be shown to have responded in any way to such urging.

(3) Indeed it would not appear to be necessary to show that the accused had any particular person, or audience, in mind when he or she engaged in the conduct said to constitute the "urging".

(4) With the exception of the offences to be created by s. 80.2 (7) and (8) – as to which see below – the prosecution will not be required, as it is at present, to prove any subjective intention on the part of an accused, for example to cause violence, or to create public disorder or a public disturbance. The offence will be committed by engaging in conduct, of whatever kind, which may be found objectively to amount to the "urging" of another person to do the acts in question.

(5) In some cases – see s. 80(2), (4) and (6) – it will be sufficient for the prosecution to show "recklessness" (as distinct from deliberateness or actual intention) on the part of an accused as to whether a "circumstance" exists or will exist. "Recklessness" is defined in s. 5.4 if the Criminal Code as follows:

Recklessness

(1) A person is reckless with respect to a circumstance if:

(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(2) A person is reckless with respect to a result if:

(a) he or she is aware of a substantial risk that the result will occur; and

(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

(3) The question whether taking a risk is unjustifiable is one of fact.

(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

In these cases, *a fortiori,* the accused will not need to be shown to have actually intended the result.

(6) The offences to be created by s. 80.2 (7) and (8) do not involve the "urging" of force or violence (notions which have hitherto formed an important part of the concept of sedition). They involve, rather, the "urging" of conduct which is intended by the accused "*to assist, by any means whatever,* an organisation or country" which is either "at war with the Commonwealth" or "engaged in armed hostilities against the Australian Defence Force". Thus in the case of these proposed offences, a subjective intention on the part of the accused must be proved, namely that the conduct being "urged" would "assist" a hostile organisation or country. Such "assistance", however, may be by "any means whatsoever". It need only be minimal. It may be entirely peaceful and nonviolent. Encouragement; expressions of regret or remorse; publication of accurate factual material sympathetic to such an organisation or country; publication of accurate factual material unsympathetic to Australia's position in relation to such an organisation or country; expressions of opinion about factors which might lie behind the policies or actions of such an organisation or country: all of these activities, among countless others, would be very likely to amount to such "assistance", and thus to expose someone who "urged" another person to engage in such conduct to a 7 year goal term. The Bill provides, in s. 80.3, a defence for certain acts done in "good faith". In this respect it substantially mirrors the corresponding provisions in s. 24F of the present Crimes Act. However, the acts in respect of which this defence is available are

limited to such matters as trying to demonstrate or point out mistakes or defects in Government policy, or trying to bring about the removal of feelings of ill-will or hostility between different groups. It seems unlikely that this defence would avail an accused except in very limited circumstances.

Australians involved in creative or artistic fields seem to me to be particularly vulnerable to the risk of prosecution under the regime to be introduced by the Bill.

Take David Hare's recent play *Stuff Happens.* That was a play whose characters were for the most part, real people engaged in pubic policy concerning the war in Iraq: George Bush, Donald Rumsfeld, Colin Powell, Dick Cheney, Condoleeza Rice, Tony Blair among others. The dialogue given to those characters was in part derived from transcripts of what the real people had actually said, and in part imagined. Clearly enough, the playwright was inviting the audience to mistrust, or disbelieve, or ridicule much of what these characters, the 'leaders of the free world', were saying. Would the publication of such indirect criticism of American/British policy and actions on Iraq "assist" the insurgents in Iraq? Or al-Quaida? Arguably so. Might some audience members be encouraged, or "urged", by such a play to engage in conduct (whether acts of terrorism, at one end of the spectrum, or merely the further public dissemination of such criticisms, near the other end) of a kind which would or might contravene ss. 80.2 (1), (3), (5), (7) or (8) of the Bill? Quite possibly. Would the writer be aware of the risk that such a result might eventuate? Again, quite possibly.

Risks of contraventions of provisions of the Bill would arise, perhaps in a more acute way, with for example

- a play or film or television program depicting in a sympathetic or even non-hostile way the policies or strategies or motivations of the Iraqui insurgents, or of al-Quaida, or of other groups which may from time to time be at war with or engaged in armed hostilities with Australia

- a newspaper or magazine article, or book, which took a similar non-critical or explanatory approach, even if based on factual material which was completely accurate

- a song, or picture, or written work, which expressed corresponding sentiments or which utilised the musical or artistic or literary traditions or styles associated with the culture of a hostile organisation or country in a way which signified sympathy with or admiration of that culture

- any imaginative/creative work (literary, visual or other) which repeated or included seditious views expressed by others

In all of these hypothetical cases, the play, or film, or book, or song, or picture, or television programme could well be found to constitute, objectively, the "urging", of a person or persons exposed to it to engage in proscribed conduct. In any such case, ordinarily all of those involved in the dissemination of such works would potentially be guilty of sedition under the Bill: writers, directors, producers, actors, singers, painters, editors, publishers, distributors, broadcasters. All would arguably have "urged" such conduct.

At the very least, it seems to me that the increased uncertainty about the scope of the new offences and the potential severity of the punishment for them would inevitably tend to stifle, or to drive underground, the free expression of opinion and of creative or artistic responses to public and governmental affairs.

Blackstone Chambers PETER GRAY SC 28 October 2005