



Australian Government

**Professor Rosalind Croucher
President**

Australian Law Reform Commission

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

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Dear Committee Secretary

Australian Law Reform Commission submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the provisions of the National Security Legislation Amendment Bill 2010 and Parliamentary Joint Committee on Law Enforcement Bill 2010

The Australian Law Reform Commission (ALRC) welcomes the opportunity to contribute to the Committee's inquiry. The ALRC will restrict its comments to the National Security Legislation Amendment Bill 2010 (Cth), drawing on its experience from the major inquiry into sedition laws in Australia, culminating in the final report, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006) (ALRC Report 104).¹

The ALRC notes that the National Security Legislation Amendment Bill makes a number of amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). The enactment of this legislation substantially implemented recommendations made in the ALRC's report on protecting classified and security sensitive information— *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC Report 98 (2004).² The ALRC does not intend to comment on these amendments, but instead commends ALRC Report 98 to the Committee.

The ALRC strongly supports those provisions of the National Security Legislation Amendment Bill that implement the recommendations of ALRC Report 104. The ALRC acknowledges and congratulates the Australian Government for acting on the ALRC's recommendations, noting that there has been a high level of public interest in the recommendations since the release of the report.

On 1 March 2006, the Attorney-General signed Terms of Reference asking the ALRC to conduct a review of the operation of Schedule 7 of the *Anti-Terrorism Act (No 2) 2005* (Cth) and Part IIA of the *Crimes Act*, with respect to the recently amended provisions dealing with the offence of sedition and related matters, and to report by 30 May 2006.

¹ The report is available online at <www.alrc.gov.au/inquiries/title/summary_alrc104.html>.

² The report is available online at <www.alrc.gov.au/inquiries/title/alrc98/index.html>.

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The Terms of Reference directed the ALRC to consider:

- the circumstances in which individuals or organisations intentionally urge others to use force or violence against any group within the community, against Australians overseas, against Australia's forces overseas or in support of an enemy at war with Australia; and
- the practical difficulties involved in proving a specific intention to urge violence or acts of terrorism.

In performing its functions in relation to the reference, the ALRC was asked to have particular regard to:

- whether the amendments in Schedule 7 of the *Anti-Terrorism Act (No 2) 2005*, including the sedition offence and defences in sections 80.2 and 80.3 of the *Criminal Code*, effectively address the problem of urging the use of force or violence;
- whether 'sedition' is the appropriate term to identify this conduct;
- whether Part IIA of the *Crimes Act*, as amended, is effective to address the problem of organisations that advocate or encourage the use of force or violence to achieve political objectives; and
- any related matter.

The ALRC released an issues paper, *Review of Sedition Laws* (ALRC IP 30) in March 2006; and a discussion paper, *Review of Sedition Laws* (ALRC DP 71) in May 2006. The ALRC established a broad-based Advisory Committee to assist with the development of the inquiry;³ and developed a consultation strategy, so far as time permitted, which encouraged participation from a wide spectrum of stakeholders.⁴ The ALRC received 126 written submissions and conducted 27 consultation meetings (many of them multi-party).⁵

The final report—ALRC Report 104—was tabled in Parliament on 13 September 2006. The report contains 27 recommendations for reform, most of which were directed to the Australian Government. The *Australian Government Response to ALRC Report 104* on 23 December 2008 supported the majority of the report's recommendations.⁶

Implementation of ALRC Report 104 Recommendations

Schedule 1 of the National Security Legislation Amendment Bill implements the bulk of the ALRC's recommendations in ALRC Report 104, including:

- the repeal of the *Crimes Act 1914* (Cth) provisions concerning unlawful associations (Rec 4–1);

³ The membership of the Advisory Committee for the sedition inquiry was drawn from the bench, the bar, the academy, media organisations, civil liberties groups and human rights and equal opportunity commissioners, and included a current and former Commonwealth Director of Public Prosecutions. See Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006), List of Participants.

⁴ Including: community groups; prosecution and law enforcement agencies; criminal defence lawyers; judges; government lawyers and officials; media organisations and peak associations; legal professional associations; human rights and civil liberties groups; academics; and others.

⁵ Lists of the submissions and consultations are set out in Appendices 3 and 4 of the Report, respectively.

⁶ *Australian Government Response to ALRC Review of Sedition Laws in Australia—December 2008* (2008).

- the repeal of s 30C of the *Crimes Act* which contains the offence of advocating or inciting to crime (Rec 9–3);
- the removal of the term ‘sedition’ from federal criminal law and replacing it with references to ‘urging violence offences’, including in the heading to Part 5.1 and Division 80 of the *Criminal Code* (Cth) (Rec 2–1);
- the amendment of the treason offences in s 80.1(1)(e)–(f) of the *Criminal Code* to provide, among other things that conduct must ‘materially’ assist an enemy, making it clear that mere rhetoric or expression of dissent are not sufficient, and ensuring a proclamation of an enemy is not sufficient (Rec 11–2);
- the introduction of a new offence in the *Criminal Code* to replace the offence of sedition for intentionally urging the overthrow of the Constitution of Government by force or violence (Recs 8–1, 9–1 and 9–2);
- various amendments to s 80.2 of the *Criminal Code* to provide for the offence of intentionally urging interference in parliamentary elections or constitutional referenda by force or violence (Rec 9–4);
- the repeal of the offence of urging a person to assist the enemy and urging a person to assist those engaged in armed hostilities against the Australian Defence Force under sections 80.2(7) to (9) of the *Criminal Code* (Rec 11–1);
- the repeal of s 80.5 of the *Criminal Code* which required the Attorney-General’s written consent to a prosecution (Rec 13–1); and
- the amendment of the offences relating to urging violence against groups under s 80.2(5) of the *Criminal Code* (Recs 10–2 to 10–4).

In its response to the report, the Australian Government noted that the Government accepted the ALRC’s recommendations in relation the expansion of a defence of ‘good faith’ (Recs 12–1 and 12–2), but that it would implement those recommendations in a different manner from that proposed by the ALRC.⁷ This has been achieved through amendments to s 80.3 of the *Criminal Code*.

Other federal laws relating to the security of the Commonwealth

Chapter 3 of ALRC Report 104 considers existing offences in the *Criminal Code*, the *Crimes Act* and other federal legislation, and their interaction with sedition provisions. In discussing these provisions, the ALRC identified a range of provisions in federal legislation, including provisions under Part II of the *Crimes Act* relating to treachery, sabotage, inciting mutiny, assisting prisoners of war to escape, unlawful drilling and intentionally damaging or destroying Commonwealth property.⁸

The ALRC noted that it was outside the Inquiry’s Terms of Reference to conduct a full review of all federal law relating to the security of the Commonwealth. Nevertheless, it was clear that, while attention has been given to the modernisation of some of the *Crimes Act* offences, many still languish as ‘dead-letter’ laws that are never prosecuted. These provisions are couched in archaic language and many of them effectively have been superseded by new provisions in the *Criminal Code* and elsewhere.⁹

⁷ Australian Government Response to ALRC Review of Sedition Laws in Australia—December 2008 (2008).

⁸ See Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006), [3.35]–[3.44].

⁹ *Ibid*, [3.52].

The ALRC noted that a number of submissions to the inquiry supported a review of these provisions by the Australian Government.¹⁰ The ALRC therefore recommended that the Australian Government should initiate a review of the remaining offences in Part II of the *Crimes Act* to determine which of them merited retention, modernisation and relocation to the *Criminal Code*, and which offences should be abolished. In particular, the ALRC noted that provisions relating to treachery; sabotage; inciting mutiny; assisting prisoners of war to escape; unlawful drilling; interfering with political liberty; destroying or damaging Commonwealth property; industrial disturbances, lock-outs and strikes; and obstructing or hindering the performance of services, should be reviewed.¹¹

The Government Response to ALRC Report 104 indicated support for this recommendation but noted that a further formal external review of the offences in Part II of the *Crimes Act* was not required.

The Attorney-General's Department is currently considering the provisions with a view to repealing outdated offences or modernising necessary offences for inclusion in the *Criminal Code*. This task is being undertaken as part of the Model Criminal Code project that aims to incorporate all serious Commonwealth offences into the Code.¹²

The ALRC notes that these provisions remain on the statute books, and that they are not dealt with in the National Security Legislation Amendment Bill.

State and territory legislation

In ALRC Report 104 the ALRC noted that federal sedition laws proscribe, among other things, urging the overthrow by force or violence of 'the Government of the Commonwealth, a State or a Territory'. However, the Australian Parliament did not intend to 'cover the whole field' in relation to sedition, which would have rendered the relevant state and territory laws inoperative under s 109 of the *Australian Constitution*.

Chapter 3 of ALRC Report 104 examines various state and territory sedition laws.¹³ For example, in Victoria, s 316 of the *Crimes Act 1958* (Vic) makes it an offence to take an oath to, among other things, 'engage in any mutinous or seditious enterprise'. The nature of a seditious enterprise is not defined, leaving this to the common law.

The ALRC noted, in Chapter 2 of the report, that it had recommended that the term 'sedition' be removed from the federal statute book. The historical association of the term with suppression of political dissent gives rise to serious concerns within the community that the law might inhibit freedom of expression and freedom of association. Further, in consultations in the inquiry it

¹⁰ Arts Law Centre of Australia, *Submission SED 65*, 6 June 2006; Australian Press Council, *Submission SED 66*, 23 June 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; Sydney PEN, *Submission SED 88*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; National Tertiary Education Union, *Submission SED 118*, 3 July 2006; National Legal Aid, *Submission SED 124*, 7 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

¹¹ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006), Recs 3–1 and 4–2.

¹² *Australian Government Response to ALRC Review of Sedition Laws in Australia—December 2008* (2008).

¹³ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006), [3.55]–[3.68].

appeared that much of the concern about the offences emanated from the fact they are referred to as ‘sedition’ offences.

The ALRC stated that consideration of state and territory sedition laws indicates that they are as contentious as—or in many cases more contentious than—the original federal *Crimes Act* provisions. The ALRC commented that the fact that these sedition provisions have not occasioned any public outcry is likely to be because they have not been ‘updated’—and few people are aware of their existence. Nonetheless, the ALRC concluded that the reasoning that supports the ALRC’s recommendation to remove of the term sedition from federal legislation applies equally to the state and territory provisions. Removal of the term from state and territory laws was widely supported in submissions to the inquiry.¹⁴

The ALRC therefore recommended that, in the interests of improving and harmonising the laws in this area across Australia, the Australian Government should initiate a process through the Standing Committee of Attorneys-General to remove the term ‘sedition’ from state and territory laws.¹⁵ The Australian Government response noted that the Government supports this recommendation by the Prime Minister raising this issue with the Premiers and Chief Ministers.¹⁶ The ALRC has undertaken a brief survey of state and territory legislation, and found that many of these provisions remain on the statute books.

Education programs

This submission focuses on ALRC Report 104 recommendations requiring legislative amendment. However, the ALRC would also like to highlight that ALRC Report 104 made two recommendations relating to educational programs.

In ALRC Report 104, the ALRC stated that its recommendations, if adopted, would significantly reform federal sedition laws and further protect freedom of expression. The ALRC noted, however, that artists and members of the media will not enjoy the full benefit of this reform if they did not understand properly the nature of the offences as amended—particularly given the risk of self-censorship raised with the ALRC during the Inquiry and discussed in the report.¹⁷

In response to this concern it was suggested that, if the ALRC’s recommendations were adopted, Australia’s peak arts and media organisations should participate in the education process by informing their members of the nature and effect of the amendments to the relevant law.¹⁸ The ALRC endorsed this suggestion and recommended that:

¹⁴ Arts Law Centre of Australia, *Submission SED 65*, 6 June 2006; Australian Press Council, *Submission SED 66*, 23 June 2006; A Levy, *Submission SED 72*, 29 June 2006; Law Institute of Victoria, *Submission SED 70*, 28 June 2006; Victoria Legal Aid, *Submission SED 79*, 3 July 2006; Sydney PEN, *Submission SED 88*, 3 July 2006; The Arts Industry Council of South Australia, *Submission SED 112*, 3 July 2006; Australia Council for the Arts, *Submission SED 114*, 3 July 2006; Media Entertainment and Arts Alliance, *Submission SED 117*, 3 July 2006; National Tertiary Education Union, *Submission SED 118*, 3 July 2006; National Legal Aid, *Submission SED 124*, 7 July 2006; Public Interest Advocacy Centre, *Submission SED 125*, 7 July 2006.

¹⁵ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006), Rec 3–2.

¹⁶ *Australian Government Response to ALRC Review of Sedition Laws in Australia—December 2008* (2008).

¹⁷ See Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006), Ch 7.

¹⁸ Media and Arts Representatives, *Consultation*, Sydney, 14 June 2006.

peak arts and media organisations should provide educational programs and material to their members to promote a better understanding of: the scope of federal, state and territory laws that prohibit the urging of political or inter-group force or violence; and any potential impact of these laws on the activities of their members.¹⁹

The Government Response noted that it supported this recommendation, and that it actively supports any recommendation in relation to providing information to the public to ensure a greater understanding of the application of the offences.²⁰

Chapter 10 of ALRC Report 104 deals with the offence for urging inter-group force or violence, and made a number of recommendations relating to the current offence under s 80.2(5) (as outlined above). The ALRC noted that it is important that the Australian Government continue to develop strategies, including educational programs, to promote inter-communal harmony and understanding; and highlight the existence of civil remedies in the *Racial Discrimination Act 1975* (Cth) and relevant state and territory legislation. In the ALRC's view, it is preferable that such programs exist to stem the kinds of conduct that might otherwise need to be punished using the criminal law.

The ALRC therefore recommended that the Australian Government should continue to pursue other strategies, such as educational programs, to promote inter-communal harmony and understanding.²¹ The Government Response supported this recommendation, noting that:

the Attorney-General's Department is currently further developing its community education program including the development and distribution of information pamphlets which explain the operation of the counter-terrorism offences and related legislation. Significant improvements have also been made to the National Security website and the Department's website to give greater access to information regarding Australia's counter-terrorism measures and the impact on the community.²²

I hope this information is of assistance to the Committee.

Yours sincerely,

¹⁹ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006), Rec 7–1.

²⁰ *Australian Government Response to ALRC Review of Sedition Laws in Australia—December 2008* (2008).

²¹ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, ALRC Report 104 (2006), Rec 10–5.

²² *Australian Government Response to ALRC Review of Sedition Laws in Australia—December 2008* (2008).