

# SEDITION, SECURITY AND HUMAN RIGHTS: 'UNBALANCED' LAW REFORM IN THE 'WAR ON TERROR'

SIMON BRONITT\* AND JAMES STELLIOS†

*[This article provides a review of the history, structure and form of the law of sedition, focusing on the new provisions inserted into the Criminal Code Act 1995 (Cth) in 2005 as part of a wider counter-terrorism package. A short historical review of sedition in Australia is followed by a critical analysis of the new offences, which explores the constitutional and human rights implications of these new offences. Critical attention is given to the process of law reform that seeks to 'balance' security and human rights, focusing on the recommendations of the Australian Law Reform Commission which emerged from the retrospective review of the 2005 reforms. Our conclusion is that the 'balanced' model endorsed by the Australian Law Reform Commission produces incoherence in relation to the definition of offences and 'good faith' defences. In particular, incoherence is produced by definitions of offences that are over-inclusive or under-inclusive depending on the rationale (security or human rights) which is accorded priority.]*

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\* LLB (Bristol), LLM (Cambridge); Professor, The Australian National University College of Law; Director, National Europe Centre, Research School of the Humanities, The Australian National University.

† BEc, LLB (ANU), LLM (Cornell); Senior Lecturer, The Australian National University College of Law; Consultant, Clayton Utz.

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## I INTRODUCTION

Law reform has become a vexed task in this ‘age of terror’. In the ‘first wave’ of post-September 11, 2001 law reform, attention focused on the core offences dealing with ‘terrorist acts’ and provisions proscribing terrorist organisations.<sup>1</sup> In the wake of the Madrid train bombings in March 2004 and the London bombings in July 2005, the focus has shifted to monitoring and disrupting the activities of local ‘suspect’ communities.<sup>2</sup> The legislative reforms enacted in late 2005 reflected these trends. Aimed at the perceived root causes of terrorism, the reforms created new powers to impose control orders and authorise preventative detention.<sup>3</sup> Most significantly, for the purpose of this article, the package of counter-terrorism measures also contained provisions dealing with those organisations and individuals who advocate terrorist acts. The definition of a proscribed terrorist organisation was broadened to include an organisation which ‘advocates’ the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).<sup>4</sup> At the same time, the offence of sedition was modernised. The sedition provisions attracted considerable public attention and disquiet in the media,<sup>5</sup> leading the Australian Government to take the unusual step of requesting the Australian Law Reform Commission (‘ALRC’) to undertake a retrospective review of the new sedition laws.<sup>6</sup>

Australia is not the only jurisdiction to criminalise the advocacy of terrorism. For example, art 5 of the *Council of Europe Convention on the Prevention of Terrorism* requires state parties to establish an offence of ‘public provocation to commit a terrorist offence’.<sup>7</sup> The United Kingdom Parliament has recently enacted the *Terrorism Act 2006* (UK) c 11, which provides that the ‘encouragement’ or ‘glorification’ of terrorism is an offence. Doubts have been expressed as

<sup>1</sup> For a review of these counter-terrorism offences, see Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed, 2005) ch 15. See also *Criminal Code* divs 101 (‘Terrorism’), 102 (‘Terrorist Organisations’). The *Criminal Code* is contained in the Schedule to the *Criminal Code Act 1995* (Cth).

<sup>2</sup> For an earlier study of the impact of counter-terrorism laws on these communities, see Paddy Hillyard, *Suspect Community: People’s Experiences of the Prevention of Terrorism Acts in Britain* (1993) ch 2.

<sup>3</sup> The Anti-Terrorism Bill [No 2] 2005 (Cth) containing these provisions was introduced into the House of Representatives on 3 November 2005.

<sup>4</sup> *Criminal Code* s 102.1(2). Under *Criminal Code* s 102.1(1A), an organisation ‘advocates’ the doing of a terrorist act if:

- (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or
- (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
- (c) the organisation directly praises the doing of a terrorist act ...

<sup>5</sup> See, eg, ABC Television, ‘Govt Introduces Anti-Terrorism Legislation’, *The 7.30 Report*, 3 November 2005 <<http://www.abc.net.au/7.30/content/2005/s1497388.htm>>; Bruce Wolpe, ‘Democracy Endangered if War on Terrorism Gags the Press’, *The Sydney Morning Herald* (Sydney), 24 November 2005, 15.

<sup>6</sup> The ALRC followed, in a constrained time frame, the normal process of consultation. It produced an issues paper and discussion paper: ALRC, *Review of Sedition Laws*, Issues Paper No 30 (2006); ALRC, *Review of Sedition Laws*, Discussion Paper No 71 (2006). The ALRC’s final report was tabled in Parliament on 13 September 2006: ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006).

<sup>7</sup> *Council of Europe Convention on the Prevention of Terrorism*, opened for signature 16 May 2005, CETS 196, art 5 (not yet in force).

to whether the offences created by the *Terrorism Act 2006* (UK) c 11 are compatible with the freedom of expression, which is protected by the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>8</sup> and no doubt its compatibility will be the subject of challenge under the *Human Rights Act 1998* (UK) c 42. Expressing concerns that such an offence would constitute an unwarranted interference with the constitutionally protected freedom of political communication, the ALRC has not proposed the adoption of a glorification offence in Australia.<sup>9</sup> The ALRC has also recommended the removal of the term ‘sedition’ from the federal criminal statute book, while retaining a range of modernised ‘offences against political liberty and public order’ that cover similar ground.<sup>10</sup>

The purpose of this article is twofold — it gives a review of the history, structure and form of the new sedition offences in the *Criminal Code*, as well as a critique of the model of law reform that seeks to ‘balance’ security and human rights.

A short historical review of sedition will be followed by an analysis of the new substantive offences, which will outline the constitutional and human rights implications of these offences. In our assessment, pursuing a ‘balanced’ model has produced incoherence in relation to both the definitions of the offence and ‘good faith’ defences. The resulting provisions are over-inclusive or under-inclusive depending on the rationale (security or human rights) which is accorded priority. Notwithstanding the appeal of these models to politicians, policymakers and law reformers, we believe that maintaining legitimacy in the prosecution of serious crimes of terrorism requires the highest levels of compliance with human rights. For this reason, we believe that because the protection of human rights should lie at the heart of terrorism law reform and counter-terrorism strategies, law reformers and law-makers must resist an approach which ‘balances’ civil rights out of the equation. Finally, we offer some reflections on the uncivil processes of terrorism law reform and law-making, which have been ‘unbalanced’ by the prevailing climate of urgency and political expediency.<sup>11</sup>

## II A SHORT HISTORY OF SEDITION: SYMBOLIC PROSECUTION OR POLITICAL PERSECUTION?

The origins of sedition can be traced to the common law offence of seditious libel. Its history, from the colonial period to the mid-20<sup>th</sup> century, was a shameful story of political persecution of those who criticised government policy, and

<sup>8</sup> Opened for signature 4 November 1950, 213 UNTS 222, art 10 (entered into force 3 September 1953).

<sup>9</sup> See further ALRC, *Fighting Words*, above n 6, 125.

<sup>10</sup> See Recommendation 2–1: *ibid* 67.

<sup>11</sup> See, eg, Philip Ruddock, Attorney-General, ‘A Safe and Secure Australia: An Update on Counter-Terrorism’ (Speech delivered at the Manly Pacific Hotel, Sydney, 21 January 2006) <<http://www.ag.gov.au/agd/WWW/ministerruddockhome.nsf/Page/RWPE242AA0BB975E18ECA2570FE00787070>>.

unpopular minorities.<sup>12</sup> Following a brief revival in the post-World War II period in response to the perceived communist threat, sedition was consigned by many commentators to the ‘dustbin of legal history’.<sup>13</sup> That assessment stood firm for nearly 50 years, with several jurisdictions taking the precaution of abolishing sedition, including the Australian Capital Territory and South Australia.<sup>14</sup> However, criminal offences are not subject to desuetude and are always capable of resuscitation and redeployment against new threats. The revival of interest in sedition in 2005 was a direct response to recent terrorist attacks, and was presented as part of a package of counter-terrorism measures by the Howard Government.<sup>15</sup> Significantly, this remodelling of sedition did not form part of the wider reform project of codification and harmonisation stimulated by the Model Criminal Code project which is underway in Australia.<sup>16</sup>

Sedition is a ‘political crime’, which, as Roger Douglas points out, has been used throughout history to ‘punish people for what they think (or what they are thought to think) rather than on the basis of the degree to which their activities actually pose a threat to social order (however defined).’<sup>17</sup> This is aptly demonstrated by the prosecution of Communist Party members for sedition in the period 1948–53.<sup>18</sup> The last successful prosecution in 1950 resulted in the conviction and imprisonment of William Fardon Burns, the publisher of the Communist newspaper, *The Tribune*. His crime was publishing a series of

<sup>12</sup> Seditious libel emerged as a distinct offence in the English Star Chamber in the 17<sup>th</sup> century: ALRC, *Fighting Words*, above n 6, 49–52. Charges were brought during the colonial period to deal with individuals, including prominent lawyers and newspaper editors, who criticised various institutions of government, such as Governors and judges: see G D Woods, *A History of Criminal Law in New South Wales: The Colonial Period 1788–1900* (2002) 50–6. On the history of sedition in Australia, see Michael Head, ‘Sedition — Is the Star Chamber Dead?’ (1979) 3 *Criminal Law Journal* 89, 93–9; Laurence W Maher, ‘The Use and Abuse of Sedition’ (1992) 14 *Sydney Law Review* 287; Laurence W Maher, ‘Dissent, Disloyalty and Disaffection: Australia’s Last Cold War Sedition Case’ (1994) 16 *Adelaide Law Review* 1; Roger Douglas, ‘The Ambiguity of Sedition: The Trials of William Fardon Burns’ (2004) 9 *Australian Journal of Legal History* 227, 247–8.

<sup>13</sup> The recent revival of interest in sedition caught most commentators off guard: see, eg, Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (1<sup>st</sup> ed, 2001) 806–7.

<sup>14</sup> ALRC, *Fighting Words*, above n 6, 83, citing *Law Reform (Abolitions and Repeals) Act 1996* (ACT) s 4 and *Criminal Law Consolidation Act 1935* (SA) sch 11.

<sup>15</sup> See, eg, comments by the Attorney-General in support of the Anti-Terrorism Bill [No 2] 2005 (Cth), when called by the Deputy Speaker to summarise the Second Reading debate:

The purpose of these provisions is to modernise the existing provisions designed to criminalise the making of comments where they consist of urging the use of force or violence against our democratic and generally tolerant society here in Australia. Sedition has become a more relevant offence.

Commonwealth, *Parliamentary Debates*, House of Representatives, 29 November 2005, 88 (Philip Ruddock, Attorney-General).

<sup>16</sup> For a review of this project from the perspective of an insider, see M R Goode, ‘Constructing Criminal Law Reform and the Model Criminal Code’ (2002) 26 *Criminal Law Journal* 152. For a critical evaluation of its impact and the principles governing interpretation of the *Criminal Code*, see Miriam Gani, ‘Codifying the Criminal Law: Implications for Interpretation’ (2005) 29 *Criminal Law Journal* 264.

<sup>17</sup> Douglas, above n 12, 248. See also Maher, ‘The Use and Abuse of Sedition’, above n 12, 295, stating that ‘[a]rchival and other evidence amply demonstrates that sedition is invariably used in an oppressive manner. In twentieth century Australia the history of the law of sedition is a history of repeated injustice meted out to left wing radicals.’

<sup>18</sup> For excellent accounts, see Douglas, above n 12; Maher, ‘The Use and Abuse of Sedition’, above n 12.

articles, which contained the seditious slogan, ‘Not a Man, Not a Ship, Not a Plane, Not a Gun for the Aggressive Imperialist War on Korea and Malaya’.<sup>19</sup> Although the Commonwealth succeeded at the trial and the appeal,<sup>20</sup> this shameful litigation, which coincided with the passage of the *Communist Party Dissolution Act 1950* (Cth), attracted considerable media attention and cast doubt upon the legality of the involvement of Australia in the war. Following failed prosecutions in 1953,<sup>21</sup> the Commonwealth accordingly reassessed its strategy in the use of sedition for subsequent cases. Significantly, sedition was not deployed against the perceived communist threat and anti-war protests during the Vietnam era.<sup>22</sup>

In late 2005, the existing sedition provisions in the *Crimes Act 1914* (Cth) (*‘Crimes Act’*) were repealed and new sedition offences were inserted into the *Criminal Code*. Reflecting its historical associations with treason, sedition is included in Chapter 5 of the *Criminal Code*, titled ‘The Security of the Commonwealth’, under Part 5.1 which is titled ‘Treason and Sedition’. The new sedition offences proscribe urging others to engage in a range of specified behaviours contained in s 80.2. Three of the sedition offences deal with behaviours closely aligned to treason, namely, urging others to overthrow the *Australian Constitution*, the Commonwealth, or the government (federal, state or territory), or urging others to assist the enemy or those engaged in armed hostilities.<sup>23</sup> Sedition is also directed towards protecting political freedoms more widely, proscribing the urging of others to interfere with parliamentary elections,<sup>24</sup> as well as upholding public order by proscribing the urging of violence between defined groups.<sup>25</sup> While the new sedition offences cover diverse territory, they are linked by a common thread of advocacy (or ‘urging’, to use the language of the *Criminal Code*) of violence or force in defined circumstances.

Framed across these five distinct offences, sedition has a multi-functional character and can be deployed against individuals in very different contexts. An effect of this multi-functionality is that the rationales underpinning the offences

<sup>19</sup> See, eg, ‘Not a Man, Not a Gun for Monopoly’s Robber War against Malaya’, *The Tribune* (Sydney), 5 May 1950, 2, cited in Douglas, above n 12, 230.

<sup>20</sup> See also Douglas, above n 12.

<sup>21</sup> See Maher, ‘The Use and Abuse of Sedition’, above n 12, 306–11; Maher, ‘Dissent, Disloyalty and Disaffection’, above n 12, 38–41, discussing the unsuccessful prosecutions of Communist Party members in 1953 and the opportunities those prosecutions provided for the Commonwealth to obtain information about Communist Party members.

<sup>22</sup> Douglas notes that, after the Burns trial, sedition was not used to deal with the more virulent Vietnam anti-war protest by unionists which had called for bans on the supply of war materials, boycotting of conscription and fundraising for the Vietcong. Rather, anti-war protestors were prosecuted for less serious public order offences such as offensive conduct: see Douglas, above n 12, 248. See, eg, *Ball v McIntyre* (1966) 9 FLR 237, in which the police prevented an anti-Vietnam protest outside Parliament House in Canberra. Desmond Ball, a university student, had climbed on a statue of George V and hung a placard that read: ‘I will not fight in Vietnam’. His conviction for offensive behaviour was quashed on appeal. The Supreme Court of the Australian Capital Territory ruled that this conduct could not reasonably be regarded as ‘offensive’ in light of its obvious political context: see Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 760–1.

<sup>23</sup> *Criminal Code* s 80.2(1).

<sup>24</sup> *Criminal Code* s 80.2(4).

<sup>25</sup> *Criminal Code* s 80.2(5).

are blurred, effectively combining competing rationales relating to security and anti-discrimination. In light of the wide terrain covered by sedition offences, it is doubtful whether the availability of ‘good faith’ or public interest defences is an adequate safeguard against over-criminalisation and provides sufficient legal protection for those who engage in otherwise legitimate political activity. The scope of sedition, which is punishable by seven years of imprisonment,<sup>26</sup> should not rest on discretionary judgements of prosecutors, judges and juries about the perceived ‘legitimacy’ of otherwise seditious behaviour. As Enid Campbell and Harry Whitmore pointed out more than 30 years ago, ‘[w]hen the law may have such broad application, it is only the executive discretion as to prosecution which stands in the way of governmental suppression of unpopular political views.’<sup>27</sup> While there exists a strong culture of police, prosecutorial and judicial independence in Australia, recent benign history provides no assurance as to future practice. In our view, the offences must be confined through clearly and narrowly defined physical and fault elements.

Clearly the boundaries of criminal liability for sedition must be determined and justified at the law creation stage. Core definitions of these offences must give careful consideration to their possible impact on the freedom of political communication. Criminalisation of ‘offensive speech’ with a political context has always been problematic — constitutional law places limits on laws which impose unreasonable or disproportionate restraints on the freedom of political communication.<sup>28</sup> Beyond these constitutional limitations, offensive language crimes arouse objections because of their history of discretionary enforcement against minorities who verbally resist police authority.<sup>29</sup>

It is often said that sedition is a symbolic or political offence. As Douglas perceptively observed, the use of sedition prosecutions operates symbolically as a political barometer:

Their use is a guide to what governments are willing to tolerate, and even when prosecutions are used sparingly, the fact that they are used at all indicates that governments are relatively confident that the political climate is sufficiently tolerant of repression for them to be able to get away, not only with political prosecutions, but with the more subtle, more ubiquitous, and more effective forms of repression which typically accompany prosecutions for political crimes.<sup>30</sup>

The symbolism of sedition does not dilute its impact, either directly or indirectly. Sedition laws are claimed to have a ‘chilling effect’ on public debate which particularly affects the activities of publishers, scholars and political organisations critical of government policy. Since Douglas offered his assessment, the potential application of sedition laws has been considered by law

<sup>26</sup> *Criminal Code* s 80.2.

<sup>27</sup> Enid Campbell and Harry Whitmore, *Freedom in Australia* (revised ed, 1973) 329.

<sup>28</sup> See below Part III(B) for a discussion of the decision in *Coleman v Power* (2004) 220 CLR 1 (‘*Coleman*’), where the High Court considered the compatibility of the Queensland offence of using insulting language with the implied freedom of political communication. See also Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 759.

<sup>29</sup> Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 767–8.

<sup>30</sup> Douglas, above n 12, 248.

enforcement agencies in relation to Islamic books dealing with ‘jihadist’ themes. While not falling within sedition per se, the Attorney-General referred eight books to the Classification Review Board, which subsequently banned two Islamic texts, both authored before September 11, dealing with the topic of ‘violent jihad’.<sup>31</sup> This raised concern that an era of political censorship had been revived in Australia. Indeed, the role of the media in identifying these ‘Books of Hate’<sup>32</sup> suggests that the pressure to use sedition may not arise from law enforcement quarters, but paradoxically from the media pursuing the ‘public interest’. Indeed, the history of sedition in the 1940s demonstrates how the media itself, in an effort to expose the threat of communism within Australia, solicited public statements of disloyalty from Communist Party members. This was demonstrated in *R v Sharkey*,<sup>33</sup> where abstract hypotheticals or propositions were contrived in order to induce such statements.<sup>34</sup> The current political debate about Muslims and their allegiance to Australia suggests that religious and community leaders may be subject to similar ‘loyalty testing’ by overzealous investigative journalists.

### III THE NEW FORMS OF SEDITION: OLD WINE IN NEW BOTTLES?

When introducing the new sedition provisions into Parliament, the Attorney-General emphasised that the provisions were not a wholesale revision of the then existing sedition provisions. Rather, the new provisions were designed to modernise language.<sup>35</sup> Moreover, as the Explanatory Memorandum emphasised, the new provisions were largely based on the recommendations of the Committee of Review of Commonwealth Criminal Law chaired by the former Chief Justice Sir Harry Gibbs (‘Gibbs Committee’).<sup>36</sup> However, their central place

<sup>31</sup> Classification Review Board, ‘Classification Review Board Determines 2 Islamic Books Are Refused Classification’ (Press Release, 10 July 2006) <<http://www.oflc.gov.au/resource.html?resource=879>>. See also the final decisions of the Classification Review Board in relation to the two publications, *Defence of Muslim Lands* and *Join the Caravan*, that were refused classification: Classification Review Board, *Defence of the Muslim Lands* (10 July 2006) Office of Film and Literature Classification <<http://www.oflc.gov.au/resource.html?resource=877&filename=877.pdf>>; Classification Review Board, *Join the Caravan* (10 July 2006) Office of Film and Literature Classification <<http://www.oflc.gov.au/resource.html?resource=873&filename=873.pdf>>. In recent times, obscenity laws and classification laws have been used more to regulate pornography, rather than political ideology: see Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 615. These Classification Review Board decisions to refuse classification reflect a greater preparedness on the part of government to exercise control over Islamic political and religious material linked to terrorism. ‘Refused Classification’ by the Classification Review Board prevents the distribution or importation of these books. See also Norman Abjorensen, ‘Strike up the Ban: Censor Joins the War on Terrorism’ (Discussion Paper No 26/06, Democratic Audit of Australia, The Australian National University, 2006).

<sup>32</sup> The ‘Books of Hate’ episode is discussed in ALRC, *Fighting Words*, above n 6, 220–1, 222.

<sup>33</sup> (1949) 79 CLR 121 (‘*Sharkey*’). See further below Part III(A).

<sup>34</sup> Laurence Louis Sharkey was prosecuted for statements, made during an interview with the press, where he said that in the event of a war against the Soviets, ‘Australian workers would welcome Soviet Forces’: *Sharkey* (1949) 79 CLR 121, 123; see also Maher, ‘The Use and Abuse of Sedition’, above n 12, 301.

<sup>35</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 3 November 2005, 103 (Philip Ruddock, Attorney-General).

<sup>36</sup> Explanatory Memorandum, Anti-Terrorism Bill [No 2] 2005 (Cth) 88. See H Gibbs, R Watson and A Menzies, ‘Review of Commonwealth Criminal Law: Offences Relating to the Security and Defence of the Commonwealth’ (Discussion Paper No 8, Committee of Review of Com-

amongst the raft of new terrorism provisions was undoubted. The Senate Legal and Constitutional Legislation Committee recommended that the provisions not be enacted until an inquiry was undertaken by the ALRC into the best means of preventing the incitement of terrorism.<sup>37</sup> The Howard Government, however, did not accept those recommendations, preferring that the provisions be enacted (with some recommended changes) and the ALRC to conduct a review of the provisions after their enactment.

Broadly speaking, two of the five offences contained within the *Criminal Code* prohibit persons urging others to use force or violence against the constitutional system of government. Another two offences, broadly speaking, proscribe persons urging others to assist enemies of Australia. Those provisions criminalise the following conduct:

- where a person urges another person to overthrow by force or violence the Constitution,<sup>38</sup> the government of the Commonwealth, a state or a territory,<sup>39</sup> or the lawful authority of the government of the Commonwealth (s 80.2(1));
- where a person urges another person to interfere by force or violence with federal parliamentary elections (s 80.2(3)); and
- where a person urges another person to assist an organisation or country at war with the Commonwealth or engage in armed hostilities against the Australian Defence Force (s 80.2(7), (8)).

The offences in s 80.2(1) and (3) are established whether the urging of force or violence is *intended* for the relevant institutions and process of government, or whether the person urging the conduct is *reckless* as to that element of the offence.<sup>40</sup> The offences in s 80.2(7) and (8) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.<sup>41</sup> All the offences in s 80.2 are subject to a ‘good faith’ defence in s 80.3. ‘Good faith’ encompasses attempts to:

- show mistakes in government policy, or errors in government or law with a view to reform;
- urge lawful reform;

monwealth Criminal Law, 1988); H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991).

<sup>37</sup> Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Provisions of the Anti-Terrorism Bill [No 2] 2005* (2005) 115, cited in ALRC, *Fighting Words*, above n 6, 35.

<sup>38</sup> As Dixon J recognised in *Burns v Ransley* (1949) 79 CLR 101, 115, the word ‘Constitution’ ‘does not refer to a document or instrument of government but to the polity or organized form of government which the fundamental rules of law have established whether they are expressed in a written constitution or not.’

<sup>39</sup> The word ‘government’ was interpreted by Dixon J ‘to signify the established system of political rule, the governing power of the country consisting of the executive and the legislature considered as an organized entity and independently of the persons of whom it consists from time to time’: *ibid*. An interpretation that would cover persons in political and public offices would give the provision ‘an application inconsistent with parliamentary and democratic institutions and with the principles of the common law ... governing the freedom of criticism and of expression’: *at ibid*.

<sup>40</sup> *Criminal Code* s 80.2(2), (4).

<sup>41</sup> *Criminal Code* s 80.2(9).

- point out matters producing ill will or hostility between different groups;
- do anything in connection with an industrial dispute or matter; or
- publish a report about a matter of public interest.<sup>42</sup>

The good faith defence will be discussed further in Part V below.

Prior to their replacement by *Criminal Code* s 80.2, the sedition provisions were contained in s 24D of the *Crimes Act*. Section 24D made it an offence to write, print, utter or publish words expressive of a seditious intention.<sup>43</sup> A seditious intention included the following purposes:

- to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;<sup>44</sup> and
- to excite Her Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by the law of the Commonwealth.<sup>45</sup>

In 1986, the offences of sedition were significantly restricted by amendments to the *Crimes Act* which imposed a fault element into the definition of seditious conduct, which had to be carried out with 'the intention of causing violence or creating public disorder or a public disturbance'.<sup>46</sup> Section 24A(2) contained a range of 'good faith' defences similar to *Criminal Code* s 80.3.

Three main points may be made about the respective sets of provisions. First, in relation to provisions protective of the Commonwealth constitutional framework, the current provisions target the urging of *forceful* or *violent* action. In contrast, *Crimes Act* s 24A(d), in its original form, focused more broadly on the excitement of disaffection against those institutions.<sup>47</sup> As stated by the ALRC, the 'urging' provisions 'shift the emphasis from speech that is merely critical of the established order to exhortations to use force or violence'.<sup>48</sup> Second, the relevant provisions in *Crimes Act* s 24A that were protective of governmental institutions were limited to Commonwealth institutions. By contrast, *Criminal Code* s 80.2(1) also seeks to protect the government of a state from a person urging its forceful or violent overthrow.<sup>49</sup> Third, s 80.2(7) and (8) are new provisions, which were not explicitly recommended in those terms by the Gibbs

<sup>42</sup> *Criminal Code* s 80.3(1).

<sup>43</sup> When read with the definition of 'seditious words' in *Crimes Act* s 24B.

<sup>44</sup> *Crimes Act* s 24A(d).

<sup>45</sup> *Crimes Act* s 24A(f).

<sup>46</sup> *Crimes Act* ss 24B, 24D, discussed by Gibbs, Watson and Menzies, 'Review of Commonwealth Criminal Law: Offences Relating to the Security and Defence of the Commonwealth', above n 36, 303–4.

<sup>47</sup> Following a recommendation of the Royal Commission on Australia's Security and Intelligence Agencies, the provisions were amended in 1986 to require proof of an intention to create violence, public disturbance or disorder: Commonwealth, Royal Commission on Australia's Security and Intelligence Agencies, *Report on the Australian Security Intelligence Organization* (1985), cited in ALRC, *Fighting Words*, above n 6, 60.

<sup>48</sup> ALRC, *Fighting Words*, above n 6, 62.

<sup>49</sup> Although it is made clear that the Commonwealth does not seek to exclude the operation of state sedition laws.

Committee. There was some disagreement in submissions to the ALRC as to whether these were entirely new provisions, with the Attorney-General's Department arguing that they were 'clearly contemplated' by the former repealed provisions.<sup>50</sup> Although new in form, at least some of the conduct caught by s 80.2(7) or (8) would have been covered by the earlier disaffection provisions. As the cases of *Burns v Ransley*<sup>51</sup> and *Sharkey*<sup>52</sup> show, statements in support of Soviet hostilities against Australia fell within the disaffection provisions.

#### A Constitutional Power

The constitutional validity of the former sedition provisions in *Crimes Act* s 24A were upheld by the High Court in *Burns v Ransley* and *Sharkey*. In *Sharkey*, the judges unanimously held that Commonwealth legislative power extended to the protection of Commonwealth governmental institutions from seditious words.<sup>53</sup> The power to protect the constitutional framework from force or violence is thus reasonably clear. There is little doubt that the Commonwealth Parliament has the legislative power to protect the Australian Government, not only from conduct involving force or violence, but also from those who urge others to use force or violence. The power would also extend to the protection of parliamentary elections in *Criminal Code* s 80.2(3), and to the protection of the government of a territory in s 80.2(1).<sup>54</sup>

As Dixon J emphasised in *Sharkey*, however, the power has its limitations. These limitations will be explored further below.<sup>55</sup> For present purposes, it is sufficient to note that this Commonwealth power would not 'authorize legislation upon matters which are prima facie within the province of the States upon grounds of a connection with Federal affairs that is only tenuous, vague, fanciful or remote.'<sup>56</sup>

Two points may be made in this regard. First, while the role of *recklessness* in relation to the constitutional elements of the offence potentially removes the proscribed conduct from the core territory of federal protection, as Dixon J said, Commonwealth power in this respect 'has always been applied flexibly and liberally' and would probably extend to the proscription of conduct engaged in with reckless disregard of its federal effects.<sup>57</sup> This is especially the case given

<sup>50</sup> ALRC, *Fighting Words*, above n 6, 226, citing Submission to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Anti-Terrorism Bill [No 2] 2005*, 22 November 2005, Submission No 290A, attach A (Attorney-General's Department).

<sup>51</sup> (1949) 79 CLR 101. This was an appeal from the conviction of Gilbert Burns. Cf the prosecution and conviction of William Fardon Burns discussed previously: see above nn 18–20 and accompanying text.

<sup>52</sup> (1949) 79 CLR 121.

<sup>53</sup> However, their Honours' views differed as to the source of that power. Latham CJ, McTiernan and Webb JJ referred to the express incidental power in s 51(xxxix): *ibid* 135 (Latham CJ), 157 (McTiernan J), 163 (Webb J). Dixon J referred to the implied power arising 'out of the very nature and existence of the Commonwealth as a political institution': at 148. Rich and Williams JJ did not specify a head of power: at 145 (Rich J), 159–65 (Williams J).

<sup>54</sup> Under *Australian Constitution* s 122.

<sup>55</sup> See below Part IV(A).

<sup>56</sup> *Sharkey* (1949) 79 CLR 121, 151 (Dixon J).

<sup>57</sup> *Ibid*.

the narrow subjective meaning of recklessness for these purposes.<sup>58</sup> Second, unless, as Dixon J said in *Sharkey*, ‘domestic violence within a State is of such a character as to interfere with the operations of the Federal Government, or with the rights and privileges of federal citizenship’,<sup>59</sup> the Commonwealth has no power to interfere to protect against that violence. Thus, there must be at least some doubt as to the constitutional power to prohibit the urging of persons under *Criminal Code* s 80.2(2)(b) which is directed to a state government on the basis Dixon J’s judgment in *Sharkey*. It may well be, however, that s 80.2(2)(b) can be supported as a provision enacted under the external affairs power for the purpose of implementing international obligations to prohibit incitement to commit a terrorist act.<sup>60</sup>

### B *Implied Freedom of Political Communication and Interpretive Uncertainties*

The High Court sedition cases of *Burns v Ransley* and *Sharkey* preceded the development of the implied freedom of political communication. Despite some continuing dissatisfaction with its existence,<sup>61</sup> it is reasonably settled that an implied constitutional limitation on Commonwealth and state legislative and executive powers derives from the provisions of the *Australian Constitution* that create the Commonwealth system of representative and responsible government and the process for federal referenda.<sup>62</sup> The limitation protects political communication that is relevant to those federal constitutional institutions and processes to the extent necessary for their effective operation.<sup>63</sup> The protection, however, is not absolute, and there will be circumstances where political communication may be burdened in pursuit of other public interests. In many important respects, the dimensions of the constitutional protection are unclear or unresolved, and its application in some contexts is difficult to predict.<sup>64</sup> However, it has developed sufficiently such that a number of initial observations can be made as to the compatibility of the sedition provisions with the implied freedom.

<sup>58</sup> See *Criminal Code* s 5.4.

<sup>59</sup> (1949) 79 CLR 121, 151.

<sup>60</sup> See ALRC, *Fighting Words*, above n 6, 104, where the binding nature of United Nations Security Council decisions on Australia, as a member state of the United Nations, is discussed.

<sup>61</sup> See, eg, the judgments of Callinan J: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 338–9; *Roberts v Bass* (2002) 212 CLR 1, 101–2; *Coleman* (2004) 220 CLR 1, 88; *APLA Lid v Legal Services Commissioner of New South Wales* (2005) 224 CLR 322, 477 (‘APLA’).

<sup>62</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (‘Lange’). Prior to *Lange*, there were differing views as to the constitutional foundation for the implied freedom. However, in *Lange*, the High Court held that the freedom was firmly grounded in the text of the *Australian Constitution*.

<sup>63</sup> *Lange* (1997) 189 CLR 520, 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

<sup>64</sup> In the context of copyright, see Robert Burrell and James Stellios, ‘Copyright and Freedom of Political Communication in Australia’ in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses* (2005) 257, 257. In relation to racial and religious vilification laws, see Nicholas Aroney, ‘The Constitutional (In)validity of Religious Vilification Laws: Implications for Their Interpretation’ (2006) 34 *Federal Law Review* 287; Dan Meagher, ‘What is “Political Communication”? The Rationale and Scope of the Implied Freedom of Political Communication’ (2004) 28 *Melbourne University Law Review* 438.

When determining the compatibility of a provision with the implied freedom, the test adopted unanimously by the High Court in *Lange*, as modified by a majority in *Coleman*,<sup>65</sup> asks two questions:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end [in a manner<sup>66</sup>] which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government ... If the first question is answered 'yes' and the second is answered 'no', the law is invalid.<sup>67</sup>

To take the easiest question first, there is no doubt the sedition provisions would be seen as pursuing legitimate interests. As indicated, the enactment of s 80.2 of the *Criminal Code* has shifted the focus of the provisions to the prevention of force or violence. Assuming the provisions are otherwise within federal power, preventing the risk of force or violence against governmental institutions and processes would be viewed as directed towards legitimate ends. In *Coleman*, the state provisions in question prohibited the use of 'threatening, abusive or insulting words' to any person in a public place.<sup>68</sup> All judges accepted that the *prevention of violence* was a legitimate end to be pursued by the legislation. McHugh J stated that '[r]egulating political statements for the purpose of preventing breaches of the peace by those provoked by the statements is an end that is compatible with the system of representative government established by the *Constitution*.'<sup>69</sup> Although the Court was specifically concerned with violence towards a person engaged in provocative conduct, the rationale is equally applicable to the provocation of violence towards others. Furthermore, the protection of Commonwealth electoral processes,<sup>70</sup> and the prevention of persons assisting the enemy,<sup>71</sup> would be seen as legitimate government interests.

The questions of whether these laws burden political communication, and whether the provisions are reasonably appropriate and adapted to a legitimate end, will depend, significantly, on how they are interpreted. The ALRC highlighted a range of interpretive difficulties with the sedition provisions, some of which go to the fault elements that have to be shown, while others go to the

<sup>65</sup> *Coleman* (2004) 220 CLR 1, 30 (McHugh J), 57 (Gummow and Hayne JJ), 61–2 (Kirby J). Despite a clear acceptance of that change by a majority of the Court, the altered test was not applied by the other three judges in the subsequent case of *APLA* (2005) 224 CLR 322.

<sup>66</sup> The wording in parentheses was altered by a majority of the High Court in *Coleman* (2004) 220 CLR 1, 30–1 (McHugh J), 57 (Gummow and Hayne JJ), 62 (Kirby J).

<sup>67</sup> *Lange* (1997) 189 CLR 520, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) (citations omitted). The Court in *Lange* said the 'reasonably appropriate and adapted' test is more or less equivalent to the test of proportionality: at 567 fn 272. However, it is unlikely that the use of the idea of proportionality squares precisely with the way in which that concept is used in international or comparative human rights jurisprudence.

<sup>68</sup> (2004) 220 CLR 1, 8 (Gleeson CJ).

<sup>69</sup> *Ibid* 33.

<sup>70</sup> *Criminal Code* s 80.2(3). See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Langer v Commonwealth* (1996) 186 CLR 302.

<sup>71</sup> For comments regarding the protection of national security, see, eg, *Coleman* (2004) 220 CLR 1, 32 (McHugh J).

meaning of the expressions used in the provisions to describe the physical elements and defences.

In broad terms, the new offences of sedition subscribe to the general principle in the criminal law that serious crimes require proof of intention, a presumption reflected both in the common law and the principles of criminal responsibility in the *Criminal Code*. Under the *Criminal Code*, the default provisions, which apply where the fault element is unspecified, require proof of intention in relation to elements of conduct, and recklessness as to the circumstances or results specified in the offence.<sup>72</sup> Accepting that sedition offences have a broader preventative focus than ordinary incitement, the ALRC rejected the argument that the ‘urging’ must relate to a *specific* terrorist act or other crime.<sup>73</sup> For the purpose of sedition, the fault element need only relate to the use of force or violence in general terms.

An arena of controversy, however, arises in relation to the *scope* of that fault element. For some offences, recklessness in relation to defined circumstances or results is included as an express fault element. The Attorney-General’s Department argues that, outside these cases, the ordinary presumption of fault in the *Criminal Code* operates. In its view, the offences of sedition are ‘conduct crimes’, and thus all that must be proved is that the conduct element (namely, the ‘urging’) was intentional.<sup>74</sup>

The ALRC took a different view, recommending that the provisions be amended to insert the word ‘intentionally’ before the word ‘urges’ to clarify the fault element applicable to urging the use of force or violence.<sup>75</sup>

In our view, the placement of the adverb ‘intentionally’ does not achieve this objective, and may indeed promote ambiguity. The ALRC claims that the term ‘intentionally’ relates not only to the conduct element, but also to the results (the use of force or violence which is being urged).<sup>76</sup> However, to achieve the latter objective unambiguously — and to avoid the possibility that a court may interpret the offence as one of recklessness as to the results under s 5.6 of the *Criminal Code* — the offence should have framed the intention requirement expressly, stating ‘the person must intend that the urged force or violence will occur’. This way of framing the intention element would be consistent with the

<sup>72</sup> *Criminal Code* s 5.6.

<sup>73</sup> ALRC, *Fighting Words*, above n 6, 174.

<sup>74</sup> See Submission to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Anti-Terrorism Bill [No 2] 2005*, 22 November 2005, Submission No 290A (Attorney-General’s Department); Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill [No 2] 2005*, above n 37, 99–100, cited in ALRC, *Fighting Words*, above n 6, 178.

<sup>75</sup> ALRC, *Fighting Words*, above n 6, 181. The Attorney-General’s Department resisted inclusion of the word ‘intentionally’ as superfluous in light of *Criminal Code* s 5.6, which arguably has the same effect: Submission to ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, 3 July 2006, Submission No 92 (Attorney-General’s Department), cited in ALRC, *Fighting Words*, above n 6, 180.

<sup>76</sup> See Recommendation 8–1: ALRC, *Fighting Words*, above n 6, 176. The Attorney-General and the Commonwealth Director of Public Prosecutions opposed the recommendation, citing evidential difficulties in relation to proving this state of mind: at 175. The ALRC rejected this argument, noting the seriousness of the offence and that the Crown is obliged to prove intention for many similar offences: at 175.

earlier 1986 amendment of the sedition offence which, as noted above, required ‘an intention of causing violence’.<sup>77</sup>

The desirability of construing sedition as an offence requiring an intention *as to a result* (not merely as to conduct or circumstance) is highlighted by the High Court’s approach in regard to sedition provisions.<sup>78</sup> When dealing with the provisions in their previous form, a majority of the High Court took a broad view of what conduct constituted the excitement of disaffection. For example, Rich J in *Burns v Ransley* and *Sharkey* held that to ‘excite’ disaffection included to ‘inspire or kindle’ disaffection.<sup>79</sup> Latham CJ appeared to take the view that the ‘statement of an abstract theoretical opinion’ or ‘a set of abstract intellectual propositions which had no relation to action by any person or persons’ would not have been covered by the prohibitions.<sup>80</sup> However, his Honour (along with Rich J) held that the hypothetical nature of the alleged seditious intention did not exclude it from the prohibition.<sup>81</sup> In contrast, Dixon J thought there had to be a ‘real intention’, the purpose itself ‘must be a reality’,<sup>82</sup> and statements relating to a contingency or spoken as a hypothesis would not be caught.<sup>83</sup> McTiernan J also focused on the actual purpose of the speaker in the context, rather than ‘the tendency of the words or the result which they are calculated to produce’.<sup>84</sup>

A statutory majority of the Court in *Burns v Ransley* (Latham CJ and Rich J) held that the statements made by a representative of the Australian Communist Party during a public debate were caught by the sedition provisions.<sup>85</sup> The statements were in response to questions pressed by the media, and were to the effect that Australian Communist Party members would fight on the side of Soviet Russia in the event of a future war. Intention as to a result — namely the occurrence of violence or force — may assist in limiting the scope of the offence, excluding statements which only have a remote or fanciful connection with the use of violence or force being targeted by the offence.

Another deficiency with the new offences is that there is no requirement of *immediacy* or *likelihood* of the urged force or violence occurring.<sup>86</sup> Thus, urgings will be caught if intended to cause the force or violence, even if it is entirely unlikely or even fanciful that the force or violence would result. These questions of ‘proximity and degree’ have troubled courts when addressing incitement-type offences.<sup>87</sup> The United States Supreme Court has had difficulty developing and applying a test to accommodate free speech interests protected by the First Amendment and the competing public interest in preventing violent conduct. In

<sup>77</sup> See above n 46 and accompanying text.

<sup>78</sup> See also Maher, ‘The Use and Abuse of Sedition’, above n 12, 313–16, discussing the provisions in their previous forms.

<sup>79</sup> *Burns v Ransley* (1949) 79 CLR 101, 112; *Sharkey* (1949) 79 CLR 121, 145.

<sup>80</sup> *Sharkey* (1949) 79 CLR 121, 140.

<sup>81</sup> See *Burns v Ransley* (1949) 79 CLR 101, 108 (Latham CJ), 111 (Rich J).

<sup>82</sup> *Ibid* 115–16.

<sup>83</sup> *Ibid* 117–18.

<sup>84</sup> *Ibid* 119.

<sup>85</sup> *Ibid* 109 (Latham CJ), 112 (Rich J).

<sup>86</sup> Cf Maher, ‘The Use and Abuse of Sedition’, above n 12, 313–16, discussing the provisions in their previous form.

<sup>87</sup> *Schenck v United States*, 249 US 47, 52 (Holmes J) (1919).

trying to draw the line between constitutionally protected speech and the unlawful incitement of violence, the Supreme Court has moved from a ‘clear and present danger’ test<sup>88</sup> to a balancing model,<sup>89</sup> and finally, to the test in *Brandenburg v Ohio* that asks whether the speech is ‘directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action.’<sup>90</sup> Lower Australian courts have also struggled with the same questions when dealing with constitutional arguments about religious and racial vilification legislation.<sup>91</sup> The ALRC considered that these concerns would be addressed indirectly by its recommendation for the inclusion of a requirement that there be an intention that the urged force or violence occur.<sup>92</sup> The introduction of tests of imminence or reasonable likelihood of violence would, in the view of the ALRC, introduce additional complexity.<sup>93</sup> With respect, we disagree. Imminence is a legal concept that is used widely both in constitutional and criminal law, and plays a significant role in defining other public order powers and offences relating to breach of the peace.<sup>94</sup>

In relation to the prohibitions in *Criminal Code* s 80.2(7) and (8), the main concern of the ALRC was the breadth of the word ‘assist’. In its view, ‘assisting an organisation or country’ could be interpreted or applied ‘to proscribe legitimate political protest, and punish merely rhetorical encouragement or support for those who disagree with Australian government policy’, and extend to prohibit the urging of lawful conduct.<sup>95</sup> The ALRC also recommended that s 80.2(7) and (8) be repealed, and that a provision relating to assistance be relocated to the treason offence in s 80.1(1), with the clarification that only ‘material’ assistance is intended to be caught and that the assistance must enable an enemy ‘to engage in war’ with the Commonwealth or ‘to engage in armed hostilities’ against the Australian Defence Force.<sup>96</sup>

Compatibility with the implied freedom of political communication will also depend upon the scope of the defences. Many of the ‘good faith’ defences,<sup>97</sup> on their face, appear to be directed at protecting political communication. Thus, provided there is ‘good faith’, a person can (most relevantly for present purposes):

- try to show that the sovereign, Governor-General, Governors or others referred to in s 80.3(a) are mistaken;

<sup>88</sup> *Ibid.*

<sup>89</sup> *Dennis v United States*, 341 US 494 (1951).

<sup>90</sup> 395 US 444, 447 (Burger CJ, Harlan, Brennan, Stewart, White and Marshall JJ) (1969) (emphasis added). See the discussion of these movements in Erwin Chemerinsky, *Constitutional Law, Principles and Policies* (2<sup>nd</sup> ed, 2002) 954–67.

<sup>91</sup> See Aroney, above n 64; Meagher, above n 64.

<sup>92</sup> ALRC, *Fighting Words*, above n 6, 185.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Forbutt v Blake* (1981) 51 FLR 465, 469–70 (Connor ACJ), discussed in Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 730.

<sup>95</sup> ALRC, *Fighting Words*, above n 6, 230; see also at 116.

<sup>96</sup> See Recommendation 11–1: *ibid* 231; Recommendation 11–2: at 234.

<sup>97</sup> See further below Part V, where the defence in *Criminal Code* s 80.3 is set out in full.

- point out errors or defects in the government, legislation or administration of justice at the federal, state or territory level under s 80.3(b) with a view to reforming those errors or defects;
- urge another person to lawfully procure legal or administrative change at the federal, state or territory level under s 80.3(c); and
- publish a report or commentary about a matter of public interest under s 80.3(h).

In considering the earlier ‘good faith’ defences, Latham CJ in *Burns v Ransley* certainly thought that they were protective of political criticism and opposition.<sup>98</sup>

Various submissions to the ALRC highlighted the potential limits of the defences for protecting political communication.<sup>99</sup> For example, it is unclear whether ‘publishing’ in s 80.3(h) would protect *oral* comment or reporting, or whether a ‘report or commentary’ would cover artistic expression or satire.<sup>100</sup> Furthermore, the defence in s 80.3(1)(b), which requires that the communication be made ‘with a view to reforming those errors or defects’, might be said to be limited to ‘constructive forms of expression’, and thus not cover political satire or irony.<sup>101</sup> The same might be said for the necessary condition of ‘good faith’ for all the defences.<sup>102</sup>

The clearest indication from the High Court on the areas of sedition and political communication come from its decision in *Coleman*.<sup>103</sup> As indicated, the Court in *Coleman* considered the validity of a prohibition on the use of ‘insulting’ words in a public place. The charges stemmed from Patrick Coleman’s personal campaign against alleged police corruption where he distributed pamphlets that named several police officers who, in his view, were corrupt. When Coleman was distributing the pamphlets, a police officer named in one of the pamphlets approached him and an altercation followed in which Coleman said, ‘this is Constable Brendan Power, a corrupt police officer.’<sup>104</sup> He was convicted of using insulting words in a public place, contrary to *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7(1)(d).<sup>105</sup> A four-member majority held the prohibition did not apply to the words of Coleman. Three of the four

<sup>98</sup> (1949) 79 CLR 101, 109.

<sup>99</sup> ALRC, *Fighting Words*, above n 6, 251.

<sup>100</sup> *Ibid* 249–52.

<sup>101</sup> Cf in *Coleman* (2004) 220 CLR 1, 26, where McHugh J states that ‘[i]nsults are as much a part of communications concerning political and government matters as is irony, humour or acerbic criticism’. Kirby J held that the constitutional system of government ‘belongs as much to the obsessive, the emotional and the inarticulate as it does to the logical, the cerebral and the restrained’: at 79. McHugh J has also stated in *Levy v Victoria* (1997) 189 CLR 579, 623, that the freedom ‘protects false, unreasoned and emotional communications as well as true, reasoned and detached communications’. Toohey and Gummow JJ made a similar point: at 613. As to whether political satire can be protected by the implied freedom, see *Australian Broadcasting Corporation v Hanson* [1998] QCA 306 (Unreported, de Jersey CJ, McMurdo P and McPherson JA, 28 September 1998); cf *Brander v Ryan* (2000) 78 SASR 234.

<sup>102</sup> ALRC, *Fighting Words*, above n 6, 249–52.

<sup>103</sup> See generally Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 758–60.

<sup>104</sup> *Coleman* (2004) 220 CLR 1, 21 (Gleeson CJ).

<sup>105</sup> The Queensland Parliament has since repealed this provision: see *Vagrants, Gaming and Other Offences Act 1931* (Qld) s 7AA. This Act has since been repealed in its entirety by the *Summary Offences Act 2005* (Qld).

judges in the majority (Gummow, Hayne and Kirby JJ) interpreted the word ‘insulting’ narrowly, only to cover words ‘intended to provoke unlawful physical retaliation, or were reasonably likely to do so’.<sup>106</sup> Their Honours’ conclusion on that narrow construction was reinforced by the existence of the implied freedom,<sup>107</sup> with strong suggestions that broader interpretations would breach the constitutional limitation.<sup>108</sup>

The other member of the majority, McHugh J, interpreted the word ‘insulting’ more broadly to cover the use of words ‘calculated to hurt the personal feelings of a person and [which] did affect the feelings of that person’.<sup>109</sup> On this basis, his Honour held the unqualified prohibition on the use of insulting words (which would include political communication) could not be justified by the objective of preventing a breach of the peace and was therefore invalid. Without being prescriptive of what might meet constitutional requirements, his Honour indicated that ‘the law would have to make proof of a breach of the peace and the intention to commit the breach elements of the offence.’<sup>110</sup>

Thus, in the analogous context of criminalising ‘fighting words’,<sup>111</sup> the judges identified different dimensions of the communication process as falling beyond constitutional protection. Gummow and Hayne JJ, with Kirby J agreeing, seemed to identify either the intention of the speaker *or* the reasonable likelihood of the effect as elements that can be criminalised.<sup>112</sup> On the other hand, McHugh J seemed to identify both an actual impact *and* intention as legislative requirements before a sanction could apply free of constitutional constraints.<sup>113</sup> Of course, given the nature of the issue in *Coleman*, and the way in which their Honours resolved the questions through statutory interpretation, the majority judges were not required to push these conditions further. In particular, they were not called on to consider issues of ‘proximity and degree’ of the disorder apprehended.

In applying the implied freedom to the federal sedition provisions, the High Court will have to identify, with greater precision, the particular dimensions of the communication process that could be subject to prohibition. It will also have to engage with the problem of the point at which a communication will cease to be relevantly ‘political’ and transform into a communication that is beyond constitutional protection (which did not have to be addressed in *Coleman*). Defining the relevantly ‘political’ is something that the High Court has so far been reluctant to do.<sup>114</sup>

<sup>106</sup> *Coleman* (2004) 220 CLR 1, 54 (Gummow and Hayne JJ), 67 (Kirby J).

<sup>107</sup> *Ibid* 54 (Gummow and Hayne JJ), 71 (Kirby J).

<sup>108</sup> *Ibid* 58 (Gummow and Hayne JJ), 70 (Kirby J).

<sup>109</sup> *Ibid* 20 (McHugh J).

<sup>110</sup> *Ibid* 34.

<sup>111</sup> This is the way in which these types of laws are characterised in the US: see *Chaplinsky v New Hampshire*, 315 US 568 (1942). The ALRC appears to have applied that label to sedition-type offences: see ALRC, *Fighting Words*, above n 6. In the US, these are commonly known as cases involving ‘advocacy of illegal action’.

<sup>112</sup> *Coleman* (2004) 220 CLR 1, 54 (Gummow and Hayne JJ), 67 (Kirby J).

<sup>113</sup> *Ibid* 34.

<sup>114</sup> Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25 *Melbourne University Law Review* 374, 378–83; see further Adri-

However in the end, as the ALRC concluded, the sedition provisions are probably valid for two reasons. First, they do not burden political communication (on the assumption that the urging of the use of force or violence, or the giving of assistance to our enemies to engage in hostilities, cannot be characterised as relevantly political). Second, even if there is such a burden, the provisions are reasonably appropriate and adapted to achieving their legitimate end.<sup>115</sup> Their focus on the prevention of the use of force and violence, or assistance to Australia's enemies, is probably sufficiently narrow (as was the case in *Coleman*) to justify the prohibitions, even if they do catch the odd constitutionally protected communication. This would especially be the case if the High Court consciously interprets the prohibitions narrowly with sensitivity to the requisite fault elements and issues of proximity and degree (as was the case in the judgments of Dixon and McTiernan JJ in *Burns v Ransley*), and if it takes a generous view of the 'good faith' defences (a statutory dimension absent in *Coleman*).

#### IV URGING INTER-GROUP VIOLENCE: SEDITION WITH AN IDENTITY CRISIS?

Urging violence in the community, according to *Criminal Code* s 80.2(5), is a new offence, although it bears considerable conceptual similarity to s 24A(1) of the *Crimes Act*. The latter offence, which was one form of seditious intent, required the promotion of 'feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth'.<sup>116</sup>

The language of this offence was anomalous and outdated. The Attorney-General's Department strongly supported the case for modernisation, claiming that this wording addressed only incitement of unrest between different 'social classes'.<sup>117</sup> It followed that on this view, the offence had no application to the incitement of violence between groups distinguished on other grounds such as race, religion, nationality or political opinion. This 'class conflict' reading of seditious intent is overly restrictive. Historical research reveals that the 19<sup>th</sup> century common law (upon which subsequent statutory definitions were developed in the 20<sup>th</sup> century) conceived this form of seditious intent to deal specifically with Irish nationalist agitation against British rule.<sup>118</sup> Clearly then,

enne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28 *University of New South Wales Law Journal* 842; Meagher, above n 64.

<sup>115</sup> ALRC, *Fighting Words*, above n 6, 143–6.

<sup>116</sup> See *Crimes Act* s 24A(1)(g). This offence was inserted into the *Crimes Act* in 1920, following the classic definition of 'seditious intention' contained in Sir James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (4<sup>th</sup> ed, 1887). See further ALRC, *Fighting Words*, above n 6, 27–8, 47–8.

<sup>117</sup> Submission to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Provisions of the Anti-Terrorism Bill [No 2] 2005*, 16 November 2005, Submission No 290, 4 (Attorney-General's Department).

<sup>118</sup> ALRC, *Fighting Words*, above n 6, 202–3, notes that the definition in Stephen, above n 116, was influenced by *O'Connell v The Queen* (1844) 11 Cl & Fin 155; 8 ER 1061, in which the defendants were prosecuted successfully for conspiring to promote feelings of ill will and hostility

this earlier form of sedition could in fact criminalise incitement of violence between groups distinguished by race, religion, nationality or political opinion.

That said, the new sedition offence in the *Criminal Code* is a significant improvement on the earlier definition. Under s 80.2(5), a person commits an offence, and faces seven years' imprisonment, 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.

The new offence borrows heavily from the recommendations of the Gibbs Committee.<sup>119</sup> It has narrowed the physical element, replacing the language of 'disaffection' (such as feelings of ill will and hostility) with 'urging force or violence'. It has also clarified the meaning of 'classes' of subjects in the offence by reframing the definition in terms of specified groups.

#### A 'Constitutional Pegs'

As noted by the ALRC, this form of sedition has 'two possible constitutional pegs'.<sup>120</sup> One peg is domestic, linked to promoting security within the Commonwealth. The other peg is international, linked to the external affairs power of the *Australian Constitution* and various anti-discrimination obligations imposed by international law. Melding these two federal objects into a single provision pulls the offence in different directions, affecting both its form and scope. For reasons discussed below, we believe a federal offence of sedition that targets urging force or violence between groups is unnecessary; such an offence, if required, should be aligned to anti-discrimination law and addressed through state or territory provisions.<sup>121</sup> Our position differs from the view of the ALRC, which takes the view that this behaviour may be conceived as a public order offence, albeit one with a federal dimension.<sup>122</sup>

The present offence in s 80.2(5) reflects the federal dimension, by linking the urging of force or violence to the security of the Commonwealth. This linkage is achieved through inclusion of the clumsy, albeit constitutionally familiar, phrase

between the English and the Irish. See also ALRC at 202–3 which discusses *Boucher v The King* [1951] SCR 265, 293–4 (Kellock J).

<sup>119</sup> The influence of the Gibbs Committee on the definition is acknowledged in Explanatory Memorandum, Anti-Terrorism Bill [No 2] 2005 (Cth) 88. See generally ALRC, *Fighting Words*, above n 6, 32.

<sup>120</sup> ALRC, *Fighting Words*, above n 6, 32. Whether the implied freedom of political communication might operate to limit the operation of *Criminal Code* s 80.2(5) will depend upon similar considerations to those discussed in above Part III(B).

<sup>121</sup> Racially motivated violence is a significant manifestation of discrimination: Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence* (1991).

<sup>122</sup> The ALRC has proposed the alternate position, viewing the offence of inciting inter-group violence as a public order offence of the Commonwealth: ALRC, *Fighting Words*, above n 6, 222.

‘the peace, order and good government of the Commonwealth.’<sup>123</sup> Since its inclusion as a federal offence in 1920, the sedition provisions have included this limb, which draws directly upon the plenary powers phrase in s 51 of the *Australian Constitution*. The phrase enumerates the heads of Commonwealth power: ‘The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to [the relevant head of power]’.

The inclusion of this constitutional limb in *Crimes Act* s 24A(1)(g) was subjected to close scrutiny by Dixon J in *Sharkey*.<sup>124</sup> Although his Honour joined the rest of the Court in upholding the validity of the other sedition provisions, he dissented as to the validity of s 24A(1)(g). Having emphasised the need for a connection between the law and federal government, his Honour said:

Unless in some way the functions of the Commonwealth are involved or some subject matter within the province of its legislative power or there is some prejudice to the security of the Federal organs of government to be feared, ill-will and hostility between different classes of His Majesty’s subjects are not a matter with respect to which the Commonwealth may legislate. Such feelings or relations among the people form a matter of internal order and fall within the province of the States.<sup>125</sup>

Section 119 of the *Australian Constitution*, as Dixon J highlighted, provides for Commonwealth protection of every state against invasion and, on the application of the executive of the state, against domestic violence. Thus, unless there is an application by a state, ‘it is not within the province of the Commonwealth to protect the State against domestic violence.’<sup>126</sup>

It was in this context that Dixon J examined the words ‘so as to endanger the peace, order or good government of the Commonwealth’ in s 24A(1)(g). Having considered the various meanings of the words ‘the Commonwealth’, his Honour concluded that

[t]he words are ... incapable of any definite meaning which would provide the necessary connection with the subjects of Federal power, with the administration of the Federal Government or with the security of any of its institutions. ...  
... it describes no definite thing or state of fact capable of connecting the utterance with a subject of Commonwealth power or any of the affairs of the Commonwealth.<sup>127</sup>

The other judges upheld the validity of s 24A(1)(g), seemingly accepting that the provision’s textual connection to the Commonwealth was sufficient to bring the provision within power. Only Williams J expressed some concern, but was

<sup>123</sup> *Crimes Act* s 24A(1)(g) used the phrase ‘endanger the peace, order or good government of the Commonwealth’. It is unclear whether the use of ‘or’ rather than ‘and’ was a drafting error. In *Sharkey* (1949) 79 CLR 121, 153, Dixon J considered that the change of word made ‘no real alteration in the meaning of the phrase’, perhaps instead pointing ‘to the necessity of considering separately and distributively the elements that go to make up the welfare of the people.’

<sup>124</sup> (1949) 79 CLR 121, 149–51.

<sup>125</sup> *Ibid* 150.

<sup>126</sup> *Ibid* 151.

<sup>127</sup> *Ibid* 153–4.

content to uphold its validity on the basis that ‘the Commonwealth’ was to be read as referring to the Commonwealth as a body politic, and not in the geographical sense.<sup>128</sup>

Despite the majority view in *Sharkey*, there is great strength in Dixon J’s contention that the expression ‘the peace, order or good government of the Commonwealth’ is devoid of definite meaning necessary to bring s 80.2(5) within Commonwealth power. As his Honour said:

What is the element for which you are to look in the definition of the crime? What is the specific connection with the affairs of the Federal Government which must exist in fact and must be endangered by the seditious words? It is impossible to define it.<sup>129</sup>

As a result, some doubt remains as to whether s 80.2(5) could be supported on the basis accepted by the majority in *Sharkey*.

The constitutional limb of sedition frames the urging of violence or force against the *Commonwealth* as the paramount harm, directing attention away from the harm this type of incitement poses for individuals and groups targeted by discriminatory violence.<sup>130</sup> It constrains the offence significantly as the prosecution must prove that the urging of force or violence between groups would threaten ‘the peace, order and good government of the Commonwealth’. In terms of both scale and effect, this means that the prosecution would need to prove that the violence urged would impinge upon the security of the Commonwealth. This would arguably rule out its application to small-scale and localised intrastate violence, such as the recent race riots in Cronulla, Sydney, in 2005.<sup>131</sup> Notwithstanding this limitation, the ALRC favoured retention of the ‘peace, order and good government’ phrase, noting that ‘[n]ot every incident of civil unrest requires federal intervention’ and that there were other state and territory vilification laws applicable in these situations.<sup>132</sup>

The second peg upon which the constitutionality of the offence rests is related to various international human rights treaty obligations. As the Gibbs Committee noted,<sup>133</sup> the *International Covenant on Civil and Political Rights* provides that

<sup>128</sup> Ibid 159–60.

<sup>129</sup> Ibid 154.

<sup>130</sup> ALRC, *Fighting Words*, above n 6, 212–16, noting the concerns of the Fitzroy Legal Service and the Public Interest Advocacy Centre.

<sup>131</sup> A point made in ALRC, *Fighting Words*, above n 6, 219. The Cronulla race riots began on 11 December 2005 when an estimated mob of 5000 gathered at Cronulla Beach, and attacked persons of Middle Eastern appearance. Retaliatory attacks in Cronulla and surrounding suburbs occurred until order was restored. The racially-driven violence sent shock waves throughout the Australian community. See the report from a national symposium on understanding the causes and impacts of the Cronulla riots: Centre for Multicultural and Community Development, University of the Sunshine Coast and Multi-Faith Centre, Griffith University, *Responding to Cronulla: Rethinking Multiculturalism* (2006) <<http://www.usc.edu.au/NR/rdonlyres/F22784F0-05D0-45E1-B984-B75A7F1D2467/0/CronullaSymposiumProceedingsFinal.pdf>>. For media coverage, see, eg, ABC Television, ‘Riot and Revenge’, *Four Corners*, 13 March 2006 <<http://www.abc.net.au/4corners/content/2006/s1590953.htm>>.

<sup>132</sup> ALRC, *Fighting Words*, above n 6, 219.

<sup>133</sup> Gibbs, Watson and Menzies, *Fifth Interim Report*, above n 36, 306.

‘[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.’<sup>134</sup>

This obligation is further bolstered by the *International Convention on the Elimination of All Forms of Racial Discrimination*,<sup>135</sup> which imposes on state parties an obligation to adopt immediate and positive measures designed to eradicate all incitement of racial discrimination, or acts of racial discrimination and, inter alia, 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, and also the provision of any assistance to racist activities, including the financing thereof ...<sup>136</sup>

Despite the superficial similarities with a rights-protective provision, there are significant doubts as to whether the validity of s 80.2(5) can be supported as a provision enacted for the purpose of implementing international human rights obligations. The High Court has allowed the Commonwealth some leeway to implement human rights obligations selectively.<sup>137</sup> However, as the Court has noted, ‘[w]here a treaty relating to a domestic subject matter is relied on to enliven the [external affairs power] the validity of the law depends on whether its purpose or object is to implement the treaty’.<sup>138</sup>

With those observations in mind, the availability of the *ICCPR* or *CERD* provisions to support s 80.2(5) must be open to some doubt. First, the addition of the link to the ‘peace, order and good government of the Commonwealth’ significantly narrows the scope of the prohibition in a manner not envisaged by these international treaties.<sup>139</sup> It was submitted to the ALRC that the words ‘the Commonwealth’ could be understood in a geographical sense,<sup>140</sup> which might broaden the scope of the provision. However, that interpretation would be contrary to the observations in *Sharkey* and would undermine the first peg of

<sup>134</sup> Opened for signature 16 December 1966, 999 UNTS 171, art 20(2) (entered into force 23 March 1976) (*‘ICCPR’*).

<sup>135</sup> Opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) (*‘CERD’*).

<sup>136</sup> *Ibid* art 4(a).

<sup>137</sup> Partial implementation of treaty obligations has been accepted by the High Court: see *Victoria v Commonwealth* (1996) 187 CLR 416, 488 (*‘Industrial Relations Act Case’*). See, eg, *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4, which seeks partially to implement only the privacy provision in the *ICCPR* by providing that sexual conduct involving consenting adults acting in private is not to be subject to any arbitrary interference by the Commonwealth, a state or a territory. Although the constitutional validity of the provision was not determined in *Croome v Tasmania* (1997) 191 CLR 119, the Court did not express any indication to the contrary.

<sup>138</sup> *Industrial Relations Act Case* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ). The test to be satisfied for implementation is whether the Commonwealth provision is ‘reasonably capable of being considered appropriate and adapted to achieving the purpose or object of giving effect to the treaty’: at 488 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

<sup>139</sup> Ben Saul, ‘Speaking of Terror: Criminalising Incitement to Violence’ (2005) 28 *University of New South Wales Law Journal* 868, 877.

<sup>140</sup> Gareth Griffith, ‘Sedition, Incitement and Vilification: Issues in the Current Debate’ (Briefing Paper No 1, Parliament of New South Wales, 2006) 35, cited in ALRC, *Fighting Words*, above n 6, 211.

constitutional support.<sup>141</sup> Second, the prohibition on the urging of *force or violence* is only a subset of the international obligations that have a much broader focus.<sup>142</sup> Third, the group characteristics identified in s 80.2(5) include ‘political opinion’ — a characteristic not set out in the treaty provisions.<sup>143</sup> Fourth, the prohibition is limited to inter-group force or violence. It does not include urgings directed towards individuals or groups not identified by the prescribed characteristics, nor would it cover the urging of prescribed group violence against individuals or other groups without those characteristics.<sup>144</sup>

Taken individually, these points of departure from the treaty obligations might fall within the leeway allowed under the external affairs power. However, if taken together, there is a strong argument that they demonstrate the divergent purposes of s 80.2(5). The acknowledged purpose of s 80.2(5) is to deal with the root causes of terrorism. On the other hand, as Ben Saul has argued, ‘[t]he rationale for protecting one group from violence by another is not to prevent sedition or terrorism, but to guarantee the dignity of the members of human groups in a pluralist society’.<sup>145</sup> While these are not necessarily mutually exclusive objectives, for the purposes of the external affairs power, coincidence is not enough: the law must be enacted *for the purpose* of implementing the treaty provisions. Much is revealed by the statement of the Attorney-General’s Department to the ALRC that ‘the enactment of s 80.2(5) is consistent with, but not required by, Australia’s obligations under international law.’<sup>146</sup> This lack of purpose is further underscored by the Commonwealth’s reservations to the specific provisions of the *ICCPR* and *CERD* in respect of anti-vilification offences.<sup>147</sup> Accordingly, there are some serious doubts as to whether s 80.2(5) has the purpose of implementing the obligations in the *ICCPR* and the *CERD*, so that it can be supported by the external affairs power.

### B *Criminalising Racial Vilification — A Reversal in Policy?*

Until the enactment of s 80.2(5), the Commonwealth exhibited caution in adopting a policy of criminalisation for racial vilification. It had rejected the Gibbs Committee’s recommendations for a new offence along the lines of s 80.2(5), instead addressing its international obligations indirectly by classifying vilification as ‘unlawful discrimination’ under the *Racial Discrimination Act 1975* (Cth). Rather than prosecution as envisaged under the *ICCPR* and *CERD*,

<sup>141</sup> See especially *Sharkey* (1949) 79 CLR 121, 137–8 (Latham CJ), 159 (Williams J). It was suggested by the ALRC that a geographical interpretation might have caught the urging of force or violence in the Cronulla riots if SMS text messages were sent across state boundaries: ALRC, *Fighting Words*, above n 6, 211–12. It is not clear why the cross-border dimension would be necessary for the urgings to fall within the geographical interpretation but, in any event, such an interpretation is difficult to square with the observations in *Sharkey*.

<sup>142</sup> ALRC, *Fighting Words*, above n 6, 212–13.

<sup>143</sup> Saul, above n 139, 878.

<sup>144</sup> See *ibid* 877; ALRC, *Fighting Words*, above n 6, 215–16.

<sup>145</sup> Saul, above n 139, 877.

<sup>146</sup> Submission to ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, 12 April 2006, Submission No 31 (Attorney-General’s Department), cited in ALRC, *Fighting Words*, above n 6, 213.

<sup>147</sup> *Ibid*.

federal law promotes a process of conciliation and civil remedies for ‘unlawful discrimination’ through the Human Rights and Equal Opportunity Commission (with adjudication before the Federal Magistrates Court as a last resort). Commentators have noted that the Commonwealth’s caution in this field signified a high degree of sensitivity to free speech, and deference to the legal opinion that criminalisation of racial vilification might violate the implied freedom of political communication under the *Australian Constitution*.<sup>148</sup>

The 2005 reforms to sedition may be viewed as a partial reversal of Commonwealth policy. It is clear from the ALRC review that the reversal was not a newly found federal commitment to, or re-evaluation of, its international human rights obligations, as the reservations to the *ICCPR* and *CERD* remain in force. Rather, the remodelling of sedition must be understood as a net-widening counter-terrorism strategy aimed at criminalising hate speech believed to precipitate acts of terrorism. This reticence at the federal level may be contrasted with the position in the states and territories (except the Northern Territory), which have enacted a range of anti-vilification offences.<sup>149</sup>

A person who urges (by written or oral means) the use of force or violence between groups based on defined differences (such as race, religion and political opinion) is rightly condemned and, as discussed above, a criminal offence proscribing such behaviour would probably survive constitutional challenge if it were otherwise supported by federal power. With the inclusion of appropriate limitations relating to: (a) the inclusion of a fault element based on intention; and/or (b) a physical element that requires proof of an *imminent* risk of force or violence, this type of offence would likely survive constitutional challenge notwithstanding its potential burden upon the freedom of political communication.

### C Definitional Incoherence

An offence proscribing the urging of inter-group violence grafts an international human rights rationale onto a domestic security rationale. Depending on which of these two rationales is accorded priority, the offence is either under-inclusive or over-inclusive. From a human rights perspective, the offence incorporates some, *but not all*, of the impermissible grounds for distinguishing between individuals recognised in international human rights treaties and domestic anti-discrimination law.<sup>150</sup> The ALRC has recommended expanding the

<sup>148</sup> Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (2002) 304; Luke McNamara and Tamsin Solomon, ‘The Commonwealth *Racial Hatred Act 1995*: Achievement or Disappointment?’ (1996) 18 *Adelaide Law Review* 259, 281.

<sup>149</sup> *Discrimination Act 1991* (ACT) ss 65–7; *Anti-Discrimination Act 1977* (NSW) ss 20C–20D; *Anti-Discrimination Act 1991* (Qld) s 124A; *Racial Vilification Act 1996* (SA) s 4; *Anti-Discrimination Act 1998* (Tas) ss 19, 21; *Racial and Religious Tolerance Act 2001* (Vic) ss 7, 24; *Criminal Code* (WA) ss 77–80I. The various legislative models for vilification offences enacted in Canada, Europe, New Zealand, New South Wales, the United States and the United Kingdom are reviewed in Human Rights and Equal Opportunity Commission, *Racist Violence*, above n 121, ch 11. See further ALRC, *Fighting Words*, above n 6, 196–201.

<sup>150</sup> Cf *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171, art 26 (entered into force 23 March 1976), which states that ‘the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour,

definition to include one further category of difference, namely ‘national origin’, in order to deal with groups which have distinct ‘blended’ identities — that is, Australians who were previously foreign nationals, or their descendants, such as Vietnamese Australians.<sup>151</sup> In addition, the ALRC expressed some reservation over the inclusion of urging violence towards groups that are distinguished by ‘political opinion’, noting arguments that this ground lacks constitutional support since it is neither included in art 20 of the *ICCPR*, nor art 4 of the *CERD*.<sup>152</sup> Since violence incited against ‘political’ groups constitutes a more direct threat to the safety of the Commonwealth and its institutions, firmer constitutional ground may be obtained by grounding the offence on its domestic (rather than international) constitutional peg. On balance, however, the ALRC has recommended the retention of ‘political opinion’ as a distinguishing factor.

The broader question not addressed by the ALRC is whether the offence should be remodelled, as a matter of policy, to include other group-based grounds of distinction recognised by anti-discrimination law, such as sexuality and gender. There is a compelling argument that the labelling function of criminal law should be used to censure the use of force or violence (including inchoate forms of incitement or urging the use of force or violence) that singles out vulnerable disadvantaged groups. In relation to sedition, according priority to the human rights rationale would have the effect of criminalising the intentional urging of violence or force which is rooted in *any* form of discrimination proscribed by international human rights law. This human rights offence would signal to both the courts and the wider community that discriminatory motives behind violence (including the advocacy of violence) serves to aggravate (rather than mitigate) punishment.

From the security perspective, however, moving beyond the present distinguishing grounds would produce an offence which is over-inclusive. While supported by human rights principles and criminal justice policy, a difficulty arises as to whether these aims could be sensibly accommodated within the federal constraints of the offence of sedition. While devastating to the victims and their communities, it is doubtful whether ‘hate crimes’ outside the field of racist or religious violence would be likely to endanger significantly the security of the Commonwealth and its institutions.<sup>153</sup> Moreover, rather than extending sedition, there is an argument that these behaviours may be more effectively addressed through the wide range of anti-vilification offences that have been adopted at the state or territory level.<sup>154</sup>

sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’ The Australian Capital Territory and Victoria are the only local jurisdictions thus far to have enshrined the right to equality before the law in legislation: *Human Rights Act 2004* (ACT) s 8; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 8.

<sup>151</sup> See Recommendation 10–2: ALRC, *Fighting Words*, above n 6, 223.

<sup>152</sup> ALRC, *Review of Sedition Laws*, Discussion Paper, above n 6, 197, 202.

<sup>153</sup> This extension was not considered by the ALRC, reflecting its view that this form of sedition was essentially a public order offence: ALRC, *Fighting Words*, above n 6, 217.

<sup>154</sup> ALRC, *Review of Sedition Laws*, Discussion Paper, above n 6, 201; see also above n 149 and accompanying text.

Criminalising ‘hate crimes’ has been much debated among criminal scholars.<sup>155</sup> Substantive criminal law generally excludes from consideration the fact that a defendant was motivated by hatred, prejudice or bias towards particular minorities or disadvantaged groups, notwithstanding that much violence is grounded in such motives and constitutes a recurrent theme in many cases including homicide. While banished from the substantive criminal law, such discriminatory motives may be *indirectly* considered as factors relevant to sentencing. In the United Kingdom, racial or religious hatred towards the victim aggravates the penalty for the offence.<sup>156</sup> In New South Wales, a broader model of sentence aggravation was adopted in 2002, as part of an overhaul of general sentencing principles. Under those provisions, matters aggravating a sentence include, inter alia, the fact that

the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability) ...<sup>157</sup>

While appearing to be a progressive development from an anti-discrimination policy perspective, the political pressure for these new powers stemmed from the moral panic about the rise of ‘ethnically’ motivated Lebanese gang rape in Sydney.<sup>158</sup>

There are two significant limitations with these models. First, the provisions confer on the sentencing court a discretion (rather than a duty) to take these discriminatory motives into account.<sup>159</sup> Second, the provision omits ‘gender’ from the protected class. A cursory review of violent offences (murder, rape and assault) reveals that ‘domestic violence’ is pervasive, and many serious crimes directed towards women are motivated by misogynistic and sexist attitudes.<sup>160</sup> From an anti-discrimination perspective, the exclusion of gender from this list is regrettable in light of the continued struggle of the criminal law to regard such

<sup>155</sup> For an excellent review of the topic in the Australian context, see Mark Walters, ‘Hate Crimes in Australia: Introducing Punishment Enhancers’ (2005) 29 *Criminal Law Journal* 201; Chris Cunneen, David Fraser and Stephen Tomsen (eds), *Faces of Hate: Hate Crime in Australia* (1997).

<sup>156</sup> Walters, above n 155, 204, discussing the *Crime and Disorder Act 1998* (UK) c 37 and 2001 reforms to the Act, which extended the power to aggravate penalties to religious hatred as part of a package of anti-terrorism laws.

<sup>157</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h), inserted by *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002* (NSW). See Walters, above n 155, 209, where s 21A(2)(h) is discussed.

<sup>158</sup> As Kate Warner has noted, the media played a significant role in constructing the gang rape as ethnically motivated, portraying the incidents as young Lebanese gangs targeting victims because they were ‘Australian’. As well as the sentence enhancement, further aggravated gang rape offences were enacted: Kate Warner, ‘Gang Rape in Sydney: Crime, the Media, Politics, Race and Sentencing’ (2004) 37 *Australian and New Zealand Journal of Criminology* 344. See also Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 598.

<sup>159</sup> *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(5) provides: ‘The fact that any such aggravating or mitigating factor is relevant and known to the court does not require the court to increase or reduce the sentence for the offence.’

<sup>160</sup> For the available data on the prevalence of domestic violence, see Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 720. Worse still, in some contexts, these discriminatory beliefs provide foundations for partial defences such as provocation: at 280–1.

discriminatory motives and gendered harm as aggravating rather than mitigating conditions.

Recognising the limitations of sedition as an anti-discrimination measure, the ALRC proposed that the offence should be reconceived more narrowly, as a public order offence.<sup>161</sup> Yet, as a public order offence, this provision seems under-inclusive. We have already noted the constitutional constraints that require the prosecution to establish some threat to the security of the Commonwealth, which effectively rules out its application to relatively small-scale and localised disorder, such as the Cronulla riots. Further, the offence, reflecting its historical antecedents, requires the agitation of force or violence to be directed *between* groups. Thus, advocacy of acts of violence against an *individual* (albeit arising by virtue of his or her membership of a defined group and accompanied by discriminatory motives) falls outside the scope of the offence. The inclusion of the ‘group-to-group’ limitation has been justified by reference to the counter-terrorism rationale. The Attorney General’s Department noted that this aspect of the offence ‘drives at the root cause of the problem of terrorism by focusing on violence that is behind it’.<sup>162</sup> Singling out acts of incitement of group-to-group violence, rather than the incitement of discrimination against individuals on the grounds of their membership of a particular group, may be counterproductive. There is concern that this feature of the offence ‘stigmatises inter-group violence and reinforces the stereotyping of certain ethnicities or religions as terrorists.’<sup>163</sup>

Do we really need this species of sedition in the *Criminal Code* that criminalises the urging of force or violence between groups by individuals acting with discriminatory motives? Should the federal criminal law be linked to anti-discrimination law through this new sedition offence? To both questions, our answer is no. In simple terms, an offence which attempts to meld security and anti-discrimination rationales produces definitional incoherence, and creates an offence which is either under-inclusive or over-inclusive, depending on the rationale which is accorded priority.

A final source of unease relating to s 80.2(5) is the likely effect of importing anti-discrimination law into the criminal law — this relates to the ‘neutrality’ between groups distinguished under this offence. In common with anti-discrimination law generally, the new offence of sedition does not expressly identify those disadvantaged groups requiring protection under the law. The law is framed in neutral terms as a right to equality or non-discrimination. Thus, for example, under anti-discrimination law, *both* men and women have a right to equal treatment. There is a significant body of critical feminist scholarship outlining the weaknesses of equality jurisprudence, which conceals and denies

<sup>161</sup> ALRC, *Fighting Words*, above n 6, 109.

<sup>162</sup> Submission to ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, 12 April 2006, Submission No 31 (Attorney-General’s Department), cited in ALRC, *Fighting Words*, above n 6, 208.

<sup>163</sup> ALRC, *Fighting Words*, above n 6, 209. In addition, recent research by the Human Rights and Equal Opportunity Commission shows that since September 11, Australian Arabs and Muslims are often vilified based on a perception that they share responsibility for terrorism or are potential terrorists: Human Rights and Equal Opportunity Commission, *Isma — Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians* (2004).

remedies for the structural disadvantages in both the public and private spheres that only women experience.<sup>164</sup> In the current sedition offence, there is equivalent ‘neutrality’ which may not serve to protect those minorities who have been historically oppressed and harmed by racial or religious violence (including Aboriginal, Jewish and Islamic communities).<sup>165</sup> Worse still, there is a risk that the offence may be counterproductive, intensifying the surveillance and policing of these communities (which are already subject to disproportionately high levels of policing).<sup>166</sup> It is not inconceivable that the offence would be used to criminalise minority leaders who advocate forceful resistance against everyday violence and discrimination by Anglo-Saxon Australians.<sup>167</sup> In light of the above concerns, a preferable strategy may be to address racist motivations by targeting *specified* vulnerable groups through general sentencing enhancement powers at the federal level, tagging federal anti-discrimination policy to the law of sentencing, rather than to special anti-terrorism offences.

#### V BALANCING SEDITIOUS INTENTIONS AND ‘GOOD FAITH’ DEFENCES

The physical elements of the sedition offences are broad. However, an important safeguard in relation to these offences is the role of fault and the availability of defences. As the ALRC noted, this is the key issue for law reform:

Under the Terms of Reference, the central questions for this Inquiry are whether the new sedition regime (taking together the offences in s 80.2 and the ‘good faith’ defence in s 80.3) is well-articulated as a matter of criminal law, and strikes an acceptable balance in a tolerant society.<sup>168</sup>

The ALRC recommended that the offences require proof that the person *intended* that the force or violence urged would occur.<sup>169</sup> The ALRC claims the precise meaning of ‘intentionally’ in this context ‘will be determined by ordinary usage and the common law’.<sup>170</sup> However, the extent to which the pre-*Criminal Code* common law concepts should guide *Criminal Code* construction remains

<sup>164</sup> The limits of rights to formal equality in law were reviewed in ALRC, *Equality before the Law: Women’s Equity — Part II*, Report No 69 (1994). The majority of commissioners recommended a ‘neutral’ equality right, with a minority arguing for an equality guarantee in the following gendered terms: ‘Every woman has the right to equality in law.’: at [16.22]; see also at [16.19]. See further Stephen Bottomley and Simon Bronitt, *Law in Context* (3<sup>rd</sup> ed, 2006) ch 8, especially at 272.

<sup>165</sup> The Human Rights and Equal Opportunity Commission documented in a 1991 report widespread racial violence against minorities, including Aboriginal, Jewish and Islamic communities in Australia: Human Rights and Equal Opportunity Commission, *Racist Violence*, above n 121, 69–177, 209–26. At the time of publication, Sheik Feiz Mohammad allegedly made comments that referred to Jews as ‘evil’ and calling them ‘pigs’. Acting Attorney-General Kevin Andrews has indicated that this case will be reviewed by the Australian Federal Police to determine whether sedition charges could be laid: see Jano Gibson and Nick O’Malley, ‘Jews Attacked in Sheik’s Video Nasty’, *The Sydney Morning Herald* (Sydney), 19 January 2007, 1.

<sup>166</sup> See Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 745–7, 764–5.

<sup>167</sup> There is a significant debate about the value of equality rights: see *ibid* 126–35.

<sup>168</sup> ALRC, *Fighting Words*, above n 6, 13.

<sup>169</sup> See above n 76 and accompanying text.

<sup>170</sup> ALRC, *Fighting Words*, above n 6, 175–6, citing I Leader-Elliot, Attorney-General’s Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (2002) 61.

controversial.<sup>171</sup> Regrettably, the ALRC analysis of the fault element overlooked how the ‘default’ definitions of intention would interact with its recommendations. The *Criminal Code* has adopted a twofold definition of intention with respect to results, which extends to a person who ‘means to bring it about or *is aware that it will occur in the ordinary course of events*’.<sup>172</sup> The latter mental state (which is called an ‘oblique’ or ‘indirect’ intention) is said to encompass the morally equivalent mental state of awareness of a consequence as being ‘virtually certain’ to occur.

In the context of terrorism, this extended definition of intention has a broad reach: inflammatory political speeches calling for ‘violent jihad’ in Australia may exhibit no direct desire that the urging will precipitate violence, but the extended definition permits intention to cover cases where the person is aware that it will occur in the ordinary course of events. Under this definition, publication of extracts from the so-called ‘Books of Hate’ on the internet,<sup>173</sup> dealing with provocative jihadist themes of suicide bombing and martyrdom operations, would arguably fall within the definition. Bearing in mind the breadth of the physical element, which proscribes urging the use of force or violence, rather than the incitement of *specific* offences of violence, terrorism or public disorder, there is a strong argument that intention should be restricted to its narrowest form of ‘meaning’ to bring about that consequence — a position which is consistent with the common law governing attempt, incitement, and aiding and abetting.<sup>174</sup>

The potential breadth of the physical and fault elements of sedition is further balanced by the availability of the six ‘good faith’ defences contained in s 80.3 of the *Criminal Code*:

- (1) Sections 80.1 and 80.2 do not apply to a person who:
  - (a) tries in good faith to show that any of the following persons are mistaken in any of his or her counsels, policies or actions:
    - (i) the Sovereign;
    - (ii) the Governor-General;
    - (iii) the Governor of a State;
    - (iv) the Administrator of a Territory;
    - (v) an adviser of any of the above;
    - (vi) a person responsible for the government of another country; or
  - (b) points out in good faith errors or defects in the following, with a view to reforming those errors or defects:
    - (i) the Government of the Commonwealth, a State or a Territory;
    - (ii) the *Constitution*;

<sup>171</sup> Gani, ‘Codifying the Criminal Law’, above n 16.

<sup>172</sup> *Criminal Code* s 5.2 (emphasis added). See also Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 175–6, 892–3 (discussing ‘oblique’ intention in relation to terrorism).

<sup>173</sup> See above nn 31–2 and accompanying text.

<sup>174</sup> *Giorgianni v The Queen* (1985) 156 CLR 473, 506 (Wilson, Deane and Dawson JJ).

- (iii) legislation of the Commonwealth, a State, a Territory or another country;
- (iv) the administration of justice of or in the Commonwealth, a State, a Territory or another country; or
- (c) urges in good faith another person to attempt to lawfully procure a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country; or
- (d) points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; or
- (e) does anything in good faith in connection with an industrial dispute or an industrial matter; or
- (f) publishes in good faith a report or commentary about a matter of public interest.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).

The ‘good faith’ defence recognised at common law, and subsequently incorporated into statutory form, reflects the origins of the offence as a form of seditious libel. In historical terms, the common law defamation defence of ‘good faith’ played a key role in maintaining sedition within proper bounds. This was particularly important in the 19<sup>th</sup> century, when the offence proscribed behaviour that today would be regarded as legitimate political agitation for reform or criticism of public officials.

The modern defence in s 80.3 provides six examples of behaviour in ‘good faith’, though these are not intended to be exhaustive. In the modern criminal law, the use of ‘good faith’ — beyond these prescribed ‘public interest’ defences — seems anomalous for a number of reasons. First, the concept of ‘good faith’ (while familiar to defamation and equity lawyers) is rarely used in the criminal law, and there is little (if any) criminal jurisprudence which can guide juries or judges, as well as the wider community, on the precise exculpatory matters that will fall within the scope of the defence.<sup>175</sup> The legislation directs the court to consider the presence of the following intentions in s 80.3(2) in determining the contours of the defence:

In considering a defence under subsection (1), the Court may have regard to any relevant matter, including whether the acts were done:

- (a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth; or
- (b) with the intention of assisting an enemy:
  - (i) at war with the Commonwealth; and
  - (ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth; or

<sup>175</sup> The ALRC notes that the concept has been incorporated as a defence to racial vilification under Commonwealth law, which is a civil rather than criminal provision. In contrast, it is not a defence to the criminal offence of serious racial vilification in New South Wales: ALRC, *Fighting Words*, above n 6, 248.

- (c) with the intention of assisting another country, or an organisation, that is engaged in armed hostilities against the Australian Defence Force; or
- (d) with the intention of assisting a proclaimed enemy of a proclaimed country (within the meaning of subsection 24AA(4) of the *Crimes Act 1914*); or
- (e) with the intention of assisting persons specified in paragraphs 24AA(2)(a) and (b) of the *Crimes Act 1914*; or
- (f) with the intention of causing violence or creating public disorder or a public disturbance.

Presumably, proof of one of these intentions excludes the operation of the ‘good faith’ defence.<sup>176</sup> As the ALRC has pointed out, where the prosecution is required to establish intention in relation to the key physical elements — namely to urge force or violence with the intention that it will occur — ‘good faith’ defences become largely redundant.<sup>177</sup> Rather than make intention relevant to ‘good faith’ (or lack thereof) ‘through the backdoor’, it is preferable to define the fault element in ways that ‘do not extend to legitimate activities or unduly impinge on freedom of expression in the first place’.<sup>178</sup> To that end, the ALRC recommended that the ‘good faith’ defences be repealed, requiring that the tribunal of fact consider, in determining whether there is intention, the *context* in which the communication occurred — namely, whether it occurred in the course of or in connection with an artistic performance or work, for a genuine academic, artistic or scientific purpose, in connection with an industrial protest, or when reporting news.<sup>179</sup> These draw heavily on the public interest factors that have been developed in relation to defences for obscene publications, and have also been incorporated into federal law to guide classification decisions.<sup>180</sup>

Reframing ‘good faith’ to include public interest factors is desirable. However, the proposal to view them as *evidential* factors relevant to intention poses some difficulties. On a conceptual level, public interest factors do not bear on whether or not a person urged the use of force or violence with the intention that it will occur; the factors function independently of that question, presenting themselves as exculpatory excuses. In our view, the case for including a general ‘public interest’ defence falls away if a narrower ambit for the fault element of core offences is adopted. Indeed, morally speaking, should people who urge the use of violence or force with the *intention* (in the narrower sense of meaning) that it will occur be excused because of the context in which the conduct occurred?

<sup>176</sup> This effect is not expressly stated in *Criminal Code* s 80.3. In contrast, the former ‘good faith’ defence in *Crimes Act* s 24F(2) stated that an act or thing done with one of these prescribed intents is ‘not an act or thing done in good faith’.

<sup>177</sup> ALRC, *Fighting Words*, above n 6, 257.

<sup>178</sup> *Ibid* 259.

<sup>179</sup> See Recommendation 12–2: *ibid* 261.

<sup>180</sup> For example, at the Commonwealth level, ‘literary, artistic or educational merit’ are some of the matters to be taken into account in deciding whether material is offensive: *Criminal Code* s 473.4(b). A similar approach is taken in Victoria, where it is a defence if the material ‘possesses artistic merit or is for a genuine medical, legal, scientific or educational purpose’: *Crimes Act 1958* (Vic) s 70(2)(b).

The case for retaining public interest defences is much stronger if an extended definition of intention is applied which encompasses awareness that the use of violence or force will occur in the ordinary course of events — the state of mind which could catch journalists and academics who publish material dealing with provocative jihadist themes. As an inchoate offence directed to averting serious consequences (for example, overthrow of the *Australian Constitution*), it seems preferable that public interest factors, if they operate at all, should be incorporated into the offence provisions. Certainly, if the scope of the physical and fault elements for sedition are narrowed in the ways suggested above, constitutional law and international human rights law do not impose the further demand that defendants have broad ‘fallback’ defences of ‘good faith’ or public interest.

#### VI SEDITION AS A CRIME OF UNIVERSAL JURISDICTION

Even prior to September 11, the general trend favoured an increasingly broad view of geographical jurisdiction under the criminal law.<sup>181</sup> The traditional common law view that ‘all crime is local’ was increasingly supplemented by a more flexible idea of criminal jurisdiction. In Australia, the federal jurisdiction has undertaken the most significant overhaul of the law, incorporating the Model Criminal Code provisions into the *Criminal Code*. The most innovative aspect of the reform is that it is now for Parliament (rather than for the courts) to specify a priori the scope of jurisdiction in relation to specific offences. The ‘categorisation’ model includes a default standard of geographic jurisdiction (which is based on territoriality), supplemented by several categories of extended geographical jurisdiction (Categories A to D).<sup>182</sup>

The Commonwealth has liberally departed from the default standard in relation to terrorism offences including sedition. Sedition is designated as a ‘Category D’ offence, which has the broadest extraterritorial reach. This makes sedition a crime of universal jurisdiction, to use the international law terminology.<sup>183</sup> In common with the terrorism offences created in 2002, this offence applies to any person (both citizens and non-citizens) regardless of whether the conduct (or results of the conduct) occurred in Australia. Reflecting concerns about potential over-breadth, the sedition offence requires the consent of the Attorney-General for prosecution.<sup>184</sup> Putting aside the practical difficulties of enforcement, which apply to all crimes of universal jurisdiction, there are some objections to the application of Category D to the offences of urging others to assist enemies or engage in hostilities against Australia. These offences, like treason, imply an a priori allegiance on the part of the defendant towards Australia (which, in this

<sup>181</sup> See generally Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 855, which traces the development of non-geographic jurisdiction in the federal law.

<sup>182</sup> *Criminal Code* ss 15.1–15.4.

<sup>183</sup> *Criminal Code* s 80.4. For a discussion on the expansion of Category D jurisdiction, and the influence of intentional law on the development of domestic criminal jurisdiction, see Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 856–60.

<sup>184</sup> The ALRC has argued that this further safeguard was unnecessary since the Attorney-General’s consent is required for all Category D offences where the conduct occurs outside Australia, or the person is not Australian: see *Criminal Code* s 16.1, discussed in ALRC, *Fighting Words*, above n 6, 269–71.

context, would be unreasonable to impose on non-citizens).<sup>185</sup> While the ALRC accepted this argument in relation to treason, and inserted a requirement that the defendant be an Australian citizen or resident, it recommended preserving universal jurisdiction for sedition offences,<sup>186</sup> accepting the Attorney-General's argument that extraterritoriality is needed to address dissemination of offending material via the internet.<sup>187</sup>

#### VII SEDITION AND RETROSPECTIVE LAW REFORM?

Much of the debate about the expansion of state power to combat terrorism has been framed as a question of balance between security and liberty.<sup>188</sup> The 'balancing approach' has been very influential in counter-terrorism law reform in Australia, which seeks to reconcile security and respect for fundamental liberal rights and values.<sup>189</sup> As Attorney-General Philip Ruddock has pointed out, '[t]here will always be a trade-off between national security and individual rights. The task of Government is to recognise these trade-offs and preserve our security without compromising basic rights and liberties.'<sup>190</sup>

There has been sustained criticism of the use of balancing concepts and metaphors to guide criminal justice reform.<sup>191</sup> The prospect of reasoned public debate seems remote, though the Howard Government persists in framing counter-terrorism reform as the striking of a balance between security and liberty.

As this article has revealed, there are significant challenges in balancing the demands of security and human rights within the structure of a coherent legislative framework. In relation to new substantive offences, preventative powers and surveillance tools, the Government has not placed human rights at the centre of

<sup>185</sup> ALRC, *Fighting Words*, above n 6, 235.

<sup>186</sup> *Ibid* 235–6.

<sup>187</sup> Submission to ALRC, *Fighting Words: A Review of Sedition Laws in Australia*, 12 April 2006, Submission No 31 (Attorney-General's Department), cited in *ibid* 238–9. The policy and evidential difficulties of extended jurisdiction in relation to cybercrime is discussed in Simon Bronitt and Miriam Gani, 'Shifting Boundaries of Cybercrime: From Computer Hacking to Cyberterrorism' (2003) 27 *Criminal Law Journal* 303, 312–17.

<sup>188</sup> See Jeremy Waldron, 'Security and Liberty: The Image of Balance' (2003) 11 *Journal of Political Philosophy* 191.

<sup>189</sup> The balanced approach was adopted in Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills* (2002). See also George Williams, 'Australian Values and the War on Terrorism', *Review, The Australian Financial Review* (Sydney), 7 February 2003, 6; George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* (2004) ch 3.

<sup>190</sup> Philip Ruddock, 'The Commonwealth Response to September 11: The Rule of Law and National Security' (Speech delivered at the National Forum on the War on Terrorism and the Rule of Law, New South Wales Parliament House, 10 November 2003) <[http://www.gtcentre.unsw.edu.au/publications/papers/docs/2003/88\\_PhilipRuddock.pdf](http://www.gtcentre.unsw.edu.au/publications/papers/docs/2003/88_PhilipRuddock.pdf)>.

<sup>191</sup> See, eg, Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 *Journal of Law and Society* 507; Simon Bronitt, 'Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?' (2003) 14 *Public Law Review* 76; Miriam Gani, 'Upping the Ante in the "War on Terror"' in Patty Fawkner (ed), *A Fair Go in an Age of Terror: Uniya's Jesuit Lenten Seminars 2003 and 2004* (2004) 80, 90–101. For an earlier critique of balancing in the criminal justice context, see Andrew Ashworth, 'Crime, Community and Creeping Consequentialism' [1996] *Criminal Law Review* 220. These themes are further developed in Waldron, above n 188, critiquing the balancing approach in the context of special laws to advance the 'War on Terror'.

regulatory design.<sup>192</sup> Rather, it has tended to defer to the perceived needs of law enforcement, security concerns, and the untested claims that existing laws and general principles are inadequate or ill-suited to the task. Human rights should not be balanced away by security interests as a matter of course. As many human rights scholars have pointed out, human rights (such as to privacy and to a fair trial) may be subject to permissible limitations in the name of security, provided these are both necessary and proportionate.<sup>193</sup> Since the *legal* expression of human rights is rarely unqualified or absolute,<sup>194</sup> the correct approach to policy development in this field is to promote strict compliance with (rather than broad derogation from) the human rights expressed in international treaties and relevant case law, and those contained in domestic human rights legislation.<sup>195</sup>

Although Australia has devoted considerable resources to prosecuting the ‘War on Terror’, law reform has been conducted largely ‘on the cheap’. With limited time and resources, government has been encouraged to draw upon ‘off-the-shelf’ solutions. One such example is the Australian definition of ‘terrorist act’, which follows the definition in the *Terrorism Act 2006* (UK) c 11, albeit with some significant differences.<sup>196</sup> A similar approach was adopted in relation to sedition, with the impetus for the reform drawn from Europe, though in its substance, the definition draws heavily on the recommendations of the Gibbs Committee, which reviewed federal criminal law in the 1980s for different purposes.

Terrorism law reform is often foreshadowed with limited detail, through media releases aimed at ‘softening’ the community to the general concept — a form of legal product testing — before a detailed legislative package is unveiled at a later date. The most damaging aspect of the post-September 11 public policy envi-

<sup>192</sup> Regarding the place of human rights in regulatory theories, see generally Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 41–2.

<sup>193</sup> This point has been made recently in the review of the federal terrorism laws enacted in 2002: see Security Legislation Review Committee, Attorney-General’s Department, Australia, *Report of the Security Legislation Review Committee* (2006) 39, endorsing the views expressed in the Human Rights and Equal Opportunity Commission’s submission. See generally Connor Gearty, *Principles of Human Rights Adjudication* (2004).

<sup>194</sup> There are only a few absolute rights, such as the right not to be subject to ‘torture or to cruel, inhuman or degrading treatment or punishment’: *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976). In the post-September 11 environment, some scholars have called for a reassessment of this absolute position: see, eg, Alan Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge* (2002); Mirko Bagaric and Julie Clarke, ‘Not Enough Official Torture in the World? The Circumstances in Which Torture Is Morally Justified’ (2005) 39 *University of San Francisco Law Review* 581.

<sup>195</sup> Australia has not yet adopted a bill of rights at the federal level, though the Australian Capital Territory and Victoria have adopted human rights legislation modelled in part on the *Human Rights Act 1998* (UK) c 42: see *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic). The *Charter of Human Rights and Responsibilities Act 2006* (Vic) comes into effect on 1 January 2007 (with some provisions to become effective from 1 January 2008).

<sup>196</sup> One key difference relates to the added significant transnational dimension, bringing any acts of terrorism in the world within the potential reach of Australian jurisdiction — ‘terrorist act’ includes ‘coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country’: *Criminal Code* s 100.1 (emphasis added). For a discussion of the significance of this ‘global’ definition of terrorism, see Bottomley and Bronitt, above n 164, ch 14.

ronment is the tendency to link the vulnerability to attack to a presumed inadequacy of existing powers and criminal laws, rather than to the capacity of both intelligence and law enforcement agencies.<sup>197</sup> In this pressured environment, where the political target becomes law reform, there is insufficient time for a considered review of public policy or legislative options. The political imperative to act in order to reassure the electorate is a hard pressure to resist. There is no allowance for a systematic process of review examining the reach of existing laws, or whether minor adaptation could achieve a result more consistent with the existing fabric and fundamental principles of Australian criminal law. Indeed, the compromise of the *process* of law reform has been particularly acute in relation to the ‘War on Terror’, but should be understood as part of a wider ‘uncivil politics of law and order’<sup>198</sup> that shapes and distorts criminal justice reform generally. As David Brown notes, this climate has several effects on law reform:

One consequence is the tendency to sideline, by-pass or ignore official law reform reports as unresponsive to political imperatives requiring instant responses to media legitimisation crises around particular cases. Another possible consequence is the extent to which law reform commissions and their work may lose credibility and authority in the face of a more general anti-elites movement, expressing the rise of a public voice challenging traditional forms of expert discourse.<sup>199</sup>

The reform of sedition law largely conforms to this ‘uncivil’ model. New laws governing preventative detention and sedition were enacted in late 2005. The *Anti-Terrorism Act [No 2] 2005* (Cth) was enacted with indecent haste, notwithstanding significant community interest and concern about its potential impact. With only one week scheduled for public submissions, the Senate Legal and Constitutional Committee received submissions from 294 individuals and organisations.<sup>200</sup> At the close of submissions, the Senate Committee then had only 11 business days to review and make recommendations on the Bill. Not

<sup>197</sup> A recent example is the debate over the preventative detention laws, which were adopted following the Council of Australian Governments meeting in September 2005. The Council agreed to the enactment of a series of anti-terrorist measures. The Australian Government agreed to amend the *Criminal Code* to provide for preventative detention and the issuing of control orders. The states and territories agreed to enact complementary legislation to give effect to the parts of the scheme for which the Commonwealth lacks constitutional capacity to legislate: see Council of Australian Governments, ‘Special Meeting on Counter-Terrorism’ (Communiqué, 27 September 2005) 4 <<http://www.coag.gov.au/meetings/270905/coag270905.pdf>>. Reflecting the demands of the *Human Rights Act 2004* (ACT), the Australian Capital Territory’s Stanhope Government enacted territory legislation which had more stringent due process safeguards than counterpart federal and state laws. Both the Australian Government and the Australian Federal Police presented this behaviour as irresponsible: see, eg, Ben Doherty ‘Canberra Is Target for Terror: Soft Laws to Blame: Keelty’, *The Canberra Times* (Canberra), 1 February 2006, 1.

<sup>198</sup> The phrase ‘uncivil politics of law and order’ was used before September 11 to describe the trend to drive criminal justice reform in Australia by reference to ‘law and order’ commonsense, rather than by informed expert opinion or available data: Russell Hogg and David Brown, *Rethinking Law and Order* (1998) ch 1.

<sup>199</sup> David Brown, ‘Challenges to Criminal Justice Reform’ in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (2005) 343, 356.

<sup>200</sup> Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill [No 2] 2005*, above n 37, 215–17.

surprisingly, few significant changes were made to the Bill before its enactment.<sup>201</sup>

Due to the public concern aroused by this Bill, the Government sought to reassure the community (and the Opposition) by referring the sedition reforms to the ALRC for retrospective inquiry and report. Though the new laws were safely in place, the pressure to conduct the review process swiftly did not abate: public consultation for this review, which examined how the new law interacts with existing offences, proceeded within a very tight timetable. While most ALRC inquiries take one or more years to complete, the ALRC was asked to report within three months.<sup>202</sup> While the ALRC is to be commended for its attempt to develop a broad consultation strategy with stakeholders, the constrained time frame placed both the ALRC and the respondents under considerable pressure. The resulting recommendations suggested modernising and clarifying some of the legal definitions, symbolically expunging sedition, with its ‘historical baggage’, from our legal lexicon.<sup>203</sup> However, repackaging the offence as a renamed public order crime, as the ALRC recommends, does not address the problems caused by the attempt to meld security and human rights rationales into a single offence of urging inter-group violence. In our view, the result is an offence which is ineffective, as it is either over-inclusive or under-inclusive depending on which one of the rationales is accorded priority.

#### VIII CONCLUSION

Law reform agendas place a high premium on the liberal values of consistency, clarity and coherence. The ‘rationalising enterprise’ behind criminal law reform struggles with the inherent ‘political’ questions about criminalisation.<sup>204</sup> It is no surprise then that the review undertaken by the ALRC focused largely on the modernisation of legal definitions and key concepts, and the need to ‘balance’ competing interests relating to security and human rights.<sup>205</sup> One of the key recommendations of the ALRC is to rename sedition, placing the offences within a new ‘public order’ framework of urging political or inter-group force or

<sup>201</sup> The Attorney-General announced on 1 December 2005 that the Australian Government would amend the Anti-Terrorism Bill [No 2] 2005 (Cth) to incorporate some of the recommendations of the Senate Committee: see Attorney-General’s Department, ‘Government Enhances Anti-Terror Bill’ (Press Release, 1 December 2005). These amendments concerned: the right of the detainee to present information in relation to a control order and to receive a copy of the order; special protections for detainees between 16 and 18 years of age; detainees’ capacity to contact parents/guardians and legal representatives; clarification of the procedural requirements for the issuing of final control orders; and the insertion of a requirement to notify the Commonwealth Ombudsman when a control order or prohibited contact order is made and to provide the Ombudsman with a copy of that order and summary of the grounds on which it was made. In relation to sedition, the Bill was amended to clarify that seditious intention requires the intention to use force or violence to effect the listed purposes.

<sup>202</sup> ALRC, *Fighting Words*, above n 6, 41.

<sup>203</sup> See Recommendation 2–1: *ibid* 67.

<sup>204</sup> For an example of a conflict between rationalisation and criminalisation politics, see Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 786–9.

<sup>205</sup> The ALRC recommended that the states and territories remove the term ‘sedition’ from these offences, modernise key concepts, and harmonise the offences with the federal approach: see Recommendation 2–1: ALRC, *Fighting Words*, above n 6, 67.

violence.<sup>206</sup> While modernisation is not objectionable, it fails to confront the conceptual and practical difficulties of melding security and human rights rationales for these various offences. This is most apparent in relation to the offence of urging inter-group force or violence. Rather than forcing these offences into the federal counter-terrorism framework, it would be more effective to address discriminatory violence through anti-vilification provisions (including sentence enhancement) at the state or territory level. When framed in this way, the law could address a wider range of conduct that precipitates violent crime against minorities, and would minimise the risk of these measures becoming yet another form of legal oppression for already persecuted communities.

In general terms, we remain doubtful that enacting ‘exceptional’ terrorist offences is the appropriate strategy for law reform. Although appealing to politicians and ‘law and order’ constituencies, incorporating ‘political’ and ‘religious’ ideologies into the definition of offences places a person’s *belief system* on trial, rather than focusing forensic attention on the harm (actual and potential) that the person has committed or intended to commit. Before September 11, 2001, most countries, including the United Kingdom and Australia, used the ordinary criminal law to prosecute terrorist offences, and specialist legislation was not deemed necessary.<sup>207</sup> The preference of a strategy of legal normalisation over exceptionalism is reinforced by the principles articulated by the International Commission of Jurists in *The Berlin Declaration* in 2004:

In combating terrorism, states should apply and where necessary adapt existing criminal laws rather than create new, broadly defined offences or resort to extreme administrative measures, especially those involving deprivation of liberty.<sup>208</sup>

Unfortunately, Australia’s current approach to terrorism law reform is unlikely to change. A real danger arises from unintended ‘trickle down’ effects of this approach. The events of September 11 have heralded a broad array of preventative laws in Australia. Criminal laws now target organisations, not just individuals, criminalising the status and belief system of a person as much as the harm which that person intends or causes. This trend towards prevention in the criminal law was evident before September 11, though terrorism has provided a further impetus for intensification and expansion.<sup>209</sup> Prosecution and deterrence

<sup>206</sup> The ALRC had proposed to reframe *Criminal Code* s 80.2 more broadly as ‘Offences against Political Liberty and Public Order’: ALRC, *Review of Sedition Laws*, Discussion Paper, above n 6, 39.

<sup>207</sup> Ben Brandon, ‘Terrorism, Human Rights and the Rule of Law: 120 Years of the UK’s Legal Response to Terrorism’ [2004] *Criminal Law Review* 981. A Privy Counsellor Review Committee recommended that ordinary criminal justice and security provisions continue to be the preferred way, so far as possible, of countering terrorism: Privy Counsellor Review Committee, United Kingdom, *Anti-Terrorism, Crime and Security Act 2001 Review: Report* (2003) 8. To the extent that special counter-terrorism legislation is deemed necessary, it should be kept distinct from the mainstream criminal law.

<sup>208</sup> International Commission of Jurists, *The Berlin Declaration: The ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (28 August 2004) 2 <[http://www.icj.org/IMG/pdf/Berlin\\_Declaration.pdf](http://www.icj.org/IMG/pdf/Berlin_Declaration.pdf)>.

<sup>209</sup> For a review of this trend, see the research by Andrew Goldsmith discussed in Bronitt and McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed), above n 1, 878. It has been suggested that it

is no longer the ultimate objective or endgame, but rather it is surveillance and disruption of suspect groups. The impact of September 11 on the legitimacy of law reform processes has been highly deleterious — the contributions of law reform agencies, as well as parliamentary committees, have been sidelined. Within the climate of political exigency, where security outweighs human rights at every turn, the scope for genuine community involvement and informed academic research on terrorism law reform is highly constrained. The question for legal scholars and practitioners is how long these trends will continue and how best to promote strategies for law reform in which human rights and fundamental legal values are protected and respected, rather than viewed as luxuries that liberal democratic societies can no longer afford.

would be sensible to employ a version of the precautionary principle in relation to terrorism threats: see Cass R Sunstein, *Laws of Fear: Beyond the Precautionary Principle* (2005) 61.