Fighting words

The ALRC's review of federal sedition laws

By Kate Connors

The Australian Law Reform Commission (ALRC) had the opportunity in 2006 to consider the new sedition offences enacted by the Federal Government in its November 2005 package of anti-terrorism laws.

The ALRC received this reference from the Attorney-General, following a recommendation by the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Anti-Terrorism Bill (No 2) 2005.

The enactment of the new sedition laws attracted widespread public criticism and comment. The Senate Committee inquiry, chaired by Senator Marise Payne, held three days of public hearings in Sydney in mid-November 2005 and received nearly 300 written submissions. This high level of public interest carried over to the ALRC's Inquiry, which received a further 126 written submissions and conducted 27 consultation meetings (many of them with groups of interested parties). It was 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.

The ALRC released two consultation documents—an Issues Paper (IP 30), released in March 2006, and a Discussion Paper (DP 71), released in May 2006. The ALRC encouraged participation in the Inquiry from a wide spectrum of stakeholders, including: community groups; prosecution and law enforcement agencies; criminal defence lawyers; judges; government lawyers and officials; media organisations and peak arts associations; legal professional associations; human rights and civil liberties groups; and academics.

The ALRC's final report *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104, 2006) was published in late July 2006. The Report contains 27 recommendations to reform federal sedition laws and related legislation. In summary, the ALRC recommends that the term 'sedition' be removed from the statute book, and that the offences of urging the use of force or violence against the government or community groups be redrafted. These changes would ensure 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.

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The law under review

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. Sedition provisions were found in state criminal law from an earlier date, but the offence entered the federal statute book when ss 24A–24F were inserted into the *Crimes Act 1914* (Cth) in 1920.[1] Until the recent amendments, it was widely considered in Australia that the sedition offences were 'dead-letter' law, with the last federal prosecution occurring in 1953.

In December 2005, the federal Parliament passed the *Anti-Terrorism Act (No 2) 2005*

(Cth), which amended the *Criminal Code* and the *Crimes Act*. Schedule 7 of the 2005 Act contained provisions that 'modernised' the old law on sedition and some 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, characterised on the basis of 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 entity 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 specifically excluded from the ambit of these provisions. All five offences are subject to a good faith defence in s 80.3. This section provides a defence where, for example, the speaker is pointing out mistakes in government policy or publishing 'in good faith' a report or commentary about a matter of public interest.

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Recommendations for reform

Removal of the term 'sedition'

In *Fighting Words*, the ALRC emphasises that, while there is a need to refine the new legislation, the 2005 amendments represent a significant improvement on the state of sedition law prior to this time. The ALRC found that much of the concern about the new offences in the *Criminal Code* is triggered by the fact that they are still referred to as 'sedition' offences. 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. Therefore, the central recommendation of the Report is that the term 'sedition' be removed from the legislation. Re-characterising the relevant offences as 'urging the use of force or violence' would cut ties with the troublesome history of sedition law, and clarify the purpose of these offences. The ALRC also recommends that state and territory governments, through the Standing Committee of Attorneys-General, initiate a process to remove the term (and the old concept of) 'sedition' from their statutes.

Clarifying the fault elements for the 'urging force or violence' offences

Governments have a right to legislate to protect democratic institutions (such as free elections and representative government) from attack by force or violence. Therefore, the ALRC recommends that the basic offences of: urging the overthrow by force or violence of the *Constitution* or Government; urging interference in parliamentary elections by force or violence; and urging inter-group force or violence should be retained.

However, a number of refinements should be made to the offences to ensure that they could not be applied in a way that would infringe on legitimate freedom of expression or prompt artists or commentators to self-censor. To make the distinction between political expression and criminal conduct clear, the ALRC recommends that the prosecution should be required to prove that a person urged others to use force or violence against community groups or the institutions of democratic government *and* did this with the intention that this violence would eventuate. This amendment would help remove from the ambit of the offences any rhetorical statements, satire, artistic expression, reportage and other communications that the person does not intend anyone will act upon, and it would ensure there is a more concrete link between the offences and force or violence. However, this 'ulterior intention' falls short of that required to prove the crime of incitement. It does not require an intention that a *specific* offence be committed by another, only that the use of force or violence would eventuate in a general sense.

Clarifying the meaning of 'assist'

The ALRC's most significant concerns are about the offences currently contained in s 80.2(7)–(8) of the *Criminal Code*. These two offences do not require the urging of force or violence; rather it is an offence merely to 'assist' an enemy at war with Australia or an entity that is engaged in armed hostilities against the Australian Defence Force (ADF).

The ALRC received a run of submissions and commentary that pointed to the undesirable breadth of the term 'assists', which is not defined in the *Criminal Code*. A blanket prohibition on conduct that 'assists' the enemy

conceivably could capture the expression of merely dissenting opinions about government policy. For example, it may be said colloquially that strong criticism of Australia's recent military interventions in Afghanistan or Iraq 'gives aid and comfort' to—and thus 'assists'—the enemy.

In addition, there is no requirement to show that the defendant's conduct actually assisted the enemy to wage war against Australia or engage in armed hostilities against the ADF; the prosecution would only need 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.

Given the extent of these concerns, the ALRC recommends that these offences be repealed, and the offences dealt with in a different way. Two of the treason offences set out in s 80.1 of the *Criminal Code* are framed in similar terms to the sedition offences in s 80.2(7)–(8) and carry a maximum penalty of life imprisonment. The ALRC therefore cannot recommend repeal of the 'assisting' offences in s 80.2, without recommending amendments to remedy the same inadequacies in the parallel treason provisions.

The ALRC recommends that the treason offences be reframed to make clear that they only apply to conduct that is 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' would send a clear message 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. Humanitarian assistance would remain excluded.

Abolition of the 'good faith' defence

The ALRC argues that the 'good faith' defence, as currently available under the legislation, is inappropriate to these offences. The concept of good faith in the context of sedition law is traceable to its origins in the law of libel and defamation. In defamation law, the protection accorded by qualified privilege is lost if the publisher was motivated by what the common law describes as malice. Commonwealth, state and territory anti-vilification legislation also contain exemptions that are, in some respects, similar to defences in defamation law and refer to the concept of good faith. Submissions to this Inquiry questioned the effectiveness of the defences in protecting media organisations and journalists in particular. One concern was that media organisations or journalists might be required to reveal information about their sources of information and the integrity of those sources in order to show good faith. Concerns also were expressed that the defences do not provide adequate protection in relation to satire, theatre and comedy using irony, sarcasm and ridicule.

Rather than attempt to protect freedom of expression through a 'defence' that arises after a person has been found to have satisfied all the elements of the offence, the ALRC believes it would be better in principle and in practice to reframe the criminal offences in such a way that they do not extend to legitimate activities or unduly impinge on freedom of expression in the first place. As outlined above, the focus should be on proving that a person intentionally urges the use of force or violence (in the specified

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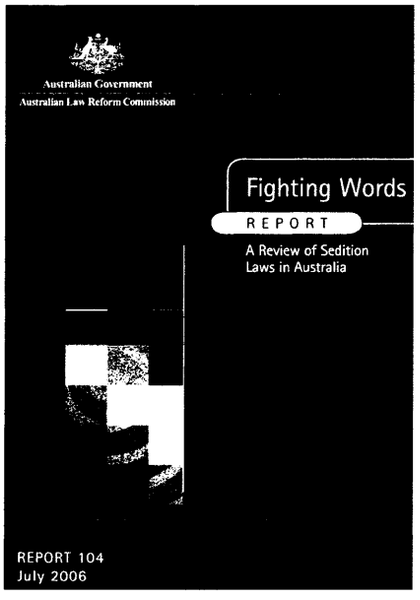
The ALRC Report

Fighting Words: A Review of Sedition Laws in Australia is available free online at www.alrc.gov.au or for purchase from the ALRC.



circumstances), with the intention that the force or violence urged will occur. It is therefore recommended that the good faith defence be abolished.

In considering whether the person intended the urged force or violence to occur, context is critical. To ensure that free speech is protected, the ALRC recommends that a new provision be enacted stating that, in determining whether a person intended that the urged force or violence would occur, the court or jury must have regard to the context in which the conduct occurred. These contexts include (where applicable) whether the conduct was done: (a) in the development, performance, exhibition or distribution of an artistic work; (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; (c) in connection with an industrial dispute or an industrial matter; or (d) in the dissemination of news or current affairs.

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Removal of the 'unlawful associations' provisions

The ALRC also was directed to review the unlawful associations provisions in Part IIA of the *Crimes Act*. These provisions were introduced in 1926 to deal with the perceived threat of the Communist Party of Australia and radical trade union activity, but they rarely have been used since. Canadian provisions that served as a model for Part IIA were repealed in 1936. The Terms of Reference for the Inquiry asked the ALRC to consider Part IIA because the declaration of an 'unlawful association' may proceed from a finding that the members of a group share a 'seditious intention', as defined in s 30A of the *Crimes Act*.

A clear view was expressed in consultations and submissions that the unlawful associations provisions are anachronistic and unnecessary. The ALRC agrees that there is little point in seeking to modernise these provisions since that work already has been done in developing the proscribed terrorist organisations provisions in Division 102 of the *Criminal Code*, which are better suited to contemporary circumstances. Consequently, the ALRC recommends that the unlawful associations provisions of Part IIA of the *Crimes Act* be repealed.

Review of old Crimes Act provisions

In the course of this 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', sabotage, assisting prisoners of war, unlawful military drills, interfering with political liberty, and damaging Commonwealth property. It was beyond the Inquiry's Terms of Reference to conduct a systematic review of these provisions. However, the ALRC recommends 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.

Endnotes

1. *War Precautions Repeal Act 1920* (Cth) s 12.