

8 October 2009

The Assistant Secretary  
Security Law Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

**By email: [CTconsultation@ag.gov.au](mailto:CTconsultation@ag.gov.au)**

Dear Sir / Madam

**Discussion Paper – National Security Legislation (July 2009)**

The Executive Council of Australian Jewry (ECAJ) presents the following submissions on behalf of the Australian Jewish Community, in relation to the abovementioned Discussion Paper.

The ECAJ is the elected representative organisation of the Jewish community in Australia, and we welcome this opportunity to make submissions as to matters addressed by the Discussion Paper.

**Introduction**

The Australian Jewish community acknowledges that the Government faces a particularly difficult task in enacting and administering provisions that effectively protect Australian society and Australian values whilst providing sufficient flexibility to both pre-empt and respond to attempts to undermine our society and values.

We commend the amendments to Chapter 5 of the Criminal Code, the Crimes Act 1914, the Charter of the United Nations Act 1945 and the National Security Information (Criminal and Civil Proceedings) Act

2004. The amendments overall provide significant and constructive refinements which have been in the offing since at least 2006.

The submissions below address only those matters in respect of which the Executive Council of Australian Jewry considers that further refinements to the proposed legislation are in order.

**Inciting hatred against groups and against members of groups**

4. The proposed amendments do not seek to create a new Federal criminal offence based on the intentional or reckless incitement of racial and other forms of hatred in the community. In our view this is a regrettable omission. In Australia, the Report of the National Inquiry into Racist Violence in Australia (Human Rights and Equal Opportunity Commission (HREOC) 1991) noted high levels of hatred-induced violence as did the report of the Royal Commission into Aboriginal Deaths in Custody (1991). Both reports recommended legislative intervention to proscribe racial vilification. They recommended the introduction of a range of remedies including, in the case of the HREOC Report, criminal sanctions. In 2005, the NSW Bureau of Crime Statistics and Research released a report that concluded that racist taunts are a principal cause of violence in schools.
5. According to the 2006 Census conducted by the Australian Bureau of Statistics, almost a quarter of Australia's population was born overseas. For 44% of Australians, one or both parents were born overseas. 17% of Australians nominated a language other than English as their "language spoken at home". More than 200 linguistic, cultural or ethno-religious groups are represented in the total population. (See [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/2070.0Publication29.01.0910/\\$File/20700\\_Cultural\\_overview.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/2070.0Publication29.01.0910/$File/20700_Cultural_overview.pdf)). Australia's laws therefore operate in a social environment of cultural diversity. As the Cronulla Riots and revenge attacks in Sydney in 2005 demonstrated all too clearly, the failure to proscribe public acts of incitement to racial hatred tears at the social fabric and gravely compromises the peace, order and good government of the community.
6. There is also the harm to specific minority groups who are the targets of vilificatory conduct. The harm is in the impairment of their ability to go about their daily lives with a sense of safety and security. Such a sense of security is necessary for all members of the community to make a meaningful contribution to and develop a sense of belonging in the society in which they live. Failure by the state to provide this security for minority groups

can have devastating consequences. The UK Crown Prosecution Service Guidelines for prosecuting racist crime describes the effect of these crimes on victims as follows:

*“The impact on victims is different for each individual, but many experience similar problems. They can feel extremely isolated or fearful of going out or even staying at home. They may become withdrawn, and suspicious of organisations and strangers. Their mental and physical health may suffer in a variety of ways. For young people in particular the impact can be damaging to self-esteem and identity and, without potential support, a form of self-hatred of their racial or religious identity can result which may take the form of self-harm or even suicide.*

7. The confusion, fear and lack of safety felt by individuals has a ripple effect in the wider community of their racial or religious group. Communities can feel victimised and vulnerable to further attack.
8. Further, the absence of any Federal offence based on intentional or reckless incitement of racial hatred overlooks the fact that such incitement is almost always the precursor to racially motivated acts of violence, even though the nexus may be difficult to prove to the criminal standard. Those who engage in hate-motivated violent behaviour are liable to criminal prosecution under the existing law. But those who incite them to acts of hatred in the first place by appealing to, and seeking to manipulate, their prejudices, fears and grievances, are at present effectively beyond the reach of the criminal law, if they themselves do not engage in overt acts or threats of violence, or clearly and unambiguously procure others to do so. The 2006 conviction in the UK of the extremist Muslim cleric, Abu Hamza, for racial incitement demonstrates that a workable criminal law against serious vilification is achievable and is effective.
9. The criminal proscription should extend to serious vilification of those *presumed* to have the characteristic giving rise to the proscribed conduct, as is provided for under section 80F of the Criminal Code of Western Australia.
10. The publication, including on the internet, of material which incites, counsels, condones, encourages, praises or urges such acts of violence should be specifically proscribed, and media regulators such as the Australian Communications and Media Authority and the Classification Board should be required under the *Commonwealth Services Act 1992* and

the *Classification (Publications, Films and Computer Games) Act 1995* respectively, to proscribe such material.

### **Urging violence against groups and against members of groups**

11. The Australian Jewish community wholeheartedly supports the introduction of the proposed sections 80.2A and 80.2B to the Criminal Code. We would however suggest some refinements to more accurately achieve the goal of the amendments.
  - 11.1. For abundant caution, we suggest that the reference to “the peace, order and good government of the Commonwealth” in paragraph (1) (d) of both of the proposed new sections be amended to read “**the peace, order and good government of the Commonwealth or any part thereof**”.
  - 11.2. We observe that proposed section 80.2B addresses the circumstance where a single person is the target, but not where multiple persons who are members of the group are a target. For abundant caution, we suggest that the words “a group (the *targeted group*)” in 80.2A(1) be amended to read “a group (the *targeted group*) or two or more members of the targeted group”.
  - 11.3. It is a grave mistake in our view to make available any of the defences in existing section 80.3 to the new offences set out in proposed sections 80.2A and 80.2B. The defences in section 80.3 were drafted specifically to apply to the existing offences of treason and sedition. Such defences are completely inappropriate in relation to offences based on the urging of violence against groups or members of groups. In our submission, the urging of violence against one’s fellow Australians can ***never and in no circumstances*** be regarded as having been done “in good faith” or “for a genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest” or any of the other purposes referred to in proposed subsection 80.3(3). ***Civil prohibitions*** against incitement to racial ***hatred*** commonly allow for these sorts of defences. But such defences are not available in the relevant legislation of the various States in respect of the ***criminal proscription*** of incitement to racial hatred, and it would be completely misconceived and inappropriate to make such defences available in the context of the ***criminal proscription*** of incitement to racial ***violence***. Such defences would merely create an opportunity for persons charged with urging violence against

their fellow Australians to use the ensuing trial, with impunity, as a platform to promote their views and to engage in further incitement of violence. It is therefore our strong recommendation that the defences provided for in section 80.3 be expressly excluded from applying to the new offences set out in proposed sections 80.2A and 80.2B.

- 11.4. Finally, we agree with the recommendation of the ALRC that the Attorney-General's consent not be required before proceedings for an offence against Division 80 commence. Alternatively, the requirements should be maintained in the context of treason offences but not in the context of urging violence against groups and against members of groups.

### **Narrowing the Treason Offence**

12. Relevantly, armed hostilities will often not be against the Australian Defence Force. They will be against Australians, and usually civilians. That is the nature of terrorism in the 21st century. We therefore submit that the words: "***or Australians***" be inserted after the words: "*the Australian Defence Force*" in proposed section 80.1AA(4).
13. In addition, we do not support the proposed amendment to proposed section 80.1AA(2) because the declaration of enemy status in the context of 21st century terrorism often occurs after the terrorist act has occurred, and significantly, after the assistance has been provided. Moreover, if the assistance is provided to an organisation that is a listed and prohibited terrorist organisation, the absence of a declaration of enemy status should not preclude the finding of a contravention.
14. Finally, as is the case with so many other criminal laws, the requirement of intention should be capable of fulfilment by conduct that is reckless as to the provision of the assistance. We submit that the words "intentionally" should be replaced in each case by the words: "***intentionally or recklessly***".
15. One particularly dangerous manifestation of the encouragement of terrorism which has occurred in Australia is the selling of a manual which instructs the reader in suicide bombing techniques. We believe that such activity should be expressly proscribed.

**Amendments to the Terrorist Act definition and offences in Division 100 and 101 of the Criminal Code.**

16. It is the view of the Australian Jewish community, that to protect society against incitements to terror, the Government should adopt a similar standard to the glorification of terrorism provisions contained in the *Terrorism Act 2006* (UK).
17. It follows that there needs to be a limited offence of Glorification of Terrorism on the model of Sections 1-4 of the UK legislation. At the very least it should be a criminal offence to “advocate the doing of a terrorist act” within the meaning of subsection 9A(2) of the *Classification (Publications, Films and Computer Games) Act 1995*.

Yours sincerely,

**Robert M Goot AM SC**  
**President**