

CRITIQUE AND COMMENT

THE FALSE ANALOGY BETWEEN VILIFICATION AND SEDITION

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[In 2005, the Commonwealth introduced new sedition laws which created the offence of '[u]rging violence within the community'. The construction of this offence is the product of a false analogy that has been drawn between vilification and sedition. This article critiques both the analogy and its implications, arguing that vilification and sedition are conceptually distinct and, indeed, directly counterposed to one another. Analogising the concepts has two unintended and undesirable consequences. First, the institutionalisation of the analogy in a component of the new sedition laws has contributed to significant weaknesses in the construction of that law. Secondly, a failure to differentiate sufficiently between the core rationales for legislating against vilification and legislating against sedition could have consequences for the ways in which the public understands these offences. Specifically, it could both undermine the justification for anti-vilification laws and, conversely, provide friendly cover for an anti-terrorism provision which ought instead to be debated on its own merits.]

CONTENTS

I	Introduction	270
II	Australia's New Sedition Laws	271
III	Analogy and Confusion in the 2005 Debates	275
IV	Sedition and the Roots of the Analogy	278
V	Vilification	285
VI	Implications for the Broader Debate	289

I INTRODUCTION

In 2005, the Commonwealth introduced new anti-terrorism provisions in the *Anti-Terrorism Act (No 2) 2005* (Cth). This legislation included the updating of sedition offences,¹ a component of which was the newly expressed offence of '[u]rging violence within the community'.² The construction of this provision is, as I shall argue, a product of a false analogy that has been drawn between

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¹ *Anti-Terrorism Act (No 2) 2005* (Cth) sch 7.

² *Criminal Code Act 1995* (Cth) sch 1 s 80.2(5).

vilification³ and sediton. In this article I take issue with both this analogy and its implications. Vilification and sediton, I shall argue, are conceptually two very distinct entities; moreover, their core meanings are directly counterposed to one another. Sediton is speech directed against governmental authority⁴ — an authority which ought to tolerate such dissent to a very high degree. By contrast, vilification is speech directed against the vulnerable and marginalised,⁵ and there are persuasive arguments that it ought not be tolerated. Thus analogising between these two offences obscures, rather than clarifies, debate around the sediton legislation. It has also contributed to weaknesses in the sediton law under consideration and has the potential to distort understanding of anti-vilification laws, thereby undermining the justifications for anti-vilification legislation. Finally, it provides a friendly cover for an anti-terrorism provision which ought to be debated on its own merits, rather than smuggled into popular currency under the more palatable guise of a provision designed to ameliorate community harm.

In order to make this argument, this article begins, in Part II, by outlining the introduction of the 2005 Australian sediton laws and discussing the ways in which commentators have attempted to distinguish vilification from sediton. Part III considers instances when commentators discussing these laws have fallen into the trap of drawing an analogy between vilification and sediton. Part IV provides a discussion and critique of the idea of sediton in order to highlight some crucial differences between sediton and vilification. This Part also signals the historical point at which the analogy emerged in Australia. Part V discusses the concept of vilification and again highlights some points of disjuncture and contradiction between vilification and sediton. Finally, Part VI outlines the implications of this critique for further debate around sediton laws in Australia.

II AUSTRALIA'S NEW SEDITION LAWS

The 2005 sediton laws were highly controversial. Although the Labor Opposition supported and voted in favour of most of the government's anti-terrorism initiatives, it opposed the sediton laws and moved an amendment in Parliament to remove sch 7 from the Anti-Terrorism Bill (No 2) 2005 (Cth).⁶ A 2005 report on the Bill by the Senate Legal and Constitutional Legislation Committee ('SLCLC') acknowledged that submissions and evidence received on the draft legislation from a broad range of community representatives — including media representatives, artists, lawyers and Muslim community members — were

³ The terms 'vilification', 'hate speech' and 'racial hatred' will be used interchangeably in this article. For the various definitions given to the term 'vilification', see below Part V.

⁴ Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2nd ed, 2004) 389–95; Eric Barendt, *Freedom of Speech* (2nd ed, 2005) 163.

⁵ See Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (2002) 148–54, for an insight into the identity of racial vilification complainants under the *Anti-Discrimination Act 1977* (NSW).

⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 2005, 60, 64 (Kim Beazley, Leader of the Opposition).

‘overwhelmingly opposed’ to the new sedition laws.⁷ The only supporters of the legislation were the Attorney-General’s Department and the Australian Federal Police.⁸ The *SLCLC Report* recommended that the sedition laws be removed from the draft legislation when it was put to Parliament.⁹ In response to these and other criticisms of the new sedition laws, the government agreed to subject them to a review by the Australian Law Reform Commission (‘ALRC’) *after* they were enacted — a review which subsequently occurred¹⁰ but was not acted upon by the Howard government.¹¹

The *Anti-Terrorism Act (No 2) 2005* (Cth) sch 7 removed existing sedition provisions in ss 24A–24F of the *Crimes Act 1914* (Cth) (‘*Crimes Act*’) and introduced five new sedition provisions into s 80.2 of *Criminal Code Act 1995* (Cth) sch 1 (‘*Criminal Code*’). They included urging force or violence to overthrow the *Constitution* or a government,¹² urging force or violence which interferes in parliamentary elections,¹³ urging force or ‘violence within the community’,¹⁴ ‘[u]rging a person to assist the enemy’,¹⁵ and ‘[u]rging a person to assist those engaged in armed hostilities’ against the Australian Defence Force.¹⁶

The third of these offences — urging violence within the community — is the focus of the present analysis. Section 80.2(5) states that:

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.

Section 80.3 outlines defences available for this offence. These include acts done in good faith that are: designed to show that representatives or advisers of government are mistaken¹⁷ or that there are ‘errors or defects’ in the *Constitution*, legislation or the administration of justice;¹⁸ aimed at lawfully pursuing

⁷ Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005) 76 (‘*SLCLC Report*’).

⁸ *Ibid* 86–9.

⁹ *Ibid* 115 (recommendation 27).

¹⁰ ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006) (‘*ALRC Report*’).

¹¹ The Rudd government subsequently issued a response to the ALRC review in December 2008 in which the ALRC’s recommendations were generally accepted: see Attorney-General’s Department (Cth), *Australian Government Response to ALRC Review of Sedition Laws in Australia* (2008).

¹² *Criminal Code* s 80.2(1). The recklessness standard applies: s 80.2(2).

¹³ *Criminal Code* s 80.2(3). The recklessness standard applies: s 80.2(4).

¹⁴ *Criminal Code* s 80.2(5). The recklessness standard applies: s 80.2(6).

¹⁵ *Criminal Code* s 80.2(7). A defence for humanitarian aid applies: s 80.2(9).

¹⁶ *Criminal Code* s 80.2(8). A defence for humanitarian aid applies: s 80.2(9).

¹⁷ *Criminal Code* s 80.3(1)(a).

¹⁸ *Criminal Code* s 80.3(1)(b).

changes to government policy;¹⁹ aimed at preventing matters which produce ‘ill-will or hostility’ between groups;²⁰ done in relation to matters in connection with industrial disputes;²¹ or done in relation to the good faith reporting of matters in the public interest.²²

Additionally, the new laws retained the ‘seditious intention’ provision in the *Crimes Act* in relation to ‘unlawful associations’ — ‘any body of persons [that] advocates or encourages’ an act with the object of ‘seditious intention’ may be deemed unlawful.²³ Seditious intention is defined as an intention to use force or violence to effect purposes including the promotion of ‘feelings of ill-will or hostility between different groups so as to threaten the peace, order and good government of the Commonwealth.’²⁴ This means that the phraseology of the unlawful association provisions in the *Crimes Act* was almost identical to that of the sedition offences in the *Crimes Act*, which pre-dated the 2005 legislation — indeed, the *Anti-Terrorism Act (No 2) 2005* (Cth) only amended the unlawful associations provisions to the extent of changing the wording ‘classes of Her Majesty’s subjects’²⁵ to ‘groups’.²⁶ But it also means the phraseology retained and extant in the *Crimes Act* is different from, and inconsistent with, the phraseology of the provisions introduced into the *Criminal Code* in 2005.

In parliamentary debate over the new sedition provisions, the Coalition government was careful not to promote them explicitly as a type of anti-vilification law. Historically, the Liberal Party had been antagonistic towards such laws, as shown when expressing strong criticism of the passage of the *Racial Hatred Act 1995* (Cth), which introduced racial anti-vilification laws at a federal level.²⁷ In the Explanatory Memorandum to the 2005 Bill, the Attorney-General Philip Ruddock stated only that the new legislation, including the subsection under discussion here, modernised the language of the former sedition laws by replacing the phrase ‘classes of Her Majesty’s subjects’ with the word ‘groups’, adding that ‘groups’ was a broader category (and implying that this category more accurately reflected society’s diversity).²⁸ He pointed out that this had been recommended by the *Review of Commonwealth Criminal Law: Fifth Interim*

¹⁹ *Criminal Code* s 80.3(1)(c).

²⁰ *Criminal Code* s 80.3(1)(d).

²¹ *Criminal Code* s 80.3(1)(e).

²² *Criminal Code* s 80.3(1)(f). These defences mirror the previous *Crimes Act* s 24F, with the exception of a new good faith reporting provision in *Criminal Code* s 80.3(1)(f).

²³ *Crimes Act* ss 30A(1)–(2). Section 30B makes membership of an unlawful association an offence.

²⁴ *Crimes Act* s 30A(3)(d).

²⁵ *Crimes Act* s 24A(g), repealed by *Anti-Terrorism Act (No 2) 2005* (Cth) sch 7 item 2.

²⁶ *Crimes Act* s 30A(3)(d). See *ALRC Report*, above n 10, 196; Ben Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 874.

²⁷ See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1994, 3491–4 (Tony Abbott). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 6 March 1995, 1577–9 (Michael Lavarch, Attorney-General); Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 1995, 474 (Michael Lavarch, Attorney-General).

²⁸ Explanatory Memorandum, *Anti-Terrorism Bill (No 2) 2005* (Cth) 88.

Report ('Gibbs Report'),²⁹ although many commentators have argued that the government's citation of the *Gibbs Report* in justifying its legislation was misleading since its recommendations were only selectively applied.³⁰ The Attorney-General added that the defences in s 80.3 mirrored the good faith defences in the former legislation, with 'the only substantive difference' being the greater discretion accorded to the court in interpreting whether an act had been done in good faith, which was seen as likely to widen the application of the defence.³¹ In his second reading speech in the House of Representatives, the Attorney-General reiterated some of these points without elaborating further on the justification for s 80.2(5).³²

Other important commentary on the new sedition laws explicitly differentiated between vilification and sedition. For example, the *SLCLC Report* into the draft 2005 legislation cited a submission by the Human Rights and Equal Opportunity Commission ('HREOC'), which argued in favour of comprehensive religious discrimination and vilification laws at a federal level.³³ HREOC asserted that this would be consistent with Australia's obligations under art 20 of the *International Covenant on Civil and Political Rights* ('ICCPR')³⁴ and art 4(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('CERD').³⁵ HREOC pointed out that this should not be done 'under the umbrella of sedition laws', but rather in its own right.³⁶ Other submissions to the SLCLC drew similar conclusions. The Gilbert + Tobin Centre of Public Law, for example, argued that while s 80.2(5) was 'welcome because it would criminalise ... incitement to violence against racial, religious, national, or political groups' — consistent with international human rights treaty obligations — it was 'an error to classify this offence as sedition'.³⁷ The Centre made a number of criticisms of the offence and made recommendations which, had they been adopted, would have created an anti-vilification offence located in anti-vilification law.³⁸ The ALRC review of sedition laws in 2006, conducted after the laws were enacted, acknowledged that there was some 'overlap' with anti-vilification laws in Australia and that much public commentary had wel-

²⁹ The recommendation appears in Commonwealth, *Review of Commonwealth Criminal Law: Fifth Interim Report*, Parl Paper No 194 (1991) 345. See *ibid* 90.

³⁰ *SLCLC Report*, above n 7, 84–5; Saul, 'Speaking of Terror', above n 26, 872; Gilbert + Tobin Centre of Public Law, Submission No 80 to SLCLC, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, 10 November 2005, 16.

³¹ Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth) 91–2. The Attorney-General's comment about the wide application of the provision was specifically targeted to s 80.3(2).

³² Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 103 (Phillip Ruddock, Attorney-General).

³³ *SLCLC Report*, above n 7, 95. See also HREOC, Submission No 158 to SLCLC, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, 11 November 2005, 31.

³⁴ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³⁵ Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969).

³⁶ HREOC, Submission No 158 to SLCLC, above n 33, 31.

³⁷ Gilbert + Tobin Centre of Public Law, above n 30, 17.

³⁸ *Ibid*. For a discussion of some concerns with the Bill, see Ben Saul, 'More Harm than Good May Flow from Updated Anti-Terror Laws', *The Australian* (Sydney), 20 October 2005, 15; Ben Saul, 'Watching What You Say', *The Age* (Melbourne), 19 October 2005, 15.

came the creation of an offence of urging violence against specified groups.³⁹ However, the ALRC also noted that the provisions had been criticised as not belonging in anti-terrorism legislation and as not targeting seditious activity.⁴⁰ It stated that it was unclear why the government described the new offences as 'sedition', with this comment particularly targeted at the offence that 'deal[t] with urging inter-group violence'.⁴¹

III ANALOGY AND CONFUSION IN THE 2005 DEBATES

In other fora, however, some confusion began to emerge during debate around the provisions introduced in 2005. It is perhaps not surprising that during the heat of public debate some lack of clarity over the meaning and use of terms may have emerged in some circles. It is also perhaps not surprising that the government of the day sought to use some specious arguments in justifying its controversial laws. Nevertheless, I argue that the confusion evident in the 2005 debates reflects a longstanding confusion between vilification and sedition that has deep implications.

Hints of this confusion include a poorly executed and explained manoeuvre by Opposition Leader Kim Beazley, who argued that the new anti-terrorism laws as a whole were too narrow and that a new federal, criminal anti-vilification law prohibiting incitement to violence on the grounds of race and religion was needed as a component of practical measures required to tackle terrorism.⁴² The Opposition introduced the Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth) but it did not proceed. This Bill outlined a criminal anti-vilification offence that did not apply on the ground of political opinion and did not require a disturbance to constitutional authority, but rather applied to acts directed at individuals, thereby rendering it a criminal anti-vilification law and not a sedition law.⁴³ However, insofar as Beazley explicitly linked the call for criminal anti-vilification laws with measures required to combat terrorism, this manoeuvre arguably contributed to confusion. Media commentary on Beazley's proposal noted that it was 'similar' to the component of the new sedition laws dealing with urging violence against other groups.⁴⁴ But not everyone was confused; Beazley's proposal prompted a response from Prime Minister John Howard, who reiterated his party's historical opposition to anti-vilification laws by saying 'I do not think religious and racial vilification laws work, and we as a party have

³⁹ *ALRC Report*, above n 10, 196.

⁴⁰ *Ibid.* See also Saul, 'Speaking of Terror', above n 26, 877.

⁴¹ *ALRC Report*, above n 10, 10, 65–6.

⁴² Bronwyn Hurrell, 'States Balk at PM's Push on Terror Bill', *The Mercury* (Hobart), 31 October 2005, 6. See also Samantha Maiden, 'Beazley's Terror Law Turmoil', *The Australian* (Sydney), 31 October 2005, 3; Michael Harvey, 'D-Day for Terror Laws: Late Labor Push to Block Bill', *Herald Sun* (Melbourne), 31 October 2005, 17. See generally Chris Merritt, 'Beazley Bill Opens Debate on Terror Law', *The Australian* (Sydney), 2 November 2005, 6. For a discussion of Beazley's additions to the debate, see Michael Costello, 'Beazley Is No Blind Follower', *The Australian* (Sydney), 11 November 2005, 16.

⁴³ See *ALRC Report*, above n 10, 201.

⁴⁴ See Merritt, above n 42, 6.

opposed them in the past,⁴⁵ and further stated that ‘you can’t graft racial vilification laws into the law relating to sedition’.⁴⁶

An analogy between vilification and sedition was more explicitly evident in arguments which sought to determine the constitutional justification for the new sedition law under discussion. In particular, this occurred when the Attorney-General’s Department was seeking to justify its enactment of sedition laws with reference to Australia’s international human rights treaty obligations. In the Department’s submission to the SLCLC inquiry into the draft legislation it argued that ‘subsection 80.2(5) is in part implementation of Article 20 of the *ICCPR* which requires State parties to prohibit advocacy that incites violence, discrimination or hostility.’⁴⁷ The Department’s later submission to the ALRC review in 2006 echoed this, arguing that s 80.2(5) of the *Criminal Code* was consistent with the provisions in international human rights treaties requiring the prohibition of racial hatred.⁴⁸ This is surprising, given the same government’s hostility to criminal anti-vilification laws and their historical attitudes towards those same international human rights treaty provisions.

When Australia ratified *CERD* in 1975, it made a declaration concerning art 4(a),⁴⁹ which requires signatories to

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 ...⁵⁰

Note that *CERD* relates only to ‘racial discrimination’, defined by reference to ‘race, colour, descent, or national or ethnic origin’.⁵¹ It does not, and was not intended to, include ‘religion’ as a protected category.⁵² In making its declaration, the Australian government argued that it was ‘not at present in a position’ to legislate to cover all the matters at issue in art 4(a), but that it intended ‘at the first suitable moment’ to do so.⁵³ Then, when ratifying the *ICCPR* in 1980, Australia made a reservation to art 20, which prohibits ‘propaganda for war’ and ‘[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence’.⁵⁴ In making its reservation, the Australian government stated that Australia had legislated ‘with respect to the subject matter of the article in matters of practical concern in the interest of public

⁴⁵ Channel Nine, Interview by Laurie Oakes with John Howard, Prime Minister of Australia, *Sunday*, 30 October 2005.

⁴⁶ *Ibid.* See also Maiden, above n 42, 3.

⁴⁷ Attorney-General’s Department (Cth), Submission No 190A to SLCLC, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, 22 November 2005, Attachment A, 6.

⁴⁸ Attorney-General’s Department (Cth), Submission No 31 to ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, 12 April 2006, 12.

⁴⁹ Australia, Ratification of *CERD*, deposited 30 September 1975, 982 UNTS 357.

⁵⁰ *CERD* art 4(a).

⁵¹ *CERD* art 1(1).

⁵² HREOC, *Ismae — Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004) 28.

⁵³ Australia, Ratification of *CERD*, deposited 30 September 1975, 982 UNTS 357.

⁵⁴ *ICCPR* art 20.

order', and therefore did not intend to introduce any further legislation to address the issue.⁵⁵ This indicated a change of policy under a new conservative federal government. It would take another 20 years for the *Racial Hatred Act 1995* (Cth) to be enacted. Even then, however, Australia's reservations were not removed since the federal legislation did not include criminal provisions.⁵⁶ Both reservations are therefore still in place, and Australian governments have for three decades failed to enact criminal racial hatred legislation at a federal level.

Thus, while maintaining its overt and express opposition to the passage of criminal racial hatred laws, the federal government simultaneously argued that international treaty obligations — which require states to criminalise the incitement of hatred that constitutes incitement to violence — provided a constitutional justification for its seditio laws. In this way, the Attorney-General's Department (and by extension the federal government) analogised the seditio offence with vilification, the latter being the object of the relevant prohibitions in the *ICCPR* and *CERD*.

It was not only in seeking to clarify the constitutional justification for its seditio laws that the Attorney-General's Department implicitly or explicitly analogised vilification and seditio. As well as a constitutional justification, the Department outlined a public policy justification for its seditio laws which was arguably based on confused reasoning. In one of its two submissions to the ALRC's review in 2006, the Attorney-General's Department argued that, whereas in the past urging violence against a monarch would have been considered seditious, in a contemporary and diverse society urging violence against groups was also definable as seditious activity.⁵⁷ The Department's argument appears to have been that, should certain expressions between groups be capable of urging violence within the community, such expressions could, in harming citizens, lead to harm to the polity itself in a manner consistent with a conceptualisation of seditio.⁵⁸ In a later submission to the ALRC, the Department clumsily pursued this idea further:

the Department reiterates its view expressed in its previous submission that there is a common theme between seditio and terrorism offences, that being, violence between racial groups. Indeed, there is barely a terrorist cause within the last century that does not have a racial aspect to the particular cause.⁵⁹

For the moment I note only that in making this argument the Department engaged again in an implicit analogising of activities that could be conceived of as vilification with activities that could be conceived of as seditio. Here, the Department argues that speech which urges violence between racial groups can constitute seditio, and that the same speech which urges violence between racial

⁵⁵ Australia, Ratification of *ICCPR*, deposited 13 August 1980, 1197 UNTS 411, 412.

⁵⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 23 November 1995, 3744 (Michael Lavarch, Attorney-General).

⁵⁷ Attorney-General's Department, Submission No 31 to ALRC, above n 48, 1.

⁵⁸ *Ibid* 8.

⁵⁹ Attorney-General's Department (Cth), Submission No 92 to ALRC, *Fighting Words: A Review of Seditio Laws in Australia*, 3 July 2006, 3.

groups can constitute terrorism. In Part IV below, I will engage more deeply with the question of the viability of this argument.

Academic work in this field has not been immune from confusion, nor have community commentators. Dan Meagher has argued that s 80.2(5) criminalises for the first time in federal law ‘a form of racial vilification’.⁶⁰ He argues that this amounts to the reversal of a ‘long-held antipathy of the federal coalition parties to make racial vilification a specific crime.’⁶¹ Furthermore, he states that the purpose of the subsection under discussion is ‘to proscribe a very limited, seditious form of incitement to group racial violence.’⁶² He thus conceptualises incitement to violence captured by s 80.2(5) as both vilifying and seditious. In parliamentary debate, Senator Natasha Stott Despoja of the Australian Democrats argued that because other laws — including anti-vilification laws — already dealt with the areas that the sedition laws covered, the latter were unnecessary.⁶³ Additionally, a NSW Parliamentary Library Research Service briefing paper acknowledged that the new sedition offence in s 80.2(5) ‘might be said’ to amount to a Commonwealth prohibition in criminal law of ‘vilification on racial, religious grounds and other grounds’.⁶⁴

This establishes that there is evidence of the analogising of vilification and sedition at a number of levels in the 2005 public debate. First, the awkward attempts of then Opposition Leader Kim Beazley to make a stand during the initial debate led to his equating criminally punishable vilification with anti-terrorism measures. Secondly, the government’s constitutional justification for the sedition law under discussion directly drew a link between that law and international human rights treaty obligations designed to address vilification and hatred. Thirdly, in its policy justifications, the Attorney-General’s Department drew explicit links between the speech behind sedition and the speech behind terrorism, arguing that sedition could be conceived of as speech urging violence between certain groups. Finally, an academic has described s 80.2(5) as a seditious form of group vilification and other commentators have evinced similarly confused reasoning. As I will establish below, this apparent confusion reflects a more longstanding analogy between vilification and sedition.

IV SEDITION AND THE ROOTS OF THE ANALOGY

Some cautionary preliminary remarks are first required. My task here is not to provide an overview or comparison of sedition laws in Australia or internationally. Nor am I concerned with the drafting of a ‘perfect’ or ideal sedition law, although I will comment on weaknesses in the statutory form of s 80.2(5), which

⁶⁰ Dan Meagher, ‘Inciting Racial Violence as Sedition: A Problem of Definition?’ (2006) 30 *Criminal Law Journal* 289, 290 (citations omitted).

⁶¹ *Ibid* (citations omitted).

⁶² *Ibid* 291.

⁶³ Commonwealth, *Parliamentary Debates*, Senate, 5 December 2005, 12 (Natasha Stott Despoja).

⁶⁴ Gareth Griffith, ‘Sedition, Incitement and Vilification: Issues in the Current Debate’ (Briefing Paper No 1, NSW Parliamentary Library Research Service, Parliament of New South Wales, 2006) 34.

I argue arise from the false analogising which has occurred. My initial concern here is to investigate what it is about an activity, in conceptual terms, that permits us to conceive of it as seditious.

The concept of seditious arose in the 17th century from the laws of treason, and was conceived of at that time as expression which ‘stir[red] up opposition to the established authority’.⁶⁵ As Laurence Maher argues, seditious originated from the law of treason as an offence against ‘lawfully constituted authority’ — a response to ‘all criticism of government no matter how innocuous.’⁶⁶ The breadth of the idea was considerable — it was the expression of opposition to, or criticism of, public authority that constituted seditious.⁶⁷ However, the relevant and singular object of the expression was governmental authority.

In 1792, a United Kingdom statute had the effect of adding a requirement of subjective intention into the common law of seditious.⁶⁸ In 1887, a definitive account of seditious was produced in Sir James Fitzjames Stephen’s *Digest of the Criminal Law*.⁶⁹ Stephen defined seditious intent as ‘an intention to bring into ... contempt’ the authority of the monarch or government, or to attempt to incite alterations to the legal system of authority by illegal means, ‘or to promote feelings of ill-will and hostility between different classes of ... subjects.’⁷⁰ Simon Bronitt and James Stellios point out that this last category was introduced to target Irish nationalist agitation against British rule, and thus was not limited to a restrictive interpretation of ‘class’.⁷¹ Into the 19th century, an increasing recognition of the general importance of freedom of speech and freedom to criticise government emerged.⁷² During this time, the legal parameters of the offence remained under dispute, including questions of whether or not the offence required the demonstration of subjective intention of causing, or the demonstration of actual incitement to cause, violence or unrest.⁷³ However, the core of the offence remained disturbance to, or challenge of, constitutional authority, as reinforced by a Supreme Court of Canada decision of 1951.⁷⁴ This view was affirmed in a 1991 United Kingdom decision in which it was held that for seditious to be established, the activities must be related to ‘resistance or defiance for the purpose of disturbing constituted authority.’⁷⁵ In Europe, the offence of seditious requires a direct connection between the activities being

⁶⁵ *ALRC Report*, above n 10, 49.

⁶⁶ Laurence W Maher, ‘The Use and Abuse of Seditious’ (1992) 14 *Sydney Law Review* 287, 290–1.

⁶⁷ *ALRC Report*, above n 10, 49–50.

⁶⁸ *Libel Act 1792*, 32 Geo 3, c 60. See also *ibid* 51.

⁶⁹ See *ALRC Report*, above n 10, 47–8.

⁷⁰ Sir James Fitzjames Stephen, *A Digest of the Criminal Law* (4th ed, 1887) 66 (citations omitted).

⁷¹ Simon Bronitt and James Stellios, ‘Seditious, Security and Human Rights: “Unbalanced” Law Reform in the “War on Terror”’ (2006) 30 *Melbourne University Law Review* 923, 940–1.

⁷² See *ALRC Report*, above n 10, 51; Maher, above n 66, 291.

⁷³ *ALRC Report*, above n 10, 51–2.

⁷⁴ *Boucher v The King* [1951] SCR 265, 283 (Kerwin J), 296–7 (Kellock J), 308 (Estey J). See also *ibid* 52.

⁷⁵ *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury* [1991] 1 QB 429, 453 (Watkins LJ). On the significance of this statement of common law, see Griffith, above n 64, 35.

prosecuted and the ‘jeopardising [of] the security or integrity of the state.’⁷⁶ The core of the idea, then, is a threat to public, constitutional authority.

In Australia, the common law of sedition was inherited from the United Kingdom and in 1920 the offence was incorporated into the *Crimes Act*.⁷⁷ When this occurred, the statute permitted a greater range of offences to be prosecuted because it did not require proof of subjective intent or of actual incitement to violence and disorder.⁷⁸ It has been argued that the successful prosecutions of Communist Party of Australia members for sedition in the mid-20th century would not have been possible had the common law been retained.⁷⁹ In 1986, the offences were amended to require intention to cause violence, ‘public disorder or ... public disturbance’.⁸⁰ Other criticisms of the previous sedition laws include those of Maher, who points out that sedition laws were used virtually exclusively against people who may not have represented a serious, imminent threat to the state but were expressing radical left-wing ideas.⁸¹ Bronitt and Stelliios concur, arguing that sedition laws present a ‘shameful story of political persecution of those who criticised government policy’⁸² and noting Roger Douglas’s description of sedition as a ‘political crime’.⁸³

Nevertheless, while disputes about proof of subjective intention, demonstration of actual violence or disorder and criteria for the enforceability of sedition statutes remain, they are not my direct concern here. Rather, I note that in the context of the existence of such disputes, and indeed in spite of them, the key element in describing and characterising an offence as seditious remains that the object of the activity under discussion is public, constitutional authority. Although disputes continue to exist over other aspects of legal definitions of sedition, this aspect of the entity appears not to be under dispute. This is important, indeed vital, to my argument.

In the Australian sedition laws enacted in 1920, the relevant section concerned with inter-group violence was s 24A(g), which defined seditious intention as an intention ‘to promote 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’.⁸⁴ Thus, although hostility between groups became an element of a sedition offence, this subsection nonetheless entrenches the core

⁷⁶ *ALRC Report*, above n 10, 109.

⁷⁷ *War Precautions Act Repeal Act 1920* (Cth) s 12, inserting *Crimes Act 1914* (Cth) s 24A(g). See also *ibid* 53–4.

⁷⁸ *ALRC Report*, above n 10, 54.

⁷⁹ *Ibid* 56–7.

⁸⁰ *Intelligence and Security (Consequential Amendments) Act 1986* (Cth) ss 12–14. See also *Gibbs Report*, above n 29, 303–4.

⁸¹ Maher, above n 66, 295. For discussion of the use of sedition laws to prosecute individuals associated with the Communist Party of Australia, see generally at 295–311.

⁸² Bronitt and Stelliios, above n 71, 925.

⁸³ *Ibid* 926, quoting Roger Douglas, ‘The Ambiguity of Sedition: The Trials of William Fardon Burns’ (2005) 9 *Australian Journal of Legal History* 227, 248.

⁸⁴ *Crimes Act* s 24A(g) (emphasis added), inserted by *War Precautions Act Repeal Act 1920* (Cth) s 12, repealed by *Anti-Terrorism Act (No 2) 2005* (Cth) sch 7 item 2.

idea that sedition is first and foremost activity that will imperil public, constitutional authority.⁸⁵

Then the *Gibbs Report* of 1991 recommended that Australian sedition laws be updated, and specifically that inciting the overthrow of governmental authority, or interference in elections, ought to be an offence.⁸⁶ However, most significantly, for the first time the report suggested amending the wording of the inter-group offence to sever the connection between the threat which occurs and the object of that threat, namely public, constitutional authority. It did so by recommending that the inter-group element of the sedition laws be amended to read that it would constitute an offence to incite ‘the use of force or violence by groups within the community, whether distinguished by nationality, race or religion, against other such groups or members thereof.’⁸⁷

This recommendation thus removed the core of the previously existing offence from its terminology — it severed the direct connection between the offence being undertaken and the risk to public, constitutional authority. The introduction of this new terminology was not explicitly explained or justified. In the context of the Gibbs Committee’s other recommendations regarding the need to update the sedition laws to reflect modern language and to prohibit activities that directly threaten government,⁸⁸ the removal of the direct connection to constitutional authority does not appear to have been argumentatively supported. Additionally, the entire review was considerable in scope, and the sedition section of the multi-volume report occupies only seven pages, so perhaps this level of detail was not able to be considered. Importantly, the *ALRC Report* noted this confusion, acknowledged the lack of an explicit explanation in the *Gibbs Report* and suggested that a possible explanation lay in the fact that the Committee’s deliberations were occurring simultaneously with national inquiries highlighting the incidence of racial violence and vilification, and with legislative moves to address vilification.⁸⁹

Other aspects of the *Gibbs Report* also suggest that the reason for the severing of the direct connection with a threat to constitutional authority arose from a false analogy being drawn between vilification and sedition at that time. The *Gibbs Report* noted that there were no express criminal provisions against ‘sedition’ in the United Kingdom or Canada.⁹⁰ However, in doing so, it introduced into its discussion of sedition information regarding anti-vilification measures being introduced in those jurisdictions. It noted that the United Kingdom had recommended the enactment of provisions against ‘acts intended or likely to stir up racial hate’ and that Canada had recommended the enactment

⁸⁵ As discussed in Part II, the terminology ‘to promote feelings of ill-will or hostility between different groups so as to threaten the peace, order and good government of the Commonwealth’ remained in the *Crimes Act* s 30A(3)(d) (in relation to ‘unlawful associations’) after the 2005 legislation was passed.

⁸⁶ *Gibbs Report*, above n 29, 307, 344–5.

⁸⁷ *Ibid* 307, 345.

⁸⁸ *Ibid* 275, 343–9.

⁸⁹ *ALRC Report*, above n 10, 205.

⁹⁰ *Gibbs Report*, above n 29, 304.

of an offence of ‘publicly stir[ring] up hatred against an identifiable group.’⁹¹ Thus, the report drew an explicit link between racial hatred provisions and sedition laws. This link was neither explored, nor justified. But the report did argue that art 20 of the *ICCPR* and art 4 of *CERD* provided constitutional support for a prohibition on incitement to violence on national, racial or religious grounds,⁹² again linking international treaty obligations that prohibit racial vilification to its discussion of sedition laws. Once again, no direct connection was made between such violence and the core of a sedition offence — the threat to public, constitutional authority. This suggests further that the error in conceptualisation and construction of the sedition offence relating to inter-group hostility which arose in the *Gibbs Report* emerged out of confusion and a false analogy between provisions designed to address vilification and provisions designed to address sedition.

The recommendations of the *Gibbs Report* in relation to sedition were not immediately adopted, but, as noted above, when the new sedition laws were introduced in 2005 the federal government cited the report in justifying its new laws.⁹³ Further examination of debates over the 2005 provisions reinforces the idea that the loss of a direct connection between ‘sedition’ and activities against public, constitutional authority which emerged in the *Gibbs Report* was reproduced and reinforced. Accordingly, the key — arguably core — element of sedition was not translated clearly enough into the new sedition offence concerned with inter-group violence (*Criminal Code* s 80.2(5)). In its first submission to the ALRC review, the Attorney-General’s Department characterised sedition as ‘conduct which urges violence or the use of force which is aimed at threatening the peace, order and good government of a nation.’⁹⁴ In this comment, the intimate connection between the urging of force and the threat to the government is maintained and is determinative. Yet in the next sentence, and while still discussing the concept of ‘sedition’, the Department argued that the urging of ‘violence against groups in a society which is made up of different cultures and religions’ also constituted ‘a very real attack on the fabric of society’.⁹⁵

In its second submission in response to the ALRC’s discussion paper, the Attorney-General’s Department revised its formulation again, broadening it considerably. While recognising that sedition could be violence directed at the ‘established order’, the Department also advocated the view that where violence is directed at the ‘community as a whole’ this can also be seditious.⁹⁶ In these latter two statements, the connection between sedition and violence against public, constitutional authority was severed completely. This conforms to the

⁹¹ *Ibid.*

⁹² *Ibid* 306–7.

⁹³ See above nn 29–30 and accompanying text. See especially Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth) 88–90.

⁹⁴ Attorney-General’s Department, Submission No 92 to ALRC, above n 59, 1.

⁹⁵ *Ibid.*

⁹⁶ Attorney-General’s Department, Submission No 31 to ALRC, above n 48, 1.

discussion above of the *Gibbs Report's* establishment of the false analogy in 1991.

In the final wording of s 80.2(5) introduced in 2005, the connection between sedition and constitutional authority has not been completely severed, but it has been weakened in comparison to the 1920 provisions. In my view, this weakening means that the new provision fails to capture adequately the phenomenology of sedition. While it is true that the urging of force or violence against a group in *Criminal Code* s 80.2(5)(a) is qualified by s 80.2(5)(b) in requiring that such force or violence also threatens 'the peace, order and good government of the Commonwealth', the link is purely conjunctive. The violence itself is defined as violence simply between groups distinguished by 'race, religion, nationality or political opinion'.⁹⁷ This creates a remove in the concept of sedition — instead of being conceptualised as a politically motivated urging to violence in order to achieve a political end against the power of governing authorities, it becomes conceptualised as an urging to violence among groups of people with different opinions on race, religion, nationality or politics *for any reason* which also happens to have the effect of disrupting lawful, constitutional authority. This effect need not be intrinsic to the activity, nor intentional, nor foreseeable.

In my view, this distorts the meaning of sedition. It places a barrier before the core idea that sedition is unlike normal intra-community violence in that it is explicitly motivated by a violent animosity towards governmental authority. The link to the threat to the Commonwealth in sub-s (b) is insufficient in my view to rescue the provision from this charge. This is because the inter-group violence described in sub-s (a) fails to differentiate the identity of the targets of violence from the identity of the instigators of violence in meaningful terms, and thus fails to pay attention to the context within which violence may be advocated. The key to sedition is not that the violence it urges *coincidentally* disrupts the authority of the state in the context of inter-group disputes — it is that the violence it urges deliberately aims to disrupt the authority of the state by those who are subjected to that authority and wish to overthrow it. Where sedition is conceived of as inclusive of inter-group violence in the community that has as an effect the undermining of constitutional authority, an error has been committed. Not all urging to violence that coincidentally undermines governmental authority is seditious. Conceptually speaking, only urging to violence that deliberately or intentionally attacks, or that aims to attack, governmental authority ought to be conceived of as seditious.

An objection to my argument could be that it might be possible to distinguish activities designed to attack governmental authority by classifying these authorities as 'groups' and so, to that extent, the nomenclature of s 80.2(5) could be regarded as viable. But this is refutable on the ground that governmental authority is not directly defined in Australia on the basis of race or religion or nationality.⁹⁸ Furthermore, no specific political opinion is required in order to

⁹⁷ *Criminal Code* s 80.2(5)(a).

⁹⁸ The possible exception, in the formal sense, is that in order to be a Member of Parliament one must be an Australian citizen under *Constitution* s 34. This is unlikely to be the intended meaning

obtain or possess constitutional authority.⁹⁹ Although political parties seek to win government, either of the two major parties and a number of smaller parties and independents share that governing power in our parliamentary representative system of government. This means that violence between groups on this ground is conceptually distinct from violence directed against constitutional authority.

Further, s 80.2(5) is the only section among the five sedition offences that has this problem. Two of the other four offences are focused on direct urging of force or violence against a constitutional authority, broadly conceived — urging by force or violence the overthrow of the *Constitution*, a government or lawful authority (s 80.2(1)), and urging interference by force or violence in elections (s 80.2(3)). The other two utilise the terminology of urging a person to assist an organisation or country at war with the Commonwealth (s 80.2(7)), or engaging in armed hostilities against the Australian Defence Force (s 80.2(8)). These latter two offences may have other problems of nomenclature, given the gap between force or violence and the statutory phraseology of assistance, but this is not the place to discuss such problems should they exist. The point is that the other four sedition offences do not demonstrate the two significant problems identified here with s 80.2(5). The first problem is insufficient identification of the fact that the key point of antagonism in a sedition offence ought to be between groups or individuals in the community on the one hand (even if in the context of inter-group violence) and objects of constitutional authority on the other. The second is that of happenstance — it fails to distinguish between situations where the harm to constitutional authority is coincidental (in the sense of occurring at the same time *and* being incidental to) and situations where that harm is central (as in the traditional conception of sedition).

To reiterate, sedition is expression that advocates violent action against the state, its apparatus or its authority by those subject to and opposing that authority. The object of sedition is state or governmental authority. This produces a conceptualisation of sedition as a criminal type of speech considered dangerous because, and to the extent to which, it threatens the established order. It is the state, the government, the *Constitution*, or the apparatus of authority that is clearly identified as the object of sedition. It is urging violence against a perceived holder of constitutional power, conceptually speaking, that is the key criterion for judging an action to be seditious.

of s 80.2(5) as it appears to capture differences between sub-national groups within the Australian community that may retain an identity, and thus informal affiliation, with a nation other than Australia.

⁹⁹ 'Political opinion' is not a basis on which discrimination is prohibited under anti-discrimination laws in any jurisdiction. However, general prohibitions on discrimination in areas such as work, education, provision of goods, services and accommodation apply on the following grounds: 'political belief or activity' (*Anti-Discrimination Act 1991* (Qld) s 7(j); *Equal Opportunity Act 1995* (Vic) s 6(g)); 'political belief or affiliation' or 'political activity' (*Anti-Discrimination Act 1998* (Tas) ss 16(m)–(n)); 'religious or political conviction' (*Discrimination Act 1991* (ACT) s 7(1)(i); *Equal Opportunity Act 1984* (WA) s 53(1)(a)); and 'political opinion, affiliation or activity' (*Anti-Discrimination Act 1992* (NT) s 19(1)(n)).

V VILIFICATION

I move now to consider, first, the concept of vilification and then some related issues to do with the statutory form in which anti-vilification laws have been enacted in Australia. The aim in the initial sections of this Part is not to define as controversial an idea as vilification in an immutable manner, but rather to explore conceptually the nature of expressions that might be characterised as vilifying. I then apply that conceptualisation to a discussion of vilification laws in Australia and to s 80.2(5) of the sedition law.

Vilification is ‘speech or expression which is capable of instilling or inciting hatred of, or prejudice towards, a person or group of people on a specified ground’.¹⁰⁰ It is thus characterised as the harmful expression of prejudice. Vilification’s core meaning and force are that it is speech which harms identified targets and the community to which those targets are perceived to belong by ascribing negative stereotypes to all perceived members of that community. In doing so, it does more than offend its targets: it harms them in tangible ways and is thus a discursive manifestation of prejudice.¹⁰¹ Vilification enacts (racist or other) discrimination through its expression.¹⁰² The justifications for a state-assisted response to vilification include a recognition that vilification inflicts injury on the vulnerable and threatens their dignity and equality.¹⁰³ This injury provides a justification for the state to act to deter the activities that caused that harm and to ameliorate its effects, both to assist the individuals who may be targeted and to promote equality in the community more generally.

Vilification is directed at a person (or a group of people) who is characteristically a member of a group facing prejudice, such as a racial or sexual minority.¹⁰⁴ This is not to imply that non-minority individuals might not attempt to use anti-vilification laws to their benefit. Indeed, there is some evidence that they do; for example, people of Anglo-Celtic origin have lodged complaints under New South Wales legislation, although their success at having their complaints substantiated is relatively low.¹⁰⁵ Nor am I disputing the fact that legal provisions in Australia use ‘neutral terms’ so as to permit non-minority individuals to attempt to use anti-vilification laws to their benefit.¹⁰⁶ However, I am arguing that, phenomenologically, there is an intrinsic relationship between the prejudice that a vilifier holds against the identity of the community to which they perceive

¹⁰⁰ Katharine Gelber and Adrienne Stone, ‘Introduction’ in Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) xiii, xiii.

¹⁰¹ See generally Katharine Gelber, *Speaking Back: The Free Speech versus Hate Speech Debate* (2002) chs 3–4.

¹⁰² For theoretical explanations of how vilification enacts discrimination, see generally *ibid*; Aleardo Zanghellini, ‘Jurisprudential Foundations for Anti-Vilification Laws: The Relevance of Speech Act and Foucauldian Theory’ (2003) 27 *Melbourne University Law Review* 458.

¹⁰³ Barendt, above n 4, 171, 173–4.

¹⁰⁴ *Ibid* 171, 174–5; O’Neill, Rice and Douglas, above n 4, 519; Gelber, *Speaking Back*, above n 101, 69–70.

¹⁰⁵ McNamara, above n 5, 148–50, 161; Katharine Gelber, ‘Implementing Racial Anti-Vilification Laws in New South Wales 1989–1998: A Study’ (2000) 59(1) *Australian Journal of Public Administration* 13, 16.

¹⁰⁶ O’Neill, Rice and Douglas, above n 4, 517.

their target to belong, and the ability to characterise their utterance as vilifying rather than simply offensive.¹⁰⁷ Patricia Williams has described the expression of racist ideas as ‘an offense so deeply painful and assaultive as to constitute ... “spirit-murder.”’¹⁰⁸ Mari Matsuda, in discussing ‘the violence of the word’, argues that ‘[r]acist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group.’¹⁰⁹ Thus, and by definition, vilification is directed against the marginalised. Conceptually, this stands vilification in direct contradistinction to sedition. The two are in this sense directly polarised.

Indeed, the sedition offences have been critiqued as targeting some of the very groups that were intended to be the beneficiaries of anti-vilification laws.¹¹⁰ Whereas anti-vilification laws are designed to assist members of vulnerable and marginalised groups, the sedition laws have been criticised as contributing further to the marginalisation and vulnerability of those same groups. Agnes Chong argues that, in Australia, Muslim communities are concerned that the sedition laws create a climate of fear and uncertainty, which is likely to have a chilling effect on their speech and contribute to an anxiety that public authorities will misunderstand their words. This is leading to self-censorship and an inhibition of intercommunity dialogue.¹¹¹ This argument was also made in many submissions to the ALRC review conducted in 2006.¹¹²

Anti-vilification laws have become an accepted part of the Australian anti-discrimination policy framework and exist in every state,¹¹³ the Australian Capital Territory,¹¹⁴ and federally.¹¹⁵ The most common ground on which vilification is prohibited is race,¹¹⁶ defined in most jurisdictions as including colour, descent, nationality, ethnicity or ethnic origin.¹¹⁷ In New South Wales, the term ‘ethno-religious’ was added to racial anti-vilification laws in 1994 to extend the operation of the laws to groups such as Jews and Sikhs, a move that formally recognised the extant approach of the courts.¹¹⁸ Other specified grounds include sexuality/homosexuality, disability, gender, gender identity/transgender

¹⁰⁷ See generally Zanghellini, above n 102, 470–82.

¹⁰⁸ Patricia Williams, ‘Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law’s Response to Racism’ (1987) 42 *University of Miami Law Review* 127, 129.

¹⁰⁹ Mari J Matsuda, ‘Public Response to Racist Speech: Considering the Victim’s Story’ (1989) 87 *Michigan Law Review* 2320, 2332.

¹¹⁰ See, eg, James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* (1999) 29.

¹¹¹ Agnes Chong, ‘Intolerance of Terror, or the Terror of Intolerance? Religious Tolerance and the Response to Terrorism’ (2006) 8 *UTS Law Review* 153, 163.

¹¹² *ALRC Report*, above n 10, 148–50, 156–8.

¹¹³ *Anti-Discrimination Act 1977* (NSW) ss 20B–20D, 38R–38T, 49ZS–49ZTA, 49ZX–49ZXC; *Anti-Discrimination Act 1991* (Qld) ss 124A, 131A; *Civil Liability Act 1936* (SA) s 73; *Racial Vilification Act 1996* (SA); *Anti-Discrimination Act 1998* (Tas) ss 17(1), 19; *Racial and Religious Tolerance Act 2001* (Vic); *Criminal Code Act Compilation Act 1913* (WA) ch 11.

¹¹⁴ *Discrimination Act 1991* (ACT) ss 65–7.

¹¹⁵ *Racial Discrimination Act 1975* (Cth) ss 18B–18F.

¹¹⁶ The concept of ‘race’ in federal anti-discrimination law was derived from *CERD*, which uses the conceptualisation, ‘race, colour, descent, or national or ethnic origin’: art 1(1).

¹¹⁷ See, eg, *Racial and Religious Tolerance Act 2001* (Vic) s 3.

¹¹⁸ *Anti-Discrimination (Amendment) Act 1994* (NSW) sch 1 item 1, amending *Anti-Discrimination Act 1977* (NSW) s 4(1). See also McNamara, above n 5, 130.

status and HIV/AIDS status.¹¹⁹ Queensland expressly includes ‘religion’,¹²⁰ Victoria includes ‘religious belief or activity’¹²¹ and Tasmania includes ‘religious belief or affiliation or religious activity’¹²² as protected grounds under anti-vilification laws.

A further point of comparison is the statutory form of anti-vilification laws as compared with the terminology of the sedition law under discussion. Here there is remarkably little overlap, which implies that legislators, despite creating the confusion referred to above, were aware of conceptual differences between vilification and sedition. Federally and in Tasmania, civil provisions against vilification have been enacted,¹²³ whereas in Western Australia only criminal provisions are in force.¹²⁴ In all other states and the Australian Capital Territory both civil and criminal provisions apply.¹²⁵ In most jurisdictions, the wording of the civil offence is that it is an offence to ‘incite hatred towards, serious contempt for, or severe ridicule of, a person or group’ of people on the specified grounds.¹²⁶ Federally, the wording of the civil offence is that it is unlawful to do an act if it is reasonably likely to ‘offend, insult, humiliate or intimidate another person or a group of people’ on a specified ground.¹²⁷ Additionally, in Tasmania, an as yet insufficiently tested provision in the *Anti-Discrimination Act 1998* (Tas) appears to enlarge the concept and application of anti-vilification laws in relation to conduct which ‘offends, humiliates ... insults or ridicules’¹²⁸ a person on the grounds of gender, marital status, relationship status, pregnancy, breast-feeding, parental status or family responsibilities.¹²⁹ This wording is similar (but not identical) to the anti-vilification law of the Commonwealth, and may mean that Tasmania is the only jurisdiction in Australia with anti-vilification laws covering gender related issues. Overall, there is no real overlap between the phraseology of civil anti-vilification laws around Australia and the criminal sedition law under discussion, which implies a level of awareness (among at least the drafters of the legislation) that the two are conceptually distinct.

Criminal anti-vilification provisions have an understandably higher threshold. This can be demonstrated by the fact that in almost 20 years of criminal anti-vilification laws in Western Australia, there has only been one instance of a

¹¹⁹ Katharine Gelber, ‘Hate Speech and the Australian Legal and Political Landscape’ in Katharine Gelber and Adrienne Stone (eds), *Hate Speech and Freedom of Speech in Australia* (2007) 2, 6.

¹²⁰ *Anti-Discrimination Act 1991* (Qld) s 124A(1).

¹²¹ *Racial and Religious Tolerance Act 2001* (Vic) s 8(1).

¹²² *Anti-Discrimination Act 1998* (Tas) s 19(d).

¹²³ *Racial Discrimination Act 1975* (Cth) ss 18B–18F; *Anti-Discrimination Act 1998* (Tas) ss 17(1), 19.

¹²⁴ *Criminal Code Act Compilation Act 1913* (WA) ch 11.

¹²⁵ Gelber, ‘Hate Speech and the Australian Legal and Political Landscape’, above n 119, 7.

¹²⁶ *Discrimination Act 1991* (ACT) s 66(1); *Anti-Discrimination Act 1977* (NSW) s 20C(1); *Anti-Discrimination Act 1991* (Qld) s 124A; *Racial Vilification Act 1996* (SA) s 4; *Anti-Discrimination Act 1998* (Tas) s 19. See also *Civil Liability Act 1936* (SA) s 73(1); *Racial and Religious Tolerance Act 2001* (Vic) s 7(1).

¹²⁷ *Racial Discrimination Act 1975* (Cth) s 18C(1)(a).

¹²⁸ *Anti-Discrimination Act 1998* (Tas) s 17(1).

¹²⁹ *Anti-Discrimination Act 1998* (Tas) ss 16(e)–(j).

successful prosecution.¹³⁰ Criminal anti-vilification provisions tend to require either a public act that incites, or an act with intention to incite, hatred, serious contempt or severe ridicule of a person on the specified ground by means which threaten physical harm to persons or property or which incite others to threaten physical harm to persons or property.¹³¹ The exception is Western Australia, which has created two-tiered offences based on the existence or otherwise of intent, including: conduct intended to, or likely to, incite 'racial animosity or racist harassment';¹³² '[p]ossession of material for dissemination' with intent to, or likely to, 'incite racial animosity or racist harassment';¹³³ conduct intended to, or likely to, 'racially harass',¹³⁴ meaning to 'threaten, seriously and substantially abuse or severely ridicule';¹³⁵ and '[p]ossession of material for display' with intent to, or likely to, racially harass.¹³⁶ In sum, there is little resemblance between the form of even criminal anti-vilification laws and the form of the sedition law under discussion, which creates an offence of *urging* force or violence between groups (identified in certain ways) that would also threaten constitutional authority. Moreover, the Commonwealth government that implemented the sedition laws consistently opposed the introduction of criminal anti-vilification laws at a federal level,¹³⁷ which could have utilised either the same grounds as sedition or any other grounds at all.

I reiterate two key points here. The first and most important is that, conceptually, sedition and vilification are directly counterposed insofar as the former is directed against constitutional authority and the latter against the vulnerable. This criticism is augmented by claims that the effect of the sedition laws on the community appears to be to suppress the speech of those most vulnerable, in a direct reversal of the intended effect of anti-vilification laws. Secondly, there is little resemblance between the construction of Australian anti-vilification laws and sedition laws, raising further doubts as to the appropriateness of even the most casual analogy between the two and heightening the likelihood that, in spite

¹³⁰ The *Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred Act) 1990* (WA) was assented to on 9 October 1990. Following a high profile graffiti attack in which swastikas and slogans including 'Hitler was right' and 'Asians Out' were painted on a synagogue and Chinese restaurant in July 2004, five men were successfully prosecuted for criminal damage: see Holly Nott, 'WA: Three Men Sentenced for Racist Graffiti', *Australian Associated Press General News* (online), 5 August 2004; 'Jail for Race-Hate Graffiti', *The Australian* (Sydney), 20 May 2005, 3. One of the men, Damon Paul Blaxall, was also charged with possession of racist material. In 2005, Blaxall was convicted on both counts and sentenced to eight months jail for criminal damage and four months for possession of the racist material: see Peta Rasdien, 'Green Plea Fails to Save Graffiti Racist', *The West Australian* (Perth), 21 December 2005, 41.

¹³¹ *Anti-Discrimination Act 1977* (NSW) s 20D(1); *Anti-Discrimination Act 1991* (Qld) s 131A; *Racial Vilification Act 1996* (SA) s 4; *Racial and Religious Tolerance Act 2001* (Vic) ss 24(1), 25(1). *Discrimination Act 1991* (ACT) s 67(1)(c) is in slightly different terms as it criminalises acts which are 'threatening'.

¹³² *Criminal Code Act Compilation Act 1913* (WA) ss 77–8.

¹³³ *Criminal Code Act Compilation Act 1913* (WA) ss 79–80.

¹³⁴ *Criminal Code Act Compilation Act 1913* (WA) ss 80A–80B.

¹³⁵ *Criminal Code Act Compilation Act 1913* (WA) s 76.

¹³⁶ *Criminal Code Act Compilation Act 1913* (WA) ss 80C–80D.

¹³⁷ See above nn 45–6 and accompanying text.

of their reliance on such an analogy, legislators were in fact aware of crucial differences between the two.

VI IMPLICATIONS FOR THE BROADER DEBATE

The discussion here has important implications for the ways in which the public debate around sedition laws and vilification laws is likely to proceed. To the extent that the two activities are conceptually directly counterposed, there are important implications for prospective remedies. The primary rationale for a vilification offence is that it is an offence against the vulnerable, so to remedy vilification requires that the government act to support those targeted, and try to ameliorate the harms caused. Sedition, by contrast, is directed against the most powerful institution in society — the constitutional authority of the state. In contrast with the targets of vilification, the state ought to tolerate speech directed against it, even — and especially — that speech which is vehemently and radically expressed. This is because it is uniquely placed to do so by being the possessor of constitutional authority and power.

The argument I make here means that Meagher's description of the s 80.2(5) offence as a type of seditious racial vilification is oxymoronic.¹³⁸ It is not possible for an offence to capture both sedition and vilification at the same time. It also means that the ALRC's well-meaning argument that s 80.2(5) should not be repealed, but instead should be amended into a type of public order offence — because it 'has value that extends beyond the current climate of terrorism' and can be used to condemn racially or religiously motivated violence¹³⁹ — would need to be implemented with caution and clarity so as to avoid entrenching further confusion.

Indeed, the federal government's expression of support for most of the ALRC's recommendations in December 2008 means that an offence of urging 'political or inter-group force or violence' will no longer be classified as 'sedition', and will require the demonstration of intent.¹⁴⁰ Section 80.2(5) will be expanded to cover the urging of a person, and the urging of a non-specified group.¹⁴¹ However, the provision will still operate under the aegis of chapter 5 of the *Criminal Code*, relating to the security of the Commonwealth. Further, in expressing support for most of the ALRC's recommendations the government acknowledged the ALRC's position that the reconstructed offence will be consistent with Australia's obligations under the *ICCPR* and *CERD*.¹⁴² Yet there has been no move to construct a discrete criminal racial vilification offence, which would more clearly be consistent with those obligations and which would not connect

¹³⁸ See, eg, Meagher, above n 60, 290, where the author characterises s 80.2(5) as a dual 'racial vilification and sedition law' (emphasis omitted). He also describes the provision as a 'seditious form of racial incitement': at 294.

¹³⁹ *ALRC Report*, above n 10, 217–18, 222–3.

¹⁴⁰ Attorney-General's Department (Cth), *Australian Government Response to ALRC Review of Sedition Laws in Australia*, above n 11.

¹⁴¹ *Ibid* 4.

¹⁴² *Ibid*.

racial vilification with actions that threaten constitutional authority. Some confusion clearly remains.

The false analogy that arose in 1991 and was institutionalised in s 80.2(5) in 2005 has had worrying consequences. First, the federal government of the time was able to justify its controversial sedition law by linking it to the prevention of harm to the community instead of linking it to the prevention of harm to constitutional authority. In this way, it was able to draw on and bolster the likely community support for legislative measures designed to protect the community from harm. Secondly, at the same time, the government maintained its opposition to criminal anti-vilification laws, laws which — were they to be enacted — might reasonably be expected to have a greater and more successful impact on reducing the harms caused by inter-group vilification than s 80.2(5). Thirdly, the introduction of s 80.2(5) has had a negligible impact on Australia's fulfilment of its relevant international human rights treaty obligations, which require it to take steps to introduce criminal laws prohibiting racial hatred.

My argument has an important normative consequence. I wish to clarify how and why it is possible to support anti-vilification laws while at the same time being critical of sedition laws. Devoid of their context and analogised, both sedition and vilification can appear at face value to be restrictions on free speech in the interests of preventing harm. However, if this superficial view is taken, not only are different entities being confused, but it also becomes difficult for those who have found themselves in support of anti-vilification laws to explain and defend their unease with sedition laws. Yet explain and defend this position we must. Anti-vilification laws have longstanding support in the broader community and in policy circles. If anti-vilification laws become equated with sedition laws, two possibilities emerge. The first is that in the name of defending free speech the support that exists for anti-vilification laws will be undermined. The second is that in the name of preventing harm the support that exists for anti-vilification laws could be harnessed to support sedition laws to the detriment of free speech. This possibility has been discussed by Penelope Mathew who, in trying to discern the government's reasoning behind opposing criminal anti-vilification laws while supporting criminal sedition laws, has mused that perhaps the crucial difference is 'that the speech we're thinking about now targets the majority, rather than a vulnerable religious or racial minority'.¹⁴³ I build on that point in a more comprehensive and complex way here.

In no liberal democratic society is speech entirely free. Even in the United States, where the First Amendment provides an exceptionally strong constitutional and jurisprudential protection for free speech,¹⁴⁴ a small number of types of speech are considered unprotected, including true threats, fighting words, libel and obscenity, although the interpretation of when such speech is unprotected is

¹⁴³ Penelope Mathew, 'The Anti-Terrorism Bill 2005' (Speech delivered at Are We Crossing the Line?: Forum on National Security Laws and Human Rights, Canberra, 31 October 2005) <http://www.hreoc.gov.au/about/media/speeches/other/20051031_national_security_forum.html>.

¹⁴⁴ Adrienne Stone and Simon Evans, 'Australia: Freedom of Speech and Insult in the High Court of Australia' (2006) 4 *International Journal of Constitutional Law* 677, 686.

narrow.¹⁴⁵ In many other countries (such as Canada¹⁴⁶ and the United Kingdom)¹⁴⁷ regulation of speech — including racially discriminatory speech — is an accepted part of the policy framework. Determining the appropriate boundaries of free speech is a difficult and challenging task for policymakers and law-makers in societies that generally value freedom of speech. In making such determinations, it is vital that comprehensive understandings of the purpose of, and justifications for, applying those limitations be developed and maintained. Only such an understanding will permit us to differentiate the justifiable from the non-justifiable regulation of speech. It seems obvious that criticism of government, however virulent and forceful, ought to be tolerated to an exceptionally high degree in liberal democratic societies. Discrimination against the vulnerable ought not.

¹⁴⁵ Weinstein, above n 110, 26–30.

¹⁴⁶ Barendt, above n 4, 55–9. See generally L W Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (2004).

¹⁴⁷ Barendt, above n 4, 39–48.