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Hate Speech, Sedition and the War on Terror

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Reviving sedition and the War on Terror: a new hate speech crime?

In Australia, the 'first wave' of law reform after the 9/11 terrorist attacks in 2001 was focused on the core offences dealing with terrorist acts and proscribing terrorist organisations (Bronitt and McSherry 2005: ch 15). In the wake of the subsequent Madrid and London bombings, attention shifted to monitoring and disrupting the activities of local 'suspect' communities.[1] Reforms enacted in late 2005 were aimed at the perceived root causes of terrorism, creating new powers to impose control orders and preventative detention.[2] 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).[3] At the same time, the offence of sedition, which criminalises individuals who urge

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1 For an earlier study of the impact of anti-terrorism laws on these communities, see Hillyard (1993).

2 The Anti-Terrorism Bill (No 2) 2005 (Cth) was introduced into the House of the Representatives on 3 November 2005.

3 *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 …

violence or force in defined circumstances, was modernised as part of this reform package.

The sedition provisions attracted considerable public attention and disquiet in the media (ABC Television 2005; Wolpe 2005), leading the government to take the unusual step of requesting that the Australian Law Reform Commission (ALRC) undertake a retrospective review of the new sedition laws.[4] The ALRC recommended that the term 'sedition' be removed from federal criminal law, though retaining a range of modernised offences that cover essentially similar ground.[5]

Australia is not the only jurisdiction to criminalise the advocacy of terrorism. In the European context, the Council of Europe's *Convention on the Prevention of Terrorism* (2005) provides the broad framework for developing new legal measures for tackling terrorism. The Convention requires State Parties to establish offences proscribing public provocation to commit a terrorist offence, recruitment and training for terrorism, as well as related ancillary forms of liability.[6] To that end, the United Kingdom has recently enacted a controversial offence of 'encouragement or glorification of terrorism' in the *Terrorism Act 2006* (UK) (ALRC 2006: 120-1). It is unclear whether the glorification offence created by the *Terrorism Act* is compatible with the freedom of expression protected by the *European Convention on Human Rights* (1950), and no doubt its compatibility with this human right will be subjected to a challenge under the *Human Rights Act 1998* (UK). Sharing concerns that such an offence would constitute an unwarranted infringement of constitutionally protected freedom of expression, the ALRC (2006: 125-6) recommended that this type of offence not be adopted in Australia.

The aim of this chapter is not to provide a comprehensive review of the new federal sedition offences in Australia.[7] Rather, it pursues the more limited aim of exploring one particular form of sedition which has potential application to hate speech, namely, the new offence of urging intra-group violence in s 80.2(5) of the *Criminal Code* (Cth). This form of sedition addresses hate speech that incites violence between defined groups. This chapter demonstrates that the offence is

4 The ALRC followed, albeit in a constrained timeframe, 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 2006).

5 ALRC 2006: Recommendation 2-1 at 167.

6 Council of Europe, *Convention on the Prevention of Terrorism*, opened for signature 16 May 2005, CETS No 196, arts 5-7.

7 For a review of the history and development of these laws, as well as human rights and constitutional implications, see Bronitt and Stellios (2006).

caught between two different and competing rationales – security and anti-discrimination. This bifurcation not only promotes definitional incoherence, it also produces an offence that is both under-inclusive and over-inclusive depending on which of these two rationales is accorded priority.

Sedition is the quintessential 'political crime'. As Roger Douglas has pointed out, the offence has been used through history to 'punish people for what they think (or what they are thought to think) rather than on the basis of the degree to which their activities actually pose a threat to social order (however defined)' (Douglas 2004: 248).[8] Although rarely prosecuted in modern times, its history is tainted with political persecution: from its use against traitors in the 17th century, through to the prosecution campaign against Australian Communist Party members during the Cold War era (Douglas 2004; Head 1979; Maher 1992; Maher 1994; Woods 2002: 50-6).

The revival of sedition in 2005 caught most commentators off guard, the offence having been consigned to the 'dustbin of legal history' (Bronitt and McSherry 2001: 806-7). For nearly 50 years, this assessment stood strong, with several jurisdictions taking the further precaution of abolishing the offence, including the Australian Capital Territory and South Australia (ALRC 2006: 83-4). However, criminal offences are not subject to the doctrine of desuetude, and are always capable of resuscitation and redeployment against new or emerging threats. The revival of interest in sedition in Australia responded directly to the London bombings, presented as part of a broader package of counter-terrorism measures.[9] Significantly, the reform to the law of sedition did not form part of the wider Model Criminal Code project of codification and harmonisation that has been underway in Australia since the early 1990s.[10]

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8 See also Maher (1992: 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'.

9 See, for example, 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 at 88 (Philip Ruddock, Attorney-General).

10 For a review of this project from an 'insider' perspective, see Goode (2002). For a critical evaluation of its impact and the principles governing Code interpretation, see Gani (2005: 280).

The historical and constitutional foundations of urging inter-group violence

In late 2005 the existing sedition provisions in the *Crimes Act 1914* (Cth) were repealed and new sedition offences were inserted into the *Criminal Code* (Cth). Reflecting its historical associations with treason, sedition is included in Chapter 5 of the *Criminal Code,* titled 'The Security of the Commonwealth' (Part 5.1 – Treason and Sedition). The sedition offences in the *Criminal Code* proscribe urging others to engage in a range of specified behaviours contained in s 80.2. Three of the sedition offences deal with behaviours closely aligned with treason, namely urging others to overthrow the Commonwealth or other government, or urging others to assist the enemy or those engaged in armed hostilities (s 80.2(1)). Sedition is also directed to protecting political freedoms more widely, proscribing acts urging others to interfere with parliamentary elections (s 80.2(4)), as well as upholding public order by proscribing acts urging violence between defined groups (s 80.2(5)). The latter offence, which is the subject of this chapter, defines sedition as follows:

> **Urging violence within the community**
> (5) A person commits an offence if:
> (a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and
> (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.
> Penalty: Imprisonment for 7 years. (s 80.2(5))

While the various forms of sedition, outlined above, cover a diverse territory they are linked by a common thread of the defendant's advocacy (or 'urging', to use the term in the Code) of violence or force in defined circumstances.

Framed across these five distinct offences, sedition may be deployed against individuals in very different contexts. An effect of this multi-functionality is to blur the rationale of the offence and to combine competing rationales relating to security and anti-discrimination. Bearing in mind the potential breadth of these sedition offences, it is doubtful whether the availability of a general 'good faith' or public interest defence provides adequate legal protection for those engaged in otherwise legitimate political activity. The scope of sedition, which is punishable by seven years of imprisonment (s 80.2), should not rest on discretionary judgments of prosecutors, judges and juries about the perceived 'legitimacy' of otherwise seditious behaviour. As Enid Camp-

bell and Harry Whitmore (1973: 329) 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 political views'. Notwithstanding a strong culture of police, prosecutorial and judicial independence in Australia, the past history of sedition provides little reassurance as to future use. In my view, criminalising speech requires special consideration – protection against abusive prosecution can only be assured through the careful delineation of the physical and fault elements of sedition, with strict compliance with the general principles of the criminal law.

While the urging of inter-group violence in s 80.2(5) of the *Criminal Code* is a new offence, its pedigree lies with an earlier provision in the *Crimes Act 1914* (Cth), which proscribed 'seditious intent' as including, inter alia, the promotion of 'feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth'.[11]

The language of promoting ill-will and hostility used in the *Crimes Act 1914* seems outdated and in need of modernisation. Indeed the federal Attorney-General's Department claimed that this particular formulation addressed only incitement of unrest between different 'social classes', with the implication that the offence had no application to the incitement between groups distinguished on other grounds such as race, religious, nationality or political opinion.[12] However, this 'class conflict' interpretation of seditious intent is overly restrictive. Historical research reveals that the 19th century common law of seditious libel (on which subsequent statutory offences were developed in the 20th century) devised this form of intent specifically to deal with Irish nationalist agitation against British rule.[13] Contrary to the views expressed above, sedition under the *Crimes Act 1914* could in fact criminalise the incitement of violence between groups distinguished by race, religion, nationality or political opinion.

That said, the new sedition offence in the *Criminal Code* was a distinct improvement on the 1920s formulation. It narrowed the phy-

11 See *Crimes Act 1914* (Cth) *s* 24A(1)(g) (now repealed). This offence was inserted into the *Crimes Act* in 1920, following the classic definition of 'seditious intention' contained in Stephen (1887). See further ALRC (2006: 27-8, 47-8).

12 Commonwealth Attorney-General's Department, *Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005 – Attorney-General's Department Submission No 1* (16 November 2005) at 4.

13 ALRC (2006: 202-3) notes that the definition in Stephen (1887) was influenced by *O'Connell v The Queen* (1844) 8 ER 1061, in which the defendants were prosecuted successfully for conspiring to promote feelings of ill-will and hostility between the English and the Irish. See also ALRC (2006: 202-3) which discusses *Boucher v The King* [1951] SCR 265 at 293-4 (Kellock J).

sical element, replacing promoting 'feelings of ill-will and hostility' (concepts that are not commonly used in the modern criminal law) with urging 'violence or force'. It also clarified the meaning of 'classes' in the offence by reframing the definition in terms of specific groups. The remodelled offence borrowed heavily from the recommendations of the Gibbs Committee (Gibbs, Watson and Menzies 1988) which were made in the wider context of its review of federal criminal law.[14]

As noted by the ALRC (2006: 18), this form of sedition in s 80.2(5) has 'two possible constitutional pegs'; that is, two of the Federal Parliament's enumerated legislative powers under s 51 of the Constitution can support the section. One peg is domestic, linked to promoting security and public order within the Commonwealth. The other peg is international, linked to the Constitution's external affairs power and various treaty obligations imposed by international law. The melding of these two federal objects into a single provision pulls the offence in different directions, affecting both the form and scope of the offence.

In the present offence, the domestic dimension is reflected in a formulation linking the incitement of force or violence to the security of the Commonwealth. This linkage is achieved through the inclusion of a clumsy, albeit familiar, phrase – 'peace, order or good government of the Commonwealth' – which is drawn directly from the plenary powers phrase contained in s 51 of the Constitution, which 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]'.[15] Since its statutory formulation as a Commonwealth offence in 1920, the sedition offence has included this limb. The inclusion of this phrase in the sedition offence was judicially considered by the High Court in *R v Sharkey*:

> 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 people form a matter of internal order and fall within the province of the States. It was doubtless because this was

14 See Gibbs, Watson and Menzies (1988). The influence of the Gibbs Review on the definition is acknowledged in the Explanatory Memorandum, Anti-Terrorism Bill (No 2) 2005 (Cth) at 88. See discussion in ALRC (2006: 18).

15 *Crimes Act* 1914 (Cth) s 24A(1)(g) uses the phrase 'endanger the peace, order or good government of the Commonwealth'.

> seen to be the case that the curious words "so as to endanger the peace, order or good government of the Commonwealth" were added to those of Sir Fitzjames Stephen.[16]

A significant difficulty is that the constitutional limb of sedition conceptualises the incitement of violence or force against the Commonwealth as the *paramount* harm, rather than the harm this incitement poses for individuals and groups targeted for discriminatory violence.[17] This constrains the offence considerably: the prosecution must prove that the incitement of force or violence between groups, 'would threaten the peace, order or good government of the Commonwealth'. In terms of both scale and effect, the prosecution must prove that the violence urged would constitute a significant threat to the security of the Commonwealth. This would arguably rule out its application to small-scale and localised violence or threats to public order occurring within the borders of one State, such as the Cronulla riots (ALRC 2006: 219).[18]

The second peg upon which the constitutionality of the offence rests is related to various international human rights treaty obligations. As the Gibbs Committee had earlier noted in its review of sedition,[19] the *International Covenant on Civil and Political Rights* (ICCPR) provides the legal basis for prohibiting hate speech. Article 20(2) provides:

> Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.[20]

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

16 (1949) 79 CLR 121 at 145 (Dixon J).

17 ALRC (2006: 195), noting the concerns of the Federation of Community Legal Centres and of the Public Interest Advocacy Centre.

18 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 (2006). For media coverage, see, for example, ABC Television (2006).

19 See Gibbs, Watson and Menzies 1988; 1991.

20 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art 20(2).

> (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof …[21]

It is well known that the Commonwealth has exhibited caution in adopting a policy of criminalisation for racial vilification. Until 2005, the Commonwealth had demonstrated a high degree of free speech sensitivity in relation to vilification offences, deferring to legal opinion that criminalisation might violate the implied freedom of political discussion under the Commonwealth Constitution.[22] As Luke McNamara (2002: 304) concluded in his excellent study of racial vilification, 'free speech sensitivity has had a profound impact on the form, substance and practical operation of Australian racial vilification laws'. However, these constitutional concerns were probably overstated. As another examination of this question concluded, 'there is no basis for concluding that racial vilification is 'political speech' in terms relevant to the implied constitutional freedom recognised by the High Court' (McNamara and Solomon 1996: 281). The issue of the constitutionality of offences relating to sedition and racial vilification, and their potential impact on the implied freedom of political communication is examined in detail elsewhere (Meagher 2004). With the inclusion of appropriate limitations relating to (a) the inclusion of a fault element based on intention; and (b) a physical element that requires proof of an *imminent* (rather than remote) risk of force or violence, it is arguable that a vilification type of offence would survive constitutional challenge notwithstanding its potential impact on the freedom of political communication. Reflecting this position, the majority of jurisdictions in Australia have now made vilification a separate criminal offence.[23]

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

22 The implied freedom of political communication was established in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, and developed further in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and *Coleman v Power* (2004) 220 CLR 1.

23 *Discrimination Act 1991* (ACT) ss 65-67; *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 HREOC (1991: ch 11). See further ALRC (2006: 196-201).

Whatever the legal foundation of this hesitancy, the Commonwealth's preference until 2005 was to address its international obligations through anti-discrimination laws and available civil remedies. Thus vilification could be pursued as a manifestation of 'unlawful discrimination' under the *Racial Discrimination Act* 1975 (Cth).[24] Rather than prosecution, as envisaged by the provision of CERD, federal law only provided for a conciliation process and remedies for unlawful discrimination through the Human Rights and Equal Opportunity Commission (HREOC) (with adjudication before the Federal Magistrates Court as a matter of last resort) (Bottomley and Bronitt 2006: 299ff).

The sedition reforms in 2005 may be viewed, in part, as a reversal of the earlier Commonwealth policy in this area. The reversal, however, did not stem from a newly found commitment to the international human rights obligations outlined in CERD. Rather, this remodelling of sedition must be understood as part of a net-widening counter-terrorism strategy, which aimed to criminalise hate speech believed to precipitate acts of terrorism. From a normative standpoint, there is a strong case for criminalising a person who urges the use of force or violence between groups based on defined differences (such as race, religion, political opinion and so on). From a philosophical perspective, the outlawing of racial vilification may be viewed as a justifiable restriction on freedom of speech, assembly and association because of the harm that it causes to others. This type of behaviour, as Sadurski has noted, causes a range of harm including: (1) the harm from violent reactions by the victims; (2) others are incited to commit violence; and (3) victims suffer psychic injury (Sadurski 1994: 90).[25] While there is an argument that this type of behaviour could fall within existing public order laws, such as using offensive or insulting language,[26] there is a countervailing need to sig-

24 On 6 November 1984 Australia withdrew reservations and declarations to the ICCPR with the exception of a reservation to art 20 (ATS 1984 No 1 at 12), which states that 'Australia interprets the rights provided for by Article 19, 21 and 22 as consistent with Article 20; accordingly, the Commonwealth and States having legislated with respect to the subject matter of the Article in matters of practical concern in the interests of public order (ordre public), the right is reserved not to introduce any further legislative provision on these matters'.

25 The inclusion of psychic injury stretches the concept of harm considerably, permitting the criminalisation of racist speech where there is no prospect of violence or disorder. Consistent with liberal principles, Sadurski favours expanding the concept of harm rather than resorting to a rationale for criminalisation based on affirmative action. For further discussion of the harm principle and criminalisation, see Bronitt and McSherry (2005: 52ff).

26 Some commentators have argued against special vilification offences, proposing that it would be far better, symbolically and practically, to promote the rigorous enforcement of the existing offences (of which there are no shortage) and forthright punishment of such conduct: Gordon (1994: 51). For a review of the offensive conduct crimes, see Bronitt and McSherry (2005: 756ff).

nify as a serious offence (with an appropriate penalty) vilification which is likely to promote violence against minorities. Furthermore, the history of public order law suggests that existing laws related to offensive conduct in Australia are more likely to be used *against* Aboriginal people and other disadvantaged groups, rather than being used as an anti-discrimination measure to deal with those individuals who publicly incite racial hatred through abuse or insults.[27]

Urging inter-group violence: sedition with an identity crisis?

As noted above, the urging of inter-group violence offence has a dual rationale: the *domestic* rationale, which addresses public order and security concerns within the Commonwealth, has been grafted onto an *international* human rights rationale that seeks to advance the principle of anti-discrimination. Depending upon which of these two rationales is accorded priority, the offence is either under-inclusive or over-inclusive.

From a human rights perspective, the present offence of urging inter-group violence appears under-inclusive because it incorporates some *but not all* of the conventional impermissible grounds for distinguishing between individuals recognised in international human rights treaties and domestic anti-discrimination law. While the sedition provision refers only to groups distinguished by 'race, religion, nationality or political opinion', the ICCPR adopts the following broader approach to discrimination:

> [T]he law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, *colour*, *sex, language*, religion, political or *other opinion*, national or *social origin*, *property, birth or other status*.[28]

The ALRC has recommended expanding the definition of group-based difference to include 'national origin', specifically to deal with groups which have distinct blended identities, that is Australians who were

27 As Wojciech Sadurski (1994: 90) has noted, the present pattern of law enforcement in Australia 'over-emphasises the seriousness of insults against majority (in particular, against enforcement agents themselves) and undervalues insults against disadvantaged minorities.

28 Article 26 (emphasis added). 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.

previously or are descendants of foreign nationals such as 'Vietnamese Australians'.[29] The ALRC (2006: 197, 202) expressed 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 included neither in art 20 of the ICCPR nor art 4 of the CERD, discussed above. Since violence incited against political groups also constitutes a threat to safety and security of the Commonwealth, firmer constitutional footing may be obtained by grounding the offence on its domestic constitutional peg (rather than the international human rights peg). On balance, however, the ALRC recommended the retention of political opinion as a distinguishing factor, though sought views on this question of its constitutionality. 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.

A concern here is that moving beyond the present distinguishing grounds would produce an offence which is over-inclusive. There is a compelling argument that the labelling function of criminal law should be used to censure violence (including inchoate forms such as incitement) that singles out disadvantaged minority groups (Ashworth 2006: 88-90). Linking these vilification offences to the subordinated position of minorities would preclude their operation to restrain vilification on distinguishing grounds such as heterosexuality or Anglo-Australian identity.[30] The alternative approach would criminalise the urging of violence or force which is rooted in *any* form of discrimination proscribed by international human rights law. This type of broad human rights offence signals both to the legal and wider community that discriminatory motives behind violence (including the advocacy of violence) ought to aggravate (rather than mitigate) punishment. While enacting a broader offence may be supported by human rights and criminal justice policy, it is unclear whether these objectives can be accommodated within the terms of the existing federal sedition offence outlined above. While devastating to victims and their communities, it is doubtful whether 'hate crime' outside the field of racist or religious violence is likely to endanger significantly the security of the Commonwealth and its institutions.[31]

29 ALRC 2006: Recommendation 10.2.

30 It has been suggested that this type of hate speech does not warrant criminalisation under vilification laws on the ground that it does not produce the same harms as hate speech which targets minorities (Zanghellini 2003).

31 This extension was not considered by the ALRC (2006), reflecting its view that this form of sedition was essentially a public order offence.

An argument against broadening sedition is that this type of conduct can be addressed more effectively though other criminal law provisions. Criminalising 'hate speech' has been much debated among criminal scholars.[32] One of the concerns has been whether such crimes 'fit' with the stance of the substantive criminal law that typically discounts the relevance of motive to criminal responsibility.[33] Notwithstanding that much violence is motivated by prejudice or bias towards minority or disadvantaged groups, and constitutes a recurrent theme in many serious crimes including homicide, under the criminal law such 'facts' are deemed irrelevant to guilt. While banished from the substantive law, discriminatory motives may be considered *indirectly* as factors relevant to sentencing.[34] In the United Kingdom, racial or religious hatred towards the victim aggravates the penalty for the offence.[35] In New South Wales, a broader model of sentence aggravation was adopted in 2002 as part of an overhaul of general sentencing principles. Under this provision, matters aggravating 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)'.[36]

While these sentencing powers are progressive from an anti-discrimination perspective, there are two significant limitations: first, the consideration of these factors is based on a judicial discretion (rather than an obligation);[37] secondly, the provision omits 'gender' as a protected group. A cursory review of violent offences (murder, rape and assault) reveals that 'domestic violence' is pervasive, and that much serious crime directed towards women is motivated by misogynistic

32 For analyses of the criminalisation of 'hate speech', see Anand (1997); Flahvin (1995); Meagher (2004a); Meagher (2006); White (1997). For an excellent review of 'hate crimes' more generally in the Australian context, see Walters (2005).

33 See Bronitt and McSherry (2005: 175), though it should be noted that there are some exceptions to this general proposition.

34 Ibid at 175: 'While the legal suppression of motive keeps the political, social and cultural explanations of offending out of the court room at the trial stage, motive is highly relevant at sentencing'.

35 See Walters (2005: 204) discussing the *Crime and Disorder Act 1998* (UK), and the 2001 reforms, which extended the power to aggravate penalties to religious hatred as part of a package of anti-terrorism laws.

36 Ibid at 209 discussing *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(h), inserted by *Crimes (Sentencing Procedure) Amendment (General Sentencing Principles) Act 2002* (NSW). For a review of hate crime generally, see Cunneen, Fraser and Tomsen (1997).

37 The *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'.

and sexist attitudes.[38] The exclusion of gender as a hate crime motivation is regrettable in light of the criminal law's continued struggle to regard such discriminatory motives and gendered harm as aggravating rather than mitigating conditions.[39]

Recognising the difficulties with applying the term sedition to an anti-discrimination measure, the ALRC recommended that the offence should be conceived, more narrowly, as a public order offence.[40] However, as a public order offence, this form of sedition has some curious features. The offender's incitement must be directed to provoking violence *between groups*. Thus, simply inciting violence against an *individual* (by virtue of his or her membership of a defined group) may fall outside the scope of the offence. The inclusion of the 'group-to-group' limitation has been justified by reference to the counter-terrorism rationale, with the Attorney-General's Department noting that this aspect of the offence 'drives at the root cause of the problem of terrorism by focusing on violence that is behind it'.[41] Singling out acts of incitement of group-to-group violence may be counterproductive. There is concern that this feature of the offence 'stigmatises group-based violence and reinforces the stereotyping of certain ethnicities or religions as terrorists' (ALRC 2006: 209).[42]

Conclusion

Do we need this species of sedition to deal with individuals who incite (with discriminatory motives) violence between groups? Should the substantive criminal law be tagged to anti-discrimination law and policy in this way? To both questions, the answer is 'no'.

In simple terms, combining security and anti-discrimination rationales produces an offence which is either over-inclusive or under-inclusive depending on which rationale is accorded priority. Worse still, such an offence may produce counterproductive effects. The integration of anti-discrimination jurisprudence into the substantive crimi-

38 For the available data on the prevalence of domestic violence, see Bronitt and McSherry (2005: 720).

39 Worse still, in some contexts, these discriminatory beliefs provide foundations for partial excuses like provocation: ibid at 280-1.

40 See ALRC (2006: 66), noting that '[t]his is a public order offence aimed at punishing and deterring violence between different groups in the Australian community and bears little relationship with historical conceptions of "sedition".'

41 Commonwealth Attorney-General's Department, *Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005 – Attorney-General's Department Submission No 1* (16 November 2005) at 12.

42 In addition, recent research by HREOC (2004) shows that, since 11 September, Australian Arabs and Muslims are often vilified based on a perception that they share responsibility for terrorism or are potential terrorists.

nal law requires the law to maintain 'neutrality' between those groups being distinguished by this offence. In common with anti-discrimination measures generally, the offence of urging inter-group violence does not expressly identify those disadvantaged minority groups requiring protection under the law. Framing the offence in neutral terms flows from the legal commitment to the liberal principle of equality before the law (Bottomley and Bronitt 2006: 32 ff). But as Aleardo Zanghellini (2003: 459) has noted:

> A problem with this neutral approach is that the relevant law may be applied a way that reinforces current social hierarchies. Thus, in the British context the relevant (neutrally worded) racial anti-vilification law 'was used, at least in the first decade of operation, more effectively against Black Power leaders than against white racists'.

Critical feminist scholarship has similarly identified this counter-productive feature of gender discrimination laws based on equality.[43] In light of this experience, it is not unreasonable to assume that the equivalent 'neutrality' of this type of sedition offence may not protect those minorities which have been historically oppressed by discriminatory violence (including Aboriginal, Jewish and Islamic communities).[44] Worse still, there is a concern such an offence will be counterproductive, intensifying surveillance and policing of these communities (which already suffer from disproportionately high levels of policing) (Bronitt and McSherry 2005: 745-7, 764-5). Indeed, the history of sedition in the 1940s demonstrates how the media, in an effort to expose the threat of Communism within Australia, engaged in a range of entrapment techniques, soliciting statements of disloyalty from Communist Party members by the contrived use of hypothetical propositions.[45] In the current context of the political debate about Muslims and their allegiance to Australia, it is not unlikely that religious and community leaders may be subject to similar 'loyalty testing' by these laws. There is no doubt that in the post-9/11 environment there was an increase in

43 For a review of critical feminist perspectives on equality jurisprudence generally, see Bottomley and Bronitt (2006: 257-75).

44 HREOC (1991: 69-177, 209-26) documented in a 1991 report widespread racial violence against minorities, including Aboriginal, Jewish and Islamic communities in Australia. At the time of writing, Sheik Feiz Mohammad allegedly made comments that referred to Jews as evil and calling them pigs; the Acting Attorney-General Kevin Andrews indicated that this case will be reviewed by the Australian Federal Police to determine whether sedition charges could be laid: Gibson and O'Malley (2007).

45 *Burns v Ransley* (1949) 79 CLR 101; *R v Sharkey* (1949) 79 CLR 121. Sharkey was prosecuted for statements, made during an interview with the press, that in the event of a war against the Soviets, 'Australian workers would welcome Soviet Forces': see further Maher (1992: 301).

racist violence against minority groups (a point explored in other chapters in this collection). However, enacting exceptional measures, such as sedition offences, is unlikely to counter these trends, or serve as an effective instrument of either counter-terrorism or anti-discrimination law and policy.

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