

17 July 2007

Secretariat
Justice and Electoral Committee
Parliament House
Wellington

Dear Sir or Madam

SUBMISSION ON CRIMES (REPEAL OF SEDITIOUS OFFENCES) AMENDMENT BILL

1. Thank you for the opportunity to provide this submission on behalf of Maxim Institute.
2. Maxim Institute is an independent research and policy think tank. We are a charitable trust, funded by donations.
3. Maxim Institute opposes the Crimes (Repeal of Seditious Offences) Amendment Bill ("**Bill**"). We submit that the current seditious offences should be amended rather than repealed. We request the opportunity to appear before the Select Committee in person to present an oral submission on the Bill.

SUMMARY OF POSITION

4. Maxim Institute submits that while the current seditious offences are too broad and too easily misused, **the appropriate response is amendment, not repeal.**
5. **The central function of seditious offences is to protect lawful authority.** This is an important interest because it represents a common commitment to our democracy and our constitutional system. **Taking away this protection devalues lawful authority and therefore our constitutional system.** It erodes the sense of respect people hold for authority and may then lead to a lack of engagement with democracy, which is a danger to democracy itself.
6. **Democracy also requires the broadest possible range for free speech.** The current seditious offences do not permit this, and they must be amended so that they are more narrowly and tightly defined. **The only speech that should be prohibited is speech which intentionally urges violence against lawful authority and which creates an immediate or direct danger of this violence.** If these amendments are made, the limit they place on free speech will be justifiable.
7. It has been suggested that other criminal offences are an adequate and appropriate substitute for seditious offences. But these **other offences do not protect the same interest as seditious offences.** Urging violence against lawful authority is not just a sub-species of a general criminal offence. There are also **practical difficulties** with relying on these other offences.

OVERVIEW

8. This submission will address:
 - a. the importance of the core interest that seditious offences protect;
 - b. the importance of free speech, and its relationship with seditious offences;
 - c. amendments to the current seditious offences that are needed to ensure that the core interest of seditious offences is protected and that the proper balance with free speech is struck;
 - d. why the other offences that the Law Commission says could protect the core interest of seditious offences are not sufficient.

CORE INTEREST PROTECTED BY SEDITIOUS OFFENCES

9. The central function of seditious offences is to protect lawful authority. This includes systems of government, the head of State, the justice system, Parliament and members of Parliament themselves. In other words, they are designed to protect the institutions and processes of democracy and government.
10. Generally speaking, seditious offences do this by making it illegal to incite or urge the use of violence or force against lawful authority. As the Law Commission says in its comprehensive report, *Reforming the Law of Sedition*, “[s]edition law in New Zealand flows from words not actions.”¹ This report forms the basis for the Bill, which is intended to give effect to its recommendations.²
11. However, the current seditious offences in the Crimes Act 1961 (“**Crimes Act**”) go wider than this core interest. They are not limited to urging the use of violence against lawful authority. The Bill seeks to repeal these offences.
12. Maxim Institute submits that it is necessary to retain a seditious offence—not the current seditious offences—for two related reasons. The first is the obvious one that seditious offences help to protect the government and other institutions from attack, allowing them to act before they are actually attacked as a result of incitement to violence against property or persons without having to wait until the violence actually occurs. Clearly, there would have to be a real likelihood of attack or violence to justify such action.
13. The second reason is that seditious offences represent a common commitment to democratic institutions and to lawful authority, and a respect for them and appreciation of their importance. They do this by recognising that urging violence against lawful authority is a different type of crime from generally urging violence, because of the importance of the authority that is threatened.
14. Our constitutional system will not function unless we have a common commitment to it and unless we all accept the importance of the system and its institutions. Repealing the seditious offences and leaving the constitutional system protected only by the general criminal law, as the Law Commission has recommended, implies that constitutional systems and institutions are nothing special, and do not deserve any extra protection or recognition. In short, it devalues them.

15. This devaluation is not just a theoretical or abstract problem. It fosters an attitude that democratic processes and institutions of government are optional or even irrelevant, which is likely to lead to them being bypassed. If this attitude becomes widespread, it will undermine our constitutional system. A democratic system only functions well if everyone respects it, engages in it and agrees not to bypass it to pursue change and power through other means. Once this system has begun to be undermined, it becomes more likely that people who want to achieve change and power will resort to other means, instead of taking part in the democratic process. In other words, there is a risk of a downward spiral.
16. We submit that we should be taking every opportunity to encourage citizens to engage with the democratic process and to respect lawful authority. Otherwise, features showing a lack of engagement with the democratic process, such as voter apathy, may increase. The danger posed by lack of engagement is serious enough to justify retaining a seditious offence by itself. Even if it seems unlikely that repealing the seditious offences will result in a sudden explosion of violence against the government, the offence is still of utmost symbolic value.
17. As Professor Joseph has said:³

Western legal systems identify with laws that promote the realisation of social goals and individual human worth. But to achieve these ends, there must be order. In *Goodall v Te Kooti*, Denniston J observed that: "A leading duty, if not the leading duty, of a government is to preserve the public peace, and everyone has to sacrifice part of his individual rights and liberties for that object." Without order, there is anarchy and none of the basic values of the legal system can be realised.
18. Of course, this does not mean that any measures that promote order or that protect our constitutional systems are desirable. There are other, equally important principles that must be given their proper weight. In the context of seditious offences, this includes the vital principle of free speech, especially free political speech.
19. Before turning to free speech, we note that it has been stated that seditious offence provisions have generally fallen into disuse, as though this means that they are no longer relevant.⁴ If this is intended to support arguments for repeal, it is not convincing. The interest protected by seditious offences continues to be relevant and important, regardless of whether the offence is invoked. Just because provisions are not used frequently does not mean that they are flawed or unnecessary, just as the fact that provisions are used frequently does not necessarily mean that they are good law. At most, disuse indicates that facts that would trigger the offence have not arisen frequently or recently, not that the interest protected is unimportant or that the provisions are irrelevant in a modern society. The fact that the circumstances that trigger the offence have not occurred recently or frequently does not mean that they will not occur again.
20. In addition, law has a symbolic value. It communicates what is right and what is wrong, regardless of how frequently it is invoked.

FREE SPEECH

21. Freedom of thought and speech are “ultimate legal values.”⁵ They are quite rightly described as part of the “lifeblood of a democracy,”⁶ and “political expression (that is, comment about government and government policy) usually enjoys the greatest protection, and is often described as being at the core of the right.”⁷ If the State does not “permit the expression of opinions in a lawful framework, however unpopular or objectionable these opinions may be,” then “the State is emptied of moral content and is perceived in terms of force alone.”⁸
22. In New Zealand, the importance of free speech is recognised in section 14 of the New Zealand Bill of Rights Act 1990 (“**Bill of Rights Act**”), which provides that “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.”
23. It is indisputable that to have a fair and participative democracy, a wide degree of freedom of expression must be allowed. Even speech that promotes unpopular, unreasonable, distasteful or dangerous ideas must be allowed. As the Law Commission says, “expressions should not be branded as criminal simply because they involve dissent and political opposition to the Government and authority.”⁹
24. While our constitutional systems will not work if they are not respected and protected, it is equally true that they will not work unless there is freedom of speech. Therefore, respecting and protecting our constitutional systems and permitting free speech to the maximum extent possible are both necessary to ensure that the system works properly and that everyone is prepared and able to engage with it.
25. However, sometimes the right to freedom of expression comes into conflict with other principles. When this happens, it is essential to bear in mind that the right to freedom of expression is not absolute. The Bill of Rights Act itself recognises this when it says, in section 5, that there may be limits on rights as long as they are reasonable, prescribed by law and “demonstrably justified in a free and democratic society.”
26. Similarly, the International Covenant on Civil and Political Rights, which New Zealand has ratified, provides that the right to freedom of expression can be limited if the limitations are established by law and are necessary “for the protection of national security or of public order”¹⁰
27. In its discussion of freedom of expression, the Law Commission cites JS Mill, saying that:¹¹

the liberty of an individual to act or express opinions is limited. In [Mill’s] view:

... opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor ... ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer.

28. Joseph points out that the right to free speech:¹²

must be balanced against the State's interest in preservation and security. No State can tolerate incitement to forcible overthrow or mutiny. ... A vexing question facing the liberal democracy is: At what point must personal freedoms give way? Countries variously identify this point by reference to their state security offences such as treason, sedition or incitement to forcible overthrow.

29. The Law Commission states that protecting "freedom of expression, particularly of political expression," is "[t]he heart of the case against sedition."¹³ The key issue, therefore, is whether all seditious offences are always an unjustifiable breach of the right to freedom of expression, or whether there are other interests that, in some circumstances, might outweigh the need to protect freedom of expression. Mere speech must not be restricted, but it is possible for speech to cross a threshold that means that some restrictions are justified.

30. The Law Commission stated that "the most relevant limits on freedom of expression are those that are justifiable in the interests of peace and public order," agreeing that the State "should have the power to impose measures for the suppression of incitements to the actual use of violence, for the purpose of resisting the authority of the [State] or effecting a revolution."¹⁴

31. Because they potentially criminalise mere political dissent or opposition, we agree with the Law Commission that the current seditious offences in the Act are "an unjustifiable breach of the right of freedom of expression."¹⁵ However, this does not mean that any sedition-type offence is an unjustifiable limitation on the right. Given the important interest that seditious offences protect, we should seek to preserve a seditious offence that is limited to protecting the core interest and that imposes the minimum possible limitations on free speech. The next section of this submission considers how this could be done.

AMENDMENT OF THE CURRENT SEDITIOUS OFFENCES

32. We submit that examining the current seditious offences shows that:

- a. these offences go beyond the core meaning of sedition and are too wide; and
- b. the threshold for invoking them is too low.

33. We submit that this means that protecting our constitutional systems and protecting our right to freedom of expression are not properly balanced. However, the proper balance can be struck by the amendments we recommend. After examining the current seditious offences in the Crimes Act and the Law Commission's main reasons for repeal, we will discuss possible amendments and associated issues in detail.

Current seditious offences

34. The Crimes Act sets out the current seditious offences in sections 81 to 85. These offences operate by defining "seditious intention" and then saying that certain acts involving a seditious intention are criminal offences.

35. Section 81 of the Act provides that:

(1) A seditious intention is an intention—

- (a) to bring into hatred or contempt, or to excite disaffection against, Her Majesty, or the Government of New Zealand, or the administration of justice; or
- (b) to incite the public or any persons or any class of persons to attempt to procure otherwise than by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand;
- (c) to incite, procure, or encourage violence, lawlessness, or disorder; or
- (d) to incite, procure, or encourage the commission of any offence that is prejudicial to the public safety or to the maintenance of public order; or
- (e) to excite such hostility or ill will between different classes of persons as may endanger the public safety.

(2) Without limiting any other legal justification, excuse, or defence available to any other person charged with any offence, it is hereby declared that no one shall be deemed to have a seditious intention only because he intends in good faith—

- (a) to show that Her Majesty has been misled or mistaken in her measures; or
- (b) to point out errors or defects in the Government or Constitution of New Zealand, or in the administration of justice; or to incite or procure the public or any persons or class of persons to attempt to procure by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand; or
- (c) to point out, with a view to their removal, matters producing or having a tendency to produce feelings of hostility or ill will between different classes or persons. ...

36. It is a criminal offence to:

- a. be “a party to a seditious conspiracy,” which is “an agreement between 2 or more persons to carry into execution any seditious intention;”¹⁶
- b. make or publish a “statement that expresses any seditious intention;”¹⁷
- c. print, publish, sell, distribute or bring into New Zealand “any document, statement, advertisement, or other matter that expresses any seditious intention;”¹⁸ or
- d. use printing or other apparatus to print “any document, statement, advertisement, or other matter that expresses or will express any seditious intention,” or to permit the use of the apparatus for this purpose.¹⁹

Seditious offences are too wide

37. The operation of the seditious offences therefore depends on the existence of a “seditious intention.” Seditious offences should protect against the urging of violence or force against lawful authority. The current definition of a “seditious intention” does much more than this and it is not always necessary to actually have a seditious intention to have committed an offence.

“Seditious intention”

38. “Seditious intention” extends to bringing into “hatred or contempt,” or exciting “disaffection” in section 81(1)(a). Clearly this is far broader than urging violence. So too is the reference to alteration “otherwise than by lawful means” in section 81(1)(b), which the Law Commission notes could catch encouragement of “a trespass action on a cordoned off area of parliamentary grounds by way of protest against government policy.”²⁰
39. Section 81(1)(c) comes closest to the core meaning of sedition. It applies to inciting “violence, lawlessness or disorder.” It appears too broad, because it is not limited to “violence, lawlessness or disorder” against the constitutional system and because “disorder” appears to be a low threshold. However, in *R v Selwyn* the Court of Appeal has recently stated that “proof of intention to encourage violence is an essential element of the crime,” as is proof that “the property at which [the] conduct was directed belonged to or was associated with the Crown, the Government or administration of justice.”²¹
40. Section 81(1)(d) does not necessarily require any element of violence, and is not specifically related to action against the constitutional system. Finally, we agree with the Law Commission that section 81(1)(e) is more concerned with “hate speech” than with sedition.²² Australian commentators note that this sort of anti-discrimination rationale does not fit with the objective of seditious offence provisions.²³ It “grafts an international human rights rationale onto a domestic security rationale,” and this “produces definitional incoherence, and creates an offence which is either under-inclusive or over-inclusive, depending on the rationale which is accorded priority.”²⁴ As we have previously argued, “hate speech” laws are an unjustifiable limitation of the right to freedom of expression.²⁵ Just as is the case with sedition, speech which merely encourages hatred or contempt or which is merely unpopular, objectionable or distasteful should not be a criminal offence.

Requirement to have a “seditious intention”

41. The offences in sections 82 to 85 are not consistent. The offences of seditious conspiracy (section 82) and publishing seditious documents (section 84) both require that the person accused actually has a seditious intention. However, someone could be liable for publishing a seditious statement or permitting it to be published (section 83) or for using or allowing the use of apparatus to print a seditious statement (section 85) even if they did not have a seditious intention.
42. As the Law Commission notes, a literal reading of sections 83 and 85 is that a newspaper could be guilty of a seditious offence for simply reporting a seditious statement made by someone else. Equally, someone who allows their photocopier to be used to copy a document that contains a seditious statement would be guilty even though they had no knowledge of what was in the document.²⁶ Clearly this is inappropriate and unjust.

Threshold for invoking current seditious offences is too low

43. At the moment, it is only necessary to show a “seditious intention” to establish a breach of the law, and it is not always necessary to show that the person accused was the one with the seditious intention.

44. We submit that this threshold is far too low. It means that an offence can be committed even where there was absolutely no likelihood of the words spoken or document published actually violence against lawful authority.

45. This is in contrast to the approach to seditious offences in the UK, where the common law requires a “seditious tendency” as well as a “seditious intention” for an offence to be committed.²⁷ In other words, “[t]he act or words must also have a tendency to incite public disorder and violence.”²⁸ This reflects the position reached in *R v Aldred*, that “all the circumstances surrounding the publication” should be examined, including:²⁹

the audience addressed, because language which would be innocuous ... if used to an assembly of professors or divines, might produce a different result if used before an assembly of young and uneducated men. You are also entitled to take into account the state of public feeling ... [and] the place and mode of publication.

46. Similarly, a number of cases in the United States have confirmed that the circumstances in which words were said is relevant when considering whether it is justifiable to restrict them. In *Schenk v United States*, Holmes J stated that:³⁰

... the character of every act depends on the circumstances in which it is done ... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

47. This test was refined in *Brandenburg v Ohio*.³¹ In its discussion of this case, the Law Commission notes that it established that “prosecution for subversive advocacy” requires three things to be established:³²

- (a) express advocacy of law violation (that is, lawless action);
- (b) the advocacy must call for immediate law violation; and
- (c) the immediate law violation must be likely to occur.

48. The current seditious offences in the Crimes Act do not require any examination of the circumstances to see whether the speech in question has a “seditious tendency” or makes “immediate law violation” likely. This is a glaring omission.

Law Commission’s reasons for repeal

49. After considering the unsatisfactory nature of the current seditious offences, the Law Commission gives five main reasons why repeal of those offences is required.

50. The first is that “the legal profile of the offence is broad, variable and uncertain. The meaning of ‘sedition’ has changed over time.”³³ But this does not mean that repeal is required. It simply means that we should fix the meaning of sedition and of the seditious offences now, in light of the compelling public interest that is at their heart.

51. The second reason is that “as a matter of policy, the present law invades the democratic value of free speech for no adequate public reason.”³⁴ We agree that the present law is

unsatisfactory, but we submit that there is a compelling public interest at its heart, and that this interest should be protected.

52. The third reason is that “the present law falls foul of the New Zealand Bill of Rights Act 1990.”³⁵ Again, we agree that this is true with respect to the current law. However, the defects of the current seditious offences do not, by themselves, mean that we must repeal them outright when these defects can be cured by amendment, and when this amendment will ensure that they are justified limitations under the Bill of Rights Act.
53. The fourth reason is that “the seditious offences can be inappropriately used to impose a form of political censorship, and they have been used for this purpose.”³⁶ We agree that the current seditious offences have been used inappropriately. Again, this does not favour repeal over amendment.
54. The fifth reason is that “the law is not needed because those elements of it that should be retained are more appropriately covered by other offences.”³⁷ For reasons that are set out in more detail later in this submission, we disagree.
55. In summary, the Law Commission’s reasons do not demonstrate that complete repeal is necessary. We submit that the majority of them can be met with amendments to the current law.

Striking the proper balance: amendments required

56. We agree with the Law Commission that “the width of the [current seditious] offences means they are an unjustifiable breach of the right of freedom of expression,” and that their “linguistic over-inclusiveness” means that “they have the potential for misuse. Indeed, they have been inappropriately used in New Zealand in times of political unrest and perceived threats to established authority.”³⁸
57. However, we do not agree that “[t]he time has come to remove the seditious offences from the New Zealand statute book.”³⁹ As we have submitted, seditious offences have an important role to play.
58. **We submit that the best approach is to amend the current seditious offences so that:**
 - a. **a seditious intention only exists where there is intentional urging of violence against lawful authority;**
 - b. **proof of a seditious tendency is required; and**
 - c. **the “hate speech”-type offence is removed.**
59. This is consistent with the Law Commission’s view that statements can justifiably be criminalised where they advocate “imminent violence against the State or the community or individuals ... if a criminal offence is a likely outcome and there is proof of intention to advocate” imminent violence.⁴⁰
60. We submit that if these amendments are made, the resulting limitation on the right of freedom of expression will be justified under the Bill of Rights Act. It will be consistent with

the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, which state that:⁴¹

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.

61. Amendment is the approach that has been taken in Australia, where:⁴²

Three of the new offences contained in s80.2 of the Criminal Code [which modernise the old seditious offences] shift the emphasis from speech that is merely critical of the established order to exhortations to use force or violence against established authority, voters or particular groups within the community. It is very difficult to understand why exhortations to use force or violence should *not* be prohibited by federal law, provided that the offences are properly framed.

62. We will also address other possible amendments that we do not believe are necessary, but which the Committee may wish to consider and which should be covered for the sake of completeness.

Amended definition of “seditious intention”

63. The definition of “seditious intention” should be amended so that a seditious intention only exists where there is an intention to urge violence against lawful authority. This will narrow the current definition by requiring that there must always be an intention to urge *violence*. Inspiring contempt, hatred, disaffection or other lesser things will not result in a speaker committing any offence.

64. We submit that this creates an appropriate line between speech that it is accepted should be criminalised, and speech that should be permitted.

65. We also submit that proving that an accused had an actual “seditious intention” should be a necessary element of any seditious offence. This would mean, for example, that it would no longer be possible to commit any offence merely by allowing someone to use your photocopier when you had no knowledge of what was being copied.

66. It has also been argued that “Intention as to a result—namely the occurrence of violence or force—may assist in limiting the scope of the offence, excluding statements which only have a remote or fanciful connection with the use of violence or force being targeted by the offence.”⁴³ In other words, if this suggestion was adopted, it would be necessary to show not only that a speaker intended to urge violence against lawful authority, but also that he or she intended that violence would result.

67. We submit that this intention as to result should not be an element of “seditious intention.” It would be extremely difficult to prove this intention, making the seditious offence somewhat redundant. In any case, we submit that someone who intentionally urges violence in circumstances where violence is likely to result (that is, where there is a seditious tendency) has crossed a threshold that should be marked out as criminal. In

almost every case of this sort, the speaker will have intended their words to be acted on. If they did not have this intention, then they were reckless or naïve in intentionally urging violence in circumstances where it was likely to result.

68. We also submit that requiring proof of a specific intention to urge violence against lawful authority and proof of a seditious tendency provides sufficient protection for speakers.

Amendment to include “seditious tendency”

69. We submit it should be necessary to prove a “seditious tendency” as well as a “seditious intention.” This would require showing that there was an immediate or direct likelihood that the violence advocated would actually occur, having regard to all the circumstances. If the words spoken did not create an immediate or direct likelihood of violence against lawful authority, then the speaker would not have committed any offence, even if he or she had a seditious intention when he or she spoke.

Removal of “hate speech”-type offence

70. For the reasons that we have already given, the limb of the “seditious intention” definition that is more like a “hate speech” offence should be removed.

Bill of Rights Act issues

71. The issue is, of course, whether the amended seditious offence we have proposed is a justifiable limit to the right to freedom of expression in the Bill of Rights Act. As the Law Commission says, “Suppressing speech that proximately encourages violence is a justifiable limitation in a democratic society, since national security can outweigh freedom of expression. But the suppression must be only to the extent strictly necessary to prevent the greater harm.”⁴⁴
72. To determine whether a limitation to a right in the Bill of Rights Act is justified, we must consider “the importance of the objective pursued by the limit, and ... the proportionality of the means chosen to advance the objective.”⁴⁵
73. We submit that the objective of seditious offences, protecting lawful authority against those urging violence, has been demonstrated to be highly important. It plays an integral role in maintaining common commitment to our institutions of democratic government and protecting them from violence. Without this common commitment, the system would not function.
74. The proportionality assessment also involves asking whether there is a “rational connection between means and objective” and whether the “impairment of the right is minimal,” though perhaps a better way of phrasing this last element is to “require that the limit should be no greater than is reasonably necessary for attaining the objective.”⁴⁶
75. We submit that there is a rational connection between the objective of seditious offences and the means chosen, that is, the amended seditious offence we have proposed. This is because the amended seditious offence would apply directly to the type of conduct that compromises the interest protected by seditious offences generally. We also submit that

the amended seditious offence limits the right to freedom of expression no more than is necessary to achieve its purpose. This is because the proposed offence is narrowly focused and tightly defined to catch only intentional urging to violence against lawful authority that is immediately or directly likely to result in violence. It does not criminalise “speech that is merely critical of the established order.”⁴⁷

Consent to prosecution required

76. One way that an extra safeguard can be put on the use of criminal provisions is to require the prosecution to obtain consent before using them. Usually this consent must be obtained from the Attorney-General as, for example, in section 78B of the Crimes Act, which requires the Attorney-General’s consent to any charges under section 78 (espionage) or section 78A (wrongful communication, retention, or copying of official information).
77. This approach has been taken in Australia. “Reflecting concerns about potential overbreadth, the sedition offence requires the consent of the Attorney-General for prosecution.”⁴⁸
78. In *Burgess v Field*,⁴⁹ the High Court has recently considered cases where the consent of the Attorney-General or a High Court Judge is required before a prosecution commences. The Court noted that the old offence of criminal libel required the consent of a High Court Judge to prosecute. It held that one reason why the leave of a Judge, rather than the Attorney-General, was required in the case before it was so that there could not be “any suggestion of improper political involvement, or the appearance of such involvement, in the decision to prosecute.”⁵⁰ A discussion of historical sedition cases in Australia reveals that, where it is the Attorney-General that must give consent, the fear of improper political involvement may well be justified.⁵¹
79. This may be a relevant consideration if a requirement is introduced to obtain consent to prosecute seditious offences. On balance, we submit that consent to prosecution is not required as a safeguard once the offences have been amended in the way that we have suggested. However, the possibility remains open if an extra safeguard against unreasonable prosecution is desired. If the Committee wishes to include this safeguard, we submit that it should be a Judge’s consent that is required, not the Attorney-General’s, because of the risk of improper political motivations influencing an Attorney-General.

Good faith defences

80. Section 81(2) of the Crimes Act provides several “good faith” defences to the current seditious offences. Conduct that falls within the amended seditious offence we have proposed can not be said to have occurred in “good faith,” but we do not see any harm in retaining defences of good faith. If nothing else, they may be a reminder of the type of constructive engagement with the democratic process that is to be expected.

“A rose by any other name ...”

81. The Australian Law Reform Commission has suggested dropping “sedition” and associated terms because of their “historical baggage,” and “repackaging the offence as a

renamed public order crime.”⁵² We do not consider that this change is required. The key concern is that the offence protects the core interest that seditious offences are intended to protect, and no more and is a justifiable limitation of the right to freedom of expression. Once the offence has been amended appropriately, that is all that matters.

OTHER OFFENCES NOT SUFFICIENT TO PROTECT CORE INTEREST

82. One of the key reasons that the Law Commission recommends repeal of the seditious offences is that it considers that speech that incites violence “can be adequately and more appropriately dealt with by charges of incitement to commit other offences.”⁵³ The Law Commission refers⁵⁴ to the “other offences” in the Crimes Act of treason,⁵⁵ unlawful assembly,⁵⁶ riot⁵⁷ and riotous damage.⁵⁸ It also refers⁵⁹ to the offences in the Summary Offences Act 1981 of disorderly behaviour,⁶⁰ offensive behaviour or language,⁶¹ disorderly assembly,⁶² publishing instructions for making explosives or weapons⁶³ and unreasonably disrupting meetings.⁶⁴

General offences

83. We submit that it is not appropriate or adequate to rely on these other criminal offences. None of them protects the same core interest that seditious offences do, an interest which we have shown is worthy of protection.
84. The problem with relying on these other criminal offences is particularly serious with general offences like riot, unlawful assembly or disrupting a meeting. **Urging violence against lawful authority is not just a type of these general offences; it is entirely different in nature and deserves to be treated differently in law.** In other words, there is a fundamental difference between throwing petrol bombs at Parliament when the House is sitting with the intention of forcing a change in the law, and throwing petrol bombs at a bank with the intention of robbing it. Both are serious crimes, but the attack on Parliament is more than just unreasonably disrupting a meeting; it strikes at the heart of our democracy and our constitutional systems.

Treason

85. Treason covers killing or wounding the Sovereign, being involved in war against New Zealand, inciting or assisting with the invasion of New Zealand, using force to overthrow the Government of New Zealand or conspiring to do any of these things. The only one of these that really comes close to covering the same ground as seditious offences is overthrowing the government. Even then, this would not cover much of the conduct that we should protect against. For example, reacting violently against a particular government policy or law should be recognised as a criminal offence, but it would not cross the threshold of attempting to overthrow the government.
86. Treason only applies to people who owe allegiance to New Zealand’s head of state. While even aliens temporarily resident in New Zealand owe this allegiance,⁶⁵ there would be a gap in coverage if this offence was used to replace seditious offences, as no allegiance would be owed by those not resident at all.

Conspiracy and incitement

87. The purported reliance on conspiracy⁶⁶ and incitement⁶⁷ to commit these other offences is also problematic. Conspiracy to commit an offence requires a common intention between conspirators;⁶⁸ in other words, it requires more than one person to conspire. This offence would not cover a single person urging violence against lawful authority, nor would it cover multiple people acting independently without a common intention.
88. Incitement to commit an offence could be committed by one person, or by multiple people acting independently. However, to be guilty of the offence of incitement, an inciter must intend to incite the commission of a particular offence and “must also intend that the person incited will act with the criminal intention (mens rea) required for the offence incited.”⁶⁹
89. Because of the need to show these specific intentions, incitement is not an easy offence to prove, and so there may be significant practical difficulties with relying on it to the extent that the Law Commission suggests. A member of the New Zealand Law Society’s Criminal Law Committee has referred to this difficulty, suggesting incitement “is an inadequate replacement for some of the current sedition offences” and that if these offences are repealed, “there is no offence provision that can easily take their place.”⁷⁰ This suggests that the offence of incitement may not actually provide the level of protection that the Law Commission considers it will.

Terrorist offences

90. The Law Commission also relies on the coverage provided by the terrorist offences in the Crimes Act and the offences in the Terrorism Suppression Act 2002.⁷¹
91. The terrorist offences in the Crimes Act do protect against threats of major damage intended to cause “significant disruption to civil administration in New Zealand,” among other things, but this is a higher standard of threat and conduct than sedition, as the threat must be of “major” damage or loss and must be intended to cause “significant” disruption. Seditious offences should cover urging violence even if the urging is to violence that does minor or medium amounts of damage or loss, or is intended to cause disruption which is less than “significant.”
92. The definition of “terrorist act” in the Terrorism Suppression Act 2002 also sets a higher standard of threat and conduct. A “terrorist act” must be intended to have one of the following outcomes:⁷²
- the death of, or serious injury to, 1 or more persons ...: a serious risk to the health or safety of a population: destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage ...: serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life: introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.
93. Again, this will leave urging less serious violence uncovered, and it will leave urging violence uncovered if it is done without one of the specific intentions listed above. In addition, the Law Commission also notes that “The Terrorism Suppression Act 2002 has

no general offence of committing a terrorist offence so it seems unlikely that [the offence of incitement in the Crimes Act] could be used to prosecute 'incitement to commit a terrorist act'.⁷³

Summary of reliance on other offences

94. We submit that the other offences relied on by the Law Commission to replace the seditious offences are not appropriate. Conceptually, the more minor offences do not adequately reflect the interest protected by seditious offences, that is, urging violence against lawful authority. Practically, proving incitement to commit these minor offences may be extremely difficult, and the more serious offences, at best, only cover sedition on a very grand scale. They do not cover other conduct that should still be an offence in order to ensure that there is protection for the core interest recognised by seditious offences.

CONCLUSION

95. Maxim Institute submits that repealing the seditious offences is not justified for all the reasons discussed previously. Seditious offences protect a vital interest, one that is central to our democracy. When they are properly focused and defined, they are a justified limitation on the right to freedom of expression. This focus and definition can be achieved by amending the existing law. Retaining a specific offence of sedition is necessary; urging violence against lawful authority is not just a type of the more general criminal offences, and there are also practical difficulties with relying on other criminal offences.

96. Seditious offences have great practical and symbolic importance. Not only do they protect our constitutional systems against violence, but they represent a respect for those systems that is essential to encourage full participation in democracy. If they are repealed, this encouragement will be lost and that respect will be weakened. Ultimately, that weakens democracy.

97. Thank you again for the opportunity to make this submission.

Yours sincerely

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ENDNOTES

- ¹ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 9.
- ² Crimes (Repeal of Seditious Offences) Amendment Bill, Explanatory Note, 1.
- ³ Joseph, P. *Constitutional and Administrative Law in New Zealand* (Wellington: Brookers, 2001), 219, citing *Gendall v Te Kooti* (1891) 9 NZLR 26, 58.
- ⁴ See, for example, Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 23; Maher, L. *The Use and Abuse of Sedition* (1992) 14 SydLR 287.
- ⁵ Joseph, P. *Constitutional and Administrative Law in New Zealand* (Wellington: Brookers, 2001), 221.
- ⁶ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), para 120, citing *R v Home Secretary ex p Simms* [2000] 2 AC 115, per Lord Steyn.
- ⁷ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 36, citing Rishworth, P., Huscroft, G. and Mahoney, R. *The New Zealand Bill of Rights Act* (Victoria: OUP, 2003), 312.
- ⁸ Joseph, P. *Constitutional and Administrative Law in New Zealand* (Wellington: Brookers, 2001), 221, citing Friedmann, W. *Legal Theory* (London: Stevens, 1960), 384.
- ⁹ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 10.
- ¹⁰ International Covenant on Civil and Political Rights, article 19(2) and (3).
- ¹¹ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 29, citing Mill, J. "On Liberty," *Three Essays* (Oxford: OUP, 1991), 62.
- ¹² Joseph, P. *Constitutional and Administrative Law in New Zealand* (Wellington: Brookers, 2001), 221.
- ¹³ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 10.
- ¹⁴ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 43.
- ¹⁵ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 6.
- ¹⁶ Crimes Act 1961, sections 81(3) and 82.
- ¹⁷ Crimes Act 1961, section 83.
- ¹⁸ Crimes Act 1961, section 84.
- ¹⁹ Crimes Act 1961, section 85.
- ²⁰ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 47.
- ²¹ *R v Selwyn* [2007] NZCA 123, paras 20, 22.
- ²² Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 82-84.
- ²³ See Bronitt, S. and Stellios, J. *Sedition, Security and Human Rights: 'Unbalanced' Law Reform in the 'War on Terror'* (2006) 30 Melbourne University Law Review 923, 927-928.
- ²⁴ See Bronitt, S. and Stellios, J. *Sedition, Security and Human Rights: 'Unbalanced' Law Reform in the 'War on Terror'* (2006) 30 Melbourne University Law Review 923, 947, 949.
- ²⁵ See Maxim Institute *Hate Speech: Balancing expression, religion, discrimination and harm* (Maxim Institute, 2006) [cited 16 July 2007]; available at http://www.maxim.org.nz/files/pdf/policy_paper_hate_speech.pdf.
- ²⁶ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007) paras 308-312.
- ²⁷ Halsbury's Laws of England, vol. 11(1), *Criminal Law, Evidence and Procedure* (2006), para 370.
- ²⁸ Halsbury's Laws of England, vol. 11(1), *Criminal Law, Evidence and Procedure* (2006), para 371.
- ²⁹ *R v Aldred* (1909) 22 Cox CC 1, 3, cited in Boasberg, J. *Seditious Libel v Incitement to Mutiny* (1990) 10 OJLS 106, 113.
- ³⁰ *Schenk v United States* 249 US 47 (1919), cited in Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 34.
- ³¹ 395 US 444 (1969).
- ³² Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 35, citing Schwartz, B. *Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?* (1994) Sup Ct Rev 209, 240-241.
- ³³ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 11.
- ³⁴ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 11.
- ³⁵ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 11.
- ³⁶ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 11.
- ³⁷ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 11.
- ³⁸ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 6.
- ³⁹ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 6.
- ⁴⁰ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 69.
- ⁴¹ Cited in Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 59.
- ⁴² Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (Sydney: ALRC, 2006), 62, cited in Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 67.
- ⁴³ See Bronitt, S. and Stellios, J. *Sedition, Security and Human Rights: 'Unbalanced' Law Reform in the 'War on Terror'* (2006) 30 Melbourne University Law Review 923, 936.
- ⁴⁴ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 48.
- ⁴⁵ Wilberg, H. *The Bill of Rights and other enactments* [2007] NZLJ 112, 114, discussing the recent decision of the Supreme Court in *R v Hansen* [2007] NZSC 7.
- ⁴⁶ Wilberg, H. *The Bill of Rights and other enactments* [2007] NZLJ 112, 114.
- ⁴⁷ Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia* (Sydney: ALRC, 2006), 62, cited in Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 67.
- ⁴⁸ See Bronitt, S. and Stellios, J. *Sedition, Security and Human Rights: 'Unbalanced' Law Reform in the 'War on Terror'* (2006) 30 Melbourne University Law Review 923, 954.
- ⁴⁹ *Burgess v Field* (unreported, CIV 2007-404-3206, High Court Auckland, Randerson J, 6 July 2007).
- ⁵⁰ *Burgess v Field* (unreported, CIV 2007-404-3206, High Court Auckland, Randerson J, 6 July 2007), para 45.
- ⁵¹ Maher, L. *The Use and Abuse of Sedition* (1992) 14 SydLR 287, 299-301.
- ⁵² See Bronitt, S. and Stellios, J. *Sedition, Security and Human Rights: 'Unbalanced' Law Reform in the 'War on Terror'* (2006) 30 Melbourne University Law Review 923, 958.
- ⁵³ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 65.

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- ⁵⁴ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 72-74.
- ⁵⁵ Crimes Act 1961, section 73.
- ⁵⁶ Crimes Act 1961, section 86.
- ⁵⁷ Crimes Act 1961, section 87.
- ⁵⁸ Crimes Act 1961, section 90.
- ⁵⁹ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 77-78.
- ⁶⁰ Summary Offences Act 1981, section 3.
- ⁶¹ Summary Offences Act 1981, section 4.
- ⁶² Summary Offences Act 1981, section 5A.
- ⁶³ Summary Offences Act 1981, section 8.
- ⁶⁴ Summary Offences Act 1981, section 37.
- ⁶⁵ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 73.
- ⁶⁶ Crimes Act 1961, section 310.
- ⁶⁷ Crimes Act 1961, section 311.
- ⁶⁸ *R v Gemmell* [1985] 2 NZLR 740, cited in Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 70.
- ⁶⁹ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 71.
- ⁷⁰ *Abolish sedition*, *Law Commission says*, LawTalk 685, 23 April 2007, 14.
- ⁷¹ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 74-77.
- ⁷² Terrorism Suppression Act 2002, section 5(3).
- ⁷³ Law Commission, *Reforming the Law of Sedition* (Wellington: Law Commission, 2007), 77.