

# **New Seditious Laws: Defending or Subverting Freedom?**

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Public Forum Program of Civil Liberties Australia (ACT) Inc and Independent Scholars  
Association of Australia, supported by the National Library of Australia

Canberra, Thursday 14 September 2006

## **Not a Man, Not a Ship, Not a Plane, Not a Gun for the Aggressive, Imperialist War**

Anon, *Tribune*, May 1950

The headline, of course, was not the War on Terror, but the War on Korea and Malaya. These headlines in May 1950 (repeated in several editions of the bi-weekly Communist newspaper, the *Tribune*) had serious criminal consequences. The editor, William Fardon Burns, who was not the author but identified as the ‘nominal’ publisher, was prosecuted and imprisoned for his publication of a series of articles evincing this seditious intent. His prosecution and subsequent appeal against conviction was an acrimonious affair, attracting considerable disquiet from a wide range of quarters. This showcase of a sedition trial, early in Menzies’ term, seemed like a success for the Commonwealth, coming on the heels of the prosecutions of Messrs Burns and Sharkey for statements made during political meetings at political meetings and in the press that in the event of a war against the Soviets, they would fight on the side of Soviet Russia.<sup>1</sup> Burns made his statement at a public debate in Brisbane between representatives of the Queensland People’s Party and the Australian Communist Party upon the subject "That Communism is not compatible with personal liberty." Sharkey had made his statement in an interview with a journalist at the Daily Telegraph.

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\* Address: National Europe Centre, ANU, Canberra ACT 0200. This research has been supported by Commonwealth funded, ARC Discovery Project (DP0451473), “Terrorism and the Non-State Actor After September 11: The Role of Law in the Search for Security”. I am grateful for the excellent research assistance provided Niamh Lenagh-Maguire.

<sup>1</sup> *Burns v Ransley* (1949) 79 CLR 101 and *R v Sharkey* (1949) 79 CLR 121.

This Cold War revival of sedition against political dissent was not surprising – there had been a long history of its use in colonial Australia against critics of government, including prosecutions of significant Emancipist lawyers/editors.

While convictions and imprisonment for sedition could be obtained, Roger Douglas pointed out, defendants like Burns and Sharkey “used the trial as a forum for communicating a critique of war to a far wider public than the readership of the *Tribune*”.<sup>2</sup> While sedition remained on the statute-book, it was not against the student revolutionary activities of the 1960s or anti-Vietnam protests of the 1970s (much to the relief of some of my ANU colleagues who lived through these turbulent). They were prosecuted for much less serious offences, including offensive conduct, convictions which were subsequently quashed on appeal on the grounds that the political context of their anti-war activity rendered it inoffensive.<sup>3</sup>

Sedition is the paramount ‘political crime’, which as Roger Douglas points out, has been used through history to ‘punish people for what they think (or what they are thought to think) rather than on the basis of the degree to which their activities actually pose a threat to social order (however defined)’.<sup>4</sup>

The revival of interest in sedition caught many commentators off guard – in an earlier discussion of sedition, I had consigned the offence, with its connections to the post-war eras of political censorship and Communist paranoia, to the “dustbin of legal history”. For nearly 50 years, this assessment could stand strong, with several jurisdictions taking the precaution of abolishing sedition including the Australian Capital Territory.

The revival of sedition today is tied with another war ... very different, but raising similar challenges, the ‘War on Terror’. In the ‘first wave’ of law reform post 9/11, attention focused on the core offences dealing with “terrorist acts” and proscribing terrorist

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<sup>2</sup> R Douglas, ‘The Ambiguity of Sedition: The Trials of William Fardon Burns’ (2004) 9 *Australian Journal of Legal History* 227.

<sup>3</sup> *Ball v McIntyre* (1966) 9 FLR 237. In this case, the police attempted to prevent an anti-Vietnam protest outside Parliament House in Canberra. Desmond Ball, a university student, had climbed on a statue of George V and hung a placard that read “I will not fight in Vietnam”. Bearing in mind the obvious political context of the protest, the Supreme Court held that the conduct was not “offensive”: discussed in S Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed, 2005).

<sup>4</sup> Douglas, above n 2, 248.

organisation.<sup>5</sup> In the wake of the subsequent Madrid and London bombings, attention has shifted to the perceived root causes of terrorism, namely organizations and individuals that advocate terrorist acts. The definition of a proscribed terrorist organisation was broadened to include one which ‘advocates’ the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).<sup>6</sup> At the same time, the offence of sedition, which criminalises individuals who urge violence or force in defined circumstances, was modernized as part of this reform package in late 2005.

The new sedition provisions attracted considerable public attention and disquiet in the media, leading the Government to take the unusual step of requesting the Australian Law Reform Commission (ALRC) to undertake a retrospective review of the new sedition laws.<sup>7</sup> The ALRC tabled its aptly titled report, *Fighting Words: A Review of Sedition Laws in Australia* (Final Report 104), yesterday in Federal Parliament (more than 300 pages).

Australia is not the only country to criminalize the advocacy of terrorism. The Council of Europe’s *Convention on the Prevention of Terrorism* (2005) requires state parties to establish an offence of ‘public provocation to commit a terrorist offence’, and, to that end, the United Kingdom has recently enacted a controversial offence of ‘encouragement or glorification of terrorism’ in the *Terrorism Act 2006* (UK).<sup>8</sup> With concerns that such a nebulous offence would constitute an unwarranted interference into constitutionally protected freedom of expression, the ALRC has not proposed its adoption. What the ALRC does recommend, is that the term ‘sedition’ should be expunged from the federal statute book because its historical taint. That said, it recommends retaining a range of modernized federal security/public order offences urging political or inter-group force or

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<sup>5</sup> For a review of these terrorist offences see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed, 2005), Ch 15.

<sup>6</sup> *Criminal Code* (Cth) s 102.1(2). Advocates is defined in s 102.1(1A) as follows: an organisation advocates the doing of a terrorist act if: (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or (c) the organisation directly praises the doing of a terrorist act.

<sup>7</sup> The ALRC has followed, in a constrained timeframe, the normal two stage process of consultation through an Issues Paper (ALRC IP 30) and a Discussion Paper (ALRC DP 71). A final report with recommendations for reform was tabled in Federal Parliament at the time of writing (13/9/06): see, ALRC 104 (Final Report ). *Fighting Words: A Review of Sedition Laws in Australia*.

<sup>8</sup> Australian Law Reform Commission, *Review of Sedition Laws Discussion Paper* (Discussion Paper 71), Proposal 6.1, 99ff

violence. There is a strong theme throughout the ALRC review that the challenge is to modernize and clarify the scope of the offence: the question of criminalization was given only brief consideration. A particular concern is how these offences will interact with the revival of political censorship, and the decision to ban Islamic books dealing with violent jihad.

The new sedition offences inserted into the *Criminal Code* (Cth) are found in Chapter 5 of the *Criminal Code*, titled ‘The Security of the Commonwealth’ (Part 5.1—Treason and Sedition). The sedition offences in the *Criminal Code* proscribe urging others to engage in range of specified behaviours contained in section 80.2. While the new sedition offences cover a diverse territory they are linked by a common thread of the defendant’s advocacy (or ‘urging’, to use the term in the Code) of violence or force in defined circumstances.

Three of the sedition offences deal with behaviours closely aligned to treason, namely urging others to overthrow the Commonwealth or government or urging others to assist the enemy or those engaged in armed hostilities. Sedition is also directed to protecting political freedoms more widely, proscribing acts of urging others to interfere with parliamentary elections, as well as upholding public order by proscribing acts of urging violence between defined groups.

I would like to focus on one form of sedition: urging of inter-group violence in s 80.2(5). While a new offence, it bears considerable conceptual similarity to the former offence in the *Crimes Act 1914* (Cth) which proscribed “seditious intent” as including inter alia the promotion of ‘feelings of ill-will and hostility between different classes of His Majesty’s subjects so as to endanger the peace, order or good government of the Commonwealth’.<sup>9</sup>

The language used in the offence seems outdated. The Attorney-General’s Department, strongly supporting the case for reform, claimed that the wording of the offence

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<sup>9</sup> See *Crimes Act 1914* (Cth) s 24A(1)(g) (now repealed). This offence was inserted into the *Crimes Act* in 1920, following the definition contained in Stephen’s *Digest of the Criminal Law* published in 1887. See discussion in ALRC above n 6, 14ff.

addressed incitement of unrest between different “social classes”.<sup>10</sup> It followed on this view, that the offence had no application to the incitement of violence between groups distinguished on other grounds such as race, religious, nationality or political opinion. This ‘class conflict’ or ‘socio-economic’ reading of seditious intent is overly restrictive. Historical research reveals that the 19<sup>th</sup> century common law (upon which subsequent statutory definitions were developed in the 20<sup>th</sup> century) conceived this form of intent to deal specifically with Irish nationalist agitation against British rule.<sup>11</sup>

The new sedition offence in the *Criminal Code* was an improvement on the 1920s definition. It narrowed the physical element, replacing inciting “feelings of ill-will and hostility” (concepts that are not commonly used in the modern criminal law) with urging “violence or force”. It also clarified the meaning of “classes” in the offence by reframing the definition in terms of specific groups.

*Urging violence within the community*

- (5) A person commits an offence if:
- (a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and
  - (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

As noted by the ALRC, this form of sedition has ‘two possible constitutional pegs’.<sup>12</sup> One peg is domestic, linked to promoting Commonwealth security and anti-terrorism. The other peg is international, linked to the Constitution’s external affairs power and various treaty obligations imposed by international law. The melding of these two rationales into a single provision pulls the offence in different directions.

In the present offence, the federal dimension is evident through inclusion of a clumsy, albeit familiar phrase, ‘peace, order and good government of the Commonwealth’ which

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<sup>10</sup> Commonwealth Attorney General’s Department, *Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005 - Attorney General’s Department Submission No. 1* (16 November 2005) 4.

<sup>11</sup> The ALRC notes (above n 6, 184) the definition in the *Digest* was influenced by *O’Connell v The Queen* (1844) 8 ER 1061, in which the defendants were prosecuted successfully for conspiring to promote feelings of ill-will and hostility between the English and the Irish. See discussion in *Boucher v The King* [1951] 2 DLR 369, 381–382 (Kellock J).

<sup>12</sup> *Ibid*

is drawn directly from the plenary powers contained in s 51 of the Commonwealth Constitution. Since its statutory formulation as a Commonwealth offence in 1920, the sedition offence has included this limb. This is a strange element of the offence, which brings the offence within federal competence and underscores the Commonwealth flavour” of the offence (to use the words of the AGD, see ALRC 104: 207).

A significant difficulty is that the constitutional limb of sedition *constrains* the offence: the prosecution must prove that the incitement of force or violence between groups, ‘would threaten the peace, order and good government of the Commonwealth’. In terms of both scale and effect, the prosecution must prove that the violence urged would constitute a significant threat to the security of the Commonwealth. This would arguably rule out its application to small-scale and localised intra-state violence, such as the Cronulla riots.

The second peg upon which the constitutionality of the offence rests is related to various international human rights treaty obligations. The *International Covenant on Civil and Political Rights* (ICCPR) provides the legal basis for prohibiting this hate speech. Article 20(2) provides:

Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.<sup>13</sup>

This obligation is further bolstered by the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which imposed on State Parties an obligation to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, racial discrimination and, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof...<sup>14</sup>

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<sup>13</sup> *International Covenant on Civil and Political Rights*, adopted 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art 20(2).

<sup>14</sup> *International Convention on the Elimination of all forms of Racial Discrimination*, adopted 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), Art 4(a).

The Commonwealth had exhibited caution in adopting a policy of criminalisation for racial vilification, entering into reservations under these provisions (ALRC 104: 209). The federal preference has been to treat racial vilification as a civil rather than criminal matter – namely “unlawful discrimination” under the *Racial Discrimination Act 1975* (Cth) - favouring the conciliation process and remedies for unlawful discrimination through the Human Rights and Equal Opportunity Commission (with adjudication before the Federal Magistrates Court as a matter of last resort).

The 2005 reforms to sedition could be viewed as a partial reversal of Commonwealth policy (though the reservations stay in force). It is clear from the ALRC process that the reversal was not a newly found federal commitment to the international human rights obligations. Rather the remodelling of sedition must be understood as a net-widening counter-terrorism strategy aimed at criminalising hate speech believed to precipitate acts of terrorism. This reticence at federal level may be contrasted with the State and Territories (except NT) which have now made vilification a separate offence.<sup>15</sup>

### **Urging Inter-Group Violence: Sedition with an Identity Crisis?**

As noted above, the urging of inter-group violence offence involved grafting an anti-terrorism rationale onto a human rights rationale. Depending on which of one these two rationales is accorded priority, the offence is either under-inclusive or over-inclusive. From a human rights perspective, the present offence appears under-inclusive because it incorporates some *but not all* of the conventional impermissible grounds for distinguishing between individuals recognised in international human rights treaties and domestic anti-discrimination law.<sup>16</sup> The ALRC has recommended expanding the definition to include ‘national origin’ specifically to deal with groups which have distinct

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<sup>15</sup> *Anti-Discrimination Act 1977* (NSW) ss 20C-20D; *Racial and Religious Tolerance Act 2001* (Vic) ss 7, 24; *Anti-Discrimination Act 1991* (Qld) s 124A; *Criminal Code* (WA) ss 77, 78, 80A, 80B, 80H; *Racial Vilification Act 1996* (SA) s 4. The various legislative models for vilification offences enacted in Canada, Europe, New Zealand, New South Wales, United States and the United Kingdom are reviewed in Human Rights and Equal Opportunities Commission, *Racist Violence: Report of the National Inquiry into Racist Violence*, (1991), Ch 11.

<sup>16</sup> The *International Covenant on Civil and Political Rights* contains a similar provision in Art 26, which states that ‘the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status’. The Australian Capital Territory is the only local jurisdiction thus far to have enshrined the right to equality before the law in legislation: see *Human Rights Act 2004* (ACT), s 8.

blended identities, that is Australians whose were previously or have are descendants of foreign nationals, such as ‘Vietnamese’ Australians.<sup>17</sup>

A broader question is whether the offence should be remodelled, as a matter of policy, to include *other* group-based grounds of distinction recognised by anti-discrimination law such as sexuality and gender? A human rights rationale priority would have the effect of criminalising the intentional urging of violence or force which is rooted in *any* form of discrimination proscribed by international human rights law. The ALRC recommended maintaining a narrower focus – limited to urging inter-group violence on the basis of race, religion, nationality or national origin or political opinion. (recommendation 10-4). This is because of the construction of the offence as a counter-terrorism measure or Commonwealth security measure, rather than an anti-discrimination measure. While devastating to the victims and their communities, it is doubtful whether ‘hate crimes’ outside the field of racist or religious violence are likely to endanger significantly the security of the Commonwealth and its institutions.<sup>18</sup>

Another argument against this extension of sedition is that this conduct can be addressed more effectively though other criminal law provisions (vilification offences and sentence enhancement provisions) at State and Territory level.

According to the ALRC, sedition should be viewed as a type of public order offence. However, it is a very curious public order offence. The offender’s urgings must be directed to provoking violence *between groups*. The ALRC notes that inciting violence against an *individual* (by virtue of his or her membership of a defined group) may fall outside the scope of the offence. The inclusion of the ‘group-to-group’ limitation has been justified by reference to the counter-terrorism rationale, the Attorney General’s Department noting that this aspect of the offence ‘drives at the root cause of the problem of terrorism by focusing on violence that is behind it’.<sup>19</sup> But focusing on group-to-group

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<sup>17</sup> ALRC, above n 6,197, 203.

<sup>18</sup> This extension was not considered by the ALRC, reflecting its view that this form of sedition was essentially a public order offence: above n 6.

<sup>19</sup> Commonwealth Attorney-General’s Department, above n 12.

violence may be counterproductive. There is concern that this feature of the offence ‘stigmatises group-based violence and reinforces the stereotyping of certain ethnicities or religions as terrorist’.<sup>20</sup>

## **Conclusion**

A person who urges the use of force or violence between groups based on defined differences (like race, religion, political opinion etc) is rightly condemned. With the inclusion of appropriate limitations relating to (a) the inclusion of a fault element based on intention; and (b) a physical element that requires proof of an *imminent* risk of violence or force, this type of offence would likely survive constitutional challenge notwithstanding its potential impact upon a person’s freedom of expression. Good faith defences help to clarify the scope of the offence.

But do we need a federal offence (with a security/anti-terrorism focus) to deal with individuals (with discriminatory motives) who incite violence between groups? Should the federal criminal law be tagged to anti-discrimination law through this new offence of sedition? To both questions, the answer, to my mind, is no. In simple terms, an offence which attempts to combine security/anti-terrorism and anti-discrimination rationales is not only incoherent, it is also likely to be ineffective – either over-inclusive or under-inclusive depending on which rationale is accorded priority.

Another source of unease relates to the likely effect of importing anti-discrimination law into the criminal law – this relates to the ‘neutrality’ between groups being distinguished under this offence. In common with anti-discrimination law generally, the new offence of sedition does not expressly identify which of those distinguished groups requiring protection under the law. The law is framed in “neutral” terms, underscoring the general legal right to equality. Framed like this, the offence may not serve to protect the minorities that have been historically oppressed and vulnerable from racial violence (specifically Aboriginal, Jewish and Islamic communities). The latest data (Dunn et al,

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<sup>20</sup> ALRC above n 6, 191 noting recent HREOC research that shows, since 9/11, Australian Arabs and Muslims are often vilified on the basis that they share responsibility for terrorism or are potential terrorists: Human Rights and Equal Opportunity Commission, *Isma – Listen National Consultations on Eliminating Prejudice Against Arab and Muslim Australians* (2004)

UNSW Racism Project) shows that 9/11 has significantly increased the level of hate speech and violence directed against Muslims in Australia. I remain concerned that offences like sedition will be counter-productive, intensifying surveillance and policing of these communities (which already disproportionately high levels of policing). It is not inconceivable that the offence would be used to criminalise minority leaders who advocate forceful resistance against the everyday violence and discrimination experienced from White, Anglo-Saxon Australians.<sup>21</sup> With these concerns, I ponder that the best strategy may be abandon these laws entirely - to consign them to the dustbin of legal history – to address the issues of hate speech and incitement of violence through the mainstream criminal law and sentencing powers. And most importantly, to give further consideration to whether special anti-terrorism offences are really required.

### **Footnote on Censorship**

The linkage between sedition and censorship is critical. Sedition's roots are in the law of libel (reflecting its defences) and has been the legal definition to ban publications. Interestingly, the ALRC 104 noted that during the inquiry, Islamic books (so-called "Books of Hate") outlining the philosophy of violent jihad were available for sale (214). The AFP and CDPP took the view that these materials did not fall under sedition. Eight of these books were referred for Federal Classification Review Board and two texts dealing with the topic of 'violent jihad' that contained calls to specific action or inciting terrorism against non-believers were banned (Refuse Classification)– note that these were authored before 9/11 in the context of resistance to Soviet occupation of Afghanistan and available freely for sale on the Internet. There is concern that a new era of political censorship has been revived in Australia.<sup>22</sup> The ALRC does call for an urgent review of the classification scheme, which I would endorse, to ensure that incitement of violence/terrorism is not interpreted too loosely to the detriment of free speech values.

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<sup>21</sup> There is a significant debate about the value of equality rights: see Bronitt and McSherry, Ch 2.

<sup>22</sup> Office of Film and Literature Classification, 'Classification Review Board determines 2 Islamic books are Refused Classification', (*Media Release*, 10 July 2006). See also the relevant decisions of the Classification Review Board in relation to *Defence of Muslim Lands* and *Join the Caravan* (available on the Board's website <http://www.oflc.gov.au/special.html?n=262&p=66> ) In recent times, obscenity laws and classification laws have been used to regulate pornography, rather than political ideology: Bronitt and McSherry, above, Ch 11. These decisions to Refuse Classification imply a greater preparedness on the part of the AFP and Federal Government to exercise control over Islamic political and religious material linked to terrorism. RC prevents the distribution or importation of these books. See further N Abjorensen. "Strike up the ban: Censor joins the war on terrorism" *Democratic Audit of Australia*: Discussion Paper 26/06 (August 2006) ([http://democratic.audit.anu.edu.au/papers/20060830\\_abi\\_cens.pdf](http://democratic.audit.anu.edu.au/papers/20060830_abi_cens.pdf))