

AUSTRALIAN LAWYERS FOR HUMAN RIGHTS

Submission to the Australian Law Reform Commission Inquiry into Sedition

Introduction

1. Australian Lawyers for Human Rights welcomes the opportunity to comment orally and in writing upon the Australian Law Reform Commission's *Issues Paper No 30* on Sedition.
2. The extremely tight timeframe forced upon the ALRC within which to undertake its review of sedition laws is to be regretted and ALHR appreciates the considerable amount of work already undertaken by the ALRC in getting to this point.
3. ALHR has been unfortunately constrained in the comments it can make because of the time frame and looks forward to making further comments once the ALRC has released its Discussion Paper on the subject.
4. We have chosen to concentrate on Question 22 out of the 24 questions posed because it most particularly touches upon ALHR's remit to comment upon the human rights implications of Australian laws as judged from the standpoint of Australia's international law obligations. However, Question 22 cannot stand by itself and the submissions provided below will also touch upon Questions 16, 20 and 21.

Question 22: *Article 19 of the International Covenant on Civil and Political Rights recognises the right to freedom of expression and the right to hold opinions without interference, subject to certain restrictions. Are ss 80.2 and 80.3 of the Criminal Code necessary for the protection of national security or public order within the meaning of Art 19(3)?*

Background

5. The task of considering ss.80.2 (and 80.3) alone is somewhat artificial given that the majority of its provisions build upon the “treason” provisions in s.80.1. ALHR’s comments about s.80.2 will reflect upon s.80.1 necessarily because s.80.1 also intrudes upon freedom of expression set out in Article 19 of the ICCPR.

6. Articles 19(2) and (3) of the ICCPR relevantly provide:

“(2) *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.*

(3) *The exercise of rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*

(a) *For the respect of the rights or reputations of others;*

(b) *For the protection of national security or of public order (ordre public), or of public health or morals. (emphasis added)*

7. The relevant principles relating to the application of Articles 19(2) and (3) to the new sedition offences were usefully summarised by the Human Rights and Equal Opportunity Commission in its submission to the Senate Legal and Constitutional Committee. In particular, ALHR adopts the following passage from paragraphs 120 -123 of the Commission’s submission:

“Article 19(2) protects ‘information and ideas of all kinds’; it not only applies to information or ideas that are favourably received, or regarded as inoffensive or as a matter of indifference, but also those that offend, shock and disturb.¹ Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.²

Article 19(2) is subject to Article 19(3), which recognises specific instances in which it is permissible for states parties to restrict freedom of expression...

... The word ‘necessary’ [in paragraph 3 of Article 19] imports the principle of proportionality, which requires that any restriction must be proportionate to the legitimate ends sought to be achieved.³ As already noted above, the restriction must represent the least restrictive

¹ See *Fressoz and Roire v France* (2001) 31 EHRR 2, [45].

² See *Erdogdu v Turkey* (2002) 34 EHRR 50, [52].

³ See *Faurisson v France*, HRC Communication No. 550/93, [8]. This is also the approach adopted by the European Court of Human Rights in relation to the comparable provision of the ECHR, article 10(2): see *Fressoz and Roire v France* (2001) 31 EHRR 2. See also, *R v Shayla* [2003] 1 AC 247.

means of achieving the relevant purpose.⁴ This is to ensure that the restriction does not jeopardise the right itself.⁵

Under the ECHR, States are also required to establish that there is a 'pressing social need' for the restriction to establish 'necessity'. Whilst States are given a margin of appreciation in relation to whether there is a pressing social need for the restriction, the European Court of Human Rights has consistently held that laws which restrict expression other than expression which incites to violence or public disorder will not constitute a permissible restriction on the freedom of expression.⁶

3. Additional guidance on Australia's obligations under article 19 may be derived from *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information* (the "Johannesburg Principles").⁷ Those principles were developed by experts in international law and have been endorsed by the United Nations Special Rapporteur on Freedom of Opinion and Expression, in reports to the 1996, 1998, 1999 and 2001 sessions of the United Nations Commission on Human Rights, and referred to by the Commission in their annual resolutions on freedom of expression every year since 1996. It is well accepted in Australian law that such authoritative expressions of expert opinion are relevant to the interpretation of Australia's international obligations.⁸

4. Of particular relevance is Principle 6, which deals with 'Expression That May Threaten National Security'. It relevantly provides:

"...expression 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."

5. Like the ECHR jurisprudence referred to by HREOC, this suggests that restrictions on expression based on national security concerns will only meet the test of proportionality (and therefore be 'necessary' for the purposes of

⁴ See generally regarding proportionality and the tests applied internationally: J Kirk "Constitutional Guarantees, Characterisation and Proportionality" (1997) 21 MULR 1.

⁵ Human Rights Committee, *General Comment No.10: Freedom of Expression (Art 19)*: 29/6/83, CCPR *General Comment No.10 (General Comments)*, available at <http://www.unhchr.ch/tbs/doc.nsf>

⁶ See *Erdogdu v Turkey* (2002) 34 EHRR 50; *Baskaya and Okçuoglu v Turkey* (2001) 31 EHRR 10.

See also, *R (Rusbridger and Another) v Attorney-General* [2004] 1 AC 357.

⁷ <http://www.article19.org/pdfs/standards/joburgprinciples.pdf>

⁸ *Commonwealth v Hamilton* (2000) 108 FCR 378 at 388 per Katz J, *Somaghi v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 31 FCR 100 at 117 per Gummow J and *Commonwealth v Bradley* (1999) 95 FCR 218 at 237 per Black CJ.

article 19(3)) where the expression in question has a very close connection with acts of violence. However, the Johannesburg Principles give more precise guidance as to the circumstances in which the requisite connection will exist.

General concerns in relation to s80.2

6. It will be apparent that the new offences created by section 80.2 are inconsistent with Principle 6. In particular, there is no requirement that the prosecution prove that the ‘urging’ was **likely** to incite violence (see sub-paragraph (a) of principle 6). Nor is there any requirement for proof of a ‘direct and immediate connection between the expression and the likelihood or occurrence of such violence’ (see sub-paragraph (c) of principle 6). Rather, the offences in s80.2 apply to expression which, viewed objectively, presents no threat whatsoever to the Australian population. For example, a person who is detained under the new preventative detention regime and who (in a fit of temper) urged the AFP officers detaining him or her to take arms against the Commonwealth would commit an offence under s80.2(1). That would be so notwithstanding the fact that there was no likelihood that a member of the AFP would act upon those words.
7. In addition, none of the offences created by s80.2 are limited (as required by sub-paragraph (a) of principle 6) to violence which is ‘imminent’.
8. ALHR’s conclusion is that insofar as the provisions of s.80.2 lack the elements set out in Principle 6 then they will not be lawful with respect to Article 19(3) of the ICCPR.

Recommendation: that s.80.2 be redrafted to accord with the Johannesburg Principles particularly that the “urging” mentioned in that section must be intended to incite imminent violence, be likely to do so and there is a direct and immediate connection between the urging and the likelihood or occurrence of such violence.

Sections 80.2(7) and (8).

9. More acute problems arise in relation to sections 80.2(7) and (8). The offences created by those provisions do not require proof of an intention to urge another to violence or public disorder. The prosecution is instead required to prove that a person urged another to commit conduct that is intended to assist any organisation or country that is at war with the Commonwealth or engaged in armed hostilities with the Australian Defence Forces (ADF). (Note, however, that a defence applies in relation to conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature (80.2(9).)
10. The word ‘assist’ is not defined. While not entirely clear, it appears to be a term of considerable breadth, encompassing any act involving the giving of ‘support, help or aid’ (Macquarie Dictionary (Third Edition)).

11. The breadth and uncertainty of the offences created by sections 80.2(7) and (8) is reinforced when one considers the nature of the entities to which assistance is proscribed – organisations and nation states. Such entities may be ‘assisted’ by a multiplicity of direct and indirect means, particularly in the age of the internet. It could not, for example, be legitimately said that urging people to send stationery supplies to the insurgents in Iraq is really deserving of imprisonment for up to 7 years.
12. Assistance also includes verbal support of the organisation or country concerned. Accordingly, ‘urging’ others to engage in verbal support of an organisation or country falls foul of s.80.2(7) and (8). Importantly there need not be any direct or indirect connection with violence whether generally or specific (as required under paragraph (3) of article 19). Sub-sections 80.2(7) and (8) criminalise speech which may be objectionable and detested by many but many still would argue that its occurrence is necessary so that such views may be discussed and rebutted.
13. The types of persons likely to be caught by s.80.2(7) and (8) are beyond those engaging in purely political or rhetorical speech. Artists are also likely to be caught by the provisions where an artwork by its depiction of something is sympathetic or supportive of a country or organisation.
14. The vague and uncertain nature of these offences is itself objectionable under international law. It is well accepted in international law that national security ‘cannot be used as a pretext for imposing vague or arbitrary limitations’⁹ on rights guaranteed by the ICCPR.
15. Moreover, sub-sections 80.2(7) and (8) may also apply to forms of expression which many in the Australian community might support. The following example was given by HREOC in its submission to the Senate Legal and Constitutional Committee:

“...an Australian peace activist sends letters to ADF personnel and their families containing photographs of Iraqi children alleged to have been maimed by Coalition forces and urging them to not to be deployed in Iraq. Such action could be said to ‘urge another to engage in conduct’ (not to be deployed) that will ‘assist’ (by compromising ADF capability in Iraq, or at least lowering morale) insurgent ‘organisations’ currently ‘engaged in hostilities’ with the ADF in Iraq.”

16. Qualification of the word “assist” with an adjective such as “serious” or “substantial” is unlikely to improve the offence sufficiently to escape the effect of Article 19(3) once one properly applies the principle of proportionality ably set out in the *Johannesberg Principles*.

⁹ *Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant of Civil and Political Rights*, Annexed to UN Doc E/CN.4/1984/4 (1984).

17. It is important to also point out that ss.80.2(7) and (8) build upon ss.80.1(1)(e) and (f) and that the breadth objected to with respect to the impact on free speech of the former is derived from that in the latter. In ALHR's submission it is artificial to consider the latter without considering the former. In both cases Article 19 has something to say about the impact of those offences upon free speech because the word "conduct" is not defined and prima facie includes expression.
18. Whereas prior to the *Anti-Terrorism Act (No.2) 2006* one could doubt whether offences under s.80.1(1) would be prosecuted the Commonwealth, and no doubt the Commonwealth Director of Public Prosecution, have been emboldened to utilise such laws.

Recommendation: in addition to the application of the Johannesburg Principles as recommended above consideration should be given to the application of those principles to s.80.1.

Section 80.2(5)

19. Some specific comments are appropriate about s.80.2(5). This provision above all stands out from the other provisions set out under the heading "Sedition" because it bears no resemblance to the commonly understood term. Inter-group racial (and religious) violence is in a category of its own and in ALHR's view not be included under the rubric of "sedition" because it confuses the intent and purpose of such a provision.
20. ALHR notes that s.80.2(5) draws to some extent upon Article 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* ("CERD") and Article 20 of the ICCPR.
21. Article 4 (a) calls upon States Parties to,

"... declare an offence punishable by law ...all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin ..." (emphasis added)
22. Article 20 of the ICCPR states in part,

"(2) Any advocacy of national, racial or religious hatred that constitutes discrimination, hostility or violence shall be prohibited by law."
23. A comparison of the two articles reveals a salient difference: while Article 4(a) acts are to be punishable by law (connoting criminal prohibition) Article 20 of the ICCPR refers to prohibition by law (connoting a minimum of civil prohibition).

24. The application of Paragraph 6 of the *Johannesberg Principles* is again relevant to the criminalisation of such conduct. That is, there must be a requisite intention to incite group violence, that it is likely in the circumstances that the urging will incite such violence and there is a direct connection between the urging and the likelihood or occurrence of such violence.
25. Question 20 asks whether Australia's international obligations are met by s.80.2(5). Clearly as regards Article 20 one must take into account the provisions of the *Racial Discrimination Act 1975* particularly Parts II and IIA. The absence of religious hatred provisions means that Australia has yet to fully implement its obligations under Article 20 in the sense that the Commonwealth has failed to implement civil laws which make unlawful religious discrimination and religious hatred in the ways it has done with respect to race. (That is an issue requiring some broad and detailed consideration which ALHR is unable to give as part of these submissions.)

Recommendation: That s.80.2(5) be removed from Division 80 of Part 5.1 of the Criminal Code and be modified so as to apply the Johannesburg Principles. That the Commonwealth consider the enactment of laws prohibiting religious discrimination and religious hatred.

Defences

26. The potential breaches of article 19 outlined above are not avoided by the defences provided for in s80.3. Those defences are in the following terms:

“Sections 80.1 and 80.2 do not apply to a person who:

- (a) tries in good faith to show that any of the following persons are mistaken in any of his or her counsels, policies or actions*
 - (i) the Sovereign;*
 - (ii) the Governor-General;*
 - (iii) the Governor of a State;*
 - (iv) the Administrator of a Territory;*
 - (v) an adviser of any of the above;*
 - (vi) a person responsible for the government of another country; or*
- (b) points out in good faith errors or defects in the following, with a view to reforming those errors or defects:*
 - (i) the Government of the Commonwealth, a State or a Territory;*
 - (ii) the Constitution;*
 - (iii) legislation of the Commonwealth, a State, a Territory or another country;*
 - (iv) the administration of justice of or in the Commonwealth, a State, a Territory or another country; or*

- (c) *urges in good faith another person to attempt to lawfully procure a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country; or*
- (d) *points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; or*
- (e) *does anything in good faith in connection with an industrial dispute or an industrial matter; or*
- (f) *publishes in good faith a report or commentary about a matter of public interest.”*

27. It will be apparent that the defences do not address the fundamental problem identified above. That is, they do not exempt speech which is unlikely to incite imminent violence.
28. It will also be apparent that the defences are limited to certain narrowly specified situations, defined by reference to the purposes of the defendant and the context in which they uttered the relevant words. While protection of those forms of expression is obviously desirable, there is no express protection for other forms of equally legitimate public expression - for example, expression for academic, educational, artistic, scientific, religious or other public interest purposes.
29. The inclusion of a requirement of good faith is also problematic. In the context of the *Racial Discrimination Act 1975* (Cth) good faith has been held to require not only consideration of improper purpose, but also an objective inquiry as to whether ‘the person doing the act exercise[d] prudence, caution and diligence’.¹⁰
30. Arguably Article 19 is intended to protect forms of expression in which the maker did not exercise prudence, caution or diligence.
31. At the time of the parliamentary debate on the sedition provisions ALHR suggested the adoption of the exemption for racial hate speech set out at s.18D of the *Racial Discrimination Act 1975*:

Section 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) *in the performance, exhibition or distribution of an artistic work; or*
- (b) *in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or*

¹⁰ *Bropho v Human Rights and Equal Opportunity Commission* (2004) 204 ALR 761 at 787 [101], per Lee J. See similarly French J at 796 [144].

scientific purpose or any other genuine purpose in the public interest; or

(c) *in making or publishing:*

(i) *a fair and accurate report of any event or matter of public interest; or*

(ii) *a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.*

32. We make a small modification to this provision - that the good faith element should be removed. To that extent ALHR agrees with the recommendations of both HREOC and the Senate Constitutional and Legal Affairs Committee.

Recommendation: That a defence in then nature of that found in s.18D of the *Racial Discrimination Act 1975*, save for the good faith element, be inserted into the Criminal Code instead if s.80.3.

Simeon Beckett
President

13 April 2006