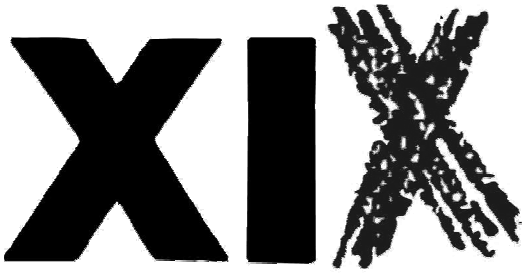

GLOBAL CAMPAIGN FOR FREE EXPRESSION

Submission

to

The Australian Law Reform Commission's Review of Sedition Laws (Issue Paper 30)

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1. Introduction

ARTICLE 19 is an international human rights organisation which defends and promotes freedom of expression and access of information around the world. We monitor, research, publish, lobby, campaign, set standards and conduct strategic litigation for the promotion of the right to freedom of expression. We take our name from Article 19 of the Universal Declaration of Human Rights, which protects the right to freedom of expression.

Our submission to the Australian Law Reform Commission's (ALRC) Review of Sedition Laws responds to a range of the Questions which raise issues in respect of the right to freedom of expression and we have adopted a free-form approach in our response. In summary we submit that the sedition provisions represent a serious incursion into the international standards for the protection of freedom of expression and strongly recommend against their continued inclusion in the *Criminal Code*.

As a prominent American commentator on the first Amendment, Harry Kalven, has observed, the existence of the offence of seditious libel – a hostile attack on government – is the hallmark of an unfree society.[1] Australia is an established democracy with a strong record of public participation and governmental accountability. The provisions enacted under the rubric of 'sedition' damage Australia's international reputation and its record for the recognition and protection of human rights. Enacting legislation in order to protect national security requires a careful balancing act between legitimate security measures and maintaining international obligations for the protection of human rights. The sedition laws fail to make this balancing act and we encourage a careful review of the provisions to bring these more closely into line with accepted international law and practice.

2. Are ss 80.2 and 80.3 Necessary and Appropriate for the Protection of National Security? [Questions 5, 7, 8, 10, 16, 17, 21 and 22]

2.1 Requirements for a Restriction on the Right to Freedom of Expression

As recognised in the ALRC Issue Paper, for a restriction on the right to freedom of expression to be permissible under international law, the restriction must be 'provided by law' and satisfy the tests of necessity and legitimacy in Article 19(3) of the ICCPR, namely that the restriction is necessary for the protection of the rights and reputation of others, or for the protection of national security, public order, or public health or morals.

2.1.1 'Provided by Law'

'Provided by law' means substantially more than simply enacting a legislative provision. In particular, the legislative provision must also meet certain standards of clarity and precision, to enable citizen to foresee the consequences of their conduct on the basis of the

[1] H Kalven, "The New York Times Case: A Note on the Central Meaning of the First Amendment" [1964] *Supreme Court Review* 191, 205.

law.[2] This also entails not permitting excessive discretion by public officials in determining whether the provision has been breached.[3]

Vaguely-drafted laws pose a significant threat to the protection of the right to freedom of expression. Such laws can have what is often called a 'chilling effect': because they create uncertainty about what is permitted and what is not, they encourage citizens to steer far clear of any controversial topic, for fear that what they wish to say is illegal, even if in fact it is not. In this way, vague laws can inhibit discussion about important matters of public concern.

2.1.2 'Necessary' to protect a legitimate interest provided in Article 19(3) of the ICCPR

In the great majority of cases where international human rights courts have ruled domestic laws to be impermissible restrictions on the right to freedom of expression, it was because the legislation in question was not truly necessary. An important reason for this is that international courts read the word 'necessary' as imposing several quality requirements on laws and practices which abridge freedom of expression.

This includes the recognition that **if there exists an alternative measure** which would accomplish the same goal in a way is less intrusive to the right to free expression, **the chosen measure is not in fact 'necessary'**.[4]

Second, the measure must **impair the right as little as possible** and, in particular, not restrict speech in a broad and untargeted way.[5]

Third, the **impact of restrictions must be proportionate**, meaning that the harm to freedom of expression caused by a measure must not outweigh the benefits to the interest it is directed at.[6] For example, a restriction which provides limited protection to a person's reputation but which seriously undermines freedom of expression does not meet this standard. A democratic society depends on the free flow of information and ideas; it is only when the overall public interest is served by limiting that flow that such a limitation can be justified. The benefits of any restriction must outweigh its costs.

Finally, in applying this test, courts and others should take into account all of the circumstances at the time the restriction is applied.[7] A restriction in favour of national security which is justifiable in times of war, for example, may not be legitimate in peacetime.

The provisions outlined in ss 80.2 and 80.3 of the *Criminal Code* violate a number of these basic and critical requirements and shall be discussed in detail in the following paragraphs.

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[2] M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (1st edition, 1993), 171. See also *Sunday Times v UK* (1979-80) 2EHRR 245, para. 49.
[3] *Pinkney v Canada*, No. 27/1978, U.N. Doc. CCPR/C/OP/1 at 12 (1985). See also *Kivenmaa v Finland*, No. 412/1990, U.N. Doc. CCPR/C/50/D/412/1990 (1994).
[4] See for example *Kim v Republic of Korea*, No. 574/1994, U.N. Doc. CCPR/C/64/D/574/1994 (1999).
[5] *Faurisson v France*, No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993 (1996), para. 8 of the separate opinion of Evatt, Kretzmer and Klein. See also Note 4.
[6] See for example *Pietraroia v Uruguay*, No. 44/1979, U.N. Doc. CCPR/C/OP/1 at 76 (1985), para. 16.
[7] See for example *Sohn v Republic of Korea*, No. 518/1992, U.N. Doc. CCPR/C/54/D/518/1992 (1995).

2.2 A Restriction Should Be Limited to Speech Where There is an Intention to Directly Incite Violence and a Direct Connection with a Likelihood of Violence [Questions 5, 7, 21 and 22]

One of our key concerns in regard to s 80.2 of the Criminal Code is that there the sub-sections do not sufficiently circumscribe the prohibited speech in order to meet the requirements that the restriction impairs the right as little as possible and the impact of the restrictions is proportionate. It is recognised by international standards relating to the right to freedom of expression that restrictions in the name of national security may only be imposed **where the speech was intended to incite imminent violence and there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence**.

In particular we refer to the principles set out in the 'Johannesburg Principles',[8] developed by a group of experts from around the world under the auspices of ARTICLE 19. Principle 6 provides:

> [E]xpression may be punished as a threat to national security only if a government can demonstrate that:
> (a) the expression is intended to incite imminent violence;
> (b) it is likely to incite such violence; and
> (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

This test has been endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression[9] and is often recommended to States for their consideration by the UN Commission on Human Rights in its annual resolutions on freedom of expression since 1996.[10]

A similar standard has been embraced by the European Court of Human Rights, whose decision in the case of *Karatas v. Turkey*[11] is highly instructive. The complainant had been convicted for the publication of poetry that allegedly condoned and glorified acts of terrorism. The Court accepted as a matter of fact that in Turkey violent terrorist attacks occurred regularly. But even in the context of regular threats to national security, the Court emphasized the applicant's fundamental right to freedom of expression and held that his conviction constituted a violation of this right. Highlighting that there was simply no causal connection between the poems and violence, the Court held:

> In the instant case, the poems had an obvious political dimension. Using colourful imagery, they expressed deep-rooted discontent with the lot of the population of Kurdish origin in Turkey. In that connection, the Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest … In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion.

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[8] Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted October 1995 (Johannesburg Principles).
[9] See, for example, UN Doc E/CN.4/1996/39, 22 March 1996, para. 154.
[10] See UN Doc. E/CN.4/1996/53, 19 April 1996. The Johannesburg Principles have also been referred to by superior courts of record around the world. See, for example, *Athukoral v. AG*, 5 May 1997, SD Nos. 1-15/97 (Supreme Court of Sri Lanka).
[11] 8 July 1999, Application No. 23168/94.

> Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries …
>
> [E]ven though some of the passages from the poems seem very aggressive in tone and to call for the use of violence, the Court considers that the fact that they were artistic in nature and of limited impact made them less a call to an uprising than an expression of deep distress in the face of a difficult political situation …[12]

The Court's judgment in *Karatas* is significant in emphasizing the necessity of the individual's intention to incite violence (the fact that the poems were very artistic in nature and thus unlikely to be a call to an uprising was significant in the Court's reasoning) and the occurrence of actual violence; as well as the necessary causal connection between the speech and the actual occurrence of violence.

In light of these international standards, ARTICLE 19 holds concern with a number of the provisions contained in s 80.2 of the *Criminal Code*. In particular, we refer to the usage of the terms 'urges', 'force', 'assist', as well as lack of a causal link between the prohibited speech-related conduct and a likelihood of imminent violence.

We note that the usage of the terms 'urges', 'force' and 'assist' are problematic both in terms of the requirement of being 'provided by law' and being truly necessary for the protection of national security or public order. Our concern in regard to the terms being 'provided by law' is discussed further below at Section 2.3.

In regard to the terms being truly necessary for the protection of national security or public order, we recommend adopting the language of incitement in place of 'urges', as incitement reflects the proper threshold under international law of prohibited speech and accords with the guidance of the Johannesburg Principles and *Karatas*. We also note that the UN Security Council adopts the language of incitement in its Resolutions 1456[13] and 1624[14] which seek to address the issue of speech-related conduct which is causally connected with terrorist activity. In particular, Resolution 1624, the Security Council expressly calls upon all States to "prohibit by law incitement to commit a terrorist act or acts".[15] Both Resolutions emphasise that all and any counter-terrorism measures implemented by States must comply with their obligations under international law, especially international human rights law.[16]

Not only is the language of incitement recognised under international standards as the threshold for restricting freedom of expression, the lay usage of the term 'incite', rather than 'urge', recognises the implicit connection with unlawful behaviour or violence. 'Incite' is defined by the Compact Oxford English Dictionary as to 'encourage or stir up (unlawful or violent behaviour); urge or persuade to act in a violent or unlawful way'. 'Urge', by contrast, is defined as to 'strongly recommend; encourage or entreat earnestly to do something'.[17]

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[12] *Ibid*, paras. 50-52.
[13] United Nations Security Council, *Resolution 1456*, UN SC, 4688th mtg, UN Doc S/Res/1456 (2003).
[14] United Nations Security Council, *Resolution 1624*, UN SC, 5261st mtg, UN Doc S/Res/1624 (2005).
[15] *Ibid*, [1(a)].
[16] Note 13, [6]; Note 14, [4].
[17] Definitions accessed at www.askoxford.com. Search results: http://www.askoxford.com/results/?view=dev_dict&field-

Similarly, in regard to 'force' this does not properly reflect the necessary link between the prohibited speech and a risk of imminent violence which justifies the prohibition in terms of national security. As noted below at Section 2.3, 'force' is a broad term which is not restricted to 'imminent violence'. Indeed, 'force' could encompass a broad range of non-violent activity. In conjunction with the problematic term 'urges', a person could encourage a person to act to lobby or picket against policies of the government, which could be considered 'force' and should not be prohibited.

Further, in regard to the application of the term 'assist' in s 80.2, we have serious concern with the mere supporting of an organisation or country without any causal link to an imminent threat of violence. The potential effect of this provision, in conjunction with the proscribing of organisations and countries considered to be an enemy of the Commonwealth (particularly where a state of war has not been declared), is to prohibit any support or indeed comment in respect of a proscribed organisation or nation (see Sections 2.3 and 4 below). It may encompass mere 'support', for example, of those engaged in armed hostilities against Australia. As cited in the ALRC Issue paper, these provisions could apply "even if Australia invades another country in violation of international law. If opposing Australian aggression is interpreted as tacit support for its enemies, Australians may be prosecuted for condemning illegal violence by their government, or for seeking to uphold the *United Nations Charter*".[18] We note that such comment, holding an elected government to account for its actions, is properly classified as political speech, which lies at the heart of freedom of expression in a democratic society. The necessity of a restriction on such speech must be clearly established.

In addition, we note that the High Court of Australia has expressly recognised that there is a right of freedom of political communication implied in the federal Constitution.[19] The High Court held that the Constitution's provisions for the direct democratic election of the Senate and House of Representatives necessarily entail that people should be free to discuss political issues. The implied freedom curtails legislative and executive power, preventing unconstitutional incursions on political communication. We submit that s 80.2 should be carefully examined in regard to whether it meets the necessity test in order to be consistent with the implied constitutional freedom of political communication.

In relation to the lack of a causal link between the prohibited speech and a likelihood of imminent violence, we note that each of the subsections of s 80.2 a person commits an offence if he or she urges another person to do an act, without any requirement that the person knows or reasonably suspects that the latter person has any specific intent to effect the act. For example, a demonstrator who carries a placard reading 'Kill Howard' could be theoretically be liable under s 80.1(1) or (2). Such an action, which could be considered offensive or dissident, falls below the threshold of an 'direct and immediate' connection

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12668446=incite&branch=13842570&textsearchtype=exact&sortorder=score%2Cname ('incite') and http://www.askoxford.com/results/?view=dict&field-12668446=urge&branch=13842570&textsearchtype=exact&sortorder=score%2Cname ('urge').

[18] B Saul, 'Speaking of Terror: Criminalising Incitement to Violence' (2005) 28 *University of New South Wales Law Journal* 868, 873.

[19] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

with a likelihood of imminent violent, thus violating the international standards on the protection of the right to freedom of expression.

We also note that such provisions fall foul of the requirements of the general law of incitement that the inciter must have both the intent to urge the commission of an offence and the further ulterior intention that the offence incited be committed.[20] Accordingly, the provisions of s 80.2 represent a significant expansion of the general rules of liability for the conduct of another.

Dr Ben Saul of the Gilbert & Tobin Centre for Public Law, University of New South Wales also highlighted this issue in his Submission 80a dated 17 November 2005, responding to a Question on Notice from Senator Brandis of the Senate Legal and Constitutional Committee. Dr Saul noted that s 80.2 represents a widening of liability from the existing *mens rea* requirements for both the sedition offences contained in ss 24C-D of the *Crimes Act* 1914 (Cth) and the offence of incitement contained in s 11 of the *Crimes Act* 1914 (Cth). Dr Saul further notes that the widening of liability in this regard is inconsistent with the recommendations of the drafters of the Model Criminal Code, who refrained from allowing liability on the basis of reckless or in the absence of an ulterior intention. Dr Saul cited the following authoritative guidance:

> Since the prohibition of incitement penalises communication restricting freedom of expression, liability is narrowly limited to communications which are intended to promote the commission of an offence. Incitement does not extend to instances of recklessness with respect to the effects which speech or other communication might have in providing an incentive or essential information for the commission of a crime.[21]

We strongly recommend that the agreed national standards on liability, as outlined in the *Criminal Code*, must be adhered to. Accordingly, we recommend that the provisions of s 80.2 are redrafted in accordance with above limitations.

2.3 A Restriction Must Meet the Requirement of Being 'Provided By Law'

In addition to our concerns about 'urges' and 'force' not establishing the necessary causal connection between the prohibited speech and a likelihood or occurrence of violence, we submit that these terms do not meet the requirement of being 'provided by law' (see Section 2.1.1 above). These terms, as well as the term 'assist', are vague and broadly drafted and potentially prohibit a wide raft of legitimate speech. In regard to 'assist', a very broad range of conduct is encompassed, including by simply lending a voice of support or voicing criticism of the Australian government. This term is in urgent need of clarification and narrowing.

No definitional guidance is given in the *Criminal Code* to their scope and, on the face of the terms, they do not provide the requisite level of clarity for an individual to regulate his or her conduct. For this reason alone, we submit that the provisions violate Article 19 of the ICCPR.

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[20] *Crimes Act* 1914 (Cth), s 11.
[21] See Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners,* AIJA, March 2002, 270-275.

2.4 Existing Legislative Provisions Render Sedition Laws Unnecessary [Questions 8 and 22]

As outlined in the ALRC Issue Paper, there are extensive, albeit not uniform, provisions at both federal and state / territory level relating to sedition, including statutory offences and the common law offences of sedition and seditious libel. The existence of these provisions undermines the necessity, as recognised under international standards, for enacting further legislation.

As recognised in the ALRC Issue Paper, in respect of s 80.2(3)-(4) there already exists a provision in the *Commonwealth Electoral Act 1918* (Cth) which provides that a person 'shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to the election under this Act'.[22] Also, the ARLC Issue Paper notes that it is an offence under s 28 of the *Crimes Act 1914* (Cth) if a person 'by violence or by threats or intimidation of any kind, hinders or interferes with the free exercise or performance, by any other person, of any political right or duty…'.

For s 80.2(5), the conduct proscribed overlaps to some extent with conduct rendered unlawful (but not criminal) by the racial vilification provisions in the *Racial Discrimination Act 1975* (Cth) and similar state and territory legislation. As discussed below at Section 2.5, we submit that criminal sanctions are not necessarily appropriate for the conduct proscribed by s 80.2, and this may further undermine the necessity of enacting s 80.2(5) in addition to the existing racial vilification provisions.

In respect of ss 80.2(1)-(2) and (7)-(8), these offences may also be rendered unnecessary as much of the proscribed conduct would constitute incitement to commit other offences, such as the offences of treason and treachery.[23] The *Crimes (Foreign Incursions and Recruitment) Act 1914* (Cth) also outlines a range of relevant offences, including s 9, which makes it an offence to recruit another person to serve with an armed force in a foreign state or to advertise or do any other act with the intention of facilitating such recruitment.

Such provisions negate the necessity of the provisions of s 80.2 on the basis that there is a significant degree of overlap with existing legislative provisions proscribing conduct.

2.5 Are the Maximum Penalties for s 80.2 Offences Appropriate? [Question 10]

It remains controversial whether the positive obligations placed on States by Article 20 of the ICCPR necessitates the use of a criminal sanction, [24] let alone the use of imprisonment. States are afforded a margin of discretion in determining this issue. In guidance of this margin of discretion, ARTICLE 19 emphasise the highly deleterious effects of custodial sanctions on freedom of expression and strongly recommend that this critical factor should be taken into account in determining the scope of the offences and the accompanying sanctions.

The disproportionately detrimental impact which custodial sanctions have on freedom of expression is well recognised under international law. In its General Comment 10, the UN

[22] *Commonwealth Electoral Act 1918* (Cth), s 327(1).
[23] *Crimes Act 1914* (Cth), ss 24AB-AB,. See also Note 18, 873.
[24] M Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edition, 2005), 470.

Human Rights Committee emphasized that "…when a State party imposes certain restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself",[25] recognising, inter alia, the serious 'chilling effect' on free expression which custodial sanctions exert.

In ARTICLE 19's view, if custodial sanction were ever to be justified for a s 80.2 offence, the provisions of s 80.2 would need to be much more narrowly drawn, with a direct and immediate connection between an intention to incite imminent violence and a likelihood or occurrence of such violence. Furthermore, we would recommend that the use of custodial sanctions be limited to the most serious of the scale of the offences, and that it should be a discretionary rather than a mandatory penalty, so as to allow for a proper consideration of the full appropriateness of applying a custodial penalty in the individual case.

We further note that we are particularly concerned about the application of criminal sanctions in the context of the media (in addition to our concerns regarding the sufficiency of the 'good faith' defences). It is fundamental in a democratic society that the media are a full latitude to report freely on all matters of public interest. The 'chilling effect' on freedom of expression has a particularly pronounced effect in the context of the media seeking to convey a diverse range of ideas and information to the public. The inappropriateness of applying criminal sanctions to the media has received particular attention from human rights courts and the Special Mandates of the UN, OSCE and OAS on the right to freedom of expression, especially in the context of decriminalising defamation. [26]

In ARTICLE 19's view, incarceration on the basis of conveying ideas and information through the media is rarely if ever justified. Accordingly, we recommend that any penalties for the media should be revised to be appropriate, proportionate and only as strictly necessary in the context of the media.

2.6 Is the Good Faith Defence in s 80.3 Necessary? Does it Provide Sufficient Protection to Journalists and Media Organisations? [Questions 16, 17 and 22]

The existence of a defence for the media to the provisions of s 80.2 is absolutely critical to the protection of press freedom and freedom of expression in general. The scope of the defence determines whether there is sufficient protection in order to meet international standards governing freedom of expression.

[25] United Nations Human Rights Committee, *General Comment 10: Article 19*, 19th session, UN Doc HRI\GEN\1\Rev1 (1983), [4].

[26] See, for example, the January 2000 report of the UN Special Rapporteur on the promotion and protection of the right to freedom of expression to the UN Human Rights Committee E/CN.4/2000/63, para. 205; the Warsaw Declaration of the OSCE Parliamentary Assembly, 8 July 1997, para. 140; and The Joint Declaration dated 10 December 2002 of the UN, OSCE and OAS Special Mandates on freedom of expression. The UN Human Rights Committee has several times expressed its concern over the misuse of criminal defamation laws in concrete cases, recommending a thorough reform in countries as wide-ranging as Azerbaijan (*Concluding observations of the Human Rights Committee: Azerbaijan*, UN Doc. CCPR/CO/73/AZE, 12 November 2001), Norway (*Concluding Observations of the Human Rights Committee: Norway,* UN Doc. CCPR/C/79/Add.112, 1 November 1999) and Cameroon (*Concluding observations of the Human Rights Committee: Cameroon*, UN Doc. CPR/C/79/Add.116, 4 November 1999).

ARTICLE 19 considers that the current drafting of the 'good faith' defence provides insufficient protection for journalists, media organisations and the right of freedom of expression in general. There should be much more stringent provisions implemented to properly protect the freedom of the press and freedom of expression as recognised by international standards.

While we recognise that requiring the Attorney General's written consent prior to commencing proceedings for a s 80.2 offence provides a form of safeguard (as stated in the Explanatory Memorandum to the Anti-Terrorism Bill), the content of this safeguard is so minimal as to render it ineffective in respect of the media. We note that there is no requirement in the Prosecution Policy of the Commonwealth Director of Public Prosecutions (DPP) for the Attorney-General to have regard to "international law, practice and comity" as exists for s 16.1 of the *Criminal Code*. Indeed, the requirement to take into consideration matters of international law only is triggered where the offence takes place overseas.

Furthermore, we have concern with the concept of requiring the consent of the Attorney-General in matters of press freedom. Written ministerial consent is open to abuse and political interference in respect of the press, which should be robustly protected from such threats to its independence. In the context of the UK's provision for the Attorney General's consideration of the public interest before giving consent to prosecute, Geoffrey Robertson QC and Andrew Nicol QC argue that:

> There is a danger in placing over-much reliance on the Attorney's discretion. He is, after all, a member of the Government, as well as the leader of the legal profession. In determining "public policy", he will obviously be influenced by the outlook of the political party of which he is a member and by the values of the profession that he leads. These influences will not always incline him to the view that revelation of particular legal or political material is necessarily in the public interest. There is another danger. The decision to publish often hinges on the question: "Will the Attorney prosecute if we do?". There is a natural temptation to seek an answer from the horse's mouth, so to speak, by submitting the controversial material to the Attorney for an indication of his attitude. This has been done by the BBC (which is notoriously craven in legal matters) and by several newspapers. It comes perilously close to making the Attorney, in effect, a political censor, an official to whom the media can go, cap in hand, with the question "please sir, can we publish this?"…[27]

As the Fairfax Group submitted to the 2005 Senate Committee, the requirement to demonstrate 'good faith' might be very difficult for a defendant to manage, especially in the context of media reports, and particularly in relation to the republication of third-party statements. The Government's response to concerns about reporting the views of others by inserting an additional good faith provision in s 80.3 which permits public in good faith of a 'report or commentary about a matter of public interest'[28] does not remedy the inherent problem of the Attorney-General as the ultimate arbiter of initiating proceedings in respect of violations by the press. It simply defers the discretion of the Attorney-General to the question of what constitutes the 'public interest' in his view. The problems inherent in this are outlined in the quote immediately above.

[27] G Robertson QC, A Nicol QC, *Media Law* (4th edition, 2002), 31-32.
[28] *Criminal Code*, s 80.3(f).

ARTICLE 19 considers that if this structural arrangement is ever to be acceptable in balancing the interests of national security and the protection of freedom of expression, there should be an express requirement for the Attorney-General to take into account the public interest in protecting the independence of the press and the content of the right to freedom of expression as protected under international law. These could be included in the Prosecution Guidelines of the Commonwealth DPP, as currently exist in relation to a prosecution under Part 2.7 of the *Crimes Act* 1914 (Cth). This would then bring the provision more closely in line with the requirements of the necessity test for a restriction on the right to freedom of expression.

3. Is There a Need for a 'Glorification' or 'Encouragement' Offence of Terrorism Similar to the United Kingdom? [Question 9]

ARTICLE 19 expressed serious concern when the introduction of these two offences was proposed. We strongly recommended against these provisions as they represent a serious expansion of liability which violate the international standards outlined above in Section 2.2.[29] The UK offences of 'glorification' and 'encouragement' are both vaguely worded and broad in scope, failing to meet the 'provided by law' test. Additionally, they include the concept of 'indirect incitement' and the making of statements which 'glorify' terrorism, which violate the Johannesburg Principles and *Karatas*, as there is an insufficient connection between the speech and a likelihood of imminent violence. The concept of 'glorification' also removes the requirement of mens rea, a fundamental component of a society governed by the rule of law.

These provisions represent a defeat of the requisite standard of protection of freedom of expression and we urge the Australian government not to follow the path taken by the United Kingdom.

4. Are the Unlawful Associations Provisions Based on 'Seditious Intention' Still Appropriate? [Question 18]

We note that Question 18 asks whether the unlawful associations provisions are appropriate, given they rely on the concept of 'seditious intention' and this concept is no longer used in connection with the offences in s 80.2 of the *Criminal Code*.

ARTICLE 19 considers that proscribing an organisation on the basis of 'seditious intention' is antithetical to modern criminal law provisions and inconsistent with standards under international law for the protection of the right to freedom of expression and the right of freedom of association.[30] We note with approval Chris Conolly's submission to the 2005 Senate Committee which criticised the use of 'seditious intention' as a basis for proscription as the definition of the term "covers practically all forms of moderate civil disobedience and objection…" and thus is at odds with the notions of participation in an established democracy.

[29] ARTICLE 19, *Submission on the 'Encouragement' of Terrorism: Clause 1 of the UK Terrorism Bill*, December 2005, http://www.article19.org/pdfs/analysis/encouragement-of-terrorism.pdf.
[30] See for an example of proscribing political organisations, *M.A v Italy*, Communication No. 117/1981, U.N. Doc. CCPR/C/OP/2 at 31 (1990).

We note that the unlawful associations provisions have effectively been reduced to 'stand alone' provisions based on seditious intention, while the offences in s 80.2 rely on other bases of liability. Furthermore, the scope of the unlawful associations provisions have been progressively eroded by context-specific legislation which supersedes the application of the former, including the *Workplace Relations Act 1996* (Cth) and the counter-terrorism amendments to the *Criminal Code* in 2002. Significantly none of the legislation which supersedes the unlawful associations provisions makes any reference to the concept of 'seditious intention'.

While we have a number of concerns with the provisions relating to the proscription of 'terrorist' organisations introduced in 2002, we consider that these provisions to be at least more closely causally linked to proscribing on the basis that an association may pose a threat to national security.

In conclusion, we note with approval the recommendation by the Gibbs' Committee that the unlawful associations provisions should be abolished and Chris Connolly's submission to the 2005 Senate Committee that the "case for retention" for these provisions is, at best, "weak".

5. Does s 80.2(5) Effectively Implement Australia's Obligations Under Article 20 of the ICCPR? [Question 20]

We note that there are two key issues which mean that s 80.2(5) does not effectively implement Australia's obligations under Article 20 of the ICCPR, namely that the provision does not comply with the threshold test set by Article 20(2) and that the provision does not meet the requirements for a restriction on freedom of expression as required by Article 19(3) of the ICCPR. Finally, we also note that s 80.2(5)(b) purports to link the urging of violence to the protection of the State. This prohibition goes beyond the scope and purpose of Article 20(2).

In respect of the threshold set by Article 20(2), the obligation imposed on States is to outlaw "*any advocacy* of national, racial or religious hatred *that constitutes incitement* to discrimination, hostility or violence…" (emphasis added). Section 80.2(5) substantially oversteps this prohibition, seeking to outlaw any urging of force or violence by a group against another group (where those groups are defined by race, religion, nationality or political opinion). As discussed above at Section 2.2, the standard of incitement requires the inciter to have both a specific intention to incite person to act as well as a ulterior intention for the act to occur. As also argued above at Section 2.2 we have particular concern with the combined effect of the vaguely drafted terms 'urges' and force' – 'urges' fails to require an intention relating to unlawful violence, and 'force' potentially encompasses a broad range of conduct, including force of argument or mere protest. This represents a serious encroachment on the right to freedom of expression, which is not authorised by the obligation outlined in Article 20(2).

In respect to meeting the requirements of a restriction outlined in Article 19(3) it is well established that any prohibition enacted in accordance with Article 20 must still be

compliant with the provisions of Article 19(3).[31] We submit that s 80.2(5) fails to meet the necessity test for a restriction on freedom of expression for the protection of national security. As discussed earlier in our submission at Section 2.2, there must be a direct and immediate connection between the speech and the likelihood or occurrence of imminent violence. The lack of specificity in the provision, as well as the indirect link between the speech-related conduct and the potential resultant act fail to meet this requirement.

We also note that s 80.2(5)(b) purports to link the urging of violence to the protection of the State. This does not reflect the purpose of Article 20, which is a special State obligation to take preventative measures at the horizontal level to enforce the rights to life (Article 6) and equality (Article 26).[32] Accordingly, s 80.2(5)(b) exceeds the scope and purpose of Article 20.

[31] United Nations Human Rights Committee, *General Comment 11: Article 20*, 19th session, UN Doc HRI\GEN\1\Rev7 (1983), [2].
[32] Note 24, 468.