

**UWS Symposium: Sedition, free speech and the war on terror
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Free speech or ‘sedition’? Prohibitions on encouraging violence

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Introduction

In its November 2005 package of anti-terrorism laws, the Government introduced a set of five ‘modernised sedition offences’, including:

(a) three offences that prohibit ‘urging others to use force of violence’

- to overthrow the Constitution or governmental authority;
- to interfere with lawful parliamentary elections; or
- to set one group in the community (distinguished by race, religion, nationality or political opinion) against another group; and

(b) two offences that prohibit ‘assisting’ an enemy at war with Australia, or an entity engaged in armed hostilities against the Australian Defence Force (ADF).

Although the five offences are grouped under the heading ‘Sedition’ in the Criminal Code, they shift the focus away from ‘mere speech’ towards ‘urging’ other persons to use ‘force or violence’ in specified contexts—which arguably is closer conceptually to criminal incitement or riot than to common law sedition. The prohibition on urging inter-group violence also represents a move away from the protection of governmental authority to the protection of vulnerable groups in the community.

The Anti-Terrorism Bill (No 2) 2005 was referred to the Senate Legal and Constitutional Legislation Committee (the Senate Committee), which held three days of public hearings and received about 300 written submissions—almost all of them opposed to the legislation (with the notable but unsurprising exceptions of the Commonwealth Attorney-General’s

Department, the Commonwealth Director of Public Prosecutions and the Australian Federal Police). Most of the concerns about the new sedition offences involved the potential for the law to over-reach, and to inhibit free speech and free association.

Ultimately, the Senate Committee recommended that Schedule 7, which contained the sedition offences, ‘be removed from the bill in its entirety’ and referred to the Australian Law Reform Commission (ALRC) for public inquiry. Failing that, the Senate Committee also recommended a number of amendments (most of which were taken up by the Government).

The Government chose to pass the legislation in December 2005—with only Green and Australian Democrat Senators voting against—but Attorney-General Philip Ruddock promised an independent review of the controversial sedition laws, and on 1 March 2006 issued formal Terms of Reference for an ALRC inquiry into whether the news laws ‘effectively address the problem of urging the use of force or violence’.

The central questions for the ALRC inquiry were whether the new offences: (a) are well articulated, as a matter of criminal law; and (b) strike an acceptable balance in a tolerant, democratic society.

Background

Sedition law has its roots in the suppression of political dissent, prohibiting criticism (‘seditious libel’) that would ‘bring into hatred or contempt, or to excite disaffection against the person of His Majesty, his heirs or successors, or the government or constitution ... or the administration of justice’, or ‘to raise discontent or disaffection among His Majesty’s subjects, or to promote feelings of ill-will and hostility between different classes’.

In some common law jurisdictions—including New South Wales—the related offence of treason still applies (technically, even if never prosecuted) to those who would even ‘compass or imagine’ the death of the King, Queen or eldest son and heir; or ‘violate the King’s companion, or eldest unmarried daughter, or the wife of the eldest son and heir’.

Australian states and territories ‘inherited’ their sedition laws from the United Kingdom (UK), whether through the common law or by enactment

of parallel statutory provisions. South Australia and the ACT have no legislation prohibiting sedition, both having abolished the offence in the 1990s in an effort to remove ‘outdated common law rules’.

Sedition entered federal law in 1914, with the intention of suppressing criticism of the conduct of the First World War, and especially conscription policy and practice. It has rarely been prosecuted, and not since the 1950s—when used against officials of the Communist Party of Australia.

To a greater extent than any other offence, then, sedition is the classical ‘political’ crime—one that punishes speech that is critical of the established order.

Do we still need ‘sedition’ laws?

Australians place a very high premium on free speech and on the importance of robust political debate and commentary. The free exchange of ideas—however unpopular or radical—is considered to be healthier for a society than the suppression and festering of such ideas.

At the same time, all liberal democratic societies place some limits on the exercise of free speech, such as through civil defamation laws, classification of books and films, and criminal prohibitions on obscenity, serious racial vilification and incitement to crime. This is authorised under all international human rights conventions and bills of rights. In the famous dictum of US Supreme Court Justice Oliver Wendell Holmes Jr, ‘the most stringent protection of free speech would not protect a man in falsely shouting “fire” in a theatre and causing a panic’.

There is little doubt that, on any dispassionate analysis, the offences introduced in 2005 are ‘better’ than the old sedition laws they replaced—technically and from a human rights perspective—since they squarely shift the emphasis from critical speech to exhortations to use force or violence.

Nevertheless, it is clear from the ALRC’s community consultation effort—as it was during the Senate Committee’s process—that there is palpable public concern about the effects of the new laws on freedom of speech and freedom of association, both directly (ie, fear of conviction and punishment)

and even more so by way of a ‘chilling effect’—self-censorship to avoid being charged in the first place.

It is an interesting phenomenon that the codification or ‘modernisation’ of old laws often creates new and greater concerns, even where these efforts bring some objective improvement and increased certainty to the law. Thus, the far more draconian state and territory laws on sedition and treason apparently have not occasioned a similar chill—because few people know about them. Ironically, a number of state and territory attorneys-general were strongly and publicly critical of the proposed federal amendments, while failing to acknowledge their own, worse laws in this area—perhaps because they didn’t know about them?

Some of the concern expressed by stakeholders and commentators clearly stems from the context in which the new laws emerged. Although the changes made in 2005 largely track the 1991 recommendations of a committee chaired by former Chief Justice Sir Harry Gibbs, sedition laws were not modernised as part of a general ‘tidy up’ of federal criminal law. Rather, Schedule 7 formed part of an anti-terrorism package that also introduced into the *Criminal Code* a range of extraordinary new powers, mechanisms and offences, such as control orders and preventive detention orders.

Media coverage of the debates did little to reassure visual artists, writers, theatre groups, social critics or satirists of their position. Although the new sedition offences no longer target ‘mere dissent’, much of the commentary continued to argue—manifestly incorrectly—that a person could fall foul of the new laws by saying that ‘the Government was wrong to send troops to Iraq’ or ‘Australia needs to cut its ties with the British Crown’, or that a university lecturer would be in trouble for asking students of politics or rhetoric to ‘study the speeches of Hitler’.

Key recommendations for reform

The thrust of the ALRC’s 27 recommendations for reform is to ensure that there is a bright line between protected freedom of expression—even when exercised in a challenging or unpopular manner—and the reach of the criminal law, which should be confined to focus on exhortations to the unlawful use of force or violence.

Abolition of the term ‘sedition’

It appears that much of the worry about the new offences emanates from the fact that they are still referred to as ‘sedition’ offences. It is not clear why, after modifying the offences substantially, the Australian Government chose to group them under the heading of ‘sedition’—particularly as no reference is made to ‘sedition’ within any of the offences themselves.

In its final report, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104, July 2006), the ALRC noted that the term ‘sedition’ was a ‘red rag’, casting a shadow over the new laws, since it conjures in the public mind a crime rooted in criticising the established authority. The ALRC recommended that the term ‘sedition’ no longer be used in federal criminal law—and that all of the states and territories should follow suit.

Retention of offences relating to political violence

Governments have a perfect right, and in many cases a positive duty, to legislate to protect the institutions of democracy (responsible government, independent courts, free elections) from attack by force or violence, and similarly to protect the personal integrity of citizens (especially vulnerable or unpopular groups).

This remains the case even where other state and territory laws (such as riot, affray, assault, malicious damage to property or hindering public officials) may be transgressed along the way to committing one of these new ‘sedition’ offences. It would be a curious result if the Australian Government could not legislate to protect itself and the fundamental institutions of democracy from violent attack, but had to rely on the legislatures of the states and territories to do this for it.

Consequently, the ALRC felt comfortable recommending the retention—subject to the modifications described below—of the three federal offences of ‘urging force or violence’: (a) against the institutions of democratic government; (b) to disrupt parliamentary elections or referenda; or (c) against groups in the community.

It is worth highlighting here that progressive groups have long called for the federal government to implement its obligations under the Convention to

Eliminate All Forms of Racial Discrimination (CERD) by enacting laws against racial violence and racial vilification. Arguably, the current offence does not far enough in this respect, but it is difficult to understand arguments against any federal action in this direction.

Clarifying the fault elements for the ‘urging force or violence’ offences

While retaining the three basic ‘urging force or violence’ offences in the Criminal Code, in order to achieve that bright line distinction the ALRC recommended three significant changes to the way these offences would operate, so that:

- it should be made clear that the person must *intentionally* urge the use of force or violence;
- for a person to be guilty of any of the three offences, the person must *intend that the urged force or violence will occur*; and
- in considering whether the person intended the urged force or violence to occur, the jury must be instructed that **context is critical**. Therefore, the jury must take into account whether the conduct in question was done:
 - (a) in the development, performance, exhibition or distribution of an artistic work; or
 - (b) in the course of any communication made for any genuine academic, artistic or scientific purpose, or any other genuine purpose in the public interest; or
 - (c) in connection with an industrial dispute or matter; or
 - (d) in the dissemination of news or current affairs.

Clarifying the meaning of ‘assist’

Considerable concern has been expressed about the new ‘sedition’ offences built around the concept of urging another to ‘assist’ an enemy at war with Australia or an entity that is engaged in armed hostilities against the ADF. These offences are virtually identical to the provisions in the Criminal Code that define the crime of treason. The ALRC recommended folding these offences back into treason, with a number of critical changes.

There is significant concern that such a blanket prohibition on conduct that ‘assists’ the enemy unduly impinges on freedom of expression, to the extent that it might capture dissenting opinions about government policy. For example, it may be said colloquially that strong criticism of Australia’s recent military interventions or strategy in Afghanistan or Iraq ‘gives aid and comfort’ to (or ‘assists’) the enemy.

To remedy these concerns, the ALRC recommended that the law should be reframed to make clear that the offences consist of *intentionally and materially* assisting an enemy to wage war on Australia or to engage in armed hostilities against the ADF.¹

The addition of the term ‘materially’ is meant to indicate that rhetoric or dissent do not amount to ‘assistance’ for these purposes; rather, the assistance must of the sort which enables the enemy to wage war or engage in armed hostilities, for instance through the provision of funds, troops, armaments or strategic advice.

The ALRC also proposes that treason be limited to Australian citizens or residents (at the time of the alleged conduct). This qualification is common in other countries, and consistent with the nature and historical origins of the crime, which centrally involves breaching a duty of allegiance to one’s country.

‘Glorification’ of terrorism

In the *Terrorism Act 2006* (UK) s 1, the UK made it a criminal offence to engage in the encouragement or ‘glorification’ of terrorism. Glorification is defined to include ‘any form of praise or celebration’. This law has been highly controversial—including in the House of Lords and the UK Parliament’s Joint Committee on Human Rights—drawing criticism that:

- the terminology used is too vague and too broad;
- there is no requirement that the person intends to incite terrorism; and
- the prohibition unduly intrudes into protected free speech (under the European Convention on Human Rights).

¹ Interestingly, the charges ultimately laid by the US Military Commission against David Hicks related to providing material support to terrorists.

The submission of the Australian Attorney-General's Department (AGD) notes that the use of terms like 'praise' and 'glorify' were considered during the development of the anti-terrorism laws, but were rejected as imprecise and generating difficulties of proof. The AG's submission concluded that existing Australian law already 'appropriately encapsulates incitement and glorification of [terrorist] acts' and thus there 'appears to be no need for a separate offence'. The ALRC agrees.

Abolition of the unlawful associations provisions

In 1926, the provisions in Part IIA of the Commonwealth *Crimes Act* were added to deal with perceived threat of Communism and radical trade union activity.

The unlawful associations provisions turn on whether the member of a group share a 'seditious intention' (s 30A). Once a body is declared to be an unlawful association, a number of criminal offences may be applicable, including:

- failure to provide information relating to an unlawful association upon the request of the Attorney-General;
- being an officer, member or representative of an unlawful association;
- giving contributions of money or goods to, or soliciting donations for, an unlawful association;
- printing, publishing or selling material issued by an unlawful association; and
- allowing meetings of an unlawful association to be held on property owned or controlled by the defendant.

In 1991, the Gibbs Committee noted that these provisions were 'little used', the Canadian laws on which they are based were repealed in 1936, and they attracted virtually no support in the submissions. Gibbs recommended abolition.

In 2002, a comprehensive set of provisions dealing with 'terrorist organisations' was introduced into the *Criminal Code* (Division 102). No attempt was made to adapt the unlawful associations provisions for this purpose, but neither were they repealed. The criteria for declaring that a

group is a ‘terrorist organisation’ do not rely on the concept of sedition or seditious intention; rather, the group must be directly or indirectly engaged in planning, fostering or advocating ‘terrorist acts’ (as defined in s 100.1).

Absent any work to do, the ALRC recommended complete abolition of these superfluous provisions.

Review of old Crimes Act provisions

In the course of the Inquiry, the ALRC came across a large number of old provisions in Part II of the *Crimes Act* that are related to sedition and treason laws. These include the offences of:

- ‘treachery’ (s 24AA),
- sabotage (s 24AB),
- assisting prisoners of war (s 26),
- unlawful military drills (s 27),
- interfering with political liberty (s 28), and
- damaging Commonwealth property (s 29).

All of these provisions are couched in archaic language, and many of them may have been superseded by new and better laws. The ALRC recommended that the Australian Government initiate a review to determine which of these offences merit retention, modernisation and relocation to the *Criminal Code*, and which should be abolished because they are redundant or otherwise inappropriate.

Procedural issues

Under the existing provisions (s 80.5), the written consent of the Attorney-General is required for the prosecution of a sedition offence to proceed.

In practice, this provision would be used only in the rare situation where the Director of Public Prosecutions has made a decision that the evidence available and the public interest warrant criminal proceedings, but the Attorney-General believes otherwise. Although this provision is designed to provide an additional safeguard for a person charged with a sedition offence, concerns were expressed that this mechanism could contribute to a perception there may be a political element in the decision whether or not to prosecute.

In recommending the abolition of this mechanism,² the ALRC noted that:

- the establishment of the independent office of the CDPP in 1983 was aimed precisely at removing any appearance of political interference in the criminal justice process; and
- the run of new terrorism offences in Part 5.3 of the *Criminal Code* do not require the Attorney-General's consent to a prosecution.

Reactions to ALRC 104

By and large, the reaction to the ALRC's findings and recommendations in the Fighting Words report has been extremely positive, with prevailing view that the Commission managed to find the right balance between protecting freedom of speech and proscribing conduct designed to provoke the use of unlawful force or violence.

Comments strongly supportive of the ALRC's approach came from:

- media organisations, such as the ABC, Fairfax, and News Ltd;
- the Australian Press Council;
- arts organisations, such as the National Association for the Visual Arts;
- civil liberties groups and human rights NGOs; and
- the Australian Vice-Chancellors Committee.

Although some stories in the media have suggested that Attorney-General Philip Ruddock had rejected some or all of the key recommendations, the Attorney-General has had positive things to say generally (for example, in conference presentations) about the quality and balance of the ALRC report, and the official position of the Attorney-General's Department is that the reports and its recommendations remain under active consideration.

² An exception would apply under s 16.1 of the *DPP Act*, where the alleged conduct occurs wholly in a foreign country and the person charged is not an Australian citizen, resident or corporation.