Review of federal sedition laws

By Kate Connors

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Although many textbooks and commentaries on Australian law have pronounced the crime of sedition (and related variations) to be 'archaic' and 'defunct', concerns about the national and international security environment have literally put the matter back on the front page—particularly in the aftermath of the terrorist attacks on New York and Washington on 11 September 2001, and the Bali, Madrid and London bombings. The latter attack introduced a new dimension to debates about counter-terrorism: the possible presence in western countries of 'home grown' terrorists and suicide bombers, and the degree to which this might warrant increased domestic surveillance and police powers, as well as criminal offences specifically tailored to cover this area.

In December 2005, the federal Parliament passed the *Anti-Terrorism Act (No 2) 2005* (Cth), which had the effect of amending the *Criminal Code* and the *Crimes Act*. Schedule 7 of the 2005 Act contained provisions that modernised the old law on sedition and related offences (most notably, unlawful associations). It replaced the old sedition offence in the *Crimes Act* with five new offences, now found in s 80.2 of the *Criminal Code*. Three of these offences make it an offence to urge the use of force or violence in the following contexts:

- to overthrow the Constitution or government (s 80.2(1));
- to interfere with the lawful processes of parliamentary elections (s 80.2(3)); and
- as between groups in the Australian community, as characterised by race, religion, nationality or political opinion (s 80.2(5)).

The other two offences make it an offence for a person to urge another person to assist an enemy at war with Australia (s 80.2(7)) or an organisation or country engaged in armed hostilities with Australia (s 80.2(8)). These offences do not specify what types of assistance the provisions are directed towards, although humanitarian assistance is not included within the ambit of these provisions. All five offences are subject to a good faith defence in s 80.3.

In March 2006, the Attorney-General asked the Australian Law Reform Commission (ALRC) to consider whether the sedition laws as 'modernised' in the *Anti-Terrorism Act 2005* (Cth) effectively address the problem of 'intentionally urging others to use force or violence' and whether 'sedition' is the appropriate term to describe these offences. As part of this Inquiry, the ALRC has recently released a discussion paper containing 25 proposals for reform.

History of sedition laws in Australia

The law of sedition prohibits words or conduct deemed to incite discontent or rebellion against the authority of the state. The criminal offence of sedition developed in England in the 17th and 18th centuries, emerging out of the laws against treason and libel, and aimed at shielding the Crown (and its institutions and officers) from criticism that might lessen its standing and authority among its subjects. Historically, the law of sedition has been used to punish a wide range of behaviour—from

satirical comment or mere criticism of authority to the incitement of violent uprising.

In Australia, the states inherited the British common law of sedition, and state prosecutions were brought at various periods throughout the 19th and early 20th centuries. Notably, sedition laws were used to prosecute:

- John Macarthur, founder of the Australian merino wool industry, for seditious behaviour against Governor Bligh in 1807–08;
- Governor Darling's political opponents, including critics in the press, in the early 1800s;
- Henry Seekamp, the editor and owner of the Ballarat Times at the time of the Eureka Stockade in 1854;
- anti-conscriptionists who opposed Australia's involvement in the First World War; and
- F W Paterson, the Member for Bowen from 1944–50, for expressing support for the workers' struggle against capitalism at a public meeting in 1930.

Sedition entered the federal statute book in 1920 when ss 24A–24F were inserted into the *Crimes Act 1914* (Cth). It is widely thought that the enactment of the federal sedition provisions was prompted by concerns about the Bolshevik Revolution and its impact on radical socialist activity in Australia. Sedition has been rarely prosecuted in Australia, and not since the 1950s when it was used on three occasions against officials of the Communist Party of Australia. However, there are some suggestions that prosecutions for sedition have been considered on a number of occasions in more recent times. Most notably, in 1976 the Attorney-General's Department was asked for advice about whether the remarks made by former Prime Minister Gough Whitlam in the wake of the dismissal of the Labor Government—to the effect that the Governor-General was 'deceitful' and 'dishonourable'—could amount to sedition.[1]

Should we still have an offence of 'sedition' in Australia?

To a greater extent than any other offence except treason, sedition punishes speech that is critical of the established order.

Law reform commissions in Canada, Ireland and the United Kingdom have recommended the abolition of existing sedition offences on the basis that they are unnecessary in light of more modern criminal offences, such as incitement and other public order offences; undesirable in light of their political nature and history; and inappropriate in modern liberal democracies where it is accepted that it is a fundamental right of citizens to criticise and challenge government structures and processes.

The legislation passed in the Australian Parliament in late 2005 repealed the old sedition offence and created new offences, which shifted the focus away from 'mere speech' towards 'urging' other persons to use 'force or violence' in a number of specified contexts—which arguably is closer conceptually to the criminal laws of incitement and riot than it is to common law sedition. There is little doubt that this change constituted an improvement on the previous offences. Nevertheless, given the history and the factual circumstances in which the new offences are likely to be applied, there are concerns held by members of the community, and politicians across party lines, that there is potential for the law to over-reach, and to inhibit free speech and free association.

The 2005 Senate Committee inquiry into the Anti-Terrorism Bill (No 2) 2005 recommended, with bipartisan support, that Schedule 7 (containing the sedition provisions) 'be removed from the Bill in its entirety' and referred to the ALRC for public inquiry. The Government accepted some of the Senate Committee's suggested amendments in this area, but chose to pass the legislation and then to refer it to the ALRC for review.

It was clear from the ALRC's community consultation process—as it was during the Senate Committee's process—that there is considerable public concern about the effects of the new laws on freedom of speech and freedom of association, both directly (that is, fear of conviction and punishment) and through the so-called 'chilling effect'—that is, self-censorship to avoid being charged in the first place. A significant proportion of the consultation meetings and written submissions to the ALRC to date have come from individuals or organisations in Australia associated with the print and broadcast media, writers, visual artists, theatre groups and filmmakers.

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

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and festering of such ideas. At the same time, all liberal democratic societies place some limits on the exercise of free speech—as authorised under all international human rights conventions—for example, through civil defamation laws and prohibitions on obscenity, serious racial vilification or incitement to commit a crime. The central questions for this Inquiry are whether the new regime is well-articulated as a matter of criminal law, and strikes an acceptable balance in a tolerant society. In its proposals, the ALRC has tried to ensure that there is a bright line between protected freedom of expression—even when exercised in a way that challenges our values—and the reach of the criminal law, which should be confined to exhortations to the unlawful use of force or violence.

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Key proposals for reform

Removal of the word 'sedition'

The ALRC proposes that the term 'sedition' be removed from the *Criminal Code*. In the view of the ALRC, 'sedition' does not accurately describe offences that, in essence, are offences against political liberty and public order. Moreover, the term 'sedition' has a problematic history. Sedition offences have been used in Australia and elsewhere to stifle political dissent in a manner that many would consider incompatible with modern democratic processes. Re-characterising the relevant offences as being either 'offences against political liberty' or 'public order' would serve the purpose of cutting ties with the problematic history of sedition law. The ALRC proposes that the sections in which the offences appear be renamed as 'Offences against political liberty and public order'. It is also proposed that state and territory governments, through the Standing Committee of Attorneys-General, initiate a process to remove the term 'sedition' from their statutes.

Clarification of the fault elements for the offences of 'urging force or violence'

Governments have a right—even a duty—to legislate to protect democratic institutions (such as free elections and representative government) from attack by force or violence. Therefore, the basic offences contained in s 80.2(1) (urging the overthrow by force or violence of the Constitution or Government); s 80.2(3) (urging interference in parliamentary elections by force or violence); and s 80.2(5) (urging inter-group force or violence) should be retained.

However, in order to clarify the scope of the offences, the ALRC proposes a number of changes to the way they would operate:

- 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 take into account whether the conduct was done:

  (a) in connection with 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 publishing a report or commentary about a matter of public interest.

Given the effect of the proposed changes, the ALRC believes that the 'good faith' defence in s 80.3 is inappropriate and should be repealed. There is a strong view that such a defence is inherently illogical: a person would need to point to evidence (which the prosecution would have to negative beyond reasonable doubt) showing that, while he or she intentionally urged another person to use force or violence to overthrow the Constitution (for example), this was done 'in good faith'. The ALRC's proposals for reform build the contextual issues into the required elements of the offences, rather than relying on an affirmative defence.

Clarifying the meaning of 'assist'

The ALRC has concerns about the offences that are not built around the concept of 'urging force or violence', but rather with urging another to 'assist' an enemy at war with Australia or an entity that is engaged in armed hostilities against the Australian Defence Force (ADF), respectively.[2] The ALRC agrees with the many submissions it received that pointed to the undesirable breadth of the term 'assist', which is not defined in the *Criminal Code*. The ALRC notes that these offences are very similar to the treason offences already in place in the *Criminal Code*, and proposes folding these offences back into treason, with some significant amendments.

In the ALRC's view, a blanket prohibition on conduct that 'assists' the enemy may unduly impinge on freedom of expression, to the extent that it captures merely dissenting opinions about government policy. For example, it may be said that strong criticism of Australia's recent military interventions in Afghanistan or Iraq gives aid and comfort to, or assists, the enemy. As well, there is no requirement to show that the defendant's conduct assisted the enemy to wage war against Australia or engage in armed hostilities against the ADF; it would be sufficient to prove that the person urged another to assist an enemy that happened to be at war with Australia or an entity happened to engage in armed hostilities against the ADF.

To remedy these concerns, the ALRC proposes that the offences 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. The addition of the term 'materially' indicates that mere rhetoric or expressions of dissent do not amount to 'assistance' for these purposes; rather, the assistance must enable the enemy or entity to wage war or engage in armed hostilities, such as through the provision of funds, troops, armaments or strategic advice or information.

The ALRC also proposes that treason be limited to Australian citizens or residents (at the

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The Sedition Inquiry

The ALRC has been asked to examine the offence of sedition, as amended by federal Parliament in 2005. The Attorney-General provided the ALRC with formal Terms of Reference for this purpose on 2 March 2006.

In particular, the ALRC has been asked to examine:

- whether the amendments, including the sedition offence and defences in sections 80.2 and 80.3 of the *Criminal Code*, effectively address the problem of urging the use of force or violence;
- whether 'sedition' is the appropriate term to identify this conduct;
- whether Part IIA of the *Crimes Act*, as amended, is effective to address the problem of organisations that advocate or encourage the use of force or violence to achieve political objectives; and
- any related matter.

In carrying out its review, the ALRC will have particular regard to:

- the circumstances in which individuals or organisations intentionally urge others to use force or violence against any group within the community, against Australians overseas, against Australia's forces overseas or in support of an enemy at war with Australia; and
- the practical difficulties involved in proving a specific intention to urge violence or acts of terrorism.

To help clarify the issues under consideration in this Inquiry, the ALRC has released two consultation papers—an Issues Paper, *Review of Sedition Laws* (IP 30) on 20 March 2006 and a Discussion Paper, *Review of Sedition Laws* (DP 71) on 29 May 2006. The Discussion Paper contains 25 proposals for reform. Consultation papers are free and are available for download from the ALRC website or by contacting the ALRC.

The final report of the Inquiry is expected to be released later this year. If you would like to be notified when the final report is released please register your interest online, or contact the ALRC.

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time of the alleged conduct). This qualification is similar to that in other countries, and is consistent with the nature and history of the offence of treason, which has at its core the breach of a duty of allegiance to one's country.

Unlawful Associations

The Terms of Reference also ask the ALRC to consider the operation of Part IIA of the *Crimes Act 1914* (Cth) dealing with unlawful associations. An unlawful association is a body that may be declared unlawful on application to the Federal Court because it advocates or encourages overthrow of the government by revolution or sabotage or has a 'seditious intention'.[3] Once a body is declared unlawful, a number of criminal offences apply, including offences for giving money to such a group, or allowing a meeting of the group to be held on a person's property.

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The ALRC has examined the provisions (including past reviews of their operation) and agrees with the predominant view expressed in consultations and submissions that the unlawful associations provisions are anachronistic and unnecessary. The terrorist organisations provisions in the *Criminal Code*, which focus on activities done in preparation for terrorist acts, rather than a group's 'seditious intention', are better suited to contemporary circumstances. Consequently, the ALRC proposes that the unlawful associations provisions of Part IIA of the *Crimes Act* be repealed.

Attorney-General's consent

Under s 80.5, an offence under Division 80 of the *Criminal Code* may not be prosecuted without the written consent of the Attorney-General. In practice, this provision would be used only in very rare circumstances, 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. According to the Explanatory Memorandum to the Anti-Terrorism Bill (No 2) 2005, this provision is designed to provide an additional safeguard for a person charged with a sedition offence.[4]

Although the requirement for the Attorney-General's consent to a prosecution is found elsewhere in the federal criminal law, significant misgivings were expressed in consultations and submissions about any perceived influence by an Attorney-General—an elected politician—in a prosecution process that has been reserved for the past twenty years to independent prosecutorial officers operating under published guidelines and ethical obligations to the court.

Given that sedition (especially in its earlier forms) can be characterised as an inherently political offence, used against dissidents and opponents of the established political order, this concern was perhaps unsurprising. On balance, the ALRC believes that the Attorney-General's consent should not be required in these cases. The ALRC is strongly influenced by the fact that the run of new terrorism offences in the *Criminal Code* do not require the Attorney-General's consent to a prosecution (unless other parts of the *Criminal Code* apply). Logic suggests that the same position apply to the offences against political liberty and public order.

Review of other provisions in the Crimes Act

In the course of this Inquiry, the ALRC has come across a number of old provisions in Part II of the *Crimes Act* that are related to the existing 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 Discussion Paper notes that it is beyond the Inquiry's Terms of Reference and timeframe to conduct a systematic review of these provisions, but the ALRC proposes that the Australian Government initiate a review to determine which offences merit retention, modernisation and relocation to the *Criminal Code*, and which should be abolished because they are redundant or otherwise inappropriate.

Glorification of terrorism

The ALRC has also considered s 1 of the *Terrorism Act 2006* (UK), which makes it a criminal offence in the United Kingdom to engage in the encouragement or 'glorification' of terrorism. Glorification is defined to include 'any form of praise or celebration, and cognate expressions are to be construed accordingly'.[5] This law has been very controversial in the UK—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 improperly

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intrudes into protected free speech (under art 10 of the European Convention on Human Rights).

In Australia, the Attorney-General's Department told the Inquiry that the use of terms like 'praise' and 'glorify' were considered during the development of the *Anti-Terrorism Act (No 2) 2005* (Cth)—but rejected as too imprecise and capable of generating difficulties of proof.[6] They concluded that the existing Australian law already 'appropriately encapsulates incitement and glorification of [terrorist] acts' and thus there 'appears to be no need for a separate offence'.[7] The ALRC agrees.

Next steps

With the release of this Discussion Paper, the ALRC has invited individuals and organisations to make submissions in response to the specific proposals, or to any of the background material and analysis provided. The deadline for submissions was 3 July 2006.

The ALRC is confident that, following further community feedback on these proposals, the final report and recommendations will achieve the desired aim in terms of technical improvements to the law and striking the balance between freedom of speech and the fair reach of the criminal law.

Endnotes

1. See H Lee. *Emergency Powers* (1984), 92. The opinion of the Attorney-General has never been published.
2. Sections 80.2(7) and (8) of the *Criminal Code 1995* (Cth).
3. As defined by s 30A of the *Crimes Act 1914* (Cth).
4. Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth), 93.
5. *Terrorism Act 2006* (UK) s 20(2).
6. Australian Government Attorney-General's Department, *Submission SED 31*, 12 April 2006.
7. Ibid.

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3. Legislative and Regulatory Reform Bill 2006 (UK) cl 1(1).
4. M Taggart, 'From 'Parliamentary Powers' to Privatisation: The Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55 U *Toronto LJ* 575.
5. R Prebble, *The Trouble with Convenience: Problems Arising from the Use of the Affirmative Resolution Procedure to Amend Legislation* LLM Research Paper, Victoria University of Wellington (2005).
6. Regulations Review Committee, 'Interim Report on the Inquiry into the Affirmative Resolution Procedure' Wellington (2004).
7. Regulations Review Committee *Inquiry into Instruments Deemed to be Regulations—An Examination of Delegated Legislation: Report of the Regulations Review Committee* Wellington (July 1999); *Inquiry into Principles Determining Whether Delegated Legislation is Giving the Status of Regulations*, Wellington (June 2004).
8. Legislation Advisory Committee, *Legislation Advisory Committee: Guidelines on Process and Content of Legislation* Wellington (2001) <http://www.justice.govt.nz/lac/index.html> at 30 March 2006.

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