

Comment

Treason, Terrorism and Imprecision: Locating s 80.2C of the *Criminal Code* (Cth) in the Taxonomy of Crimes against the State

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Abstract

This comment critically analyses the justification and operation of the ‘advocating terrorism’ offence quietly introduced into s 80.2C of the *Criminal Code* (Cth) by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). It argues that the offence is a misguided intrusion on established conceptions of permissible speech, measured by reference to the standards and logic of criminalisation embedded in existing law. Via a close reading of the content, drafting and placement of the new provision, this comment further argues that the offence has been inaccurately characterised as an offence of subversion and disloyalty. It is an improper conflation of distinct criminal behaviours to which are attached distinct forms of opprobrium. That line of criticism has not featured in academic or popular commentary about the new provision, although the conflation between disloyalty and disobedience has become a troubling fixture in Australian national security legislation. A preferable approach to the criminalisation of advocacy is one grounded in concepts of material or imminent harm, and one divorced from implications of subversive or disloyal conduct.

I Introduction

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) (*‘Foreign Fighters Act’*) contains a number of provisions generally directed to the prosecution of Australian volunteers fighting abroad alongside radical militants. Hastened through the Australian Parliament, one particular provision has received scant attention: the insertion of a new s 80.2C into the *Criminal Code*¹ to create the offence of ‘advocating terrorism’. Although modelled after existing provisions in comparable European jurisdictions,² the new offence marks a decisive expansion in the criminalisation of advocacy-based offences in Australia.

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¹ *Criminal Code Act 1995* (Cth) sch 1 (*‘Criminal Code’*).

² See, eg, *Terrorism Act 2006* (UK) s 1 (*‘Encouragement of terrorism’*) enacted pursuant to the *Council of Europe Convention on the Prevention of Terrorism*, 16 May 2005, CETS 196 (entered into force 1 June 2007). See also SC Res 1624, UN SCOR, 5261st mtg, UN Doc S/RES/1624 (14 September 2005).

This comment critically reflects on the operation and significance of the new provision. It offers an analysis of the objectives of s 80.2C (Part II) and evaluates the stated rationale for the offence considering the pathology of modern radicalism (Part III). It argues that the new provision both duplicates existing law and lowers the threshold for criminalising speech (Part IV). In addition, through its drafting, labelling, and placement in the *Criminal Code*, the offence has been consciously analogised to treason and sedition. It is an inaccurate conflation of distinct criminal behaviours to which are attached distinct forms of moral opprobrium (Part V). The conflation is also improper. The offence introduces a framework for tainting an accused person with allegations of treasonous or seditious conduct despite affording none of the legal protections ordinarily applicable to offences based on allegiance (Part VI). Ambiguous drafting and diminished fault requirements mean that a range of innocuous activities may be subject to the dual stigma of both treason and terrorism, despite constituting neither in practice.

The offence thus marks a turning point in the criminalisation of offences against the state. It reverses the existing trajectory of federal lawmaking, which has tended to avoid criminalising speech-based conduct in favour of offences grounded in the concept of material or imminent harm. Given the sheer breadth of s 80.2C, and the profound stigma attached to offences coloured by perceptions of disloyalty, the construction of the new offence is inconsistent with the care and proportionality normally observed when individual speech is criminalised in the interests of national security.

II The Operation, Enactment and Stated Rationale of s 80.2C

The new provision was inserted into div 80 of the *Criminal Code* by s 61 of the *Foreign Fighters Act*. It provides that a person commits an offence if the person advocates the doing of a terrorist act or the commission of certain terrorism offences.³ The definition of ‘advocates’ includes a person who ‘counsels, promotes, encourages or urges’.⁴ To constitute an offence, the person must engage in that conduct reckless as to whether another person will engage in a terrorist act or commit a relevant terrorism offence.⁵ Pursuant to general Commonwealth fault principles, a person is reckless with respect to a result (that is, the engagement of the second person in a terrorist act or terrorism offence) if he or she is aware of a substantial risk that the result will occur⁶ and having regard to the circumstances known, it is unjustifiable to take the risk.⁷ Whether a risk is justifiable is a question of fact.⁸ Significantly, ‘advocating terrorism’ includes advocacy of a terrorist act or terrorism offence even if such an act or offence does not occur.⁹

³ *Criminal Code* ss 80.2C(1)(a)(i)–(ii).

⁴ *Ibid* s 80.2C(3).

⁵ *Ibid* s 80.2C(1)(b).

⁶ *Ibid* s 5.4(2)(a).

⁷ *Ibid* s 5.4(2)(b).

⁸ *Ibid* s 5.4(3).

⁹ *Ibid* s 80.2C(4)(a).

The sheer scope of the offence and its collateral effects are, in part, a consequence of the range of conduct for which advocacy is prohibited. A ‘terrorist act’ has the same meaning as in s 100.1 of the *Criminal Code*;¹⁰ namely, an action — or threat of action — that causes serious physical personal harm, causes serious damage to property, endangers a person’s life, creates a serious risk to the health or safety of the public or a section of the public, or seriously interferes with certain electronic systems.¹¹ There are two further requirements. First, the action or threat must be characterised¹² by an intention to advance a political, religious or ideological cause.¹³ Second, it must be characterised by an intention to coerce or influence by intimidation an Australian or foreign government,¹⁴ or intimidate the public or a section of the public.¹⁵ References to persons, property or the public include such entities outside Australia.¹⁶ However, s 100.1 exempts certain acts from this definition. A terrorist act does not include an action that is advocacy, protest, dissent or industrial action,¹⁷ so long as it is not intended to cause serious physical personal harm, cause a person’s death, endanger the life of another, or create a serious risk to the health or safety of the public or a section of the public.¹⁸

A ‘terrorism offence’ is defined elsewhere in the *Crimes Act 1914* (Cth).¹⁹ It encompasses, inter alia, ‘international terrorist activities using explosive or lethal devices’,²⁰ treason,²¹ terrorism,²² foreign incursion and recruitment,²³ giving assets to entities proscribed in accordance with United Nations (‘UN’) Security Council resolutions,²⁴ and contravening a UN sanction enforcement law.²⁵ To satisfy s 80.2C, the terrorism offence must be punishable by five or more years’ imprisonment, and must constitute more than mere attempt, conspiracy, incitement or complicity.²⁶

Section 80.2C has received relatively little public scrutiny, forming part of a much larger package of national security reforms announced by the Abbott Government in the 44th Parliament. Other tranches of legislation concerning the powers and immunities of the Australian Security Intelligence Organisation (‘ASIO’)²⁷ and the retention of individual metadata²⁸ spent more than two and five

¹⁰ Ibid s 80.2C(3).

¹¹ Ibid ss 100.1(1) ‘terrorist act’ (a), 100.1(2)(a)–(f).

¹² *Lodhi v The Queen* (2006) 199 FLR 303, 323 [90] (Spigelman CJ).

¹³ *Criminal Code* s 100.1(1) ‘terrorist act’ (b).

¹⁴ Ibid s 100.1(1) ‘terrorist act’ (c)(i).

¹⁵ Ibid s 100.1(1) ‘terrorist act’ (c)(ii).

¹⁶ Ibid s 100.1(4).

¹⁷ Ibid s 100.1(3)(a).

¹⁸ Ibid s 100.1(3)(b).

¹⁹ *Crimes Act 1914* (Cth) s 3.

²⁰ *Criminal Code* div 72 sub-div A.

²¹ Ibid div 80 sub-div B.

²² Ibid pt 5.3.

²³ Ibid pt 5.5.

²⁴ *Charter of the United Nations Act 1945* (Cth) s 21. Terrorism offences include pt 4 of the Act generally.

²⁵ Ibid s 27. Terrorism offences include pt 5 of the Act generally.

²⁶ *Criminal Code* s 80.2C(2).

²⁷ *National Security Legislation Amendment Act (No 1) 2014* (Cth).

²⁸ *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015* (Cth).

months before Parliament, respectively, prior to receiving Assent.²⁹ The *Foreign Fighters Act*, by comparison, was subjected to less than a day of second reading debate in each House before receiving Assent on 3 November 2014: just over a month since its first introduction. It amends some 22 statutes in total, with high-publicity reforms including a prohibition on travel in ‘declared areas’ (a new offence for which the otherwise compliant Opposition reserved its most pointed criticism)³⁰ and the repeal and re-enactment of existing foreign incursion legislation as new pt 5.5 of the *Criminal Code*.³¹

Ostensibly, the Act supports efforts to suppress so-called ‘home-grown’ radicals inspired by militant groups operating in Syria and Iraq, and to deter Australian volunteers from participating in civil conflicts overseas.³² Introducing the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 in September 2014, the Attorney-General, Senator George Brandis, remarked that Australia is faced by a ‘rapid resurgence in violent extremism ... The risk posed by returning foreign fighters is one of the most significant threats to Australia in recent years’.³³ The Explanatory Memorandum to the Bill likewise asserts that foreign fighters ‘often return with radicalised ideologies that includes [sic] violent extremism’ and that ‘[a]dvocating terrorism heightens the probability of terrorist acts or the commission of terrorism offences on Australian soil and encourages others to join the fight overseas’.³⁴ The Memorandum concludes, somewhat glibly, that ‘[i]t is reasonable that such conduct should not be advocated and that reasonable steps should be taken to discourage behaviour that promotes such actions’.³⁵ To that end, the new s 80.2C offence is intended to fill a ‘current gap in the law around individuals promoting terrorism’.³⁶

This characterisation of a gap implies that the new offence has a unique and justifiable function within the *Criminal Code*. Arguably, however, this gap is merely rhetorical; a political device founded on inaccurate legal analogies (see below Part III) and an incomplete account of existing law (see below Part IV). The offence duplicates existing law in material respects and, where it does not duplicate that law, it constitutes an alarming extension of criminal liability.

²⁹ Parliament of Australia, *Progress: National Security Legislation Amendment Bill (No 1) 2014* <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s969>; Parliament of Australia, *Progress: Telecommunications (Interception and Access) Amendment (Data Retention) Bill 2015* <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r5375>.

³⁰ Cat Barker et al, Bills Digest: *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, No 34 of 2014–15, 17 October 2014, 10.

³¹ The provisions of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) remain substantially unchanged in the *Criminal Code*.

³² Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 2 [1].

³³ Commonwealth, *Parliamentary Debates*, Senate, 24 September 2014, 6999 (George Brandis).

³⁴ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 29 [138].

³⁵ *Ibid* [136].

³⁶ Commonwealth, *Parliamentary Debates*, Senate, 24 September 2014, 7001 (George Brandis).

III A Gap in the Law, or False Analogies?

The gap identified by the Attorney-General is said to arise from an asymmetry in the law, whereby an individual may lawfully ‘advocate terrorism’, while an organisation can be proscribed as a terrorist organisation for the same conduct.³⁷ Yet this analogy between individuals and organisations advocating terrorism is misleading. It is not a criminal offence, per se, for organisations to advocate terrorism. Instead, ‘advocat[ing] the doing of a terrorist act’ is merely a threshold condition permitting (but not mandating) the listing of an organisation as a terrorist organisation.³⁸ Listing is an administrative precondition to the operation of div 102 ‘terrorist organisation’ offences, which concern leadership, membership, recruitment, training, funding and association. In this respect, the ‘advocates’ criterion for proscribing an organisation operates in a different way to the new s 80.2C offence. It is not a matter that must be proved beyond reasonable doubt, as in a criminal proceeding, but is merely something of which the responsible Minister must be satisfied ‘on reasonable grounds’ prior to exercising a delegated legislative function (listing).³⁹

The exercise of the listing power under div 102 demonstrates the interpretive and evidentiary difficulty of proving advocacy. In practice, this decision is taken on the basis of advice received from ASIO, which is subsequently released in abridged form as a ‘Statement of Reasons’. Of the 20 terrorist organisations listed under the *Criminal Code*, 14 were proscribed for ‘advocating the doing of a terrorist act’.⁴⁰ However, except in one case (Jaish-e-Mohammed), advocacy was not the primary criterion on which the decision was made. It is some indication of the tenuousness of advocacy as a threshold test for illegality. Jaish-e-Mohammed, for instance, was assessed as advocating terrorism on the basis of hearsay from journalists attending a rally,⁴¹ and statements relied upon to support these assessments are often couched in extremely general language: Jabhat al-Nusra would ‘avenge the honour and the spilled blood of those... wronged by [the Syrian Government]’,⁴² while al-Shabaab warned the Kenyan Government to ‘leave our soil, otherwise they will continue suffering’.⁴³

Indeed, the *Criminal Code* acknowledges that advocating terrorism is a complicated criterion unsuited to judicial determination. If an organisation

³⁷ Ibid.

³⁸ *Criminal Code* ss 102.1(1) ‘terrorist organisation’ (b), 102.1(2)(b).

³⁹ Ibid ss 102.1(1) ‘terrorist organisation’ (b), 102.1(2).

⁴⁰ Statement of Reasons as at 18 February 2016 for Al-Murabitun, Al-Qa’ida, Al-Qa’ida in the Arabian Peninsula, Al-Qa’ida in the Islamic Maghreb, Al-Shabaab, Ansar al-Islam, Boko Haram, Hamas’ Izz al-Din al-Qassam Brigade, Islamic State, Jabhat al-Nusra, Jaish-e-Mohammed, Jamiat ul-Ansar, Lashkar-e-Tayyiba, and Palestinian Islamic Jihad: Australian Government, *Listed Terrorist Organisations* (2015) Australian National Security: <<http://www.nationalsecurity.gov.au/Listedterroristorganisations/>>.

⁴¹ Australian Government, *Jaish-e-Mohammed* (2015) Australian National Security <<http://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/Jaish-e-Mohammed.aspx>>.

⁴² Australian Government, *Jabhat al-Nusra* (2015) Australian National Security <<http://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/Jabhatal-Nusra.aspx>>.

⁴³ Australian Government, *Al-Shabaab* (2015) Australian National Security <<http://www.nationalsecurity.gov.au/Listedterroristorganisations/Pages/Al-Shabaab.aspx>>.

advocating terrorism is not listed by the Governor-General, a div 102 conviction requires the prosecution to prove, as an element of the offence, that the organisation is ‘directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act’ subject to the criminal standard of proof.⁴⁴ Proof of mere advocacy is not sufficient to establish an unlisted organisation as a ‘terrorist organisation’ at trial,⁴⁵ and what it means to ‘advocate the doing of a terrorist act’ is thus never subject to the same type of judicial inquiry as it would be in a s 80.2C prosecution. There is some overlap in this respect: the ‘advocates’ criterion for *listing* a ‘terrorist organisation’ explicitly includes ‘encourage[ment]’,⁴⁶ yet the ‘fostering’ limb of the *general* ‘terrorist organisation’ definition has also been interpreted to mean ‘encourages’.⁴⁷ However, measured against the laws applicable to terrorist organisations, ‘advocacy’ in the new s 80.2C offence clearly has a fundamentally different statutory operation. It is the core of the offence, rather than a trigger for the delegated legislative action (listing/proscription) necessary to establish a primary div 102 offence.

Even if the individual offence in s 80.2C had a real equivalent among ‘terrorist organisation’ offences, it is questionable whether individual advocacy is relevantly comparable to advocacy by an organisation. That comparison plainly underpins the recent legislation. The *Foreign Fighters Act* is animated by a specific vision of military volunteerism with Syrian and Iraqi militant groups. Although it was not mentioned by name during the introduction of the Bill, Islamic State (‘IS’)⁴⁸ is arguably the most pressing motivation for the legislative package, eclipsing both Al-Qaeda and the Taliban in the number of jihadist-related killings committed globally.⁴⁹ Unlike Al-Qaeda, it is engaged in a state-building exercise within its ‘caliphate’, placing greater emphasis on centripetal recruitment for its various civil conflicts.⁵⁰ As many as 100–250 fighters in Syria and Iraq have originated in Australia,⁵¹ while a series of threats and attacks made real the spectre of disaffected ‘lone wolf’ radicals acting on propaganda.⁵² Unaffiliated individuals

⁴⁴ *Criminal Code* ss 102.1(1) ‘terrorist organisation’ (a).

⁴⁵ *Ibid* s 102.1(1) ‘terrorist organisation’; Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth) 8.

⁴⁶ *Ibid* s 102.1(1A)(a).

⁴⁷ *Benbrika v The Queen* (2010) 29 VR 593, 627 [119].

⁴⁸ This comment adopts the alias ‘Islamic State’ as it is listed by the Australian Government under div 102 of the *Criminal Code Act 1995* (Cth).

⁴⁹ Peter R Neumann, ‘The New Jihadism: A Global Snapshot’ (Report, International Centre for the Study of Radicalisation and Political Violence, 2014) 15.

⁵⁰ Erin Marie Saltman and Charlie Winter, ‘Islamic State: The Changing Face of Modern Jihadism’ (Report, Quilliam Foundation, 2014) 43.

⁵¹ International Centre for the Study of Radicalisation and Political Violence, ‘Munich Security Report 2015’ (Report, Munich Security Conference, 2015) 38.

⁵² Emma Griffiths, ‘Terrorism Threat: Australian Alert Level Raised to High; Terrorist Attack Likely but Not Imminent’, *ABC News* (online), 13 September 2014 <<http://www.abc.net.au/news/2014-09-12/australia-increases-terrorism-threat-level/5739466>>; Cameron Houston et al, ‘Terror Suspect Shot Dead after Two Police Officers Stabbed in Endeavour Hills’, *The Age* (online), 24 September 2014 <<http://www.theage.com.au/victoria/terror-suspect-shot-dead-after-two-police-officers-stabbed-in-endeavour-hills-20140923-1015d4.html>>. Shortly after the passage of the legislation, Sydney experienced the Martin Place attack: Daniel Flitton, ‘Martin Place Siege: Horror in the Everyday is Terrorists’ Goal’, *The Sydney Morning Herald* (online), 15 December 2014 <<http://www.smh.com.au/national/martin-place-siege-horror-in-the-everyday-is-terrorists-goal-20141215-127bo0.html>>

generate much of that propaganda. A majority of foreign fighters in Syria source information about the conflict from Islamist sympathisers with no connection to any particular militant group, rather than from official IS or Jabhat al-Nusrah platforms.⁵³ In this way, ‘it is private individuals who now possess significant influence over how the conflict is perceived by those who are actively involved in it’,⁵⁴ and Australians feature among the most influential sympathisers⁵⁵ and recruiters.⁵⁶

Yet, although the dynamics of radicalism have changed, the persuasive power of individual advocacy is not relevantly equivalent to that of an organisation. It is the exploitation of social media by the official organs of IS that remains decisive in the effective dissemination of recruitment propaganda.⁵⁷ That propaganda is grounded in a compelling corporate narrative that blends humanitarianism, religious devotion and military adventurism.⁵⁸ Recent engagement campaigns have included glossy advertisements for an IS healthcare system featuring an Australian doctor,⁵⁹ in addition to the highly produced execution videos for which it is notorious. Sophisticated software ‘apps’ enabled the organisation to disseminate official content automatically through the social media accounts of thousands of followers,⁶⁰ artificially expanding its online presence. Moreover, online relationships alone are unlikely to drive radicalisation in the absence of real-world social interaction:⁶¹ interactions, for instance, with returning fighters⁶² (liable under foreign incursion provisions to penalties far in excess of the five years’ imprisonment prescribed by s 80.2C) or radical clerics (who, for reasons outlined below, are more appropriately prosecuted under alternative terrorism provisions). In this respect, the influence of individuals is amplified by the internet, but it should not be overstated. The persuasive power of individuals is a product of the corporate appeal of their parent organisation, and it is that appeal which is relevantly dangerous.

Taking a sober view of individual advocacy vis-à-vis organisations is essential when the political calculation for limiting the freedom of speech depends

⁵³ Joseph Carter, Shiraz Maher and Peter Neumann, ‘#Greenbirds: Measuring Importance and Influence in Syrian Foreign Fighter Networks’ (International Centre for the Study of Radicalisation and Political Violence, 2014) 29.

⁵⁴ Ibid 29.

⁵⁵ Ibid 2.

⁵⁶ David Wroe, ‘Australian Jihadist Neil Prakash Confirmed as Top Islamic State Recruiter’, *The Sydney Morning Herald* (online), 7 May 2015 <<http://www.smh.com.au/federal-politics/political-news/australian-jihadist-neil-prakash-confirmed-as-top-islamic-state-recruiter-20150507-ggwn68.html>>.

⁵⁷ Saltman and Winter, above n 50, 37–8.

⁵⁸ Ibid 47.

⁵⁹ Ashlyne McGhee, ‘Islamic State: Australian-trained doctor Tareq Kamleh appears in IS Propaganda Video Urging Jihad in Syria’, *ABC News* (online), 27 April 2015 <<http://www.abc.net.au/news/2015-04-25/wa-doctor-appears-in-latest-islamic-state-propaganda-video/6421900>>.

⁶⁰ JM Berger, ‘How ISIS Games Twitter’, *The Atlantic* (online), 16 June 2014 <<http://www.theatlantic.com/international/archive/2014/06/isis-iraq-twitter-social-media-strategy/372856/>>.

⁶¹ Tim Stevens and Peter R Neumann, ‘Countering Online Radicalisation: A Strategy for Action’ (Report, International Centre for the Study of Radicalisation and Political Violence, 2009) 12–13.

⁶² Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 29 [138].

on imposing ‘only’ those restrictions strictly ‘necessary ... for the protection of national security or of public order’.⁶³ The Explanatory Memorandum for the Foreign Fighters Bill argues that the severity of the action advocated under s 80.2C — ‘terrorist acts’ — justifies the creation of the new offence, and that this alone makes individual advocacy a ‘serious risk’ to the public.⁶⁴ Yet, risk is a composite of consequence and probability: any risk assessment should consider the actual persuasive influence of individuals as a class of possible advocates, not merely the content of their speech. The legislature appears to have ignored the question of whether advocacy by unaffiliated individuals is *likely* to materially affect national security interests.⁶⁵

IV A Gap in the Law, or Merely Lowering the Threshold for Conviction?

The second objection to the gap articulated by the Attorney-General is that s 80.2C substantially duplicates existing law. A range of offences could capture many of the types of advocacy anticipated by the new provision. Respondents to the Parliamentary Joint Committee on Intelligence and Security’s inquiry into the Foreign Fighters Bill noted that the offence of incitement would, in some cases, cover identical behaviour to s 80.2C.⁶⁶ Advocating terrorism applies to a person who ‘counsels, promotes, encourages or urges’ the doing of a terrorist act or terrorist offence even if no such act or offence eventuates. Likewise, incitement in s 11.4 applies to a person who ‘urges the commission of an offence’ even if ‘committing the offence incited is impossible’.⁶⁷ Inciting a terrorist act, for example, is punishable by 10 years’ imprisonment compared to the five years prescribed under s 80.2C.⁶⁸ Alternatively, a person who ‘urges’ another to use force or violence against another group (or a person perceived to be part of a group) distinguished by race, religion, nationality, national or ethnic origin, or political opinion may be prosecuted under existing div 80 provisions against urging violence, which carry a maximum penalty of five or seven years’ imprisonment.⁶⁹

Other offences focus on narrower types of advocacy. A person who ‘recruits, in Australia, another person’ to serve in any capacity with an association of people whose objectives include to ‘engage in a hostile activity’ is liable to

⁶³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(3), cited in the Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 28 [136]–[137].

⁶⁴ Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth) 28 [136].

⁶⁵ Sunstein describes this pattern of lawmaking as ‘probability neglect’: Cass Sunstein, ‘Terrorism and Probability Neglect’ (2003) 26(2) *Journal of Risk and Uncertainty* 121, 122, 133.

⁶⁶ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014* (2014) 30–1 [2.109]–[2.113].

⁶⁷ *Criminal Code* ss 11.4(1), 11.4(3).

⁶⁸ *Ibid* s 11.4(5)(a).

⁶⁹ *Ibid* ss 80.2A(2), 80.2B(2).

imprisonment for 25 years under the revived foreign incursion offences in pt 5.5.⁷⁰ Recruitment includes mere encouragement.⁷¹ To engage in a hostile activity encompasses action broadly equivalent to terrorism: action with the intention of overthrowing by force a foreign government,⁷² intimidating the public of a foreign country,⁷³ or unlawfully damaging property belonging to a foreign government.⁷⁴ Indeed, the foreign incursion recruitment offence may capture a broader range of hostile activities than s 80.2C. The latter prohibits advocacy of a ‘terrorist act’ according to its full s 100.1 definition (an action intended to advance a political, religious or ideological cause *and* intended, inter alia, to coerce or intimidate a government). The s 117.1 recruitment offence, however, applies to formal or informal associations that essentially engage in terrorist acts — that is, the specific forms of property damage or personal harm catalogued in s 100.1(2) — but it does not require proof that the action is characterised by an intention to advance a cause or coerce a government.⁷⁵

The core terrorism offences in divs 101 and 102 supply additional grounds on which to prosecute advocacy. For instance, a person is liable to imprisonment for 10 years if he or she make a document reckless as to the existence of a connection between that document and some preparation for, or the engagement of a person in, or assistance in, a terrorist act,⁷⁶ so long as the person intended to facilitate that preparation, engagement or assistance.⁷⁷ Relevant documents have included e-books (for example, *R v Khazaal*),⁷⁸ and it is arguable that the provision could equally embrace online content. In similar terms to s 80.2C, an offence is committed even if a terrorist act does not occur, or if the document is not connected with a specific terrorist act.⁷⁹ The ‘connection’ can be ascertained from the content of the document itself⁸⁰ and, although the connection should be more than remote,⁸¹ it may be sufficient that the document promotes ‘aims and techniques characteristic of terrorism’.⁸² For instance, the recent publication of an online book by Australian-born IS recruiter Neil Prakash is, prima facie, clearly subject to the s 101.5 document offence. Much like the e-book for which Belal Khazaal was convicted, Prakash has likely exposed himself to s 101.5 liability with chapters entitled ‘Islamic State fighting techniques’ and ‘How Islamic State members get into and out of Syria’.⁸³

⁷⁰ Ibid s 119.6. A comparable provision exists in div 102 criminalising ‘recruiting for a terrorist organisation’: ibid s 102.4.

⁷¹ Ibid s 117(1) ‘recruit’.

⁷² Ibid s 117.1(1) ‘engage in a hostile activity’ (a).

⁷³ Ibid s 117.1(1) ‘engage in a hostile activity’ (c).

⁷⁴ Ibid s 117.1(1) ‘engage in a hostile activity’ (e).

⁷⁵ Ibid ss 117.1(1) ‘engage in a hostile activity’ (b)(i), 119.6(b).

⁷⁶ Ibid s 101.5(2).

⁷⁷ Ibid s 101.5(5). The defendant bears an evidential burden in relation to his or her intention to facilitate preparation, engagement or assistance.

⁷⁸ [2009] NSWSC 1015 (25 September 2009).

⁷⁹ *Criminal Code* s 101.5(3).

⁸⁰ *R v Khazaal* (2012) 246 CLR 601, 611–12 [27] (French CJ).

⁸¹ Ibid 614 [35] (French CJ).

⁸² Ibid 631 [106] (Heydon J).

⁸³ Wroe, above n 56.

Other applicable provisions are framed in more general, medium-agnostic terms. It is an offence to intentionally provide support to a terrorist organisation where that support would help it to engage, prepare, plan, assist or foster a terrorist act, and where the person is, at a minimum, reckless as to whether the organisation is a terrorist organisation.⁸⁴ It is also an offence for a person to associate, on two or more occasions, with another person who ‘promotes’ the activities of a listed terrorist organisation.⁸⁵ The first person must know that the organisation is a terrorist organisation, and intend that his or her support will assist the organisation to expand or ‘continue to exist’.⁸⁶ Since associating includes ‘communicating’ with another person,⁸⁷ this provision could conceivably touch an intermediate sympathiser or loyalist who has communicated — online or otherwise — with individuals affiliated with organisations such as IS or Jabhat al-Nusra.

It follows from these observations that alternative approaches exist to criminalising the advocacy of terrorism. In each case, the mischief averted is material: actionable encouragement or advice, recruitment, fraternisation, or other support. Advocacy in the abstract is not an element of the provisions since inconsequential advocacy is not the object of concern. Furthermore, the applicable fault principles ensure that behaviour falling within the scope of those offences is, in a real sense, proximate to the primary offence. Incitement, for instance, requires that a person actually ‘intend that the offence incited be committed’, subject to any special liability provisions.⁸⁸ Intention as to a result is also required under the various heads of urging violence (that is, ‘intending that force or violence will occur’).⁸⁹ These offences demarcate the boundaries of legitimate speech in federal criminal law. Intention as to a result is the minimum threshold for criminalising speech in the security context.⁹⁰ Thus, even by the standards established in existing legislation, let alone notional conceptions of free speech, it is insupportable to argue that ‘[a]dvocating ... terrorist activity should be discouraged, regardless of the proximity between the act of advocacy and any subsequent actual act of terrorism’.⁹¹

Yet s 80.2C effectively expands the criminalisation of speech by lowering the relevant threshold to one of recklessness. In that respect, it is not filling a gap in the law so much as extending criminal liability into new terrain altogether.

⁸⁴ *Criminal Code* ss 102.7(2), 102.1(1) ‘terrorist organisation’ (a).

⁸⁵ *Ibid* s 102.8(1).

⁸⁶ *Ibid* s 102.8(1)(a).

⁸⁷ *Ibid* s 102.1(1) ‘associate’.

⁸⁸ *Ibid* s 11.4(2).

⁸⁹ *Ibid* ss 80.2A(1)(b), 80.2A(2)(b), 80.2B(1)(b), 80.2B(2)(b). See also commentary on the importance of intention as to a result in Australian Law Reform Commission (‘ALRC’), *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006) 13–14.

⁹⁰ Likewise, criminal provisions against racial vilification generally require proof of intention to incite violence or hostility (although there is some criticism that this makes prosecutions extremely onerous in practice). See, eg, *Anti-Discrimination Act 1977* (NSW) s 20D; Legislative Council Standing Committee on Law and Justice, Parliament of New South Wales, *Racial Vilification Law in New South Wales* (2013) 46–7 [4.89]–[4.91]. Racial vilification is not a criminal offence under Commonwealth legislation: *Racial Discrimination Act 1975* (Cth) ss 18C, 26.

⁹¹ Parliamentary Joint Committee on Intelligence and Security, above n 66, 39 [2.139]. The Committee’s conclusion in this regard was not supported by argument besides a passing comment about the difficulty of limiting speech in the interests of security.

Recklessness merely depends on an awareness of ‘substantial risk’.⁹² Arguably, an advocate who does not intend that a terrorist act will be committed, or that a person will join a terrorist organisation or foreign incursion, but is merely reckless as to that result is unlikely to constitute a serious threat. The influencers and recruiters of prominence in the present IS crisis plainly intend to produce a particular result, and to that extent they are covered by existing offences. Prosecution on that basis is more appropriate. The UN Special Rapporteur has noted that an ‘incitement to terrorism’ legal regime should avoid ‘reference to vague terms such as “glorifying” or “promoting” terrorism’ and that it should ‘expressly refer to... intent that th[e] message incite the commission of a terrorist act’.⁹³ The Special Rapporteur recommended a model offence to ‘unlawfully distribute or otherwise make available a message to the public with the *intent to incite the commission of a terrorist offence*’ where such conduct creates an objective ‘danger that one or more such offence may be committed’.⁹⁴ Section 80.2C departs from these principles in adopting an ambiguous⁹⁵ definition of advocacy and by requiring the lesser threshold of recklessness as to the commission of some hypothetical terrorist act or offence.

The Australian Federal Police contend that the s 80.2C offence will not extend the criminalisation of speech in practice. They suggest that the provision will chiefly apply to those individuals who are serious threats with real intent but against whom intention cannot be readily proved.⁹⁶ It is argued that ‘[t]he cumulative effect of more general statements’ now has a comparable role in the radicalisation of sympathisers as ‘explicit statements’, which might otherwise have constituted proof of intention.⁹⁷ That reasoning is objectionable on two grounds. On one hand, evidentiary difficulties do not justify the dilution of existing fault standards when those standards have already been substantially diminished for prosecutorial convenience. For many offences, it is sufficient to prove general terroristic intent without requiring proof of specific intent as to a particular, identifiable terrorist act.⁹⁸ Indeed, the difficulty in proving intention is one of the few remaining safeguards against overzealous prosecutions for remote preparatory or preliminary offences.⁹⁹ On the other hand, focusing on the operation of the provision against ‘obvious’ advocates does not address concerns that the offence captures, *in extremis*, more innocuous communication: bellicose speech that is directed towards the destabilisation of despotic or disagreeable regimes abroad,

⁹² *Criminal Code* ss 5.4(1)–(2).

⁹³ Martin Scheinin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc A/HRC/16/51 (22 December 2010), 16 [31]. It is also worth recalling that UN Security Council Resolution 1624, directed to the repudiation of the glorification of terrorism, only called upon states to ‘prohibit by law *incitement* to commit a terrorist act or acts’ (emphasis added): SC Res 1624, UN SCOR, 5261st mtg, UN Doc S/RES/1624 (14 September 2005) 3.

⁹⁴ Scheinin, above n 93, 16 [32] (emphasis added).

⁹⁵ Parliamentary Joint Committee on Intelligence and Security, above n 66, 34 [2.122]–[2.124].

⁹⁶ *Ibid* [2.113].

⁹⁷ *Ibid* [2.120].

⁹⁸ See the catch-all provisions (eg, ‘even if ... a terrorist act does not occur; or [the thing or behaviour] is not connected with ... a specific terrorist act’) in the *Criminal Code* ss 101.2(3), 101.4(3), 101.5(3), 101.6(2), 102.1(20), 103.2(2), *inter alia*.

⁹⁹ Gregory Rose and Diana Nestorovska, ‘Australian Counter-terrorism Offences: Necessity and Clarity in Federal Criminal Law Reforms’ (2007) 31(1) *Criminal Law Journal* 20, 54.

perhaps, but which is not terroristic in any lay or domestically alarming sense of the word.¹⁰⁰

Whether the offence facilitates the prosecution of serious advocates under diminished fault principles (a prosecutorial ‘catch-all’), or operates to criminalise hitherto lawful advocacy altogether, s 80.2C has thus expanded the scope of criminal liability. As discussed in Part III above, the reasoning offered by the Attorney-General and subordinate government agencies is not a satisfactorily ‘sound justification’ to depart from existing extended liability provisions.¹⁰¹ Moreover, as the Australian Law Reform Commission (‘ALRC’) observed as early as 2006 — ‘firmly’ rejecting the need for a federal offence of encouragement or glorification of terrorism — an Australian advocacy offence is not subject to the same rights-based protections that exist in the United Kingdom (‘UK’) and Canada, for example.¹⁰² In this environment, patrolling the distinction between legitimate and illegitimate speech is a legislative, rather than judicial, responsibility.

V Invoking Treason and Sedition — An Inaccurate Conflation

If the offence of ‘advocating terrorism’ has lowered the threshold at which speech is criminalised, it has done so under the rubric of high crimes against the state. That approach is considered, by some, an appropriate response to the threat of IS and its analogues. It has been said in the Senate that, ‘in the context of what we have seen happen in our country recently, we need to harden our stance on the need for our people to demonstrate their undivided loyalty to our country, our laws and our Constitution’.¹⁰³

Ostensibly, the Australian Government denies any nexus between its counter-terrorism reforms and the body of law concerning treason and sedition. In response to questions concerning the foreign fighters reforms, the Attorney-General argued that

if you are an Australian citizen and you are engaged in fighting in a foreign civil war ... [t]he crime ... is much more specific than the treason and sedition offences in the *Criminal Code*. ... You asked me about the Australians onshore who are engaged in supporting or assisting those people. To facilitate terrorism — to finance terrorism — is also an offence against other provisions of the *Criminal Code* and

¹⁰⁰ Respondents to the Parliamentary Joint Committee inquiry identified whistleblowers and journalists reporting on leaked information as among those caught: Parliamentary Joint Committee on Intelligence and Security, above n 66, 36–8 [2.128]–[2.134].

¹⁰¹ Attorney-General (Cth), *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (4th ed, 2011) 35.

¹⁰² ALRC, above n 89, 125–6 [6.22]–[6.27]. The ALRC was referring to the *Human Rights Act 1998* (UK), although other rights-based protections exist in the Canadian *Charter of Rights and Freedoms* (*Canada Act 1982* (UK) c 11, sch B pt I), which could modify or limit the new Canadian offence of encouraging or promoting terrorism.

¹⁰³ Commonwealth, *Parliamentary Debates*, Senate, 25 September 2014, 7220 (Glenn Lazarus).

again, Senator Lambie, those are much more specific and targeted than the treason and sedition offences you identify'.¹⁰⁴

Broadly speaking, these comments exemplify the pattern of lawmaking after the terrorist attacks of 11 September 2001 ('9/11'). While some pre-9/11 commentators expressed faith in the ongoing relevance of treason and sedition in prosecuting modern terrorism,¹⁰⁵ legislation has tended to favour narrower terrorism provisions with these 'more specific' elements. In Australia, no treason prosecution has been pursued since 1916,¹⁰⁶ and no federal sedition prosecution has been pursued since the Communist Party prosecutions of the 1940s–50s.¹⁰⁷ Yet, since 2002, the Commonwealth Department of Public Prosecutions has dealt with at least 108 charges under pt 5.3 'Terrorism' of the *Criminal Code*.¹⁰⁸ It is said that the development of terror-specific law is essential to fulfilling obligations at international law of taking 'proactive measures' for the suppression of terrorism.¹⁰⁹

However, in crucial respects, s 80.2C has been consciously analogised to treason. The section was not inserted into pt 5.3 of the *Criminal Code*, but was instead merged with pt 5.1: the part previously responsible for treason and urging violence. Urging violence is, with some modification, the successor offence of sedition, albeit with a modernised heading to allay criticism that 'sedition' connotes a political crime.¹¹⁰ With the *Foreign Fighters Act* amendments, the hierarchy of offences in ch 5 now reads (emphasis and maximum penalties added):

Chapter 5—The security of the Commonwealth

Part 5.1—**Treason, urging violence and advocating terrorism**

Division 80—Treason, urging violence and advocating terrorism

...

Subdivision B—Treason

80.1 Treason (life)

80.1AA Treason—materially assisting enemies etc. (life)

Subdivision C—Urging violence and advocating terrorism

80.2 Urging violence against the *Constitution* etc. (7 years)

80.2A Urging violence against groups (5–7 years)

80.2B Urging violence against members of groups (5–7 years)

80.2C Advocating terrorism (5 years)

...

¹⁰⁴ Commonwealth, *Parliamentary Debates*, Senate, 3 March 2015, 954 (George Brandis).

¹⁰⁵ Adam Reynolds, 'Treason: Defunct or Dormant' (2000) 26(1) *Monash University Law Review* 195, 202.

¹⁰⁶ Michael Head, *Crimes Against the State: Rebellion, Treason, Sedition, Terrorism and Riot* (Ashgate Publishing, 2011) 106.

¹⁰⁷ For an account of these cases, including *R v Sharkey* (1949) 79 CLR 121 and *Burns v Ransley* (1949) 79 CLR 101, see ALRC, above n 89, 55–9 [2.28]–[2.39].

¹⁰⁸ Author analysis of Commonwealth Department of Public Prosecutions Annual Reports, 'charges dealt with under the *Criminal Code*': 2002–03 (1), 2003–04 (0), 2004–05 (2), 2005–06 (2), 2006–07 (4), 2007–08 (specific charges not reported), 2008–09 (42), 2009–10 (23), 2010–11 (2), 2011–12 (9), 2012–13 (2), 2013–14 (0), 2014–15 (21) <http://www.cdpp.gov.au/publications/?publication_category=annual-reports>. Note: figures for 2014–15 may include a greater number of matters than pt 5.3 charges alone.

¹⁰⁹ United Nations Office on Drugs and Crime, *Guide for the Legislative Incorporation and Implementation of the Universal Anti-Terrorism Instruments* (2006) 52 [250]–[251], [256]; Scheinin, above n 93, 15 [29].

¹¹⁰ ALRC, above n 89, 66–7 [2.71]–[2.72].

Part 5.2—Offences relating to **espionage** and **similar activities**

...

Division 91—Espionage and similar activities (25 years)

...

Part 5.3—**Terrorism**

...

Division 101—Terrorism

101.1 Terrorist acts (life)

It is clear from this segment alone that the arrangement of offences in a code serves to group primary and preparatory offences thematically by similarities in the primary offence (for example, ‘espionage and similar activities’ or ‘terrorism’).¹¹¹ In that respect, the inclusion of s 80.2C outside the terrorism divisions is at the very least a semantic misnomer.

Yet, headings and classification arguably serve a higher purpose, and any departure from natural taxonomies should be carefully scrutinised. Here, it is useful to adapt principles of fair labelling to critically evaluate the overall architecture of a criminal statute. Generally, the arrangement and labelling of offences should signify relevant or ‘widely felt’ distinctions between different types of wrongdoing and harm.¹¹² They communicate to the public and to decision-makers (including judicial officers) the ‘nature and magnitude’ of the wrongdoing,¹¹³ and the appropriate level of condemnation that should attach to the offender.¹¹⁴ In the Australian context, headings have interpretive significance and convey legislative intention: ‘marginal notes and section headings ... are able to be amended by Parliament or under the supervision of Parliament. It is appropriate for this material to be treated as part of the Act’.¹¹⁵ Sexual assaults, for instance, are often codified in different provisions to other non-fatal ‘offences against the person’, despite sharing superficial physical characteristics. The stigma and trauma of the former ‘is a distinct experience which cannot be equated with a non-sexual physical injury’.¹¹⁶

The same principle should apply to the distinction between terrorism, on one hand, and treason and its derivatives, on the other. The distinguishing characteristics of a terrorist act in s 100.1(1) of the *Criminal Code* are the two

¹¹¹ See, eg, chapters in the *Model Criminal Code* arranged by ‘theft ... and related offences’, ‘sexual offences’ and ‘drug offences’ inter alia: Parliamentary Counsel’s Committee, Parliament of Australia, *Model Criminal Code* (2009). See also existing structures in the *Criminal Code*. The older *Crimes Act 1914* (Cth) is arranged around a more detailed taxonomy of crimes against the state, including ‘offences against the government’, ‘protection of public and other services’, ‘offences relating to the administration of justice’.

¹¹² Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 77. See also Jeremy Horder, ‘Rethinking Non-fatal Offences against the Person’ (1994) 14(3) *Oxford Journal of Legal Studies* 335, 351.

¹¹³ Ashworth and Horder, above n 112, 77.

¹¹⁴ James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71(2) *The Modern Law Review* 217, 226.

¹¹⁵ Explanatory Memorandum, Acts Interpretation Amendment Bill 2011 (Cth) 18 [93]; *Acts Interpretation Act 1901* (Cth) s 13(2)(d).

¹¹⁶ Model Criminal Code Officers Committee of the Standing Committee of the Attorneys-General, *Model Criminal Code: Sexual Offences against the Person: Report* (1999) 4. See also Chalmers and Leverick, above n 114, 220.

limbs described earlier: (1) that the act or threat is characterised by an intention to advance a political, religious or ideological cause; and (2) with the intention of coercing or influencing by intimidation any national or foreign *government* or of intimidating a domestic or foreign *public*. By comparison, the distinguishing feature of treason and sedition or urging violence is injury — either notional or material — to the security and authority of the enacting *state*, namely the Commonwealth of Australia. The acts encompassed by treason include killing, injuring or otherwise harming certain members of the executive branch such as the Sovereign;¹¹⁷ assisting a traitor;¹¹⁸ and materially assisting an enemy engaged in war with the Commonwealth or an organisation engaged in armed hostilities against the Australian Defence Force.¹¹⁹ Likewise, the most serious heads of urging violence (hereafter referred to as the ‘sedition-type’ heads) are distinguished from other forms of incitement or criminal speech by requiring that the force or violence urged: is intended to overthrow by force or violence the *Constitution*, a Commonwealth or State government;¹²⁰ is intended to interfere by force or violence with a national election or a referendum;¹²¹ or is intended to produce violence against a particular group or group member if that violence would ‘threaten the peace, order and good government of the Commonwealth’.¹²²

In short, treason and sedition are singularly concerned with injuries to the system of government, the dignity of the Sovereign, public stability, and the authority of the state.¹²³ Treason requires that the offender owes actual or imputed allegiance. Likewise, treason, sedition and treachery all require that the target of the conduct is precisely the enacting state.¹²⁴ By comparison, terrorism is concerned with the inspiration of fear to produce an illegitimate change in policy, law or public practice in *any* polity or public, whether foreign or domestic, and irrespective of the nationality of the offender.

In addition to its placement alongside treason and urging violence, s 80.2C conflates these distinctions in its unusual drafting. On one hand, it retains the characteristics of a standard terrorism offence. It applies to the advocacy of threats or acts directed against any government or public, whether foreign or domestic. On the other hand, s 80.2C it retains some of the allegiance- and nationality-based elements applicable to species of treason. All div 101 and 102 terrorism offences assert ‘category D’ extended geographical jurisdiction. They operate ‘whether or not the conduct ... or ... a result of the conduct’ occur in Australia,¹²⁵ and they do not inquire into the nationality of the offender. Yet div 80 offences, including

¹¹⁷ *Criminal Code* s 80.1(1).

¹¹⁸ *Ibid* s 80.1(2).

¹¹⁹ *Ibid* ss 80.1AA(1), 80.1AA(4).

¹²⁰ *Ibid* s 80.2(1).

¹²¹ *Ibid* s 80.2(3).

¹²² *Ibid* ss 80.2A(1), 80.2B(1).

¹²³ Katharine Gelber, ‘The False Analogy between Vilification and Sedition’ (2009) 33(1) *Melbourne University Law Review* 270, 279–80, 284.

¹²⁴ See, eg, *Crimes Act 1914* (Cth) s 24AA(1)(a)(i)–(ii). The section also provides that treachery may extend to levying war against a ‘proclaimed country’ from within the Commonwealth, although this is not the substance of the offence.

¹²⁵ *Criminal Code* s 15.4. This applies to ss 101.1, 101.2, 101.4, 101.5, 101.6, and all div 102 offences per s 102.9.

s 80.2C, possess more qualified jurisdiction. Where some injury to the Commonwealth or public order is explicitly an element of the offence (for example, treason, materially assisting the enemy, and the sedition-type species of urging violence), the offence possesses broad category D extended jurisdiction. However, where an offence does not require proof of injury to the Commonwealth or public order (for example, advocating terrorism),¹²⁶ that offence will only apply to conduct outside Australia if the person is an Australian citizen, resident or body corporate.¹²⁷ It is an unconventional fusion of treason and terrorism characteristics, and one unsupported by clear reasoning. If Australian legislation purports to criminalise terrorism against any government or public whether or not those threats, acts or consequences occur in Australia, advocating terrorism should enjoy the same scope.¹²⁸ The choice to limit its application to (a) conduct or a result of the conduct occurring in Australia, or else (b) only Australian citizens or nationals suggests that the Parliament sees this offence as a derivative of sedition, applicable only where Australian interests are affected or where Australian nationals are responsible.

The legislative history of div 80 shows that these distinctions are important, and signify different types of moral opprobrium. Two urging-violence offences do not require that violence threatens ‘peace, order and good government’. They only require that the violence is urged against groups or members of groups distinguished by race, religion, nationality or political opinion. As such, these ‘racial vilification-type’ urging-violence offences carry a maximum sentence of imprisonment that is two years shorter than their sedition-type equivalents, which require that the violence urged against those groups threatens ‘peace, order and good government’.¹²⁹ After all, while the state should tolerate vehemently critical speech, the same expectation should not be held of victims of vilification.¹³⁰ However, their insertion into div 80 was criticised for inappropriately conflating discrete criminal behaviours.¹³¹ The offences ought to have been enacted in standalone provisions that recognised the distinct personal and cultural injuries sustained by victims of racial vilification.¹³² Instead, they were merged with a body of law emphatically and narrowly concerned with injuries to the body of the state and the public. Their high purpose — the vindication of minorities and individuals suffering discriminatory attacks — was distorted and diminished as a result, converted into a vindication of public order.¹³³

Moreover, the distinctions between treason, sedition and terrorism are carefully preserved in other code jurisdictions. In June 2015, the Canadian

¹²⁶ Category B extended jurisdiction applies to *Criminal Code* ss 80.2A(2), 80.2B(2) and 80.2C(1) per s 80.4(2). The vilification-type urging-violence offences, in the sense used here, are those that do not require proof of some threat to the ‘peace, order and good government’ of the Commonwealth.

¹²⁷ *Ibid* s 15.2(c).

¹²⁸ There are strong arguments for limiting the extraterritorial application of other div 80 offences such as treason: ALRC, above n 89, 237–8 [11.50]–[11.53].

¹²⁹ *Criminal Code* ss 80.2A(2), 80.2B(2).

¹³⁰ Gelber, above n 123, 289.

¹³¹ Dan Meagher, ‘Inciting Racial Violence as Sedition: A Problem of Definition?’ (2006) 30(5) *Criminal Law Journal* 289, 294.

¹³² A survey of this criticism is provided in Gelber, above n 123, 274.

¹³³ These concerns were acknowledged in ALRC, above n 89, 207–8 [10.47], 218 [10.92].

Parliament passed Bill C-51. It inserted into the Canadian *Criminal Code* the offence of ‘advocating or promoting commission of terrorism offences’, which criminalises advocacy ‘by communicating statements’ where the person is reckless as to the subsequent commission of a terrorism offence.¹³⁴ The amendments also permit a judge to authorise the seizure of publications or deletion of digital content if satisfied on reasonable grounds that the publication or content is ‘terrorist propaganda’.¹³⁵ The new offence, however, sits in a part devoted to ‘Terrorism’, under the heading ‘Participating, Facilitating, Instructing and Harbours’ and just before the provisions dedicated to ‘Hoax Regarding Terrorist Activity’. It is arguably a more appropriate reflection of seriousness and culpability. Treason, sedition and ‘other Offences against the Queen’s Authority and Person’ are contained in a discrete part accurately entitled ‘Offences against Public Order’. Sedition is further distinguished from advocating or promoting terrorism, since it only operates against a person who advocates the use of unlawful force ‘as a means of accomplishing a governmental change *within Canada*’.¹³⁶

United States (‘US’) federal law isolates treason and its derivatives from terrorism to a greater extent. The *Constitution* places unique limitations on the scope of treason, which consists exclusively of levying war against the US or adhering to its enemies.¹³⁷ Treason, sedition and ‘subversive activities’ are grouped together in a chapter of the US *Code*. Terrorism offences are relegated to a separate chapter.¹³⁸ Moreover, the criminalisation of advocacy is subject to limits imposed by the First Amendment.¹³⁹ In *Brandenburg v Ohio*,¹⁴⁰ the US Supreme Court ruled that statute could not validly proscribe ‘mere advocacy’ unless that advocacy is ‘directed to inciting or producing imminent lawless action and is likely to produce such action’.¹⁴¹ a composite test importing both intention and an objective probability of harm. One consequence is that the US cannot enact provisions comparable to the advocacy offences enacted in Australia, Canada and the UK. Instead, prosecutors have relied on offences such as § 2339A (providing material support to terrorists) and § 2339B (providing material support or resources to designated foreign terrorist organisations) to impute that acts of glorification or advocacy constitute material support for a proscribed entity. It is a content-neutral approach to criminalising incitement that focuses less on the message conveyed and more on construing a material relationship between the advocate and a terrorist organisation.¹⁴² The threshold for a successful prosecution is thus higher than the content-based test in the UK, Canada or Australia. It more accurately captures the harm of greatest concern — advocacy that materially enhances the capabilities of a

¹³⁴ Bill C-51 (Anti-terrorism Act 2015) cl 16; inserts s 83.221 into the *Criminal Code*, RSC 1985, c C-46.

¹³⁵ *Criminal Code*, RSC 1985, c C-46, ss 83.222, 83.223.

¹³⁶ *Ibid* s 59(4) (emphasis added).

¹³⁷ *United States Constitution* art III s 3. See also 18 USC § 2381.

¹³⁸ 18 USC ch 115; 18 USC ch 113B. Unlike Canada or Australia, the US criminal code is organised alphabetically, rather than hierarchically.

¹³⁹ Laurence W Maher, ‘The Use and Abuse of Sedition’ (1992) 14(3) *Sydney Law Review* 287, 295.

¹⁴⁰ (1969) 395 US 444.

¹⁴¹ *Brandenburg v Ohio* (1969) 395 US 444, 447, 449.

¹⁴² Daphne Barak-Erez and David Scharia, ‘Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law’ (2011) 2(1) *Harvard National Security Journal* 1, 3, 15–17, 20–23, 27.

terrorist entity — without criminalising more remote acts. Significantly, that approach is formally and conceptually isolated from the law concerning treason, sedition and subversion.

VI Invoking Treason and Sedition – An Improper Conflation

This conflation of advocacy with the crimes of treason and urging violence is objectionable. Convictions under that framework essentially amount to attainder by proxy, with all the stigma of disloyalty, but none of the legal tests and protections ordinarily embedded in offences turning on disloyalty or treachery. The experience of sedition prosecutions in Australia demonstrates that the rhetoric of betrayal invariably colours perceptions of those charged with crimes against the state, whether or not the conduct in question is, in fact, treasonous or treacherous.¹⁴³ Likewise, the drafting, placement and extraterritorial application of s 80.2C will likely confirm in the mind of the public what has been suggested by the Senators quoted above — that advocating terrorism is an act of disloyalty. Yet the new offence applies, quite deliberately, to conduct that does not directly threaten Australian interests or institutions: the advocacy of terrorism anywhere in the world. It conceivably captures secular advocates agitating for the overthrow of the Assad regime in Syria, advocates for rebellion in Crimea and eastern Ukraine, and advocates for violence against Israel in the Palestinian Territories. Historically, the offence would likely capture supporters of the Arab Spring. Generally, advocating violence in these conflicts does not align with Australia's stated foreign policy interests. Yet, in few cases could it be said that such advocacy directly betrays or endangers Australian interests, especially where it is directed to audiences abroad.

There are few protections for such individuals. Until 2010, the Attorney-General was required to certify div 80 prosecutions. That provision was repealed to address perceptions of sedition and urging violence as highly politicised offences.¹⁴⁴ In the context of an advocating terrorism offence, however, that certification may have played an important role in ensuring that only the most serious offences are prosecuted; those closely or demonstrably affecting Australian interests. The Attorney-General would have to shoulder the political consequences of a decision to prosecute, under div 80, speech that fell short of incitement — although, reciprocally, those political considerations could compromise the impartial and consistent enforcement of the law. Without that certification, the decision to prosecute rests with the Commonwealth Department of Public Prosecutions. It considers, among many factors, 'whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute' and 'the necessity to maintain public confidence in the rule of law'.¹⁴⁵ However,

¹⁴³ See especially the judicial and popular rhetoric surrounding the Sharkey trial: Maher, above n 139, 302, 309.

¹⁴⁴ *National Security Legislation Amendment Act 2010* (Cth); ALRC, above n 89, 269–71 [13.16]–[13.24].

¹⁴⁵ Commonwealth Department of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process* (2014) 5 [2.10].

prosecutorial discretion is an external and relatively weak safeguard against the misuse or abuse of s 80.2C. Limitations should be embedded in the offence itself.

The div 80 good faith defence places additional limitations on the reach of s 80.2C, but it is also a weak safeguard. It is a complete defence, for instance, that the accused urged another person, in good faith, 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*’.¹⁴⁶ In considering such a defence, the court may have regard to any relevant matters including whether the acts were done for a purpose intended to prejudice Commonwealth defence, or intended to assist an organisation engaged in armed hostilities against the Australian Defence Force.¹⁴⁷ To this extent, whether the conduct is actually prejudicial to Australian interests is relevant in determining the strength of the defence. In a defence to urging violence or advocating terrorism, a court may also consider whether the acts were done in relation to an artistic work, journalism or any other ‘*genuine purpose in the public interest*’.¹⁴⁸ However, the defence is only available for the advocacy of lawful conduct. It has no application in cases where the conduct advocated is unlawful — whether or not it amounts to terrorism. On the whole, the defence does little to remedy the over-inclusiveness of s 80.2C.

VII Conclusion

The Commonwealth manifestation of advocating terrorism is unique among its foreign equivalents. On one hand, like comparable offences abroad, it extends criminal liability: it lowers the threshold for criminalising speech to capture hitherto lawful advocacy remote from any material harm. It does so on the basis of spurious analogies between the legal treatment of advocacy by organisations and advocacy by individuals. Those phenomena are not comparable, and the analogy does not supply an adequate justification for departing from existing norms governing criminal speech.

On the other hand, unlike comparable offences abroad, s 80.2C seeks to conflate advocating terrorism with treason and derivative offences. The concepts embodied by terrorism and those embodied by treason, sedition or treachery overlap, but they are not congruent. Indeed, it is precisely those crimes against the state for which high thresholds should be retained. The criminalisation of advocacy in any form is likely to have a profound chilling effect on free speech — whether or not that speech is formally captured by the offence. That chilling effect is undoubtedly exacerbated by implications of subversiveness or disloyalty, and efforts to expand the laws of subversion should be treated with suspicion. Sedition and urging violence should be the low watermark of subversive speech, not the high watermark.

The new offence is not the only evidence of an emerging legislative tendency to conflate disobedience with disloyalty. The Australian Government has

¹⁴⁶ *Criminal Code* s 80.3(1)(c) (emphasis added).

¹⁴⁷ *Ibid* s 80.3(2).

¹⁴⁸ *Ibid* s 80.3(3).

now passed legislation to revoke the citizenship of terror suspects and terror convicts, including those convicted of advocating terrorism, on the basis that such individuals have ‘repudiated their allegiance to Australia’.¹⁴⁹ Likewise, the re-enacted foreign incursion provisions — which apply only to citizens, residents or others under the protection of Australia¹⁵⁰ — reiterate a noisy political view that foreign fighters are betraying their civic obligations.¹⁵¹ In this environment, the rationale, drafting and placement of the new advocacy offence deserve aggressive scrutiny when they engage politically loaded concepts of loyalty. Between criminalising innocuous speech and toying with treason, there is little to commend the design of the new offence.

¹⁴⁹ *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) s 4.

¹⁵⁰ See, eg, *Criminal Code* s 119.1.

¹⁵¹ For an unusually explicit example of this rhetoric, see, eg, ‘Britons Fighting in Iraq and Syria May Face Treason Charges If They Return’, *The Guardian* (online), 17 October 2014 <<http://www.theguardian.com/world/2014/oct/17/isis-syria-iraq-britons-treason-charges-philip-hammond>>.