Australian Government
Attorney-General's Department

Security and Critical
Infrastructure Division

05/18041

22 November 2005

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

Dear Committee Secretary

Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005 – Attorney-General's Department Submission No. 2 – Reponses to Questions on Notice

Officers from the Attorney-General's Department appeared before the Committee on Monday 14 November 2005 and Friday November 18 and offered to take questions on notice in relation to a number of matters.

To assist the Committee in its inquiry into the Bill, the Attorney-General's Department has provided responses to the Questions on Notice from Monday 14 November (**Attachment A**), Questions on Notice from Friday 18 November (**Attachment B**) and information on the Gibbs Committee Report (**Attachment C**).

In addition the Department provides the following information in relation to Schedule 7 of the Bill which relates to sedition.

Sedition – Schedule 7

The submissions and testimony of those opposed to the proposed sedition offence has followed a familiar pattern to what I have seen in the past when someone wants to oppose a new offence. **Step 1** involves suggesting that the offence has broader coverage than what it actually has. When the Government argues convincingly that this is not the case, it is then suggested that the offence makes so little change that it is not necessary (**Step 2**).

Mr Walker's contribution is an example of this approach. In his opinion which is attached to the written submission of Mr Connolly dated 11 November (page 22) he says "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." (**Step 1**).

The Departmental response was straight forward. There is no reference in proposed s.80.2 to intention because intention is already provided for by operation of s.5.6(1) of the Criminal Code.

This is reinforced by the construction of the offences, (for example, in s.80.2(1) there would be no need to specify recklessness with respect to the object of the violence (the Constitution) if the drafter did not consider urging the use of force or violence was conduct, which in turn means of intention must be proved as required by s.5.6).[1]

In his testimony on 17 November, after appearing to acknowledge he had not taken s.5.6 into account, Mr Walker then began to argue that the offence would be difficult to prosecute and it was therefore not necessary. He would of course prefer that the 'good faith' defence to be watered down so that the motivations of the person seeking to rely on the defence are not taken into account as closely as otherwise would be the case, but even without that change he said it would be difficult to prosecute (**Step 2**).

In the end the crux of the argument of opponents to the sedition offence was that it would 'chill' certain comments. Indeed, the policy is to chill comments where they consist of urging the use of force and violence against our democratic and generally tolerant society in Australia. Many who are opposed to that policy are less concerned than relevant agencies about the consequence that the naïve and impressionable might be inspired to commit violence as a result of such urging. It also may be a relevant factor that the seditious ranting of some people attracts attention and is probably commercially valuable. The policy objective of the offence is unashamedly in conflict with such considerations. Of course there are many others, including Mr Walker, who I am sure have more honourable motivations.

I shall now respond to the propositions advanced in support of the step 2 argument. This adds to my testimony on 18 November that the changes to the sedition offence flowed from discussions with relevant agencies about specific conduct that had come to the attention of the authorities. I am constrained from outlining details of those specific cases by the potential for claims that my comments are prejudicial, but have been asked by the committee to assist with examples.

My starting point is that in recent years sedition has become a more relevant offence. The web and computer technology has made it much easier to disseminate material that urges violence in much the same way Government has recognised that it has made child porn easier to disseminate. The **attached** photograph and article from page 21 of the 19 November Canberra Times which includes a web page giving instructions on how to shoot foreigners in the streets provides a timely reminder of how vicious some of the material can be.[2] The web is of course widely accessible to children. Indeed it may be that some of the people who gave testimony to the Committee may not be as in touch as the law enforcement and security and intelligence agencies are in understanding the penetration of the web amongst young people. It is remarkable how long children spend 'surfing' the web and the nature of the material that is examined. I should add of course that people with mental impairment or a severe personality disorders have similar access.

Using the Canberra Times example, the new offence would capture the type of conduct outlined on the web page (proposed subsection 80.2(5) – urges a group (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or groups). Although the page depicts shooting foreigners it does not appear to focus much on the political motivations which would be necessary for proof of a 'terrorist act' offence (so charging for incitement to commit a terrorist act offence or a terrorist act offence itself would appear excluded, as would an

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1 The Human Rights and Equal Opportunity Commission submission of 17 November 2005 (p.2) suggested another interpretation which is not supported by the construction of the offences.

2 I use the example without making any judgment about whether it is genuine or where it was generated. The Canberra Times claims the site was developed outside Australia.

individual advocating a terrorist act offence) and it is probably insufficiently specific in terms of the target to be prosecuted as incitement to commit murder. The threat to kill offences in the Criminal Code, do not apply because of lack of specificity about who is being threatened (see section 474.15 – using a carriage service to make a threat). Subsection 474.17 – Using a carriage service to menace or cause offence – appears feasible but the maximum penalty is only 3 years imprisonment. The existing sedition offences have the same low 3 year maximum penalty and is probably not applicable because the definition of 'seditious intention' at section 24A(g) of the *Crimes Act 1914* only refers to promoting feelings of ill-will and hostility between different classes of Her Majesty's subjects. This could be read down by the court because of the historic context suggests it is only a reference to social classes (the existing provision was enacted in 1920, 3 years after the Russian revolution). Foreigners can of course come from many different social classes.

I could of course develop many other examples but the analysis would be repetitive. This offence is easier to prove than the alternatives – it would not have been put forward as an option if it was not. I have mentioned on numerous occasions that the fundamental difficulty with charging incitement to commit an offence in this context (s.11.4 of the Criminal Code) is that it provides "For a person to be guilty, the person must intend that the offence incited be committed." That is appropriate as a general principle of criminal law, but occasionally exceptions can be justified. In this case the urging of the use of force and violence is in its own right dangerous and should be prohibited as a separate offence.

I have also been asked by the Committee provide more information on the operation of the defences to the sedition offences (proposed s.80.3).

Some have suggested the defence does not apply to situations such a positive portrayal of a suicide bomber in a painting or a play. It is also suggested that the defence operates to reverse the onus of proof. Both propositions ignore the fact that in the first place the prosecution must prove beyond reasonable doubt the person intended to urge the use of force or violence, or intended to assist an enemy of Australia. S.5.2(1) of the Criminal Code provides that a person has intention with respect to conduct (the urging of the use of force or violence) if he or she means to engage in that conduct. A positive portrayal could be for many other reasons – it might be to do with the person's appalling poverty, it could be to do with the innocence of the child in the image who has been exploited by the cruel directors of the relevant terrorist organisation. A painting, short of one that has the words, "it is your duty to do likewise" emblazoned next to the image, will not even get off first base in a prosecution for the sedition offence. The same is also true of plays and other forms of art, as well as educative material.

In the event, that it could be said there is evidence the person was intentionally urging the use of force and violence but it was only being done to make a political point to do with the Government's policies, the good faith defence is available. The provision elaborates on what is taken into account when determining what is good faith (s.80.3(2)): whether the purpose intended was ultimately about prejudicing the safety or defence of our country or about causing violence, public disorder or disturbance. Suggestions that the 'good faith' concept recommended by the late former Chief Justice Sir Harry Gibbs should be removed from the defence would open the door to people suggesting it was legitimate to urge the use of force or violence to procure changes in policy. The 'good faith' defence points to the real motivation of the person and should be retained.

I should also add that the defences do not shift the legal burden of proof to the defence. The defence has to satisfy the evidential burden. This means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the defence exists (s.13.3(6) of the Criminal Code). Once the defence establishes that this reasonable possibility exists, the prosecution has to

prove the defence does not exist beyond reasonable doubt. The prosecution takes this into account when making the initial decision to prosecute. No prosecutor goes to court without being in a position to counter defences of this nature.

The Human Rights and Equal Opportunity Commission has suggested that there be special defences for educational, artistic and journalistic works which are used in racial discrimination legislation. I point out that in this case the offence is always to do with intentionally urging violence (either directly or indirectly by assisting an enemy). It is difficult to understand why the Commission would consider such conduct to be appropriate in the context of the defences they suggest as opposed to others, particularly given that urging violence against other groups in the community would appear to be consistent with the objects of Article 20 of the International Covenant on Civil and Political Rights. It far more preferable for the whole community to rely on the same defences as proposed in s.80.3 – to do otherwise is discriminatory. The danger with using special defences is that the terrorists will attempt to use education, the arts and journalism as a shield for their activities in much the same way some involved with child porn have attempted to justify their conduct.

Unlawful associations

Finally, some people asked about the unlawful association provisions in Part IIA of the Crimes Act 1914 and the offences that attach to them. In particular Senator Nettle asked whether a particular union leader had committed an offence under those provisions. I explained to the Senator that it would be inappropriate for me to provide advice on specific cases, but would do my best to assist. The Senator should note that paragraph 30A(1)(b) would only be relevant if the action could be shown to be an organisational position. The reported cases on Part IIA were in the early 1930's (eg R v Hush (1932) 48 CLR 487) and whether or not schedule 7 is enacted the unlawful association provisions will remain on the statute book. Schedule 7 simply preserves a definition so that the status quo is maintained. Suggestions that preserving the definition in some way re-invigorates the provisions are mistaken

Further responses

We continue to work on responses to further questions received today. They will be forwarded as soon as they are completed.

The action officers for this matter are Karen Bishop who can be contacted on 02 6250 6926 and Kirsten Kobus who can be contacted on 02 6250 5433.

Yours sincerely

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