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**Sedition, Incitement and
Vilification: Issues in the
Current Debate**

by

Gareth Griffith

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by

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EXECUTIVE SUMMARY

The purpose of this Briefing Paper is to explore any potential implications for NSW arising from the recent debate on free speech, most notably in respect to the Commonwealth sedition laws. These were enacted in the context of the new anti-terrorism legislation, as Schedule 7 of the Commonwealth Government's Anti-Terrorism Act (No 2) 2005 [**the 2005 Act**].

The paper focuses on three areas of the law, all of which impinge on the issue of free speech. First, it considers the law of sedition as this applies federally and in NSW. Secondly, the law of incitement is discussed. Thirdly, the paper presents an overview of the law of racial and religious vilification, taking account of the Anti-Discrimination Amendment (Religious Tolerance) Bill 2005, a Private Member's bill introduced in the NSW Legislative Council on 15 September 2005.

Sedition: The validity of the Commonwealth 2005 Act relies to an extent on the referral in 2002 by the States to the Federal Parliament of 'certain matters relating to terrorist acts'? Schedule 7 is an exception. By section 80.2(1)(b), the Federal sedition offences expressly protect 'the Government of...a State' from persons who urge others to overthrow it by 'force or violence'. In other words, the new Federal sedition laws extend to cover the protection of State governments. (page 2)

There is no specific statutory offence of sedition in NSW. Instead, the common law is relied upon. However, by section 35 of the *Imperial Acts Application Act 1969*, following a conviction for seditious libel the court may give an order for the seizure of all copies of the libel. There is therefore statutory recognition of the offence of seditious libel. This provision does not seem to have been used. It may be argued that it remains relevant in the present uncertain climate. If so, it may also be time to update its language and to consider the need for some substantive revision, as has occurred at the Federal level. Alternatively, it may be that State sedition laws generally, in NSW or elsewhere, have little if any role to play in the light of the broad new Commonwealth offences. (pages 18-24)

Incitement: Commentaries on the new sedition offences at the Commonwealth level point out that many of the offences contemplated under Schedule 7 could be successfully prosecuted under the 'Incitement' provisions of the Criminal Code, in combination with other offences. (page 25)

The general law of incitement in NSW belongs to the common law. This is not to say that specific statutory offences of incitement do not exist in NSW. Examples include: the incitement of serious racial vilification; the provision of on-line services that incite in matters of crime or violence. Also relevant is the *Crime Prevention Act 1916* (NSW). The Act is a procedural innovation, permitting incitement offences to be tried summarily. (pages 27-32)

Anti-terrorism and vilification law: Vilification laws are another means by which free speech may be curtailed. The issue of vilification is raised in the context of recent legislative and other anti-terrorist measures. A new dimension to the debate on racial and

religious vilification at the Commonwealth level is found in section 80.2(5) of Schedule 7 of the Commonwealth's *Anti-Terrorism Act (No 2) 2005*. One view of this provision is that it seeks to redress the perception that anti-terrorist legislation, while general in application, may in fact target a particular section of the community. (page 33)

Similar ground has been covered in the UK, where attempts to introduce stricter anti-terrorist laws have been accompanied by attempts to assuage concerns expressed by minority groups, by expanding the existing offences of incitement to racial hatred to apply to those who stir up hatred against a group of people based on their religious beliefs. Both arms to this legislative strategy have proved highly controversial. (pages 36-39)

Racial vilification laws: These exist in several Australian jurisdictions, including NSW under the *Anti-Discrimination Act 1977*, where civil and criminal remedies apply. The term 'ethno-religious' was inserted into the definition of 'race' in the Act in 1994, but was not itself defined. The interpretation of this term has proved problematic, especially as to its application to Muslims. The NSW Law Reform Commission recommended that the term 'ethno-religious origin' be removed from the definition of race. It also recommended that religion should be included as an unlawful ground of discrimination. However, it was not satisfied that the vilification provisions should be extended to cover religious vilification. In 1999 it 'found little evidence of widespread religious vilification in the community'. (pages 51-55)

Religious vilification laws: The 2004 HREOC report, *Isma—Listen: National Consultation on Eliminating Prejudice Against Arab and Muslim Australians* found that the majority of Arab and Muslim women canvassed had experienced an increase in violence or offensive remarks since the September 11 attacks and the first Bali bombings. The report commented: 'The lack of protection under NSW anti-discrimination law was of particular concern to Muslims in NSW, where the majority of Australian Muslims live'. HREOC recommended that Federal law be introduced making unlawful discrimination on the ground of religion or belief. Commonwealth vilification laws on the ground of religion or belief were also recommended. (page 57)

At present religious vilification laws exist in three Australian jurisdictions – Queensland, Victoria and Tasmania. Laws that restrict free speech by making unlawful vilification on the ground of religion are extremely controversial. The encouragement of tolerance in a multicultural society is one thing; its enforcement by means of religious vilification laws something different again. Very strong advocates can be found on both sides of the argument, for and against such laws. In NSW, this has proved to be the case in respect to the Anti-Discrimination Amendment (Religious Tolerance) Bill 2005. Both the Government and Opposition have declined to support the Bill on policy grounds. (page 69)

Defining religion for legal purposes is no easy matter. Guarding against the abuse or frivolous use of such legislation can also be difficult. Symbolic law can have value, in educational and other ways, but it can also carry dangers of unintended consequences. Practically, the underlying issue is whether there is a significant social problem and, if so, is it best tackled by means of vilification laws? (page 73)

1. INTRODUCTION

The purpose of this Briefing Paper is to explore any potential implications for NSW arising from the recent debate on free speech, most notably in respect to the Commonwealth sedition laws. These were enacted in the context of the new anti-terrorism legislation, as Schedule 7 of the Commonwealth Government's Anti-Terrorism Act (No 2) 2005 [**the 2005 Act**].

The current debate occurs at a time when the threat of terrorist activity has intensified, following the events of 11 September 2001 in the US and, nearer home, after 12 October 2002 when 200 people were killed in a terrorist attack at Kuta Beach in Bali, among them 88 Australian citizens. Since then a series of terrorist attacks have occurred in South East Asia and beyond, including a car bomb outside the Australian embassy in Jakarta in September 2004 and another explosion in Bali on 1 October 2005, claiming more Australian lives. Australians were also among those injured in the terrorist attacks in London in July 2005.

In Australia, as in other comparable jurisdictions, the present political climate has raised difficult questions about free speech and civil liberties generally, as legislators around the world seek to react to the challenges and threats posed by global terrorism. A range of related but conflicting issues are raised: the vulnerability of society generally to terrorist attack can be contrasted with the vulnerability of civil liberties when tensions are running high. Another issue is the potential vulnerability of certain minorities to censure and discrimination. Facing similar challenges, the British Government has introduced a raft of bills. On one side, it has sought to criminalise statements that glorify the commission or preparation of terrorist acts.¹ On the other, it has also attempted to expand the existing offences of incitement to racial hatred to apply to those who stir up hatred against a group of people based on their religious beliefs.² Different again is the questioning of 'tolerance' as a value, particularly when this is associated with the policies of multiculturalism. Bob Birrell, Director of the Monash University Centre for Population and Urban Research Centre, has spoken of these multicultural policies setting the 'scene for the maintenance and even flourishing of doctrines which from the mainstream point of view are not healthy'.³ To be added to this mix are the recent tensions and disturbances in Sydney, where communal violence has been attributed to racial and other factors. Cumulatively, recent events have shifted the debate on free speech and civil liberties, lending weight and credibility to arguments for appropriate limitations and restriction. Such moves are invariably controversial, involving as they do countervailing public interests.

This paper focuses on three areas of the law. First, it considers the law of sedition as this applies federally and in NSW. Secondly, the law of incitement is discussed. Thirdly, the

¹ Terrorism Bill 2005, clause 1(2)(a).

² Racial and Religious Hatred Bill, introduced in the House of Commons on 9 June 2005; an earlier version of these provisions was found in the Serious Organised Crime and Police Bill 2004, cl 119 and Schedule 10.

³ M Stokete, 'Risks of abundant tolerance', *The Australian*, 16 July 2005.

paper presents an overview of the law of racial and religious vilification, taking account of the Anti-Discrimination Amendment (Religious Tolerance) Bill 2005, a Private Member's bill introduced in the NSW Legislative Council on 15 September 2005.

2. SEDITION PROVISIONS IN THE COMMONWEALTH'S ANTI-TERRORISM ACT (NO 2) 2005 ACT

2.1 Sedition defined

The *Australian Concise Oxford Dictionary* defines sedition as follows: '1. conduct or speech inciting to rebellion or a breach of public order, 2. agitation against the authority of a State'.

In the Federation Edition of the *Macquarie Dictionary* sedition is defined to mean: incitement of discontent or rebellion against the government; action or language promoting such discontent or rebellion.

2.2 The 2005 Act, the States and the sedition offences

The *Anti-Terrorism Act (No 2) 2005* is the centerpiece of Australia's recent legislative reaction to the threats posed by global terrorism. The new sedition laws are contained in Schedule 7. Legislation has also been passed at the State level, including the *Terrorism (Police Powers) Amendment (Preventive Detention) Act 2005* (NSW).

The validity of the Commonwealth 2005 Act relies to an extent on the referral in 2002 by the States to the Federal Parliament of 'certain matters relating to terrorist acts'?⁴ Schedule 7 is an exception. The constitutional powers relied on by the Commonwealth are discussed later. For the present, the point to make is that, by section 80.2(1)(b), the Federal sedition offences expressly protect 'the Government of... a State' from persons who urge others to overthrow it by 'force or violence'. In other words, the new Federal sedition laws extend to cover the protection of State governments.

By section 80.2(6) the Act does not intend to 'cover the field' in respect to sedition. It states that the Commonwealth regime does not exclude State or Territory legislation in this area, at least to the extent that State or Territory law is 'capable of operating concurrently' with the Federal legislation. In other words, it is contemplated that the current combination of federal, State and Territory laws will continue in some form. At present, those States and Territories that have adopted Criminal Codes have enacted statutory sedition offences,⁵ whereas in New South Wales and Victoria sedition remains a common law offence. Only in South Australia⁶ and the ACT⁷ has the offence of 'seditious libel' been abolished.

⁴ *Terrorism (Commonwealth Powers) Act 2002* (NSW).

⁵ *Criminal Code Act 1899* (Qld), s 44; *Criminal Code Act 1924* (Tas), s 67; *Criminal Code* (WA), s 44.

⁶ *Criminal Law Consolidation Act 1935* (SA), Sch 11.

2.3 Sedition offences updated

The 2005 Act is the main response to current security concerns. Introduced into the House of Representatives on 3 November, it was passed in the Senate on 6 December, after 74 Government amendments had been agreed to.⁸ Among these amendments were ones relating to the sedition provisions in Schedule 7.

A feature of the Act is that it ‘updates’ the sedition offences. In the Second Reading speech for the bill, the Commonwealth Attorney-General, Philip Ruddock stated:

The updated sedition offence will address problems with those who incite directly against other groups within our community. The sedition amendments are modernising the language of the provisions and are not a wholesale revision of the sedition offence. However, given the considerable interest in the provisions, I would like to assure this House that I will undertake to conduct with my department a review of the sedition offences.⁹

On this question, Laurence Maher argued in 1992:

as long as the various sedition offences remain, governments will inevitably be tempted to use them improperly, especially when highly unpopular opinions are expressed...the law of sedition is anachronistic and an unjustified interference with freedom of expression ...abolition of sedition offences at both Commonwealth and State level is therefore to be preferred to any attempt to “modernise” the crime of sedition.¹⁰

2.4 Sedition offences in 1920

Sedition offences were first introduced into Commonwealth law in 1920 as part of a raft of provisions in the *War Precautions Act Repeal (1920)* (Cth) dealing with unlawful assemblies and incitement to crimes. The Act was introduced at a time when the Western powers were starting to feel the threat posed by the Bolshevik Revolution and more sharply as the British Empire was facing up to the demands for self-determination, immediately in Ireland and prospectively in India and beyond. The sedition offences were in fact based on those found in the Queensland Criminal Code, as inserted by Sir Samuel Griffith in the 1890s, itself a reflection of the English law of sedition as set out by Sir JF Stephen.

As originally enacted, the Federal sedition offences, sections 24A to 24E of the Federal

⁷ *Law Reform (Abolition and Repeals) Act 1996* (ACT), s 4.

⁸ The House of Representatives agreed to the Senate amendments on 7 December 2005.

⁹ *Commonwealth Parliamentary Debates (HR)*, 3.11.2005, p 103.

¹⁰ LW Maher, ‘The use and abuse of sedition’, (1992) 14 *Sydney Law Review* 287 at 288.

Crimes Act 1914-15, created the offences of seditious words (spoken or written)(section 24C) and engaging in a seditious enterprise (section 24D). A ‘seditious enterprise’ was defined to be ‘an enterprise undertaken in order to carry out a seditious intention’, whereas the writing or uttering of seditious words are ‘words expressive of a seditious intention’ (section 24B). As for seditious intention itself, this was defined by section 24A as an intention:

- (a) To bring the Sovereign into hatred or contempt;
- (b) To excite disaffection against the Sovereign, Government or Parliament of the UK;
- (c) To excite disaffection against the Government or Constitution of any British Dominion;
- (d) To excite disaffection against the Australian Government, Constitution or either House of the Parliament;
- (e) To excite disaffection against the imperial ties of the British Dominions;
- (f) To excite others to alter Commonwealth laws by other than lawful means; or
- (g) To promote feelings of ill-will and hostility between different classes of subjects so as to endanger the peace, order or good government of the Commonwealth.

This regime was qualified by section 24A(2) which made it lawful to: (a) ‘endeavour in good faith’ to show that government policy is mistaken; (b) ‘point out in good faith’ errors or defects in the Government or Constitution of the UK, any British Dominion, or the Commonwealth of Australia, or in legislation or the administration of justice, with a view to reforming these errors or defects; (c) ‘excite in good faith’ others to reform any matter in the Commonwealth by lawful means; and (d) ‘point out in good faith’ matters tending to produce ill-will and hostility between different classes of subjects, with a view removing these things.

Speaking to these latter clauses, Prime Minister Billy Hughes said they ‘will give ample freedom to the citizens of this country to obtain redress of all grievances, and to secure by lawful means any reforms which they may deem necessary’.¹¹ Among the ranks of unconvinced was JF Catts, a Labor anti-conscriptionist who was prosecuted seven times under the *War Precautions Act 1914* for asserting that a pro-German Japan had designs on Australia.¹² With some benefit of experience, Catts said:

I desire to put on record the perversions of the law which this so-called enlightened government are placing on the statute-book. Such measures as this are absolutely unnecessary – have not the slightest justification. No evidence has been brought forward to show that the existing law is not sufficient.¹³

By section 24E the sedition offences could only be prosecuted summarily with the consent of the Federal Attorney-General. The penalty was imprisonment for three years.

¹¹ *Commonwealth Parliamentary Debates (HR)*, 22.11.1920, p 6791.

¹² A Hoyle, ‘JF Catts’, *ADB*, Vol 7, pp 591-3.

¹³ *Commonwealth Parliamentary Debates (HR)*, 24.11.1920, p 6946.

2.5 The 1949 sedition cases

Two successful prosecutions under the 1920 Commonwealth sedition offences were upheld in 1949 by the High Court, both cases involving the prosecution of Communist Party members by the Chifley Government. In *Burns v Ransley* Gilbert Burns was convicted of sedition for saying in a public debate that the Communist Party in Australia would, in case of war, 'fight on the side of Soviet Russia'. With the Court evenly split, in his decisive judgment Latham CJ considered it unnecessary to consider the common law of sedition, a view that 'amounted to a holding that a conviction could be sustained in the absence of any incitement to violence'.¹⁴ In *R v Sharkey* Laurence Louis Sharkey was convicted for a statement published in the *Daily Mirror* which included saying that 'If Soviet Forces in pursuit of aggressors entered Australia, Australian workers would welcome them'. Campbell and Whitmore commented, 'Again, the High Court held that the conviction could be sustained despite the lack of incitement to violence and public disorder'.¹⁵

2.6 The 1953 case

The last Commonwealth sedition trial was an unsuccessful prosecution by the Menzies Government of three members of the Communist Party (James Norman Bone, Herbert Bovyll Chandler and Adam Ogston). The cases, which were tried together, resulted in the dismissal of all charges on 18 September 1953. At issue was an article titled 'The Democratic Monarchy' published in *Communist Review* in June 1953, around the time of the Coronation. The article criticised the monarchy as a 'bulwark of conservatism against social change', characterising it as an instrument of class rule. In its editorial on the case, the *Sydney Morning Herald* described the article as 'puerile in its argument and offensive in its manner' but said it 'could not possibly be considered seditious unless it was held that any criticism of the monarchy is a form of sedition'. Supporting the outcome of the case, the *Herald* said 'Another verdict would have seriously endangered freedom of speech in this country'.¹⁶

¹⁴ Campbell and Whitmore, *Freedom in Australia*, Sydney University Press 1966, p 192. Dixon J was of the opinion that what Burns said 'was merely a hypothetical answer to a hypothetical question, and did not amount to excitation of disaffection'.

¹⁵ Campbell and Whitmore, n 14, p 192. For more detailed accounts of these and other sedition cases see - LW Maher, 'The use and abuse of sedition' (1992) 14 *Sydney Law Review* 287 and M Head, 'Sedition - Is the Star Chamber Dead?' (1979) 3 *Criminal Law Journal* 89. Discussed is *Cooper v The Queen* (1961) 105 CLR 177, a sedition case brought under the Queensland Criminal Code and in relation to which leave to appeal was refused by the High Court. In that case there was incitement to violence, by words exhorting the people of New Guinea to use force to further the cause of national self-determination.

¹⁶ 'A stupid prosecution', *SMH*, 19.9.1953; 'Three sedition charges dismissed: Crown to pay costs', *SMH* 19.9.1953.

Reflecting on these cases, Maher writes:

What needs to be emphasised is that in none of the sedition cases in the period 1948-53 was there any evidence of an actual (that is, subjective) seditious intention of the types referred to in s. 24A of the Crimes Act 1914. Nor was there the slightest shred of evidence that the words used by any of the defendants were intended to provoke violence or public disorder or that the words in fact created any immediate threat of that kind.¹⁷

2.7 Intent to cause violence

In 1986 the offences of ‘seditious enterprises’ (section 24C) and ‘seditious words’ (section 24D) were amended to include ‘the intention of causing violence or creating public disorder or a public disturbance’, thereby bringing these statutory offences broadly into conformity with the common law.¹⁸

2.8 Other relevant Commonwealth offences

Prior to the 2005 Act these sedition offences were found in Part II of the Federal *Crimes Act 1914*, headed ‘Offences against the Government’. Part II includes offences of ‘treachery’ (section 24AA), ‘sabotage’ (section 24AB) and ‘incitement to mutiny’ (section 25). Provisions relating to ‘unlawful associations’ are in Part IIA, where associations which encourage ‘seditious intention’ are declared to be unlawful (section 30A(1)(b)). Also in Part IIA are specific offences of ‘advocating or inciting to crime’. These incitement offences are expressly concerned with the prevention of violent revolutionary activity and the like, including the overthrow by force or violence of a State government (section 30C(b)). Similarly, the offence of ‘treachery’ includes the doing of an act with intent to overthrow an established government of a State by force or violence (section 24AA(1)(ii)).

The armoury of relevant criminal offences is added to by the Commonwealth *Criminal Code*, for example the general ‘incitement to crimes’ offences in section 11.4, the ‘treason’ offences under section 80.1¹⁹ and the various ‘terrorist’ offences under sections 100.1 to 100.6.

2.9 Debate on the new sedition offences

Sedition laws are invariably controversial. Schedule 7 of the 2005 Act was no different. When a draft version of the Bill was released unofficially concerns about its contents were expressed from several quarters. Quoted on the ABC’s *The World Today* program was an

¹⁷ Maher, n 10, p 309.

¹⁸ At the same time section 24A (definition of seditious intention) was amended to omit those categories relating to the United Kingdom and its former Dominions (sections 24A(b)(c) and (e)).

¹⁹ By section 80.1(6) of the Criminal Code, the same ‘good faith’ defences apply in treason cases as in cases of sedition under section 24F of the Federal *Crimes Act*.

extract from a draft letter to the Howard Government from Australia's largest news organizations, Fairfax and News Limited, stating

The expansion of the sedition laws contemplated in this bill is the greatest threat to publication imposed by the Government in the history of the Commonwealth.²⁰

There was disquiet in the media, in academic, legal and artistic circles, even among Federal Coalition Party backbenchers, with Malcolm Turnbull putting the case on the ABC's *Lateline* program for a thorough revision of the 'archaic' sedition laws.²¹ Reflecting on the 2005 Bill generally, Liberal Party backbencher Petro Georgiou said:

These measures bring to the fore the very real tension between Parliament's duty to protect the community from the threat of terrorism and its obligation to ensure that other fundamental rights such as due process, liberty and freedom of speech are not unduly infringed upon or curtailed.²²

Federal Opposition Leader Kim Beazley and the premiers of NSW, Victoria and Queensland criticized the sedition provisions for imposing restrictions on free speech'.²³ Singling out the sedition aspect of the anti-terrorism package, the Victorian Premier, Steve Bracks, expressed concern about laws that were 'too broad and a threat to free speech'. He is reported as saying that the 'sedition proposals were not part of the agreement Victoria has signed' with the Commonwealth.²⁴

When the Senate Legal and Constitutional Legislation Committee reported on the 2005 Bill in late November it commented that of 294 submissions it received only two supported the proposed new sedition laws.²⁵ These two were the Federal Attorney-General's Department and the Australian Federal Police. The Senate committee's advice to the Federal Government in this matter was to 'proceed with a measure of caution'. In fact, bowing to pressure from its own backbench, as expressed through the Coalition dominated Senate Legal and Constitutional Legislation Committee and at a meeting of Coalition parties on 30 November, the Government eventually agreed to a number of amendments to its anti-

²⁰ 'Artists, journalists fearful of sedition provision in anti-terror laws', *The World Today*, ABC, 31 October 2005 - <http://www.abc.net.au/worldtoday/content/2005/s1494417.htm>

²¹ ABC NewsOnline, 'Turnbull urges review of sedition laws', 5 November 2005 - <http://www.abc.net.au/news/newsitems/200511/s1498428.htm>

²² L Dodson and J Kerr, 'MPs split on sedition law change', *The Australian*, 11.11.2005.

²³ S Scott, 'Liberals, Labor and lawyers attack sedition laws', *The Australian Financial Review*, 15.11.2005.

²⁴ I Munro, 'Free speech at risk from law: Bracks', *SMH*, 14.11.2005.

²⁵ Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, November 2005, p 114.

terrorism package, including Schedule 7.²⁶ It was in this form that the sedition laws eventually passed through the Federal Parliament.

2.10 Overview of the sedition provisions in the 2005 Act

There are two main aspects to Schedule 7 of the Act. First, the sedition offences previously found in the Commonwealth *Crimes Act* are repealed. By new subsection 30A(3) a definition of ‘seditious intention’ is still found in the *Crimes Act*, but this is in specific relation to the offences of ‘unlawful association’. Secondly, the Act inserts new sedition offences into the Criminal Code, under Part 5.1 headed ‘Treason and sedition’. The main features of this second aspect of the Act are as follows:

Five new offences: Section 80.2 sets out five new offences of sedition as follows:

- (a) Urging another person to overthrow by force or violence the Constitution or the Government of the Commonwealth, a State or a Territory; (s. 80.2(1))
- (b) Urging another person to interfere by force or violence in parliamentary elections; (s. 80.2(4))
- (c) Urging a group or groups (whether distinguished by race, religious, nationality or political opinion) to use force or violence against another group or groups, where that would threaten the peace, order and good government of the Commonwealth; (s. 80.2(5))
- (d) Urging another person to assist an organization or country that is at war with the Commonwealth (whether declared or undeclared); (s. 80.2(7))
- (e) Urging another person to assist those engaged in armed hostilities with the Australian Defence Force. (s.80.2(8))

Each offence has a maximum penalty of 7 years, compared with the penalty of 3 years for the existing offences in the Federal *Crimes Act*.

Protection of State governments: A feature of offence (a) above is that it includes urging others to violently overthrow ‘the Government of...a State’. This might either be said to extend the reach of the Federal sedition laws or, alternatively, to make explicit what was previously implicit in the previous protection afforded to the ‘Constitution of the Commonwealth’ under s.24A(d) of the Federal *Crimes Act*. The constitutionality of this aspect to the law is discussed below.

Recklessness: A controversial and confusing aspect of the original Bill was that for offences (a)-(c) above the requirement to prove intent to incite others to undertake specific acts of violence was replaced by ‘recklessness’. Section 5.4 of the Criminal Code defines the element of recklessness to mean that a person is reckless with respect to a result if they are aware of a substantial risk that the result will occur, and having regard to the circumstances known to them it is unjustifiable to take that risk. The Senate Legal and Constitutional Legislation Committee received evidence expressing concern ‘about the use of the standard of “recklessness” in the provisions, rather than “intention”’. Cited was the

²⁶ M Secombe and A Clennell, ‘PM caves in to party revolt on terror laws’, *SMH*, 1.12.2005.

advice of Bret Walker SC to the ABC where he argued, ‘There is no reference within proposed s. 80.2 to any requirement that the person doing the urging have any particular intention, such as the previous requirement for the intention to cause violence or create public disorder or disturbance’. Countering these concerns, the Federal Attorney-General’s Department submitted that under the proposed provisions the urging of violence had to be intentional whereas the consequences of that conduct only had to satisfy the requirement of recklessness.

The upshot of this debate was that the Government successfully moved an amendment to s. 80.2(2) in the Senate, clarifying what the fault element of recklessness applies to and, by the explanatory memorandum, further clarifying that, by virtue of s. 5.6 of the *Federal Criminal Code Act 1995*, ‘Intention applies to the conduct element of urging force or violence’. What this seems to mean is that the prosecution must prove ‘intention’ in terms of the *physical element* of the offence, in that the accused must intend to incite another person to commit the *actus reus* of the offence; on the other hand, the lesser requirement of ‘recklessness’ is sufficient for the physical consequences that might result. For example, the accused must be shown to have intent in urging others to violently overthrow the State government (the offence of sedition), but only recklessness so far as the consequences are concerned – whether the urging might result in acts of violence against State property or in an attempt to harm the Premier.²⁷ If that is an accurate interpretation of offences (a)-(c) above, the point to make is that, unlike the offence of incitement, they do not require purposive intention. For these sedition offences the offender need not desire the particular consequence, but he could be said to have foreseen its possibility and took the risk.

Force or violence: Urging others to resort to ‘force or violence’ is an element of the first three offences (a)-(c). However, it is not an element for offences (d) and (e) above. The Senate committee was told that these last offences ‘represented two completely new offences which “considerably expand existing sedition laws”’. Against the argument that the new offences under subsections 80.2(7) and (8) did not need to prove a link to violence, the Department responded that these offences were already contemplated under the pre-existing sedition offences, by section 24F(2) of the Crimes Act which says that the relevant defences to the sedition offences do not extend to those assisting enemies or those engaged in combat against the Australian Defence Force.

Prior to its amendment in the Senate, a link to force or violence was not required for those aspects of the Bill relating to the ‘unlawful associations’ provision of the Commonwealth *Crimes Act* (see below).

Defences: The Bill provides a defence to the offences relating to treason and sedition for certain acts done in ‘good faith’. These are set out in section 80.3 of the Criminal Code, about which the Explanatory Note for the 2005 Bill states:

²⁷ This last requirement would appear to be less onerous from a prosecution standpoint than the elements for the statutory offence of incitement found in section 11.4 of the Federal Criminal Code. This requires that, for a person to be guilty of an offence of incitement, ‘*the person must intend that the offence incited be committed*’. This seems to reflect the position at common law where a purposive intention is required – *Giorgianni v R* (1985) 156 CLR 473; M McNamara, *Outline of Criminal Law*, Butterworths 1997, p 310.

The section effectively mirrors the defence of good faith contained in section 24F of the Crimes Act, which applied to sedition offences in that Act, and the treason offence in section 80.1... The only substantive difference between section 24F of the Crimes Act and new section 80.3 of the Criminal Code is that the new provision gives more discretion to a court in considering whether an act was done in good faith.

The 'good faith' defences to the sedition offences under the Crimes Act were reformulated in 1960 and placed in the new section 24F. The defences were updated in a number of ways. For example, reference to criticism of the UK government and its former Dominions was omitted. On the other hand, the Australian categories were extended to include, among others, criticism in good faith of the Governor-General and the Governor of a State, in addition to criticism of the governments of the States, Territories and any foreign country. The Menzies Government also included a defence for anything done in good faith 'in connection with an industrial dispute or an industrial matter' (section 24F(1)(e)).

All these 'good faith' defences are now reproduced under s 80.3 of the Criminal Code. The one addition, inserted by a Government amendment in the Senate, is the new 'media' defence where a person 'publishes in good faith a report or commentary about a matter of public interest' (s 80.3(1)(f)). A media-specific defence of this kind had been argued for by Fairfax and others.

Where the 'good faith' defences do not apply: By section 24F(2) the 1960 amendments to the *Crimes Act* also stipulated those acts or things that would not qualify as 'good faith' defences to the sedition offences. These included anything done 'for a purpose intended' to prejudice the safety or defence of the Commonwealth, or with intent to assist an enemy at war with the Commonwealth. Added in 1986, consistent with the revision of the seditious enterprise and seditious words offences, were things done 'with the intention of causing violence or creating public disorder or a public disturbance' (section 24F(2)(e)). Further amendments were made in 2002, under the first round of anti-terrorism legislation. Notably, the 'good faith' defence is not available to those who intend to assist an 'organization' as defined by section 100.1 of the Criminal Code and which is engaged in armed hostilities against the Australian Defence Force (section 24F(2)(ba)(ii)). Nor is it available to those with intent to assist an enemy specified by proclamation under the Criminal Code to be an enemy at war with the Commonwealth. By paragraph 80.1(1)(e) of the Criminal Code, for this purpose a state of war does not need to have been declared against the enemy in question.

Again, these exceptions to the 'good faith' defences are reflected in s 80.3(2) of the 2005 Act. As noted, the only substantive difference is that the new provision gives more discretion to a court in considering whether an act was done in good faith.

Burden of proof: The defendant bears the evidential burden in respect to these defences, as they do for the defence of providing humanitarian aid. This last defence is specific to offences (d) and (e) above (subsections 80.2(7) and (8)). Responding to the claim that the burden of proof for the defences under the sedition provisions would be on the defendant,

the Department explained to the Senate committee that ‘the defences do not shift the burden of proof to the defence. The defence has to satisfy the evidential burden. This means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the defence exists...Once the defence establishes that this reasonable possibility exists, the prosecution has to prove the defence does not exist beyond reasonable doubt’.

Other aspects: These include:

- extension of the application of the sedition offences to conduct which occurs outside Australia and to any person, whether or not they are an Australian resident or citizen;
- Proceedings must not be commenced without the Attorney-General’s written consent;
- Provision for concurrent operation of State and Territory laws.

2.11 Seditious intention and unlawful associations

By new subsection 30A(3), a definition of ‘seditious intention’ is still found in the *Crimes Act*, but this is in specific relation to the offences of ‘unlawful association’. Unlawful associations that encourage ‘seditious intention’ are declared to be unlawful. Chris Connolly explains how these provisions work:

Section 30A of the *Crimes Act* allows an organization to be banned as an ‘unlawful association’ for having a seditious intention. A large number of additional offences then ‘hang off’ this ban. These include being a member or officer of an unlawful association, publishing or distributing pamphlets or publications of an unlawful association, donating funds to an unlawful association and allowing an unlawful association to hold a meeting on your premises.²⁸

In his submission to the Senate Legal and Constitutional Legislation Committee inquiry into the Bill, Connolly was critical of the ability to ban an ‘unlawful association’, including that it ‘does not require any link to force, violence or assisting the enemy’. By amendment in the Senate, this link is established. The explanatory memorandum commented, ‘This amendment increases the threshold for listing an unlawful association under section 30A of the Crimes Act by requiring proof of an intention to use force or violence to effect one of those purposes’.

Connolly had also submitted that this aspect of the Bill was ‘linked to an archaic definition of ‘seditious intention’ that covers practically all forms of moderate civil disobedience and objection (including boycotts and peaceful marches)’.²⁹ The Federal Attorney-General’s

²⁸ C Connolly, ‘Five key facts on sedition’, *Human Rights Defender*, 2005 Special Issue - [http://www.ahrcentre.org/documents/Human_Rights_Defender-The_Anti-Terrorism_Bill_\(No2\)_2005.pdf](http://www.ahrcentre.org/documents/Human_Rights_Defender-The_Anti-Terrorism_Bill_(No2)_2005.pdf)

²⁹ Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-Terrorism Bill (No 2) 2005*, November 2005, p 112.

Department argued that the provision, as originally introduced preserved the status quo and that it was likely to be examined as part of the review promised by the Attorney-General.³⁰ The language of former s. 24A of the *Crimes Act* has been updated, for example, with ‘urge’ instead of ‘excite’, and the dropping of the reference to ‘Her Majesty’s subjects’. Reference is also made to ‘groups’ instead of ‘classes’. Conversely, the word ‘disaffection’ is still used in section 30A(3)(b), despite Justice Dixon’s comment that ‘Disaffection is a traditional expression but it is not very precise’.³¹

2.12 Arguments against Schedule 7

The arguments presented to the Senate committee against the new sedition offences included:

- ***Proposed review of the offences*** – many queried why the new offences should be passed before the review promised by the Federal Attorney-General.
- ***An archaic law*** – the law of sedition was described as ‘archaic’ and ‘outdated’ and the committee was told that several countries had repealed sedition laws, including Canada and New Zealand. In Australia it was said to have an unfortunate history.
- ***The 1991 Gibbs Report*** – the new sedition offences were said to differ from those recommended by the Gibbs report, notably the new subsections setting out the offences of ‘urging a person to assist the enemy’ and of ‘urging a person to assist those engaged in armed hostilities’ for which there were no equivalents in the Gibbs report.
- ***No need for sedition laws*** – the sedition offences were said to duplicate existing law, such as the law of incitement to violence, which already adequately covers the relevant conduct.
- ***Freedom of speech issues*** – broad objections were raised from international law, constitutional law and general policy perspectives. Specifically, it was argued that the sedition provisions might breach the implied freedom of political communication in the Constitution. Alternatively, it was submitted that the implied freedom only protects political communication and ‘not speech more generally’.
- ***Self-censorship*** – many submissions argued that self-censorship could become an issue if the new laws were enacted. The ABC and others expressed concern about a ‘stifling’ and ‘chilling’ of debate about controversial matters.
- ***Counterproductive*** – some were concerned that the sedition offences could drive terrorism underground and/or fuel terrorism further. The view of the Islamic Council of Victoria was that extremist views are best tackled by ‘positive and

³⁰ Senate Legal and Constitutional Legislation Committee, n 29, pp 113-4.

³¹ *Burns v Ransley* (1949) 79 CLR 101 at 115.

proactive measures such as engagement and dialogue’.

2.13 Arguments for Schedule 7

Responding to several of the above criticisms and in support of the Bill as originally introduced, the Federal Attorney-General’s Department argued:

- ***Freedom of speech issues*** – the Department responded variously to the concerns expressed, including asserting the validity of the provisions both in respect to the implied constitutional freedom of political communication and international law. It was pointed out that such requirements can be subject to reasonable restrictions, on national security and other grounds.
- ***The internet and the need for sedition laws*** – against the argument that sedition offences are archaic and unnecessary, the Department maintained that, with the advent of the Internet, sedition ‘is more relevant now than in the postwar years of the 20th century’. It was said that ‘the web and computer technology has made it easier to disseminate material that urges violence’.
- ***Need for sedition laws*** – against the claim that the sedition offences duplicate existing laws, notably those against incitement, the Department said that the crime of incitement was harder to prove because it requires the prosecution to prove not only that the person urged the commission of a criminal offence, but also that the person intended that the crime urged be committed. The new sedition offences under subsections 80.2(7) and (8) were necessary because they were ‘easier to prove than the alternatives – it would not have been put forward if it was not’.

2.14 Constitutional powers – sedition and the States

A feature of the Federal sedition laws is that they prohibit urging others to violently overthrow ‘the Government of...a State’. A threshold question relates to the Commonwealth’s power to pass sedition laws, on its own and the States’ behalf. In wartime such offences as treason and incitement to mutiny can be readily accommodated under emergency powers passed pursuant to the ‘defence’ head of power (section 51(vi) of the Commonwealth Constitution). Sedition, however, is primarily a device used in peacetime. The point to make is that there is no obvious head of power under the Commonwealth Constitution by which the Federal Parliament can enact sedition laws in peacetime. There is no ‘criminal law’ head of power in the Commonwealth Constitution. Instead, the Federal Government must rely on a range of powers to make laws prohibiting and punishing criminal activity. These include the express incidental power (section 51(xxxix)) of the Commonwealth Constitution, the external affairs power (section 51(xxix)), and the executive power (section 61), which extends to the execution and maintenance of the Constitution and the laws of the Commonwealth.³² Also relevant is the controversial and ill-defined ‘implied nationhood’ power, as is the related but narrower implied power to

³² *Burns v Ransley* (1949) 79 CLR 101 at 109 (Latham CJ on sections 61 and 51(39)); *R v Sharkey* (1949) 79 CLR 121 at 149 (Dixon J on the external affairs power).

legislate in respect to ‘internal security’ or for the protection of the Constitution.³³

In the two cases before the High Court in 1949, *Burns v Ransley* and *R v Sharkey*, it was the express incidental power (section 51(xxxix)) that was relied upon primarily to establish the validity of the sedition offences, as laws intended to defend the existing regime against its overthrow or suppression. The case for such self-protective laws, enacted under section 51(xxxix), was articulated by Latham CJ who said:

Protection against fifth column activities and subversive propaganda may reasonably be regarded as desirable or even necessary for the purpose of preserving the constitutional powers and operations of governmental agencies and the existence of government itself. The prevention and punishment of intentional excitement of disaffection against the Sovereign and the Government is a form of protective law for this purpose which is to be found as a normal element in most, if not all, organized societies.³⁴

Latham CJ stopped short of suggesting an independent inherent ‘internal security’ power, a view championed by Dixon J, both in the 1949 sedition cases and in the later *Communist Party Case* in 1951. Justice Dixon stated:

I do not doubt that the legislative power of the Commonwealth extends to making punishable any utterance or publication which arouses resistance to the law or excites insurrection against the Commonwealth Government or is reasonably likely to cause discontent with and opposition to the enforcement of Federal law or the operations of Federal government. The power is not expressly given but it arises out of the very nature and existence of the Commonwealth as a political institution, because the likelihood or tendency of resistance or opposition to the execution of the functions of government is a matter that is incidental to the exercise of all its powers.³⁵

In the *Communist Party Case* he explained:

As appears from *Burns v Ransley* and *R v Sharkey*, I take the view that the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words of s. 51(xxxix) with those of other constitutional powers. I prefer the view adopted in the United States...as follows: - ‘...it is within the necessary power of the Federal government to protect its own existence and the unhindered play of its legitimate activities. And to this end, it may provide for the punishment of treason, the suppression of insurrection or rebellion and for the putting down of all individual or concerted attempts to obstruct or interfere with the discharge of the proper business of government.’³⁶

³³ HP Lee, *Emergency Powers*, The Law Book Co, 1984, Chapter 4.

³⁴ *Burns v Ransley* (1949) 79 CLR 101 at 110.

³⁵ *R v Sharkey* (1949) 79 CLR 121 at 148.

³⁶ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 187-8.

However, there were limits to this power. In a dissenting opinion in *Sharkey*, Justice Dixon did not uphold the validity of one category of sedition found in section 24A of the *Crimes Act*, namely that relating to the promotion of feelings of ill-will and hostility between different classes of subjects so as to endanger the peace, order or good government of the Commonwealth (section 24A(1)(g)). According to Justice Dixon:

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.³⁷

Also discussed in this context by Justice Dixon was section 119 of the Commonwealth Constitution, which provides:

The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.

Justice Dixon quoted at length from Quick and Garran to the effect that 'The maintenance of order in a State is primarily the concern of the State...'. Federal intervention could only be justified where the 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', including where a riot in a State interfered with the right of an elector to record his vote in Federal elections. Commonwealth intervention in such circumstances would not be to protect the State, 'but to protect itself'. Otherwise, 'even if a State is unable to cope with domestic violence, the Federal Government has no right to intervene, for the protection of the State or its citizens, unless called upon by the State Executive'.³⁸

The circumstances contemplated under section 119,³⁹ based on an express request from a State Executive, can be distinguished from the referral of power from a State Parliament to its Federal counterpart under section 51(xxxvii), as occurred in 2002 in respect to 'certain matters relating to terrorist acts'.

³⁷ *R v Sharkey* (1949) 79 CLR 121 at 150.

³⁸ *R v Sharkey* (1949) 79 CLR 121 at 151. Quoting from the *Constitution of the Australian Commonwealth* by Quick and Garran, p 964.

³⁹ For a discussion of s.119 and State applications made under it see – HP Lee, *Emergency Powers*, The Law Book Co Ltd, 1984, Chapter 4; 'Protection of Australian States against domestic violence' (July 1978) 52 ALJ 350; E Ward, *Call out the Troops: an examination of the legal basis for Australian Defence Force involvement in "non-defence" matters*, Commonwealth Parliamentary Library Research Paper 8, 1997-98.

2.15 Protecting State governments from violent overthrow?

One question to emerge from all this is whether the Commonwealth has an express or implied power to enact protective laws on behalf of the governments of the States? The power has long been asserted, at least since 1926 when the ‘unlawful associations’ provisions of the Federal *Crimes Act* protected ‘the established government...of a State’ from ‘overthrow by force or violence’.⁴⁰ Likewise, since 1960 the ‘treachery’ offences have protected State governments from violent overthrow.⁴¹ Added to this, the *Anti-Terrorism Act (No 2) 2005* expressly extends the offence of ‘urging the overthrow of the Constitution or Government’ to include persons urging others to ‘overthrow by force or violence...the Government of...a State’ (s. 80.2(1)(b)).

This power to pass laws protecting the States from violent overthrow can be said to flow from two main sources: first, from the express incidental power (s. 51(xxxix)), especially when read with s. 119 which obliges the Commonwealth to protect ‘every State against invasion’; secondly, from the implied power to protect the Commonwealth Constitution, of which the States and their governments are constituent elements. As Starke J said in the *First Uniform Tax Case*, ‘The maintenance of the States and their powers is as much the object of the Constitution as the maintenance of the Commonwealth and its powers’.⁴² In an obvious sense, in view of State involvement in Federal matters (filling Senate casual vacancies, for example) the overthrow of a State government must impinge on the functioning of the Commonwealth.

In respect to the implied power to protect the Constitution, the paradox is that Dixon J is both its main exponent and the one who insists on drawing a line between Commonwealth and State responsibilities. Would he have argued that the Commonwealth’s power is limited to the protection of the States from external threats? In the age of the Internet it must be recognized that threats to the States can come from outside Australia and the need for Commonwealth protection in this respect may be real enough. On the other hand, the conclusion that the overthrow of a State government would impinge on the functioning of the Commonwealth is also consistent with Dixon J’s reasoning. That said, from a practical standpoint it is difficult to see why the States need Commonwealth protection from ‘domestic’ or internal sources of sedition. It is not as if the army needs to be called out to arrest individuals who may urge others to commit violent acts against the State. Sedition is not equivalent to an invasion. Perhaps if the threat involves more than one State it may be so pervasive as to need Commonwealth involvement.

In respect to threats posed by on-line material, it is the case that censorship law already prohibits materials that ‘promote, incite or instruct in matters of crime or violence’. However, the Internet content regulation scheme under the Schedule 5 of the *Broadcasting Services Act 1992* (Cth) is limited in scope and coverage. The scheme only regulates Internet Service Providers and Internet Content Hosts, not producers of content. Further,

⁴⁰ *Crimes Act 1914* (Cth), s. 30A(1)(a)(ii).

⁴¹ *Crimes Act 1914* (Cth), s. 24AA(1)(a)(ii).

⁴² (1942) 65 CLR 373 at 442. The advice of Professor George Winterton is acknowledged.

under the uniform censorship arrangement enforcement of the relevant offences is left to the States. In NSW punishment for these offences is in terms of fines, not imprisonment for 7 years as stipulated under Schedule 7 of the 2005 Act.⁴³

2.16 Comment

A number of issues arise, some general, others more technical and specific in nature. Sometimes passed in haste, often at times of real or perceived national danger, when the exigencies of security are seen to outweigh the claims of liberty, sedition laws and the like have tended to remain on the statute books in perpetuity. If they have been amended, the tendency has been to curtail liberty still further. If they have been applied, it has been at times unwisely, or in circumstances of high controversy. These are among the general concerns raised by such legislation.

More specifically, in light of the new Federal sedition laws, it can be asked whether there is any practical scope remaining for comparable laws at the State level? Is it the case that the Commonwealth laws are broad enough to cover the field in fact if not in a strictly legal sense? If State sedition laws continue to be relevant, a related question is whether the law of sedition should be revisited or 'updated' in New South Wales? A further issue is whether laws on incitement and vilification should similarly be revisited in this State?

⁴³ *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* (NSW), Schedule 2.

3. THE LAW OF SEDITION IN NSW

3.1 Statutory provisions

There is no specific statutory offence of sedition in NSW. Instead, the common law is relied upon. Mention is however made of seditious libel in two NSW statutes.⁴⁴ In particular, by section 35 of the *Imperial Acts Application Act 1969*, following a conviction for seditious libel the court may give an order for the seizure of all copies of the libel. The section states that such seizure can occur where a person has been convicted for ‘composing, printing, or publishing any blasphemous libel, or seditious libel tending to bring into hatred or contempt’

- (a) the person of Her Majesty, Her heirs or successors,
- (b) or the government and constitution of the State of New South Wales as by law established,
- (c) or either House of Parliament,
- (d) or to excite Her Majesty’s subjects to attempt the alteration of any matter as by law established, otherwise than by lawful means.

Enactment of section 35 was rendered necessary by the repeal of the *Criminal Libel Act 1819* (UK).⁴⁵ According to JF Stephen, this had for the first time offered ‘a kind of statutory definition’ of seditious libel.⁴⁶ Making some allowance for jurisdictional differences, that definition was followed in the NSW *Imperial Acts Application Act 1969*. The provision has not been used to date. Until very recently section 35 may have been looked upon as ‘dead law’. That may still be the case.

Assuming that life remains in section 35, a number of questions arise. While the provision defines seditious libel, the question whether it codifies the law is more problematic. Its purpose is not so much to establish an offence of seditious libel as to provide for consequential actions that may be taken following a successful prosecution. Like the UK Act of 1819, its NSW counterpart makes no mention of the two categories of sedition normally included under the rubric of the common law, namely, to ‘raise discontent or disaffection amongst the Sovereign’s subjects’, or to ‘promote feelings of ill-will and hostility between different classes of those subjects’. This begs the question whether these added categories are in fact part of the law of seditious libel in NSW? The probable answer is that they are, as the relevant provision would be interpreted in relation to the common law. In the context of recent events, could the publishing of text messages inciting racial violence be prosecuted under the law of sedition in NSW?

⁴⁴ *Defamation Act 2005*, Sch 5 [4], which commenced on 1 January 2006, inserts a provision dealing with criminal defamation into the *Crimes Act 1900*, a provision which is said not to affect the law of seditious libel.

⁴⁵ 60 Geo III and 1 Geo IV cVIII, sections 1, 2 and 8 – *Imperial Acts Application Act 1969*, First Schedule.

⁴⁶ JF Stephen, *A History of the Criminal Law of England*, Vol 2, Macmillan 1883, p 369.

3.2 Historical note

Strictly speaking there is no offence of sedition at common law.⁴⁷ Rather, sedition is shorthand for several distinct categories of common law misdemeanours or statutory offences: (a) uttering seditious words; (b) publishing or printing a seditious libel; (c) undertaking a seditious enterprise; and (d) seditious conspiracy.⁴⁸ According to JF Stephen, if the matter published consists of words spoken, the offence is called ‘the speaking of seditious words’, whereas if the matter is published in anything capable of being a libel, the offence is called the publication of a ‘seditious libel’. As for ‘seditious conspiracy’, Stephen writes: ‘Every one commits a misdemeanour who agrees with any other person or persons to do any act for the furtherance of any seditious intention common to both or all of them’.⁴⁹

It is often remarked that the elements of the common law crime of sedition in England are far from clear.⁵⁰ Historically, the offence of sedition was widely drawn, to reflect a ‘top down’ view of the relationship between rulers and their subjects in which the ruler was their superior and, as such, naturally entitled to respect. In these circumstances, sedition covered any attack on any institution of the state and was used to stifle criticism of government policy. Writing in 1803 Edward Hyde East painted the offence of sedition with a broad brush, stating:

all contemptuous, indecent, or malicious observations upon his [the Sovereign’s] person or government, whether by writing or speaking, or by tokens, calculated to lessen him in the esteem of his subjects, or weaken his government, or to raise jealousies of him amongst the people, will fall under the notion of seditious acts, as well as all direct or indirect acts or threats calculated to overawe his measures or disturb the course of his government, not amounting to overt acts of high treason, or otherwise punishable by particular statutes.⁵¹

If it had been applied literally, sedition would have prevented any opposition to the government of the day. As it was the offence tended to be prosecuted at times of political crisis or upheaval, as in the 17th century under the Star Chamber and during the French Revolution when, Stephen writes, in 1792-93 ‘trials for political libels and seditious words were frequent’.⁵² After the Great Reform Act of 1832 prosecutions for seditious libels were

⁴⁷ JF Stephen, n 46, p 298. Stephen writes, ‘As for sedition itself, I do not think that any such offence is known to English law’. Stephen presents an authoritative historical account of the law of seditious libel and seditious conspiracy.

⁴⁸ Maher, n 10, p 287.

⁴⁹ Sir JF Stephen, *A Digest of the Criminal Law*, 9th ed (edited by L Sturge), Sweet and Maxwell 1950, p 91.

⁵⁰ E Barendt, *Freedom of Speech*, Clarendon Press 1985, p 152.

⁵¹ E Hyde East, *A Treatise of the Pleas of the Crown, Volume 1*, [aka *East’s Pleas of the Crown*] J Butterworth, 1803, p 49.

⁵² JF Stephen, *A History of the Criminal Law of England, Vol 2*, MacMillan 1883, p 362.

very rare in England, a reflection it might be said of an alternative ‘bottom up’ conception of the ruler as the agent and servant of his subjects, a view that gave added weight to the ideals of free speech and the freedom of the press to criticize and scrutinize the government of the day. Prosecutions for seditious conspiracy still occurred from time to time in the 19th century, notably following the Peterloo massacre of 1819, in connection with Chartist disturbances in 1839 and arising from the campaign for the repeal of the Union between Britain and Ireland in 1844 (the trial of O’Connell and others) and again 1880 (the trial of Parnell and others). Six years later, at a time of high unemployment and labour unrest, the radical orator John Burns and others were tried for the uttering of seditious words.⁵³ In *R v Burns*, it was said that

Sedition embraces everything, whether by word, deed, or writing, which is calculated to disturb the tranquility of the State, and lead ignorant persons to subvert the government and laws of the empire.⁵⁴

3.3 Defining sedition and seditious intention

In defining the nature of sedition *Halsbury’s Laws of England* states:

Sedition in the common law consists of any act done, or words spoken or written and published, which has or have a seditious tendency and is done or are spoken or written and published with a seditious *intention*.⁵⁵ (emphasis added)

The classic definition of seditious intention is found in Stephen’s *Digest of the Criminal Law*. Paraphrased, the ninth edition states that sedition is constituted by ‘an intention to bring into hatred or contempt, or excite disaffection against’:

- The Crown;
- The government and constitution of the UK;
- Parliament;
- The administration of justice; or
- To ‘raise discontent or disaffection amongst the Sovereign’s subjects’; or
- To ‘promote feelings of ill-will and hostility between different classes of those subjects’.⁵⁶

⁵³ (1886) 16 Cox CC 355. The jury found all the defendants ‘not guilty’. The other defendants were HM Hyndman, Jack Williams and HH Champion. They were also charged with ‘conspiracy uttering seditious words’ – W Kent, *John Burns: Labour’s Lost Leader*, Williams and Norgate 1950, p 25. Burns was to become in 1906 President of the Local Government Board and a member of the Privy Council.

⁵⁴ (1886) 2 TLR 510; 16 Cox CC 355, Cave J.

⁵⁵ *Halsbury’s Laws of England*, Volume 11(1), 4th edition, Butterworth 1990, p 77.

⁵⁶ Sir JF Stephen, *A Digest of the Criminal Law*, n 49, p 92. The last two categories were not in earlier editions of the work. The editor, LF Sturge, writes, ‘I do not think they enlarge the sense, but they make it more explicit’.

Normal political debate and criticism is not included. An intention to show that the government has been misled or mistaken, or to point out errors with a view to altering the law by peaceful means does not constitute seditious intention. Nor is it seditious to point out the causes of hostility or hatred between classes of subjects, with a view to removing them.

Feldman comments that recent cases stress that ‘the speaker or publisher must intend to provoke violence aimed at disturbing the government by force’. According to Feldman:

Today, the *actus reus* [the physical element] consists of publishing or speaking words which have a tendency to incite public disorder involving physical violence, having regard to the likely effect of the words on ordinary people and on the audience which is addressed.⁵⁷

Feldman says that the *mens rea* [the mental or subjective element] of sedition is in doubt at common law. In England this debate appears to have been resolved in favour of the requirement of a specific intention to produce public disorder. Feldman writes: ‘In *R v Burns*, Cave J told the jury that there must be a distinct intention, going beyond mere recklessness, to produce disturbances, in order to establish the necessary *mens rea*’.⁵⁸ Similarly, Barendt notes that a number of English cases stress that the speaker must intend violence for the offence to be committed: ‘was the language used calculated, or was it not, to promote public disorder or physical force or violence in a matter of State?’⁵⁹

In the 1947 case of *R v Caunt*⁶⁰ a newspaper editor was prosecuted for publishing an article that was alleged to create a risk of disorder owing to its anti-Semitic bias. The required intention in this respect was not to obstruct established authority by violence, but to set sections of the community against each other. The article contained the words ‘Violence may be the only way to bring them [British Jewry] to the sense of their responsibility to the country in which they live’. It was published in a local paper in North Lancashire shortly before British servicemen had been killed in Palestine, leading to anti-Jewish demonstrations in the city of Liverpool and elsewhere. The case was tried in Liverpool where the jury found the editor ‘not guilty’.

⁵⁷ D Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd edition, Oxford University Press 2002, p 898. He notes that a more flexible approach was taken in the mid-1920s when members of the Communist Party of Great Britain were ‘prosecuted for sedition in respect of articles and speeches advancing a political programme opposed to that of the government and advocating strike action’. For the background to this prosecution see – KD Ewing and CA Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945*, Oxford University Press 2000, Chapter 3.

⁵⁸ Feldman, n 57, p 899. *R V Burns* (1886) 16 Cox CC 355 at 364.

⁵⁹ Barendt, n 50, p 155.

⁶⁰ This unreported case is discussed in Feldman, n 57, p 899 and (1948) 64 LQR 203-205.

The law was tested again in the 1980s when British Muslims, as part of their campaign against Salman Rushdie's *The Satanic Verses*, sought to prosecute Rushdie for seditious libel,

arguing that the book's representation of Islam created hostility between Her Majesty's Muslim and non-Muslim subjects, in that it provoked widespread violence and threats of violence between Muslims and others by vilifying Islam and ridiculing its prophets and adherents.⁶¹

In refusing to issue summonses for seditious libel the Court adopted the formulation of the *mens rea* in the 1950 Canadian case of *Boucher v R*.⁶² In that case Rand J observed:

There is no modern authority which holds that the mere effect of tending to create discontent or disaffection among His Majesty's subjects or ill-will or hostility between groups of them, but not tending to issue in illegal conduct, constitutes the crime, and this for obvious reasons. Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality.

Following this, in *R v Chief Metropolitan Stipendiary Magistrate, Ex Parte Choudhury Watkins* LJ held that seditious libel is founded on:

an intention to incite to violence or to create public disturbance or disorder against His Majesty or the institutions of government. Proof of an intention to promote feelings of ill will and hostility between different classes of subjects does not alone establish a seditious intention. Not only must there be proof of an incitement to violence in this connection, but it must be violence or resistance or defiance for the purpose of disturbing constituted authority... By constituted authority what is meant is some person or body holding public office or discharging some public function of the state.⁶³

Halsbury's Laws of Australia comments:

At common law, sedition requires *an intent to promote public disorder*. Thus a statement indicative of personal disaffection or even treasonous intent would not constitute sedition unless it was *intended to influence others*.⁶⁴ (emphasis added)

⁶¹ Feldman, n 57, p 899.

⁶² The facts in *Boucher v R* (1951) 2 DLR 369 were that a member of Jehovah's Witnesses was convicted of seditious libel for publishing in Quebec a pamphlet about the animosity of officials and Roman Catholic clergy towards Jehovah's Witnesses.

⁶³ [1991] 1 All ER 306 at 323.

⁶⁴ *Halsbury's Laws of Australia*, Volume 9, Butterworths 1995, [130-12085].

3.4 The NSW Sedition Bill of 1918

In the closing months of the Great War the Holman Nationalist Ministry (1916-20) was to revisit the sedition question. It proposed that NSW should enact special sedition legislation ‘designed to impose upon those summarily convicted the outrageous penalty of disqualification from all public office in the political or municipal life of the State’.⁶⁵ Their political rights as citizens of the Commonwealth would be unaffected, but in NSW a person convicted of a sedition offence was to be ‘deemed ineligible for five years either to vote for or to be elected to any public office in the State’.⁶⁶ The offences of sedition were listed in a Schedule to the bill to include:

- Speaking and publishing seditious words;
- Publishing a seditious libel
- Seditious conspiracy (this was defined to exclude an intention to promote feelings of ill-will and hostility between different classes of His Majesty’s subjects);
- Prejudicing or discouraging recruitment;
- Attempting to cause mutiny, sedition or disaffection in the armed forces;
- Inciting etc the commission of any crime specified in the Schedule;
- Publishing words inciting etc any crime specified in the Schedule.

The immediate background to this extraordinary proposal was a resolution, passed at the triennial Interstate Labour Conference in Perth in June 1918, that seemed to favour a negotiated peace. Holman introduced the Sedition Bill into the Assembly on 28 August after which the House divided on every stage. Holman said there was nothing to fear ‘on the part of a man who in time of war is mindful of his obligations as a citizen’ from the measure, aimed as it was against the ‘sedition monger and the enemies to recruitment’. He said the bill affected only the punishment for existing offences, stating:

Under this bill, we are going to add to imprisonment what is worse than hanging in the eyes of many people – that is, exclusion from the portals of this building. I think that will be infinitely more effective as a deterrent than the fear of hanging itself.⁶⁷

In the Council, eloquent cases against the bill were made by several MLCs, notably the former Premiers McGowen and Carruthers. It was amended in the Council to limit its operation to disloyal sedition. As amended, only persons found guilty of open and flagrant disloyalty came within the bill.⁶⁸ In this form the measure was read a third time on 7 November. Carruthers said then that he hoped the bill would be dropped. Otherwise, he commented, its only effect would be to operate as a ‘matter of history’, as ‘something to which people can point as having been mistakenly undertaken by well-meaning enthusiasts,

⁶⁵ HV Evatt, *Australian Labour Leader; The Story of WA Holman and the Labour Movement*, Angus and Robertson, 1940, p 460.

⁶⁶ CH Currey, ‘The Legislative Council of NSW, 1843-1943’ (1943) 29 *JRAHS* 337 at 399.

⁶⁷ *NSWPD*, 28.8.1918, p 963.

⁶⁸ *NSWPD*, 6.11.1918, p 2588.

and will remain on the statute-book as a blemish on the good name and fair fame of this country'.⁶⁹ In the event, the measure was not assented to and does not appear on the statute books.

3.5 Comment

Wisely, it might be argued, NSW legislators have mostly steered clear of introducing sedition laws, relying instead on the common law. There is statutory recognition of the offence of seditious libel, but the consequential provision in the *Imperial Acts Application Act 1969* do not seem to have been used. It may be argued that it remains relevant in the present uncertain climate. If so, it may also be time to update its language and to consider the need for some substantive revision, as has occurred at the Federal level. Alternatively, it may be that State sedition laws generally, in NSW or elsewhere, have little if any role to play in the light of the broad new Commonwealth offences which, as noted, include the protection of State governments from violent overthrow. As for text messages inciting communal violence, these may be dealt with more appropriately under either the general law of incitement or in terms of laws prohibiting vilification on racial and other grounds.

⁶⁹ NSWPD, 7.11.1918, pp 2634-5.

4. THE LAW OF INCITEMENT

4.1 The Commonwealth law of incitement and sedition

Commentaries on the debate on the new sedition offences at the Commonwealth level point out that many of the offences contemplated under Schedule 7 could be successfully prosecuted under the ‘Incitement’ provisions of the Criminal Code, in combination with other offences. In submissions to the Senate Legal and Constitutional Legislation Committee, Ben Saul argued that ‘section 11.4 of the Criminal Code is sufficient to prosecute incitement to violence which has a specific connection to certain crime’. The Gilbert and Tobin Centre of Public Law pointed out that, in relation to the first two new sedition offences (urging the overthrow of the Constitution or government, or interference with Federal elections):

Neither offence is necessary, since such conduct can already be prosecuted by combining the existing law of incitement to commit an offence (s 11.4, Criminal Code (Cth)) with the existing offence [of] treachery (s 24AA, Crimes Act 1914 (Cth)) or the offence of disrupting elections (s 327, Commonwealth Electoral Act 1918).⁷⁰

Responding to such comments, the Federal Attorney-General’s Department submitted that ‘the crime of incitement was harder to prove because the crime of incitement requires the prosecution to prove not only that the person urged the commission of a criminal offence, but also that the person intended that the crime urged be committed’.⁷¹

Section 11.4 of the Commonwealth Criminal Code provides, in part:

- (1) A person who urges the commission of an offence is guilty of the offence of incitement.
- (2) For the person to be guilty, the person must intend that the offence incited be committed.
-
- (3) A person may be found guilty even if committing the offence incited is impossible.

Setting it apart from three of the new sedition offences, for the incitement provision ‘the person must intend that the offence incited be committed’; a reckless state of mind will not suffice.

4.2 The law of incitement in Victoria

In Victoria, incitement is on a wholly statutory basis. The Victorian *Crimes Act 1958* abolishes incitement at common law (s 321L). A statutory definition of ‘incite’ is provided by section 2A(1), by which the term ‘includes command, request, advise, encouraging or authorize’. Section 321G establishes the offence of incitement, by which intention is the requisite mental element to be proved by the prosecution. The section provides:

⁷⁰ Senate Legal and Constitutional Legislation Committee, n 29, p 86.

⁷¹ Senate Legal and Constitutional Legislation Committee, n 29, p 86.

- (1) Subject to this Act, where a person in Victoria or elsewhere incites any other person to pursue a course of conduct which will involve the commission of an offence by-
- (a) the person incited;
 - (b) the inciter; or
 - (c) both the inciter and the person incited if the inciting is acted on in accordance with the inciter's intention, the inciter is guilty of the indictable offence of incitement.
- (2) For a person to be guilty under sub-section (1) of incitement the person-
- (a) must intend that the offence the subject of the incitement be committed; and
 - (b) must intend or believe that any fact or circumstance the existence of which is an element of the offence in question will exist at the time when the conduct constituting the offence is to take place.
- (3) A person may be guilty under sub-section (1) of incitement notwithstanding the existence of facts of which the person is unaware which make commission of the offence in question by the course of conduct incited impossible.

The provision was analysed by Brooking JA in *R v Massie*,⁷² a case in which the accused was charged with inciting the commission of two different crimes, namely, murder and intentionally causing serious injury. On a critical note, Brooking JA said:

In the Second Reading Speech in the Legislative Assembly on the Bill for the Act which became the Crimes (Conspiracy and Incitement) Act 1984 (Vic), the Minister described the proposed statutory definition of incitement as clear... With all respect to those concerned with its drafting, I am not sure that I agree. It is, at all events, certainly not a definition which lends itself to wholesale incorporation into a charge.⁷³

In order to prove the commission of the offences at issue in the case, Brooking JA explained that the Crown had to prove the following elements of the crime.

1. as to intention:

- (a) that the accused intended that a course of conduct which would involve the commission of a crime should be followed either by himself or by another person or by both of them; and
- (b) that the accused intended or believed that any fact or circumstance the existence of which is an element of that crime would exist at the time when the conduct constituting the offence is to take place.

2. as to action:

that the accused, pursuant to that intention, performed acts or spoke or wrote words which commanded, requested, proposed, advised, encouraged or purported to authorize that other person to pursue the course of conduct involving the commission of a crime.⁷⁴

⁷² (1998) 103 A Crim R 551.

⁷³ (1998) 103 A Crim R 551 at 556.

⁷⁴ (1998) 103 A Crim R 551 at 564.

Brooking JA went on to say that, as at common law and under the Commonwealth Code, the other person did not have to act on the inciting for the accused to be found guilty of incitement.

4.3 The law of incitement in NSW

In contrast to the Victorian statutory regime, the general law of incitement in NSW belongs to the common law.⁷⁵ This is not to say that specific statutory offences of incitement do not exist in NSW. Far from it. Examples include: the incitement of serious racial vilification;⁷⁶ the provision of on-line services that incite in matters of crime or violence;⁷⁷ inciting another person to commit suicide;⁷⁸ the recruitment, by incitement or other means, of children to engage in criminal activity;⁷⁹ the incitement of firearms offences outside NSW;⁸⁰ and inciting the commission of a drug related offence.⁸¹ The broad incitement offence in the *Crime Prevention Act 1916* (NSW) is discussed below.

Not only are these statutory offences of incitement specific in scope, they nowhere include a statutory definition of the terms ‘incitement’ or ‘incite’ or ‘incites’. Where such terms do occur in legislation, they are interpreted both by reference to the common law and/or by reference to their particular statutory setting.

Prosecutions for incitement in NSW are not frequent. Examples include incitement to commit acts of indecency further to sections 61N and 61O of the *Crimes Act 1900* (NSW),⁸² and incitement to supply a prohibited drug.⁸³ Much of the judicial interpretation of the meaning of incitement has occurred in the context of the *Anti-Discrimination Act 1977* (NSW). However, this is in respect to provisions making the incitement of vilification on racial and other grounds ‘unlawful’, but not a criminal offence.

⁷⁵ D Ross, *Crime*, LawBook Co 2002, p 512.

⁷⁶ *Anti-Discrimination Act 1977* (NSW), s. 20D(1).

⁷⁷ *Classification (Publications, Films and Computer Games) Enforcement Amendment Act 2001* (NSW), Schedule 2.

⁷⁸ *Crimes Act 1900* (NSW), s 31C.

⁷⁹ *Crimes Act 1900* (NSW), s 351A.

⁸⁰ *Firearms Act 1995* (NSW), s 51C.

⁸¹ *Drug Misuse and Trafficking Act 1985* (NSW), s 19.

⁸² *R v Chonka* [2000] NSWCCA 466 (7 November 2000).

⁸³ *R v Eade* [2002] NSWCCA 257 (28 June 2002).

4.4 Incitement and the common law

Glanville Williams describes incitement as one of the offences ‘that enable the police to nip criminal tendencies in the bud’. Like attempt and conspiracy, incitement is an ‘inchoate crime’, in that it does not need to be fully consummated before the criminal law takes cognizance of it. An inciter, according to Williams ‘is one who counsels, commands or advises the commission of a crime’. Incitement may be of persons generally, as in a newspaper article where incitement is of persons unknown to the author, or it may be done by such means as a telephone call where the particular individual or individuals are known to the inciter.⁸⁴

In *Race Relations Board v Applin* Lord Denning said ‘A person may “incite” another to do an act by threatening or by pressure, as well as by persuasion’.⁸⁵ In *Burns and Dye*⁸⁶ the NSW Administrative Decisions Tribunal held, in respect to s 49ZT(1) of the *Anti-Discrimination Act 1977* (NSW), making it unlawful (but not a criminal offence) to incite hatred of homosexuals, that

The word ‘incite’ is to be given its ordinary natural meaning which is to ‘urge, spur on...stir up, animate; stimulate to do something’ (New Shorter Oxford English Dictionary, 1993) (Oxford); ‘urge on; stimulate or prompt to action’ (the Macquarie Dictionary, third edition, 1997) (Macquarie).

In 2003 a House of Lords Select Committee on Religious Offences (the Religious Offences Committee) presented the following overview of the common law offence of incitement:

It is an offence to incite another person to commit a criminal offence even though that other offence has not been committed or even attempted. At common law, for there to be incitement there has to be both some form of communication with a person whom it is intended to incite and, in that communication, some attempt to persuade or encourage that person to commit a criminal offence. However, for there to be incitement at common law it is not necessary to prove that the person who it was attempted to incite was in fact affected by the attempt, and incitement may exist even though the attempt was unsuccessful... The incitement does not have to be directed towards a specified person or group of persons but, rather, may be general. To be guilty of incitement one must normally intend that the offence that is being incited will be committed, *but sometimes recklessness as to whether or not the offence is committed will suffice.* (emphasis added)⁸⁷

⁸⁴ G Williams, *Criminal Law, The General Part*, 2nd ed, Stevens and Sons Ltd 1961, pp 609-613.

⁸⁵ [1973] 1 QB 813 at 825; 2 All ER 1190 at 1194.

⁸⁶ [2002] NSWADT 32 at 19; applied in *Collier v Sunol* [2005] NSWADT 261 at 40.

⁸⁷ *House of Lords Select Committee Report on Religious Offences in England and Wales, First Report*, Session 2002-2003, HL 95, para 70.

This follows Glanville Williams' comment on the mental element for incitement, where he said that 'Intention or, at least, recklessness is needful'.⁸⁸ Writing in 1997, in a NSW context, Peter Gillies said:

In order to be guilty of incitement D [the Defendant], it is proposed, must intend that another person will commit the actus reus of an offence in those circumstances which disclose that this offence is being committed.⁸⁹

However, Gillies adds that 'It is possible that a court will one day hold that intent is not essential to incitement'. This view has found judicial support in NSW, as in *R v Chonka* where Fitzgerald JA and Ireland AJ observed: 'It is common ground that incitement involves an intention to bring about a particular result or a reckless indifference as to whether that act occurs or not'.⁹⁰ On the other hand, in the specific context of section 20D(1) of the *Anti-Discrimination Act 1977* (NSW), which creates the offence of 'serious racial vilification', the Appeal Panel of the NSW Administrative Decisions Tribunal has held that intent to 'incite' is required, 'a proposition which is unarguably established by authority'.⁹¹ That is consistent with the High Court decision in *Giorgianni v R*,⁹² a case cited as authority for the proposition that incitement requires purposive intention.⁹³

Of the *actus reus* of the offence of incitement Gillies writes:

It is unnecessary that the incitement have an effect on a person sought to be incited, that is, no one need be influenced to do anything in consequence of the act of incitement. The criminality of incitement consists simply in its potential to cause or encourage another to commit a crime.⁹⁴

4.5 Incitement and the Crime Prevention Act 1916 (NSW)

In addition to the specific statutory offences of incitement there is also the broader legislative offences of 'inciting, urging, aiding or encouraging the commission of crimes' and 'printing or publishing writing inciting to crimes'. While these offences can apply to such things as sedition, they are also 'catch-all' provisions that refer to incitement to

⁸⁸ Williams, n 84, p 611.

⁸⁹ P Gillies, *Criminal Law*, 4th ed, LBC Information Services 1997, p 663.

⁹⁰ *R v Chonka* [2000] NSWCCA 466 (7 November 2000) at para 44; para 78 (Smart AJ).

⁹¹ *John Fairfax Publications Pty Ltd v Kazak* [2002] NSWADTAP 35 at 6.

⁹² (1985) 156 CLR 773. The case involved 'dangerous driving' under section 52A of the NSW *Crimes Act*, where a person was charged with aiding, abetting, counseling or procuring another person to drive dangerously, further to section 351 of the same Act. The High Court found that neither negligence nor recklessness was sufficient.

⁹³ R Muragason and L McNamara, *Outline of Criminal Law*, Butterworths 1997, p 310.

⁹⁴ Gillies, n 89, p 662.

commit crimes generally. Sections 2 and 3 of the *Crimes Prevention Act 1916* (NSW) provide:

2. Inciting to crimes

If any person incites to, urges, aids, or encourages the commission of crimes or the carrying on of operations for or by the commission of crimes that person shall be guilty of an offence against this Act.

3. Printing or publishing writing inciting to crimes

If any person prints or publishes any writing which incites to, urges, aids, or encourages the commission of crimes or the carrying on of any operations for or by the commission of crimes, such person shall be guilty of an offence against this Act, and shall be liable to imprisonment for any term not exceeding six months or to a penalty not exceeding 1 penalty unit.

By section 5 it is made clear that, where applicable, incitement offences can be punished either under this Act, under any other Act or under the common law. In other words, while the *Crimes Prevention Act 1916* is general in application it does not seek to exclude the operation either of other legislative provisions or the common law. It is, in fact, the alternatives that tend to be applied, if only because the 1916 Act really only adds a procedural gloss on the law. This was the intention behind its original enactment.

The Act has remained unchanged in substance since 1916. It was placed on the statute books at the time of the Great War when the debate about security, the holding of unlawful assemblies and the commission of acts of sedition was at its height. The Crimes Prevention Bill was introduced by the Holman Nationalist Government in December 1916. Premier Holman explained that the bill was essentially procedural in nature, in that it did not introduce any new offence or crime. Its novelty was that, instead of requiring a jury trial for incitements to crimes, including the crimes of sedition or treason, the bill permitted such offences to be tried summarily by a magistrate. Holman said: ‘Whatever the bill prohibits is already prohibited by the common law, but in order to punish offences committed under the common law it is necessary to go through the form of a serious criminal trial’. He would offer no concrete examples of incitement showing why the bill was needed, stating only that it would offer a way of dealing ‘with offences which have grown exceedingly common during the past few months’.⁹⁵

The immediate background to the case was the Industrial Workers of the World’s (the IWW) agitation against the war. This culminated in October 1916 when Donald Grant, an MLC from 1931 to 1940 and later a Senator, was charged and convicted with eleven other IWW members with treason, later altered to conspiracy to defeat the ends of justice and to commit arson, and incitement to commit sedition. Specifically, Grant had campaigned for the release from prison of Tom Barker, an IWW member jailed for his anti-conscription activities. With some of Barker’s colleagues urging a campaign of arson to secure his release, speaking in the Domain Grant said ‘For every day Barker is in jail it will cost the capitalists ten thousand pounds’. Famously, he was sentenced to 15 years hard labour for 15 words. According to Ian Turner, some of the ‘IWW Twelve’ conceded that their ‘revolutionary agitation might, by the yardstick of capitalist justice, be held seditious; but

⁹⁵ NSWPD, 13,12,1916, pp 3652-3.

this was part of the class war and they felt no shame or guilt'.⁹⁶ The campaign to free the 'IWW Twelve' started in December 1916, resulting eventually in a Royal Commission finding overturning most of the convictions. Grant was freed in 1920 by the Storey Labor Government.⁹⁷

The Crimes Prevention Bill of 1916 was opposed strongly by the Labor Party, with three future Premiers speaking against it (Dooley, Storey and Lang). With Holman's concurrence, its most controversial clause, permitting the police to arrest those speakers inciting crimes and to use force to disperse public meetings, was in fact omitted. The amendment was made in the Council where the Representative of the Government, John Garland, conceded 'If a man is uttering seditious statements, the power to arrest him exists at the present moment'.⁹⁸

Statistics show that the *Crimes Prevention Act 1916* is rarely used. For the four years from July 2001 to June 2005 only one conviction is recorded for an offence under section 3 of the legislation. The sentence in that case was a good behaviour bond under section 10 of the *Crimes (Sentencing Procedure) Act 1999*.

It is reported that one man arrested for forwarding inciting text messages in the days following the Cronulla riots has been charged with one count under section 3 of the *Crimes Prevention Act 1916* of 'print, publish to incite or urge the commission of a crime'.⁹⁹ The man was granted bail to appear in Waverley Local Court on 1 February 2006.

4.6 Comment

Sections 2 and 3 of the *Crimes Prevention Act 1916* were the basis for the Commonwealth incitement offences, as these were originally enacted in 1920.¹⁰⁰ Whereas the Commonwealth has moved on from that position, NSW has not. The fact that the 1916 Act has not been repealed or even significantly amended in nearly 90 years suggests that it is the kind of legislation that governments like to keep on the statute books 'just in case'. Procedurally, at any rate, it continues to offer an alternative to the common law where incitement is an indictable offence.

More generally, with the common law admitting the possibility, in theory at least, that the requisite mental element for incitement could be satisfied by recklessness, the question is

⁹⁶ I Turner, *Sydney's Burning*, Heinemann 1967, pp 57-8.

⁹⁷ F Farrell, 'DM Grant', *ADB*, Vol 9, p 75; D Clune, 'DM Grant', *The Biographical Dictionary of the Australian Senate, Vol 2, 1929-1962*, p 447.

⁹⁸ *NSWPD*, 14.12.1916, p 3748.

⁹⁹ 'Text crime charges laid over race riots', *AAP*, 22.12.2005. The same person has reportedly been charged under section 474.17 of the Commonwealth Criminal Code, 'Using a carriage service to menace, harass or cause offence'.

¹⁰⁰ *War Precautions Act Repeal (1920)* (Cth), s 11. The provision inserted a new section 7A into the *Crimes Act 1914-1915*.

whether this area of the law needs to be revisited. A statutory model exists in the Victorian *Crimes Act 1958*, as it does in the Commonwealth *Criminal Code Act 1995*. The Commonwealth model would appear to be the better of the two. The again, the present legislative regime in NSW may be considered perfectly adequate.

5 ANTI-TERRORISM LAW, RACE AND RELIGIOUS VILIFICATION

5.1 Free speech and its limits

A common theme of legal commentary on human rights is that free speech is not and cannot be absolute. Defamation and censorship laws, as well as laws against vilification on racial and other grounds are an obvious limitation on the right to free speech.¹⁰¹

The issue of vilification is raised in the context of recent legislative and other anti-terrorist measures. For example, in the wake of police raids on alleged terrorist plotters in Sydney and Melbourne on 8 November 2005 Muslim leaders warned that such actions could spark hate crimes against the Muslim community and 'promote simmering resentment'. Abdu El Ayoubi was reported to have said, 'There is fear that the Muslim community is being targeted by the legislation'.¹⁰² Vilification issues, as well as the application of incitement offences, were also raised in the context of the 'racial' unrest experienced recently in Sydney.

5.2 Sedition, race and religious vilification

A new dimension to the debate on racial and religious vilification at the Commonwealth level is offered by the new sedition laws found in Schedule 7 of the Commonwealth's *Anti-Terrorism Act (No 2) 2005*. Section 80.2(5) provides:

A person commits an offence if

- (a) the person urges a group or groups (whether distinguished by race, religious, nationality or political opinion) to use force or violence against another group or groups (as so distinguished); and
- (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

One view of this provision is that it seeks to redress the perception that anti-terrorist legislation, while general in application, may in fact target a particular section of the community. In this case, fears are expressed about the law's impact on Australia's Muslim community. One means by which this perception can be assuaged is by the introduction of laws designed to protect supposedly vulnerable sections of the community, either as part of the anti-terrorist package, or as in the United Kingdom in the form of separate legislation. Such an explanation may or may not be correct. What is undeniable is that the anti-terrorist legislation at the Commonwealth level in Australia has this dual nature, in that one side its sedition laws target terrorist related publications and the like, while at the same time expressly extending protection against the incitement to use force or violence on racial, religious and other grounds.

Section 80.2(5) is based on a recommendation of the 1991 Gibbs Committee's Review of Commonwealth Criminal Law. The Committee argued for the inclusion of a provision of

¹⁰¹ In NSW transgender, homosexual and HIV/AIDS vilification are also unlawful.

¹⁰² L Morris, 'Muslim leaders fear vilification', *SMH*, 9.11.2005.

this kind in the revised sedition offences, saying it would find constitutional support in the external affairs power (s 51(xxix)) and Article 20 of the International Covenant on Civil and Political Rights. Specifically, the committee recommended that it be ‘an offence to incite by any form of communication’

the use of force or violence by groups within the community, whether distinguished by nationality, race or religion, against other such groups or members thereof.

One point to make about the new sedition offence in section 80.2(5) is that it might be said to extend the coverage of Commonwealth laws to include protection against vilification on racial, religious grounds and other grounds, at least where the use of force or violence is urged. Another is that for the first time at the Commonwealth level incitement to use force or violence on racial and religious grounds, as well as on grounds of nationality and political opinion, constitutes a distinct criminal offence.

The inclusion of section 80.2(5) in Schedule 7 of the 2005 Act generated a number of responses. Consistent with the idea of the anti-terrorist legislation as an even-handed piece of legislation, in its submission to the Senate Legal and Constitutional Legislation Committee the Federal Attorney-General’s Department argued that the 2005 Act was non-discriminatory, pointing out that ‘Even in the elements of sedition it is about protecting groups in our society regardless of their race, religion, nationality or political opinion’.

While agreeing with the main thrust of this aspect of the legislation, HREOC thought that such protection should be provided under a separate law. A similar view was expressed by the Gilbert and Tobin Centre of Public Law. It welcomed section 80.2(5), as this would criminalize the incitement of violence against religious or other groups, as required by Australia’s human rights treaty obligations. However, ‘at the same time, it suggested that the offence was too narrow and would be more appropriately placed in anti-vilification laws’.¹⁰³

Writing in an independent capacity, Ben Saul, a lecturer at the Gilbert and Tobin Centre of Public Law, agreed with that view. He expressed concern about presenting group violence as counter-terrorism law, as this ‘can only reinforce the stereotyping of certain ethnicities or religions as terrorists’. Saul continued:

Further, characterising incitement to group violence as sedition is an error of classification. The idea of sedition centres on rebellion against, or subversion of, political authority; it has little to do with communal violence between groups. The rationale for protecting one group from violence by another is not to prevent sedition or terrorism, but to guarantee the dignity of members of human groups in a pluralist society.¹⁰⁴

¹⁰³ Senate Legal and Constitutional Legislation Committee, n 29, p 95.

¹⁰⁴ B Saul, ‘Preventing communal violence? Blurring sedition, vilification and terrorism’, *Human Rights Defender*, 2005 Special Issue - [http://www.ahrcentre.org/documents/Human_Rights_Defender-The_Anti-Terrorism_Bill_\(No2\)_2005.pdf](http://www.ahrcentre.org/documents/Human_Rights_Defender-The_Anti-Terrorism_Bill_(No2)_2005.pdf)

As discussed earlier, sedition laws have traditionally extended to prevent ‘discontent or disaffection amongst the Sovereign’s subjects’ or promoting ‘feelings of ill-will and hostility between different classes of those subjects’. At common law, in *R v Chief Metropolitan Stipendiary Magistrate, Ex Parte Choudhury*. Watkins LJ held that ‘Proof of an intention to promote feelings of ill will and hostility between different classes of subjects does not alone establish a seditious intention’. Rather, there ‘must be violence or resistance or defiance for the purpose of disturbing constituted authority... By constituted authority what is meant is some person or body holding public office or discharging some public function of the state’.¹⁰⁵ In this way, by a more restrictive and functional interpretation, where stress is placed on the governmental aspect to the offence, the common law avoids the difficulty identified by Saul, centering this aspect of the offence again on the subversion of political authority.

Can the same, or something similar, be said of the offence of ‘urging violence within the community’, bearing in mind that the offence requires proof that the use of force or violence ‘would threaten the peace, order and good government of the Commonwealth’? The subsection would not be interpreted in the light of the common law, but rather as a matter of statutory construction. Presumably the word ‘Commonwealth’ here is being used in a non-geographical sense to denote a matrix of institutions, rights and functions constituted under the Federal Constitution. The precise scope and reach of the new offence remains to be determined.

In the context of recent ‘riots’ at Cronulla, it has been asked whether section 80.2(5) would apply to the sending of text messages inciting public disturbances on racial or religious grounds? If such activities threaten to damage the Commonwealth’s standing internationally, then the answer could be well be ‘yes’.

Some of text messages circulating in Sydney in December 2005 were cited by Saul in his commentary on the events. He wrote:

The author of the text message which inflamed racial tensions last week committed sedition by writing: ‘This Sunday every f...ing Aussie in the Shire get down to North Cronulla to help support Leb and wog bashing day’. Also seditious is this retaliatory text: ‘all arabs unite the aussies will feel the force of the arabs as one/brothers in arms unite now/ let’s show them whos boss/ destroy everything’.

Saul commented in relation to the Commonwealth sedition offences:

Many of these incitements threaten the peace, order or good government of the Commonwealth because of the scale of the violence, the involvement of national racist organizations, and the damage to Australia’s international reputation.¹⁰⁶

¹⁰⁵ [1991] 1 All ER 306 at 323.

¹⁰⁶ B Saul, ‘It’s essential to clean up this mess’, *SMH*, 14.12.2005. Saul went on to argue that ‘incitement to racial or religious violence should be prosecuted under anti-vilification law, as suggested by the Federal Opposition in its incitement to violence bill, and not as sedition or terrorism’.

It seems in fact that those charged for sending such text messages have not been prosecuted under the new sedition laws. Instead, a combination of pre-existing Federal telecommunications offences and the State's statutory incitement law which dates from 1916 is to be relied upon (see above).

5.3 The United Kingdom, terrorism, incitement and vilification

Similar ground has been covered in the UK, where attempts to introduce stricter anti-terrorist laws¹⁰⁷ have been accompanied by attempts to assuage concerns expressed by minority groups, by expanding the existing offences of incitement to racial hatred to apply to those who stir up hatred against a group of people based on their religious beliefs.¹⁰⁸ Both arms to this legislative strategy have proved highly controversial.

In relation to the Terrorism Bill 2005, the Home Secretary argued that the law already outlaws incitement to commit a particular terrorist act, such as the statement 'Please will you go and blow up a tube train on 7 July in London', but not a generalized incitement to terrorist acts such as 'We encourage everybody to go and blow up tube trains'.¹⁰⁹ It was this gap in the law in respect to indirect incitement that the new offence of 'encouragement' in clause 1 of the Bill sought to close.

In its inquiry into the Bill a joint parliamentary committee report, *Counter-Terrorism Policy and Human Rights*, accepted there was a need for a new criminal offence of indirect incitement to terrorist acts. But it said the new offence of 'encouragement' was

not sufficiently legally certain to satisfy the requirement in Article 10 [of the European Convention on Human Rights] that interferences with freedom of expression be 'prescribed by law' because of (i) the vagueness of the glorification requirement, (ii) the breadth of the definition of 'terrorism' and (iii) the lack of any requirement of intent to incite terrorism or likelihood of such offences being caused as ingredients of the offence.¹¹⁰

The other side of the coin is that the British Government has also sought to further protect minority groups against vilification on religious grounds. The Racial and Religious Hatred Bill,¹¹¹ introduced on 9 June 2005, builds on existing anti-vilification laws by extending the

¹⁰⁷ Terrorism Bill 2005, clause 1(2)(a).

¹⁰⁸ Serious Organised Crime and Police Bill 2004, cl 119 and Schedule 10.

¹⁰⁹ HL/HC, Joint Committee on Human Rights, *Counter Terrorism Policy and Human Rights: Terrorism Bill and related matters*, Third Report of Session 2005-06, HL 75-1/HC 561-1, para 21.

¹¹⁰ HL/HC, Joint Committee on Human Rights, *Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, Third Report of Session 2005-06, p 3.

¹¹¹ For an overview of the Bill as first introduced see – House of Commons Library, *The Racial and Religious Hatred Bill*, Research Paper 05/48, 16 June 2005 - <http://www.parliament.uk/commons/lib/research/rp2005/rp05-048.pdf>

racial hatred offences in Part III of the *Public Order Act 1986* (UK) to cover stirring up hatred against persons on religious grounds.¹¹² It further amends provisions relating to offences involving stirring up hatred against persons on racial grounds. ‘Religious hatred’ is defined in the Bill to mean ‘hatred against a group of persons defined by reference to religious belief or lack of religious belief’. Substantively, as originally introduced the Bill applied to the use of words or behaviour or display of written material (s 18), publishing or distributing written material (s 19), the public performance of a play (s 20), distributing, showing or playing a recording (s 21), broadcasting (s 22) and the possession of materials with a view to display, publication or distribution (s 23) which

having regard to all the circumstances... are (or is) likely to be heard to seen by any person in whom they are (or it is) likely to stir up racial or religious hatred.

The Explanatory Note for the Bill explained that for each offence ‘the words, behaviour, written material, recordings or programmes must be both threatening, *abusive or insulting* and intended *or likely* to stir up racial hatred’ (emphasis added). The Explanatory Note stated:

There are existing offences in Part III of the 1986 Act against stirring up racial hatred. As a result of developments in case law these offences have been applied to the incitement of hatred against mono-ethnic religious groups, such as Jews and Sikhs. But this protection does not apply to all faith communities.

The Explanatory Note continued:

The Bill creates new offences of stirring up hatred against persons on religious grounds, by extending the existing offences relating to racial hatred contained in the 1986 Act. Similar provisions were included in the Anti-Terrorism, Crime and Security Bill in 2001 and again in the Serious Organised Crime and Police Bill in the 2004-05 session but were not proceeded with to enactment in either case.

The fact is that the controversial ‘religious hatred’ clauses were removed from those Bills in order to permit their orderly and successful passage through Parliament. In the case of the Racial and Religious Hatred Bill, this has faced considerable opposition in the Lords where, on 25 October 2005, the Government was defeated on an amendment to the Bill by 260 votes to 111. The architect of this and other amendments, the Liberal Democrat’s Lord Lester, commented that the ‘Government have played politics with religion and race’, by using the Bill ‘as a means of persuading Muslims to vote Labour’. He went on to say:

The Bill would criminalise abusive or insulting speech, as well as threatening

¹¹² Incitement to racial hatred was first made a criminal offence under the race *Relations Act 1965*. The relevant legislation is now found in Part III of the *Public Order Act 1986*. The Racial and Religious Hatred Bill would only extend to England and Wales. The subject is a matter over which the Scottish Parliament has the right to legislate in Scotland and similar provisions already exist in Northern Ireland, in the *Public Order (Northern Ireland) Order 1987*.

speech. As Rowan Atkinson [the comedian] points out, it promotes the idea that there should be a right not to be offended when the right to offend is far more important. Because it suffers from the twin vices of over-breadth and vagueness, the Bill threatens...to chill free expression and to encourage self-censorship.¹¹³

By amendment Lord Lester introduced a number of what he called ‘essential safeguards’ into the Bill. First, the Lords separated the terms ‘religious’ and ‘racial’ so as to create entirely separate offences. It was argued that a more robust exchange of views could be allowed regarding a person’s religion as opposed to their race, while acknowledging that religion is not always a question of personal choice.¹¹⁴ Secondly, the new offences were confined to using or publishing threatening words, as distinct from abusive or insulting words. Thirdly, the ‘likely limb’ was removed from the Bill, with the result that the prosecution would have to prove that the defendant had a specific criminal intent. Thirdly, a freedom of expression clause is included to protect from the effect of the Bill any discussion, criticism and even ridicule of a particular religion. If this last amendment stands, it will not be possible for the law to be used in a way that

prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents.¹¹⁵

From the Government side, it is argued that a safeguard against the vexatious use of religious anti-vilification legislation is that prosecutions would require the consent of the Attorney General, thus preventing the ‘legislation being misused by feuding religious groups’.¹¹⁶

A point of reference in the debate is the Victorian *Religious and Racial Tolerance Act 2001* (discussed below). Opponents of the British Bill argue that the Victorian legislation indicates the types of cases that may be brought in England Wales if the Bill is passed. Supporters of the British Bill point out that the Victorian legislation extends beyond ‘racial hatred’ to include conduct that ‘incites...serious contempt for, or revulsion or severe ridicule’. It is argued that it is ‘much easier to prove serious contempt or severe ridicule than incitement to hatred’.¹¹⁷

On 31 January 2006 the Blair Government lost two crucial votes in the House of Commons

¹¹³ *House of Lords Debates*, 25.10.2005, column 1074.

¹¹⁴ D Watkins, ‘Racial and religious hatred v free speech’, *New Law Journal* 18.11.2005, p 1737.

¹¹⁵ J Rozenberg, ‘A legal lesson from Down Under’, News.Telegraph, 27.10.2005 - <http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2005/10/27/nlaw27.xml>

¹¹⁶ Home Office, *Incitement to religious hatred frequently asked questions* - <http://old.homeoffice.gov.uk/comrace/faith/crime/faq.html>

¹¹⁷ House of Commons Library, n 111, pp 24-26.

on the Racial and Religious Hatred Bill, the result of which is that the measure will go for Royal Assent substantially in the form amended by the Lords.¹¹⁸ As at 1 February 2006 the fate of the Terrorism Bill remains to be decided.

5.4 Comment

Many questions arise, some specific to the Commonwealth's sedition laws, others concerned more generally with laws prohibiting vilification on racial and/or religious grounds. A particular question is whether such laws, if they are to be enacted, are better suited to legislation designed to combat anti-discrimination as against laws which are more clearly designed to combat the subversion of political authority? In practice, are controversial laws of this last sort likely to be used when racial or religious vilification is at issue, or is it the case that more traditional incitement laws will be relied upon, as seems to be the case in relation to the Cronulla 'riots'? Indeed, does reliance on incitement laws call into question the need for specific criminal offences for racial and religious vilification, whether these are found in anti-discrimination law or elsewhere?

¹¹⁸ M White, 'Government suffers chaotic double defeat over bill to combat religious hatred', Guardian Unlimited, 1.2.2006 -
<http://www.guardian.co.uk/frontpage/story/0,,1699397,00.html>

6. RACIAL VILIFICATION

6.1 Racial vilification defined

Vilification is generally any act that happens publicly¹¹⁹ and that could incite others to hate, have serious contempt for, or severely ridicule a person or group of people. There are several kinds of vilification of which racial and religious vilification are two types.

In Australia most anti-vilification laws are found in legislation designed to combat discrimination. Discrimination on the ground of race occurs when, because of race, a person is treated less favourably than a person similarly situated but of another race is treated. Discrimination can be ‘direct’ or ‘indirect’ in nature. An example of ‘direct’ discrimination is where a person is sacked because of his ethnic origin. An example of ‘indirect’ discrimination is where a rule is applied to everyone but it affects one racial or ethnic group more than others, and it is not reasonable. For instance, a workplace may lay down certain conditions that conflict with the religious practice of a particular group, such as requiring that employees work after 5 pm on Friday in the case of Jews.

Racial vilification can be distinguished from racial discrimination in terms of its effects. Luke McNamara writes:

Vilification does not necessarily involve the sort of harm with which anti-discrimination statutes are generally concerned – the denial of some opportunity, entitlement or advantage available to, or enjoyed by, members of other racial groups, whether in the context of education, employment or service delivery.¹²⁰

Typically, the ‘harm’ associated with racial vilification is psychological harm to the victim or target group. This is different again to the potential or actual infliction of physical ‘harm’ that is the primary justification for legal regulation, in both criminal and civil law. Racial vilification is not racist violence per se, although as McNamara states it may be a precursor to, or may incite, racist violence or ‘hate crimes’.

6.2 Overview of racial vilification laws in Australia¹²¹

The following Table shows those jurisdictions in Australia with vilification laws on any ground, including race.¹²²

¹¹⁹ The exception is the Victorian *Racial and Religious Tolerance Act 2001*.

¹²⁰ L McNamara, *Regulating Racism: Racial Vilification Laws in Australia*, Sydney Institute of Criminology Monograph Series No 16, 2002, p 11.

¹²¹ This overview is based on – Equal Opportunity Commission of Western Australia, *Racial and Religious Vilification, Consultation Paper*, August 2004 - <http://www.equalopportunity.wa.gov.au/pdf/vilification.pdf>

¹²² This Table is a revised and updated version of - Simon Rice, ‘Do Australians have equal protection against hate speech’, Democratic Audit of Australia, September 2005 <http://democratic.audit.anu.edu.au/Papers-2005/RiceVilificationLawsSept05.pdf>

Vilification laws in Australia

| | Cth | ACT | NSW | NT | Qld | SA | Tas | Vic | WA |
|---|-----|-----|-----|----|-----|----|-----|-----|----|
| Race | √ | √+ | √+ | | √+ | √- | √ | √+ | √- |
| Homosexuality/sexual Orientation/sexuality | | √+ | √+ | | √+ | | √ | | |
| Trans-sexuality/gender Identity | | √+ | √+ | | √+ | | | | |
| Religion | | | X | | √+ | X | √ | √+ | X |
| HIV/AIDS | | √+ | √+ | | | | | | |
| Disability | | | | | | | √ | | |

Key

- √+ Unlawful conduct; criminal conduct if serious.
- √ Unlawful conduct only – the subject of complaint.
- √- Criminal conduct only.
- X Rejected as a matter of current policy.

The following Table is updated from McNamara's work, *Regulating Racism: Racial Vilification Laws in Australia*. It shows in greater detail those jurisdictions with vilification laws on the ground of race.

Racial Vilification Laws in Australia

| Jurisdiction | Statute | Main sections | Commenced |
|---------------------|--|----------------------|------------------|
| NSW | <i>Anti-Discrimination Act 1977</i> | 20C-20D | 1989 |
| ACT | <i>Discrimination Act 1991</i> | 66-67 | 1991 |
| Commonwealth | <i>Racial Discrimination Act 1975</i> | 18C-18D | 1995 |
| SA | <i>Racial Vilification Act 1996</i> <i>Civil Liability Act 1936</i> | 3-6 73 | 1996 |
| Tasmania | <i>Anti-Discrimination Act 1998</i> | 19 | 1998 |
| Queensland | <i>Anti-Discrimination Act 1991</i> | 124A 131A | 2001 |
| Victoria | <i>Racial and Religious Tolerance Act 2001</i> | 7-12 24-25 | 2002 |
| WA | <i>Criminal Code 1913</i> | 77-80H | 2004 |

NSW was the first Australian jurisdiction to enact racial vilification laws in 1989. This was by amendment of the State's anti-discrimination legislation. Using NSW as a template, the other States passed similar laws, with Queensland, Tasmania and the ACT incorporating anti-vilification laws on racial and other grounds in their anti-discrimination legislation. Separate 'racial hatred' legislation exists in Victoria, South Australia and Western Australia. In Western Australia the Criminal Code provisions, introduced originally in 1990, were substantially revised by the *Criminal Code Amendment (Racial Vilification) Act 2004*.

The Commonwealth has also passed racial vilification legislation, by the amendment of the *Racial Discrimination Act* in 1995. The relevance of section 80.2(5) of the new sedition laws under Schedule 7 of the Commonwealth's *Anti-Terrorism Act (No 2) 2005* for racial vilification was discussed earlier.

Defining 'race': All the Acts use different definitions of the word 'race'. Federally, the definition mirrors Article 1.1 of the *International Convention on the Elimination of All Forms of Racial Discrimination*, to which the Commonwealth Act is designed to give effect. The Convention states that the word 'race' means:

any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

A report of the Human Rights and Equal Opportunity Commission (HEREOC) in 2004 explains judicial interpretation of the term 'ethnic origin':

Courts have decided that to fall within the ground of ethnic origin, the following characteristics are considered essential:

- a shared history of which the group was conscious as distinguishing it from other groups, and the memory of which it keeps alive and
- a cultural tradition of its own, including family and social customs and manners, but not necessarily associated with religious observance.

The report continued:

Courts in the United Kingdom have decided that Jewish people and Sikhs fall within the meaning of ethnic origin outlined above.

Australian courts have adopted these meanings and have also found that Jewish people comprise a group of people with a common ethnic origin under the RDA [Racial Discrimination Act]. As yet Australian courts have not been asked to consider whether Muslim people constitute a group with a common ethnic origin under the Federal RDA.

However, cases that have considered this issue under different laws have found that

Muslims do not share a common racial, national or ethnic origin because while Muslims profess a common belief system, the Islamic faith is widespread covering many nations and languages.

By reference to *Khan v Commissioner, Department of Corrective Services*,¹²³ a decision of the NSW Administrative Decisions Tribunal from 2002, the HEREOC report concluded:

If a person feels they have been discriminated against solely because they are of the Islamic faith then, on the basis of current case law, it is unlikely that they are covered by the grounds in the RDA.

In the NSW Act ‘race’ is defined in section 4 broadly to include ‘colour, nationality, descent and ethnic, ethno-religious or national origin’. Interpretation of the problematic term ‘ethno-religious’ is discussed later in this paper in relation to the decision in *Khan v Commissioner, Department of Corrective Services*.

The Victorian and Queensland Acts define ‘race’ as including ‘colour’, ‘descent or ancestry’, ‘nationality or national origin’, ‘ethnicity or ethnic origin’. Section 3 of the Victorian Act includes a further definition of ‘if 2 or more races are collectively referred to as a race – (i) each of those distinct races’ (ii) that collective race’.¹²⁴

Defining ‘public act’ – three approaches: The general view is that racial vilification law applies to ‘public’ acts. While this is broadly true, the Commonwealth, NSW and Victoria laws can be said to exemplify three different approaches.

As for the Commonwealth, section 18C of the *Racial Discrimination Act* prohibits unlawful acts done ‘otherwise than in private’.¹²⁵ For the purposes of section 18C, an act is not taken to be done in private if it:

- (a) causes words, sounds, images or writing to be communicated to the public; or
- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

Acts that are done ‘otherwise than in private’ have been held to include the following circumstances:

- racial abuse by an employee against another employee, on the factory floor;¹²⁶

¹²³ [2002] NSWADT 131.

¹²⁴ C Ronalds and R Pepper, *Discrimination Law and Practice*, 2nd ed, The Federation Press 2004, pp 20-21.

¹²⁵ This ‘otherwise than in private’ formulation is adopted in the *Criminal Code Amendment (Racial Vilification) Act 2004* (WA), ss 77, 78, 80A, 80B. By section 80E(2) conduct is taken not to occur in private if it: consists of any form of communication with the public or section of the public; occurs in a public place or in the sight or hearing of people who are in a public place.

¹²⁶ *Rugema v J Gadsten Pty Ltd t/a Southcorp Packaging* (1997) EOC 92-887.

- broadcasting of a television documentary;¹²⁷
- the distribution of a phone card depicting a WWII German fighter with a swastika on it;¹²⁸
- racially offensive statements made during an interview which was later printed in a newspaper, or publishing an article in a newspaper;¹²⁹
- statements made at a workshop run by a local government, which was attended by community representatives;¹³⁰
- the writing of a play which is subsequently performed in public;¹³¹
- publishing racially offensive material on an Internet site which was not protected by a password;¹³² and
- comments made at an annual general meeting of an incorporated body.¹³³

Alternatively, section 20B of the NSW Act defines ‘public act’ comprehensively to include

- (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
- (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
- (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

In its 1999 review of the NSW legislation, the NSW Law Reform Commission commented that the absence of a definition of the word ‘public’ had given rise to two problems. One refers to situations which are neither clearly private or public, where for instance ‘vilifying statements are made at a private function in the presence of a large number of people’. The other is that the Act does not cover instances where the victim is alone with the ‘vilifier’.¹³⁴

¹²⁷ *De La Mare v SBS* (unreported) [1998] HREOC H97/226-10.07.98.

¹²⁸ *Shron v Telstra Corporation Ltd* (unreported) [1998] HREOC H97/226 – 10.07.98.

¹²⁹ *McGlade v Lightfoot* (1999) EOC 93-002, [2003] EOC 93-252; *Feghaly v Oldfield & Ors* (2000) EOC 93-090; *Bryant v Queensland Newspapers Pty Ltd* [1997] HREOC 15.05.97.

¹³⁰ *Jacobs v Fardig* (1999) EOC 93-022.

¹³¹ *Bryl & Kobvacevic v Nowra & Melbourne Theatre Co* (1999) EOC 93-022.

¹³² *Jones & Ors v Tobin* (2000) EOC 93-110.

¹³³ *Miller v Werheim & Anor* [2002] EOC 93-223.

¹³⁴ NSWLRC, *Review of the Anti-Discrimination Act 1977 (NSW)*, Vol, One, Report 92, November 1999, p 536. It recommended substitution of ‘public communication’ for ‘the public’ (page 541).

Instances of where a ‘public act’ has been held to occur under the NSW Act include:

- comments made at a public ceremony;¹³⁵
- racially offensive comments by a councilor at a council meeting;¹³⁶
- speaking or shouting racial abuse in a stairwell of a block of units;¹³⁷ and
- bashing a person by the side of the road whilst shouting racial abuse.¹³⁸

Different again is the Victorian approach where, under the 2001 Act, the unlawful conduct of inciting hatred on the ground of race is not expressly required to be done ‘in public’. However, by section 12(1) of the *Racial and Religious Tolerance Act*, the conduct will not be unlawful if it is established that the parties engaged in it in circumstances that may reasonably be taken to indicate that they desired it to be heard or seen only by themselves. Conversely, this exception is qualified by section 12(2), in circumstances where it can be demonstrated that the parties ought reasonably to expect that the conduct may be heard or seen by someone else. It is claimed in this respect that the Victorian legislation relies on concepts of objectivity and reasonableness, which are said to be ‘more certain concepts in Australian jurisprudence than are the ideas of public and private’.¹³⁹

Incitement to racial vilification – two approaches: Broadly speaking, there are two legislative approaches as to what kind of conduct is regarded as unlawful. One is that found in the Commonwealth’s *Racial Discrimination Act*. The other is the NSW model, which has been adopted in Tasmania, South Australia, Queensland, Victoria and the ACT.

The main difference between the two concerns the notion of incitement. Under the section 18C(1) of the Commonwealth Act it is unlawful for a person to do an act, otherwise than in private, if the ‘act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people’, because of the race of that person or people in the group. The concept of inciting another person to hatred or ridicule is absent.¹⁴⁰

An example of section 18C in operation is the 2002 case of *Jones v Toben*¹⁴¹ where a website questioning the historical veracity of the Holocaust (among other things) was

¹³⁵ *Wagga-Wagga Aboriginal Action Group & Ors v Eldridge* (1995) EOC 92-701.

¹³⁶ *Wagga-Wagga Aboriginal Action Group & Ors v Eldridge* (1995) EOC 92-701.

¹³⁷ *Anderson v Thompson* [2001] NSWADT 11.

¹³⁸ *Russell v Commissioner of Police, NSW Police Service & Ors* [2001] NSWADT 32.

¹³⁹ For a detailed commentary see – A Chapman and K Kelly, ‘Australasian Anti-vilification law: a discussion of the public/private divide and the work relations context’, (June 2005) 27(2) *The Sydney Law Review* 203.

¹⁴⁰ For a detailed commentary on section 18C see – D Meagher, ‘So far so good?: a critical evaluation of racial vilification laws in Australia’ (2004) 32 *Federal Law Review* 225.

¹⁴¹ [2002] FCA 1150 (17 September 2002).

found to be unlawful. For the purposes of the Act, Jewish people were held to comprise a group of people with a common ethnic origin. The remedial action ordered was for the removal of the offending material from the relevant Internet site and for payment of the applicant's costs.

In NSW, on the other hand, incitement is central to the statutory scheme, with section 20C(1) of the *Anti-Discrimination Act 1977* providing:

(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

In the case of *John Fairfax Publications Pty Ltd v Kazak*¹⁴² the Appeal Panel of the NSW Administrative Decisions Tribunal discussed the meaning of the word 'incite' in the context of section 20C(1). A distinction was drawn in this respect between the interpretation of the word 'incite' in section 20C(1), a provision making it unlawful (but not an offence) to incite racial hatred, for which civil remedies apply, and section 20D(1) of the same Act which creates the offence of 'serious racial vilification'. The Appeal Panel concluded that a different construction of 'incite' should be followed in respect to the penal provision (s. 20D(1)), where intent is required, as against the remedial provision (s 20C(1)), where intention to incite is not a prerequisite to the substantiation of a complaint. In effect, for the purposes of the criminal law the Appeal Panel confirmed that 'intention' is required for offences relating to incitement, 'a proposition which is unarguably established by authority'.¹⁴³

That section 20C does not require proof of an intention to incite on the part of the perpetrator of the vilification was confirmed in the more recent case of *Kimble & Souris v Orr*¹⁴⁴. A useful summary of the approach to the construction of section 20C was also presented in the same case:

The word 'incite' should be given its ordinary English meaning, namely, to urge, spur on, stir up, animate, stimulate, or prompt action. It is not sufficient if the words merely convey hatred or express serious contempt or severe ridicule.

To establish incitement to racial vilification, it is not sufficient that 'race' is one amongst a number of relevant grounds:

¹⁴² [2002] NSWADTAP 35 at 9.

¹⁴³ [2002] NSWADTAP 35 at 6. The relevance of recklessness in this context was not considered. This distinction between the civil and criminal provisions is consistent with the views expressed by the then Attorney General, John Dowd, in the Second Reading Speech for the 1989 amendments to the legislation – *NSWPD*, 4.5.1989, p 7490. The matter was also considered in *Wagga Wagga Aboriginal Action Group v Eldridge* [1995] EOC 92-701 and by the NSW Law Reform Commission in its 1999 review of the Act where it was recommended that it be expressly stated that 'proof of specific intention to incite is not required for establishing vilification' – *NSWLRC*, n 134, p 544.

¹⁴⁴ [2003] NSWADT 49 (11 March 2003) at para 62.

Race must be ‘a substantially contributing factor’ to be incitement. It is not sufficient if there are other, equally consistent grounds, for the incitement given that section 4A of the Act does not apply to the vilification provisions.

An ‘objective test’ is to be applied:

In determining whether the public act is capable, in an objective sense, of inciting others to feel hatred towards or serious contempt for, or severe ridicule of a person or persons on the ground of race, the approach taken to the characterization of the audience for these purposes is crucial.

Thus, in the context of the vilification provisions, the question is, could the ordinary reasonable reader [listener] understand from the public act that he/she is being incited to hatred towards or serious contempt for, or severe ridicule of a person or persons on the ground of race? The question is not, could the ordinary reasonable reader [listener] reach such a conclusion after his/her own beliefs have been brought into play by the public act?

The issue for the Court or Tribunal is the likely effect on the ordinary reasonable reader (or listener or viewer) who

is a person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower but can and does read between the lines in the light of that person’s general knowledge and experience of worldly affairs.¹⁴⁵

In effect, the question is not whether a particular person was, in fact, incited to commit a crime; it is only whether, in the objective circumstances, an ordinary reasonable reader could understand from the publication that he is being incited to hatred towards or serious contempt for, or severe ridicule of a person or persons on the ground of race.

Criminal and civil remedies: In some jurisdictions - NSW, Queensland, South Australia, Victoria and the ACT – both civil and criminal remedies are provided. This two-tiered approach was first adopted in NSW where, under section 20C of the *Anti-Discrimination Act 1977* it is unlawful, by a public act, to ‘incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group’. By section 20D, the NSW *Anti-Discrimination Act 1977* also provides for an offence of ‘serious racial vilification’, which includes making it a criminal offence to incite, by a public act, ‘others to threaten physical harm’ to persons or groups, or to the property of those persons or groups, on the ground of race.

¹⁴⁵

Amalgamated Television Services Pty Ltd v Marsden (1998) 43 NSWLR 158; applied in *John Fairfax Publications Pty Ltd v Kazak* [2002] NSWADTAP 35 at 14.

In full, section 20D provides:

20D Offence of serious racial vilification

(1) A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:

- (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
- (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

Maximum penalty:

In the case of an individual—50 penalty units or imprisonment for 6 months, or both. In the case of a corporation—100 penalty units.

(2) A person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.

Writing in 2002, McNamara said there had been no criminal prosecutions for serious racial vilification under section 20D. Ten complaints had been referred to the Attorney General, none of which had resulted in the laying of criminal charges by the DPP. McNamara suggested that the provision is *exclusively* symbolic in value. He also argued that section 20D does not criminalize racial vilification ‘as such’. Rather, it criminalizes acts of racial vilification which ‘are aggravated by virtue of the fact that they involve threats of, or incitement to, violence against the individual target, or members of the group target’.¹⁴⁶

In its 1999 review of the NSW legislation, the NSW Law Reform Commission recommended relocation of the serious vilification provision to the *Crimes Act 1900* (NSW).¹⁴⁷ The same recommendation had been made in 1992 by the Samios Report.¹⁴⁸

The Queensland and ACT legislation create similar offences, with the difference that an element of knowledge or recklessness is expressly required to be established in the incitement of hatred. Section 131A (1) of the Queensland Act provides in part:

A person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group in a way that includes –

- (a) threatening physical harm towards, or towards any property of, the person or group of persons; or
- (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

Section 24(1) and (2) of the Victorian Act creates two distinct offences, one referring to the incitement of ‘hatred’ and based expressly on intention and requiring the conduct in question to threaten physical harm to persons or property, the other referring only to the

¹⁴⁶ L McNamara, n 120, pp 199-201.

¹⁴⁷ NSWLRC, n 134, p 553.

¹⁴⁸ J Samios, *Report of the Review by the Hon James Samios, MBE, MLC into the Operation of the Racial Vilification Law of NSW*. Legislative Council, 1992.

intention to engage in conduct that is knowingly likely to incite ‘serious contempt for, or revulsion of or severe ridicule of’ a person or class of persons on the ground of race. Both offences are subject to the same maximum penalties, including imprisonment for up to 6 months. Section 24(1) and (2) provides:

(1) A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely-

(a) to incite hatred against that other person or class of persons; and

(b) to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons...

(2) A person (the offender) must not, on the ground of the race of another person or class of persons, intentionally engage in conduct that the offender knows is likely to incite serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

Tasmania has no criminal racial vilification provisions. The same can be said of the Commonwealth, although as discussed earlier section 80.2(5) of the new sedition laws is relevant in this context. Otherwise, unlike in NSW, the Commonwealth’s civil provision making racial vilification unlawful does not have a criminal counterpart containing an offence of serious vilification. The Federal Opposition introduced a bill in 2003 to create offences for both racial and religious vilification but the bill did not proceed.¹⁴⁹ In December 2005 the Federal Opposition introduced the Crimes Act Amendment (Incitement to Violence) Bill, again with the intention of creating offences based on racial and religious hatred. The Bill has not proceeded beyond its First Reading.

Western Australia is peculiar in that, while it provides for criminal racial vilification provisions, it does not provide for civil remedies. As noted the criminal provisions were substantially revised under *Criminal Code Amendment (Racial Vilification) Act 2004*. Two levels of criminal responsibility apply. Sections 77 and 80A refer to conduct that it ‘intended’ to ‘incite racial animosity or racist harassment’ and ‘to racially harass’ respectively. The maximum penalty for section 77 offences is imprisonment for 14 years, for section 80A offences imprisonment for 5 years, or 2 years or a fine of \$24,000 where the offence is prosecuted by way of summary conviction. On the other hand, sections 78 and 80B refer to conduct that is ‘likely’ to result in conduct amounting to the same criminal offences, for which correspondingly lesser penalties apply.

Defences: All Australian racial vilification legislation provides a number of exceptions to the prohibition against racial vilification.¹⁵⁰ Representative is section 20C(2) of the NSW *Anti-Discrimination Act 1977* which creates a defence in the following terms:

(2) Nothing in this section renders unlawful:

(a) a fair report of a public act referred to in subsection (1), or

¹⁴⁹ Racial Hatred Bill 2003 and Racial Hatred Bill 2003 (No 2).

¹⁵⁰ *Racial Discrimination Act* (Cth) s 18D; *Racial and Religious Tolerance Act 2001* (Vic) s 11; *Anti-Discrimination Act 1991* (Qld) s 124A(2); *Civil Liability Act 1936* (SA) s 37(1); *Anti-Discrimination Act 1998* (Tas) s 55; *Discrimination Act 1991* (ACT) s 66(2).

- (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege (whether under the *Defamation Act 2005* or otherwise) in proceedings for defamation, or
- (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

The purpose of these exemptions is to strike a balance between free speech and freedom from vilification and discriminatory attacks. The similarities between these defences and those available in the law of defamation means that decision makers can rely on the extensive body of defamation jurisprudence, something that is said to ‘bring a level of certainty and predictability to the interpretive task which in turn assists the citizenry in the organisation of their affairs and lawyers in the provision of sound advice’.¹⁵¹

The same defences do not expressly apply to the criminal offence. The lack of jurisprudence in this area makes it impossible to predict whether, in the light of the implied constitutional freedom of political communication, this may affect the validity of section 20D of the NSW *Anti-Discrimination Act 1977*, or for that matter sections 24 and 25 of the Victorian *Racial and Religious Tolerance Act 2001*.

Complaints: Under the Commonwealth Racial Discrimination Act complaints about breaches can be made to HEREOC, which will investigate and attempt to conciliate the complaint. If conciliation is unsuccessful, the complainants may pursue the matter in the Federal Court or the Federal Magistrates Court. Similar orders can be made to those available to the NSW Administrative Decisions Tribunal (see below).

The NSW Anti-Discrimination Board’s complaints process was substantially revised under the *Anti-Discrimination Amendment (Miscellaneous Provisions) Act 2004*, which commenced on 2 May 2005. Basically, under the revised Part 9 of the Act a person may lodge a written complaint to the NSW Anti-Discrimination Board in respect of a breach of vilification laws. The Board will investigate the complaint and will attempt to resolve the matter through conciliation. If conciliation is not successful, the Anti-Discrimination Board may refer the matter to the Administrative Decisions Tribunal for hearing. The Tribunal determines whether the complaint is made out and makes a binding decision. If the complaint is made out in whole or part, by section 108 the Tribunal can order the respondent to: pay the complainant damages of up to \$40,000; publish an apology; cease from continuing or repeating conduct that is unlawful. Specifically in respect of vilification complaints, the respondent can be ordered to ‘develop and implement a program or policy aimed at eliminating unlawful discrimination’.

In 2004-2005, of a total of 1052 complaints received, 13 of these were on the ground of racial vilification (1.2%), compared to 175 on the ground of race (16.6%), 259 on the ground of sex (24.6%) and 214 on the ground of disability (20.3%).¹⁵² By contrast, no

¹⁵¹ D Meagher, n 140, p 243.

¹⁵² Anti-Discrimination Board of NSW, *Annual Report 2004-2005*, p 16.

complaints were received on the ground of racial vilification in 2002-2003 or 2003-2004.

Filtering complaints: Very important to the credibility of the legislation is that the Board is not swamped by inappropriate complaints. A three-stage filtering mechanism operates for this purpose. The first filter is provided by section 89B giving the President the power to determine whether or not a complaint is to be accepted or declined. In respect to ‘a vilification complaint’ this includes where the complaint fails to satisfy the requirements of section 88, which provides:

- A vilification complaint cannot be made unless each person on whose behalf the complaint is made:
- (a) has the characteristic that was the ground for the conduct that constitutes the alleged contravention, or
 - (b) claims to have that characteristic and there is no sufficient reason to doubt that claim.

A second filtering mechanism is provided by section 92, by which the President may decline to proceed with a complaint after the investigation has commenced. This is where, for example, the President is satisfied that the complaint is ‘frivolous, vexatious, misconceived or lacking in substance’ (s 92(1)(a)(i)). A third filter exists for prosecution for serious vilification, where the President must refer the complaint to the Attorney General. Section 91 provides:

- (1) The President:
 - (a) after investigating a vilification complaint, and
 - (b) before endeavouring to resolve the complaint by conciliation, is to consider whether an offence may have been committed under section 20D, 38T, 49ZTA or 49ZXC in respect of the matter the subject of the complaint.
- (2) If the President considers that an offence may have been so committed, the President is to refer the complaint to the Attorney General.
- (3) The President may only make such a referral within 28 days after receipt of the complaint.
- (4) On making the referral, the President is to give notice in writing to the complainant of:
 - (a) the making of the referral, and
 - (b) the rights of the complainant under section 93A.
- (5) The Tribunal may stay proceedings relating to the complaint until the conclusion of proceedings for the alleged offence under section 20D, 38T, 49ZTA or 49ZXC.

A third filter relates specifically to the criminal offence of serious racial vilification under section 20D. By section 20D(2) a person cannot be prosecuted without the consent of the Attorney General. Arrangements for prosecution are set out under section 91.

6.3 The meaning of the term ‘ethno-religious’

‘Race’ is defined under the NSW anti-discrimination legislation to include those of ‘ethno-religious’ origin. The ‘obscure’ meaning of the term ‘ethno-religious’ was considered in 2002 by the NSW Administrative Decisions Tribunal in *Khan v Commissioner, Department of Corrective Services*,¹⁵³ a case where a claim of race discrimination was made by an inmate of the Junee Correctional Centre who was denied access to Halal foods. Halal food is prepared in accordance with Islamic dietary laws laid down in the Koran. The specific issues before the Tribunal were, first, to determine the meaning of the term ‘ethno-religious’ and, secondly, to decide whether it includes or covers Muslims.

¹⁵³

[2002] NSWADT 131.

The term 'ethno-religious' was inserted into the definition of 'race' in the *Anti-Discrimination Act* in 1994, but was not itself defined. In its judgment the Tribunal referred at length to the discussion of the concept in the Law Reform Commission's 1999 review of the *Anti-Discrimination Act*. The report stated:

The concept of 'ethno-religious origin' is novel. It appears to have been introduced into the definition of race in order to ensure that Jews and Sikhs were within its scope. In an historical sense, this concern is understandable: much of the pressure for outlawing racial discrimination arose in the post-World War II years as the full enormity of the Holocaust became apparent. It would indeed be ironic if Jews did not fit within the CERD [Convention on the Elimination of All Forms of Racial Discrimination] definition of race. Nevertheless, the reason for the amendment remains obscure. As long ago as 1979, the New Zealand Court of Appeal accepted that, in the context of the *Race Relations Act 1971* (NZ), Jews constituted a group on the grounds of 'ethnic origins'. The Commission is not aware of any judicial determination which would cast doubt on that conclusion.

It is also suggested that the definition has been broadened to cover Sikhs. Again, the amendment seems quite unnecessary for that purpose: the *Race Discrimination Act 1976* (UK) was applied in 1983 to protect Sikhs by holding unlawful, as a form of indirect racial discrimination, a refusal by a school to admit a Sikh boy who declined to cut his hair and cease wearing a turban.¹⁵⁴

The Law Reform Commission continued:

Accordingly, the insertion of this term in the definition in 1994 was almost certainly unnecessary. More importantly, its scope is confusing. In his Second Reading Speech, the Attorney General stated:

The effect of the latter amendment is to clarify that ethno-religious groups, such as Jews, Muslims and Sikhs have access to the racial vilification and discrimination provisions of the Act.

The Law Reform Commission concluded:

This gives rise to a possible argument that the phrase imports, almost by the back door, a ground of discrimination on the ground of religion, at least in some circumstances which may not be carefully defined.

If this were the intention, the proper course is to consider on its merit the addition of religion as a ground. As the Commission concludes that such a ground should be introduced, with the necessary restrictions to avoid inappropriate coverage, the term "ethno-religious origin" should be removed from the definition of race. Groups

¹⁵⁴

NSW Law Reform Commission, *Review of the Anti-Discrimination Act 1977 (NSW)*, Vol One, Report 92, p 233.

such as Jews and Sikhs would still be covered by, for example, the category defined by ‘ethnic origin’.¹⁵⁵

For the Administrative Decisions Tribunal the Second Reading Speech was at least noteworthy for the clear pronouncement that the term ‘ethno-religious’ was not proposed to cover discrimination on the grounds of religion. According to then Attorney General, John Hannaford:

The proposed amendment to the definition of race will not allow members of ethno-religious groups, such as Jews, Muslims and Sikhs, to lodge complaints in respect of discrimination on the basis of their religion, but will protect such groups from discrimination based on their membership of a group which shares a historical identity in terms of their racial, national or ethnic origin.¹⁵⁶

According to the Administrative Decisions Tribunal, this did not help matters much. The Tribunal stated:

It is not even clear that Muslims, to use the words of the Attorney-General ‘share a common racial, national or ethnic origin’. While Muslims are all adherents to Islam, they do not share common racial, national or ethnic origins. There are Muslims in every continent and of many different racial and ethnic backgrounds. It is common knowledge for example that there are South Asian, South-East Asian, African, Middle-eastern and European communities of Muslims. Many African-Americans, most famously Muhammed Ali, are Muslims. No doubt within those broader groupings there are further ethnic sub-groups which nonetheless adhere to Islam. Hence the ambiguity in referring to Muslims as a single “ethno-religious” reason, the examples given in the Second Reading Speech are not very useful aids to interpretation.

It is a fallacy to refer only to ethnicity or to religion in determining whether or not a person belongs to an “ethno-religious” short-hand generic description of a complex type of cultural grouping which has ethnic, cultural, historical and religious aspects all entwined. Better examples of what is meant by an “ethno-religious” group than were given in the Second Reading Speech might be, for example, Javanese Christians, Bosnian Muslims or Northern Irish Catholics.¹⁵⁷

On the definitional question, the Tribunal found that the term ‘ethno-religious’ ‘signifies *a strong association between a person’s or a group’s nationality or ethnicity, culture, history and his, her or its religious beliefs and practices*’ (original emphasis). On the second question, it held that, in view of the uncertainty previously surrounding the meaning of the term ‘ethno-religious’, procedural fairness demanded that the applicant be given an opportunity to file further evidence to demonstrate that he falls within the meaning of

¹⁵⁵ NSW Law Reform Commission, n 154, p 234.

¹⁵⁶ NSWPD, 4.5.1994, p 1828.

¹⁵⁷ [2002] NSWADT 131 at paras 18-19.

‘ethno-religious’, as defined by the Tribunal.

In the more recent case of *Haider v Combined District Radio Cabs Pty Ltd*¹⁵⁸ reference was made to a passage in the 2001 case of *Khan v Commissioner, Department of Corrective Services*. In this latter case, the Appeal Panel of the Administrative Decisions Tribunal stated:

If to be a Muslim could cause a person to fall within the statutory definition of ‘race’, treatment afforded to that person because he/she is Muslim must be, for the purposes of the ADA, treatment on the ground of race. As we have stated, the issue of whether the complainant, as a Muslim, falls within the statutory definition of ‘race’ awaits proper determination.¹⁵⁹

Despite the qualification in the last sentence, the ADT in *Haider* used that passage to conclude that the complaints made by Mr Haider of discrimination due to his status as a Muslim ‘can be characterized as “ethno-religious” and therefore “race”’. It seemed that the ADT in *Haider* overlooked the clear statement made in the 2002 case of *Khan v Commissioner, Department of Corrective Services* which determined that the complainant, as a Muslim, did not fall within the statutory definition of ‘race’ or ‘ethno-religious origin’.

6.4 Comment

Several questions follow. One is whether the NSW *Anti-Discrimination Act* should be amended to define the meaning of the term ‘ethno-religious’? Another is whether the term ‘ethno-religious’ should be omitted from the Act? If so, should the Act be amended to include discrimination on the ground of religion? Further should the Act include reference to vilification on the ground of religion?

For its part, the NSW Law Reform Commission recommended that the term ‘ethno-religious origin’ be removed from the definition of race.¹⁶⁰ It also recommended that religion should be included as an unlawful ground of discrimination. However, it was not satisfied that the vilification provisions should be extended to cover religious vilification. Basically, it ‘found little evidence of widespread religious vilification in the community’.¹⁶¹

The issue has been revisited in the context of the recent debate about sedition laws, with Dr Ben Saul writing: ‘Indeed, defining “race” to include ‘ethno-religious origin’ involves the categorical error of conflating ethnicity and religion, which, while sometimes

¹⁵⁸ *Haider v Combined District Radio Cabs Pty Ltd* [2005] NSWADT 163 (15 July 2005) at para 40. The Tribunal’s definition of ‘ethno-religious’ was considered, but not applied, in *Sleiman v Kmart Australia Ltd* [2003] NSWADT 21 (31 January 2003) at paras 14-16.

¹⁵⁹ *Khan v Commissioner, Department of Corrective Services* [2001] NSWADTAP at para 44 (18 January 2001).

¹⁶⁰ NSWLRC, n 134, p 234.

¹⁶¹ NSWLRC, n 134, p 533.

overlapping...are often distinct'.¹⁶² This is part of a broader argument for reform of the NSW anti-discrimination legislation to include protection from 'religious' discrimination or vilification, even where such conduct does not incite to violence. Saul's argument is that this is still not captured under NSW or Federal law, with the new Federal sedition offence of 'urging violence within the community' on racial, religious or other grounds requiring a link to force or violence. The inclusion of religious vilification law in the *Anti-Discrimination Act 1977* (NSW) has been considered recently in the context of a Private Member's bill - the Anti-Discrimination Amendment (Religious Tolerance) Bill 2005.

¹⁶² B Saul, 'Preventing communal violence? Blurring sedition, vilification and terrorism', *Human Rights Defender*, 2005 Special Issue - [http://www.ahrcentre.org/documents/Human_Rights_Defender-The_Anti-Terrorism_Bill_\(No2\)_2005.pdf](http://www.ahrcentre.org/documents/Human_Rights_Defender-The_Anti-Terrorism_Bill_(No2)_2005.pdf)

7. RELIGIOUS VILIFICATION

7.1 Free speech and enforcing tolerance

Laws that restrict free speech by making vilification unlawful on the ground of religion are extremely controversial. The encouragement of tolerance in a multicultural society is one thing; its enforcement by means of religious vilification laws something different again. Very strong advocates can be found on both sides of the argument, for and against such laws.

In recommending the inclusion of religion as a ground of discrimination, the NSW Law Reform Commission pointed out that it is consistent with ‘the fact that religious vilification is covered by Article 20 of the ICCPR and the *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religions or Belief*.¹⁶³ More directly, the case for religious vilification laws is also made by reference to the 2004 HEREOC report, *Isma—Listen: National Consultation on Eliminating Prejudice Against Arab and Muslim Australians*, with the argument that

Arab Muslim Australians have recently been subject to extensive and harmful religious vilification and hate speech – a form of psychic violence which strikes fear into those it targets, and causes lasting psychological harm. Religious hate speech is also isolating entire groups of Arab Muslim Australians from participating in public life.¹⁶⁴

On the other side, writing in 2004 Patrick Parkinson, Professor of Law at the University of Sydney, presented trenchant criticism of religious vilification laws, calling them ‘copycat’ laws’ in Australia where they have not been enacted ‘to deal with a pressing social problem’. He describes such laws as divisive and as a threat to the ‘shared consensus’ upon which Australian multiculturalism is founded. At issue, according to Parkinson,

Is the freedom to express views about truth and falsehood, right and wrong, good and evil, which may offend others who have a different view on these matters. Religious vilification in practice, if not in theory, poses a grave danger to this freedom because of the collateral damage that can be caused by a legislative strategy to enforce tolerance.¹⁶⁵

¹⁶³ NSWLRC, n 134, p 282 and p532. Article 2(1) of the UN Declaration states: ‘No one shall be subject to discrimination by any State, institution, group of persons, or person on the grounds of religion or other belief’. In 1984 the NSW Anti-Discrimination Board in its report, *Discrimination and Religious Conviction*, had recommended making it unlawful to discriminate on the ground of religious belief or absence of religious belief (page 24).

¹⁶⁴ R Chow, ‘Inciting hatred or merely engaging in religious debate?’ (June 2005) 30(3) *Alternative Law Journal* 120.

¹⁶⁵ P Parknson, ‘Enforcing tolerance: vilification laws and religious freedom in Australia’, November 2004 - http://www.sydneianglicans.net/images/uploads/indepth/Article_-_Enforcing_Tolerance.pdf

Commenting on racial vilification laws, Ronalds and Pepper state:

Supporters of such legislation contend that it is essential to preserve the strength of a racially mixed society which is not riven by racial conflicts by drawing a line to demonstrate acceptable standards of behaviour and exchanges. The aim of the legislation is to address racism when it is manifested in a form of vilification or generates racial hatred

Opponents are often advocates of free speech who view such legislation as poorly focused. They contend that permitting open debate of unpopular or marginal ideas strengthens society as it permits them to be demolished by counter argument and then rendered powerless as lacking any merit or factual basis. They view such legislation as an unnecessary response to certain areas of debate and consider that it stifles genuine debate.¹⁶⁶

7.2 Incidence of religious vilification

Disturbingly, the 2004 HEREOC report, *Isma—Listen: National Consultation on Eliminating Prejudice Against Arab and Muslim Australians* found that the majority of Arab and Muslim women canvassed had experienced an increase in violence or offensive remarks since the September 11 attacks and the first Bali bombings. Arab and Muslim felt they were particularly at risk of harassment which had led to feelings of frustration, alienation and a loss of confidence in themselves and trust in authority. Focusing on 1423 Arab and Muslim participants in 69 focus groups held across Australia, the study also found the situation was exacerbated by local events, including public debates over the trial, conviction and sentencing of gang-rapists in Sydney in 2001-2002. These experiences ranged from offensive remarks about race or religion to physical violence.

The report commented:

The lack of protection under NSW anti-discrimination law was of particular concern to Muslims in NSW, where the majority of Australian Muslims live.¹⁶⁷

HEREOC recommended that Federal law be introduced making unlawful discrimination on the ground of religion or belief. Commonwealth vilification laws on the ground of religion or belief were also recommended.

¹⁶⁶ Ronalds and Pepper, n 124, p 102.

¹⁶⁷ HEREOC, *Isma—Listen: National Consultation on Eliminating Prejudice Against Arab and Muslim Australians*, 2004, p 4.

7.3 Issues in the debate

In its 2002 discussion paper on religious vilification law the South Australian Attorney General's Department commented:

Any law which restricts what can be said about a particular religion or religious practice, or about the persons who adhere to this religion, will restrict freedom of expression. The question is where this limit should be set. For example, should the adherents of one religion be at liberty to preach against another religion? At what point, if at all, should this be considered vilification? Should people who are concerned about a religious practice they perceive to be dangerous be free to criticise it, or lobby governments to make the practice illegal?¹⁶⁸

The discussion paper presented the following examples:

- should a feminist lobby group be at liberty to agitate against a religious requirement that women should be veiled, or a religious doctrine that forbids contraception?
- should a group of concerned parents be able to express views in the media about the dangers they believe are posed to children by a cult?
- should a pro-abortion lobby group be able to criticise or incite contempt for a group which is opposed to abortion on religious grounds?
- should a sceptical or atheist society, or an anti-religious journalist or cartoonist be at liberty to ridicule the adherents of a particular belief?
- should a homosexual parade be at liberty to satirize the anti-homosexual beliefs of a particular religion, by presenting homosexual people dressed as religious figures?

7.4 Overview of religious vilification laws in Australia

At present religious vilification laws exist in three Australian jurisdictions – Queensland, Victoria and Tasmania. The relevant legislation is set out in the following Table:

¹⁶⁸

South Australian Attorney General's Department, *Discussion Paper: Proposal for a new law against religious discrimination and vilification*, 2002, p 15.

Religious vilification laws in Australia¹⁶⁹

| State | Legislation | History |
|------------|---|---|
| Victoria | <i>Racial and Religious Tolerance Act 2001</i> | Enacted in 2001 following community consultation. ¹⁷⁰ |
| Queensland | <i>Anti-Discrimination Act 1991</i> ss 124A, 131A | The 1991 Act contained limited racial and religious vilification laws. ¹⁷¹ Stronger racial and religious vilification laws (similar to NSW racial vilification laws) were enacted in 2001 pursuant to election commitment made to ethnic and multicultural groups. |
| Tasmania | <i>Anti-Discrimination Act 1998</i> ss 19, 55 | The religious vilification laws were included as part of general anti-discrimination laws enacted in 1998. |

Steps have been taken in some other Australian jurisdictions to introduce similar laws, all of which have stalled for one reason or another. This is in the case both in South Australia¹⁷² and Western Australia,¹⁷³ where discussion or consultation papers outlining proposals for the introduction of such laws were released, only for their recommendations to be set aside on policy grounds. On 2 April 2003, the South Australian Attorney General announced that the proposed law would not proceed. He said:

Although the government meant well, it is clear that most of the people intended to benefit from the new law not only do not want it but are ardently opposed to it. It is therefore not appropriate to proceed with the legislation.

...

I encouraged the public to contribute its thoughts on the proposed legislation, and I read their comments on the proposal. The public has expressed its views and the government is not afraid to listen and act accordingly... There is no consensus. Views are polarised with strong support and strong opposition being expressed. Barring some considerable shifts in the view of opponents, there will be no new laws resulting from this proposal to amend the Act.¹⁷⁴

In respect to Western Australia, it was reported in November 2004:

¹⁶⁹ This Table was prepared by Lenny Roth.

¹⁷⁰ See Victorian Office of Multicultural Affairs, Department of Premier and Cabinet, *Racial and Religious Tolerance Bill Discussion Paper*, (Government of Victoria, 2000).

¹⁷¹ Section 126 made it unlawful for a person, by advocating racial or religious hatred or hostility, 'to incite unlawful discrimination or another contravention of the Act'.

¹⁷² South Australian Attorney General's Department, *Discussion Paper: Proposal for a new law against religious discrimination and vilification*, 2002.

¹⁷³ Equal Opportunity Commission WA, n 121.

¹⁷⁴ Hon M J Atkinson, Legislative Assembly (SA), 2 April 2003, p2669.

Attorney-General Jim McGinty said last week it was too hard to devise laws that could be fair and workable, in terms of not interfering with an established freedom of expression on religious issues.¹⁷⁵

As noted, at the Commonwealth level the Federal Opposition introduced a bill in 2003 to create offences for both racial and religious vilification. The Bill did not proceed. In December 2005 the Federal Opposition introduced the Crimes Act Amendment (Incitement to Violence) Bill, again with the intention of creating offences based on racial and religious hatred. The Bill has not proceeded beyond its First Reading. The relevant section of the new Commonwealth sedition laws was discussed earlier in this paper.

Federally, there are no laws in place expressly prohibiting vilification on religious grounds. However, some protection from discrimination is offered on religious grounds. By section 3 of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), it is possible to complain about discrimination on the grounds of religious or political opinion in the area of employment or occupation, but such discrimination is not actually unlawful. The relevance of section 80.2(5) of the new sedition laws under Schedule 7 of the Commonwealth's *Anti-Terrorism Act (No 2) 2005* for religious vilification was discussed earlier.

Also relevant are the constitutional and statutory guarantees of freedom of religion, under section 116 of the Commonwealth Constitution, section 46 of the Tasmanian *Constitution Act 1934* and section 14 of the ACT's *Human Rights Act 2004*. The Act legislation provides:

- (1) Everyone has the right to freedom of thought, conscience and religion. This right includes:
 - (a) the freedom to have or to adopt a religion or belief of his or her choice; and
 - (b) the freedom to demonstrate his or her religion or belief in worship, observance, practice and teaching, either individually or as part of a community and whether in private or public.
- (2) No-one may be coerced in a way that would limit his or her freedom to have or adopt a religion or belief in worship, observance, practice or teaching.

Discussed later in this paper is the Anti-Discrimination Amendment (Religious Tolerance) Bill 2005 which had been introduced in NSW.

7.5 Defining religion

A major hurdle for any legal regulation of religion concerns the vexed question of 'what is a religion'? Too inclusive a definition may open the floodgates to dubious litigation. Conversely, an overly restrictive approach can shut out genuine, if unconventional, faiths. Either way, any definition is sure to be controversial.

The definitional question arises from at least two distinct standpoints. One is in the context of the constitutional guarantee of freedom of religion found in section 116 of the

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'Shock at religious hate law reverse, *West Australian*, 16/1104.

Commonwealth Constitution.¹⁷⁶ The other is in relation to discrimination and vilification laws.

Briefly, in a constitutional context the issue has been considered on a number of occasions by the High Court, including in *Church of the New Faith v Commissioner for Pay-Roll Tax (Vic)*¹⁷⁷ where the question arose as to whether Scientology was entitled to tax exemptions applying to religion under State legislation. Various approaches were adopted. Mason CJ and Brennan J considered that for legal purposes the criteria of religion are twofold: belief in a supernatural being, thing or principle; and the acceptance of canons of conduct in order to give effect to that belief. However, canons of conduct that offend against the ordinary law are not covered by the protection or immunity given to religion.¹⁷⁸ In any event, it was acknowledged that any definition must encompass belief and conduct, activity or practice.

The other consideration, especially important for discrimination legislation, is that protection must be extended to non-belief. These considerations were discussed by the NSW Law Reform Commission which decided eventually to recommend the following definition of religion:

- ‘Religion’ includes both religious beliefs and practices which do not contravene the criminal law.
- ‘Religious practice’ means a practice related to the holding of a religious belief. This may include communal practices such as membership or association with a particular religious institution or church, or a ritual, custom or observance related to the holding of a religious belief.
- ‘Religion’ includes the traditional spiritual beliefs and practices of Indigenous Australians and Indigenous people from other countries.¹⁷⁹

One way around the definitional problem is to side-step it at the legislative stage, leaving it to the courts and tribunals to decide who or what is covered by the word ‘religion’ under the relevant legislation. This has been the approach adopted in those jurisdictions with religious vilification laws, as it is in the Bill currently under discussion in NSW.

¹⁷⁶ Section 116 guarantees freedom of religion in the following terms:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

¹⁷⁷ (1983) 154 CLR 120.

¹⁷⁸ (1983) 154 CLR 120 at 136.

¹⁷⁹ NSWLRC, n 134, p 292.

7.6 The Victorian Racial and Religious Tolerance Act 2001

Controversial law: In the current debate on religious vilification laws, this Victorian Act has become a standard reference point, not to say whipping boy. It is often mentioned in the British debate on the Racial and Religious Hatred Bill 2005 (see below), where it is used as a warning against the introduction of legislation which seeks to curb the free expression of views on religious matters. In May 2004 the Federal Treasurer, Peter Costello, used his National Thanksgiving address to describe the Victorian Act as ‘bad law’, saying: ‘All these anti-vilification laws have achieved is to provide a legalistic weapon by which religious groups can silence opponents rather than engaging in debate and discussion’.¹⁸⁰ By any standards, this is a controversial law.

Objects: The Victorian Act seeks to defuse the argument that laws of this kind curtail free speech and vigorous public debate by including free expression and debate among the objects of the law. Section 4(1) provides:

(1) The objects of this Act are-

(a) to promote the full and equal participation of every person in a society that values freedom of expression and is an open and multicultural democracy;

(b) to maintain the right of all Victorians to engage in robust discussion of any matter of public interest or to engage in, or comment on, any form of artistic expression, discussion of religious issues or academic debate where such discussion, expression, debate or comment does not vilify or marginalise any person or class of persons;

(c) to promote conciliation and resolve tensions between persons who (as a result of their ignorance of the attributes of others and the effect that their conduct may have on others) vilify others on the ground of race or religious belief or activity and those who are vilified.

Definition: By section 3 the *Racial and Religious Tolerance Act 2001* defines ‘religious belief or activity’ to mean: (a) holding or not holding a lawful religious belief or view; and (b) engaging in, not engaging in or refusing to engage in a lawful religious activity’. In other words, the Act extends protection to religious belief (and non-belief), as well as to religious practice or activity, but only to the extent that such practice is ‘lawful’. The Act does not protect religious beliefs and canons of conduct that are contrary to the ordinary law.

Civil and criminal remedies: Basically, the Victorian Act creates a two-tiered system, similar to that operating under the NSW *Anti-Discrimination Act 1977*,¹⁸¹ where certain conduct is declared ‘unlawful’ (but not an offence), whereas other, more serious conduct is declared to be an offence. Sections 7 and 8 respectively make racial and religious vilification unlawful, whereas section 24 and 25 create the offences of serious racial and religious vilification respectively.

¹⁸⁰ Quoted in *NSWPD*, 12.10.2005, p 18400.

¹⁸¹ The Victorian Act is said to be ‘closely modeled’ on its NSW counterpart – *VPD (LA)*, 17.5.2001, p 1285.

Sections 25(1) and (2) provide:

- (1) A person (the offender) must not, on the ground of the religious belief or activity of another person or class of persons, intentionally engage in conduct that the offender knows is likely -
 - (a) to incite hatred against that other person or class of persons; and
 - (b) (to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that person or class of persons...

- (2) A person must not, on the ground of the religious belief or activity of another person or class of persons, knowingly engage in conduct with the intention of inciting serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

One difference between the first and second tier is that the latter ‘offence’ provisions require an intention to engage in conduct that ‘the offender knows is likely’ to *incite hatred* for other persons or classes of persons. In the case of section 25(1) the conduct engaged in must threaten physical harm towards other persons or classes of persons, or their property. For section 25(2) it is sufficient that the offender knowingly engaged in conduct ‘with the intention of *inciting serious contempt for, or revulsion or severe ridicule of*’ (emphasis added) another or class of persons. Oddly, there is no requirement that the conduct must threaten physical harm towards other persons or classes of persons, or their property. However, section 25(2) is treated as the same level of offence as section 25(1). Both offences are subject to a maximum penalty of 300 penalty units in the case of a body corporate and, in any other case, imprisonment for 6 months or 60 penalty units (or both). Prosecutions in relation to the offence provisions can only commence with the written consent of the Victorian DPP (ss 24(4) and 25(4)). No criminal prosecution has yet been brought.

For both offences, the phrase ‘engage in conduct’ is said to include ‘the use of the internet or e-mail to publish or transmit statements or other material’.

Defences: The Victorian Act includes ‘good faith’ defences to sections 7 and 8, those provisions making racial and religious vilification respectively ‘unlawful’. These exceptions relate to works which are ‘in the public interest’ or to those which have artistic merit. Section 11 provides:

- A person does not contravene section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith-
- (a) in the performance, exhibition or distribution of an artistic work; or
 - (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for-
 - (i) any genuine academic, artistic, religious or scientific purpose; or
 - (ii) any purpose that is in the public interest; or
 - (c) in making or publishing a fair and accurate report of any event or matter of public interest.

In the Second Reading speech for the legislation, Premier Bracks said that section 11 is ‘not a shield for unrestrained abuse’. He continued:

The case law demonstrates that the requirement that the conduct be done ‘reasonably and in good faith’ prevents immoderate or inflammatory conduct from being protected. It should also be emphasised that these exceptions apply to

discussion by any citizen, not only commentary by artists, academics or the media.¹⁸²

The public/private distinction: By section 12 there is also an exception for ‘private conduct’, as in a private conversation in a person’s home. As discussed earlier, by section 12(1) of the *Racial and Religious Tolerance Act*, the conduct will not be unlawful if it is established that the parties engaged in it in circumstances that may reasonably be taken to indicate that they desired it to be heard or seen only by themselves. Conversely, this exception is qualified by section 12(2), in circumstances where it can be demonstrated that the parties ought reasonably to expect that the conduct may be heard or seen by someone else. Section 12 provides:

(1) A person does not contravene section 7 or 8 if the person establishes that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.

(2) Sub-section (1) does not apply in relation to conduct in any circumstances in which the parties to the conduct ought reasonably to expect that it may be heard or seen by someone else.

It is claimed by Chapman and Kelly, in respect to the public/private distinction, that the Victorian legislation relies on concepts of objectivity and reasonableness, which are said to be ‘more certain concepts in Australian jurisprudence than are the ideas of public and private’.¹⁸³ Justice PW Young found their preference generally for this legislative mode ‘odd in view of the attacks on the legislation by many community leaders in Australia as well meaning legislation which has completely misfired insofar as it seeks to advance religious tolerance’.¹⁸⁴

Premier Bracks explained the public/private distinction in the following terms:

An exception also exists for private conversations or behaviour, which occurs in circumstances that indicate, objectively, that the parties did not intend to be seen or heard by anyone else.

For example, a private conversation in a private home will be taken not to have been intended to be heard by anyone else and will escape liability. The erection of an offensive sign in the front yard of a private home, which can clearly be viewed by any person passing by, however, is a different matter.¹⁸⁵

Complaints: By section 19, complaints can be made to the Victorian Equal Opportunity Commission about ‘unlawful’ conduct by anyone who claims to have been vilified by

¹⁸² VPD(Assembly), 17.5.2001, pp 1285-1286.

¹⁸³ For a detailed commentary see – A Chapman and K Kelly, ‘Australasian Anti-vilification law: a discussion of the public/private divide and the work relations context’, (June 2005) 27(2) *The Sydney Law Review* 203.

¹⁸⁴ ‘Current issues – Anti-vilification laws’, (2005) 79 *ALJ* 407 at 408.

¹⁸⁵ VPD(Assembly), 17.5.2001, p1286.

another person under a relevant provision of the Act. Where possible, these complaints are to be dealt with by the Equal Opportunity Commission by means of conciliation. Otherwise they are to be referred to the Victorian Civil and Administrative Tribunal which may make an order that the person refrain from engaging in certain conduct, or that he do something to mitigate or redress what has occurred.¹⁸⁶

Case law and critique: The Victorian Act has come under sustained attack from many quarters, in Australia and beyond. For example, Justice PW Young wrote in the July 2005 issue of *The Australian Law Journal* as follows:

What in fact appears to be happening in Victoria is that groups of fundamentalist Christians, Moslems or Jews are attending each other's places of worship to take notes of any utterance that might be constructed as contempt for the other's religious views. Statements such as 'Christ is the only way', or 'Allah alone is God' are claimed by some to show contempt for other religions and their adherents. If this is established, legislation that was designed to encourage religious tolerance will have the effect of abolishing freedom of religion as each major religious group considers that it alone has the truth.

History has shown that society is at peace when people are permitted to practice their religion without state interference and that, provided of course, this stops short of violence and defamation.¹⁸⁷

In the British context, commentators have argued that the Racial and Religious Hatred Bill 2005, in the form it was originally introduced, would have resulted in the same 'chaos' as has occurred in Victoria. With reference to the case of *Islamic Council of Victoria v Catch the Fire Ministries Inc*,¹⁸⁸ Joshua Rozenberg, legal editor of the UK *Daily Telegraph* writes:

the Victorian Civil and Administrative Tribunal did uphold one civil complaint of unlawful conduct last December in a case that has become something of a cause célèbre. The respondents were two Christian evangelists, Daniel Scot and Danny Nalliah. Mr Nalliah - who prefers to be called Pastor Danny - was born in Sri Lanka and is the president of a mission called Catch the Fire Ministries. Mr Scot is a Pakistani Christian mathematics lecturer who was charged with blasphemy in Pakistan because of his views on Islam. Fearing the death penalty, he fled to Australia - only to find himself in court over remarks he made about Islam at a Catch the Fire seminar in 2002. Three Australian Muslims had slipped into the seminar and lodged a complaint with the state's Equal Opportunities Commission.

¹⁸⁶ *Equal Opportunity Act 1995* (Vic), s 159.

¹⁸⁷ 'Current issues – Anti-vilification laws', n 184, p 408.

¹⁸⁸ [2004] VCAT 2510 (22 December 2004); and *Islamic Council of Victoria v Catch the Fire Ministries Inc (Anti-Discrimination Remedy)* [2005] VCAT 1159 (22 June 2005).

The hearing opened in October 2003 and the tribunal did not make its final order until June 2005. In the meantime, the judge had issued a ruling running to 130 closely printed pages, finding the allegations proved. This involved a detailed examination of the teachings of Islam, going back to the seventh century. Mr Scot denied mocking or ridiculing the religion, and was cross-examined at length on his comments and beliefs.

In the end, the judge held that Mr Scot had not conducted a balanced discussion. "It was a process of taking literal translations from the Koran and making no allowance for their applicability to modern-day society," he found. Ordinary people would have been incited to hatred, ridicule, contempt or revulsion. In June, the tribunal ordered Mr Nalliah and Mr Scot not to repeat statements that had been found in breach of the law and to publish apologies in newspapers (at their own expense) and on their website. Two months later, the Supreme Court of Victoria granted them permission to appeal and suspended the apologies. So the case goes on.

Rozenberg went on to warn:

Since one surely cannot be accused of stirring up religious hatred by giving an accurate account of Islam or Judaism, Paganism or Wicca, there is plenty of room for our own courts to become bogged down in just the same way. Even if no prosecutions are brought, the Act will inhibit public debate on issues of great importance.¹⁸⁹

Another case that has received critical attention is *Fletcher v The Salvation Army*.¹⁹⁰ There a prisoner complained about a religious program that was run at a Victorian prison. The prisoner, who claimed to be a traditionalist witch and a Wiccan, said that during the presentation of the program a number of disparaging remarks were made about witches. He said that there was an implication that witches were Satanists; and he said that the program was inflammatory because it made reference to a verse in the Bible that implied if a witch wants to become a Christian the witch must burn their scriptures. The Tribunal held that the complaint was so lacking in substance that it should be summarily dismissed. The President warned:

Publicity about unmeritorious vilification claims can undermine the intentions of the Racial and Religious Tolerance Act. This is so even if unmeritorious claims are dismissed by the tribunal; indeed, even if *summarily* dismissed. Once the genie is out of the bottle (in the sense that there is widespread publicity that a colourful, but hopeless, claim has been made), it is hard to put it back (that is, to explain to the public that the claim did not succeed). Hence I recommend that consideration be given to the amendment of the Act to require a person seeking to pursue a claim

¹⁸⁹ J Rozenberg, 'A legal lesson from Down Under', News.Telegraph, 27.10.2005 - <http://news.telegraph.co.uk/news/main.jhtml?xml=/news/2005/10/27/nlaw27.xml>

¹⁹⁰ [2005] VCAT 1523 (1 August 2005).

before the tribunal to obtain the leave of the tribunal before the proceeding is initiated.¹⁹¹

This comment refers to the making of complaints about ‘unlawful’ conduct, not in respect to serious vilification offences, in relation to which a prosecution cannot be commenced without the written consent of the Victorian DPP (s. 25(4)). At present, where complaints about ‘unlawful’ conduct are concerned, it is for the Victorian Equal Opportunity Commission to determine whether there is a prima facie case to answer.

On behalf of the legislation, Premier Bracks in his Second Reading speech said:

The bill strikes an appropriate balance with freedom of expression by imposing liability only upon the most repugnant behaviour which actively urges and promotes hate. Freedom of expression has never been an untrammelled freedom of any person to do or say what they please. This is evidenced by the present limitations on freedom of expression recognised in our law such as defamation, blackmail and sedition laws. It is important that the Parliament state that extreme behaviour which has no regard for the rights of others to participate in society is unacceptable. A clear message to the victims of vilification that the community at large rejects that behaviour is equally important.¹⁹²

Premier Bracks also said of the legislation:

It is confined to prohibit only the most noxious form of conduct which incites hatred or contempt for a person or group on the basis of their race or religion. Regrettably, there have been instances of abuse and harassment of this serious nature against ethnic or religious groups in Victoria. The effect of this abuse is substantial. Victims feel the loss of reputation and a sense of not belonging to the broader community. Society, as a whole, is the loser from their reduced participation.¹⁹³

7.7 Religious vilification law in Queensland and Tasmania

Similar legislative provisions are included under the Queensland *Anti-Discrimination Act 1991*. ‘Religious activity’ and ‘religious belief’ are defined separately, but substantively in the same terms as under the Victorian Act. Section 124A then makes ‘unlawful’ vilification on grounds of race, religion, sexuality or gender identity, while section 131A creates a criminal offence for ‘serious vilification’ on the same grounds. To all intents and purposes section 124A is modeled on section 20C of the NSW *Anti-Discrimination Act 1977*, except that religion is included under the Queensland Act as a ground of vilification. Likewise, the offence provision of section 131A is modeled on section 20D of the NSW legislation, except that express mention is made of the requirement to ‘knowingly or recklessly’ incite

¹⁹¹ [2005] VCAT 1523 (1 August 2005) at para 18.

¹⁹² VPD (*Assembly*), 17.5.2001, p 1286.

¹⁹³ VPD (*Assembly*), 17.5.2001, p 1285.

the conduct at issue. This conduct is to include threatening physical harm to persons or their property, or inciting other to threaten such harm.

Section 131A (1) of the Queensland Act provides in part:

A person must not, by a public act, knowingly or recklessly incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group in a way that includes –

- (a) threatening physical harm towards, or towards any property of, the person or group of persons; or
- (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

By section 131A(2), a Crown Law Officer's written consent must be obtained before a proceeding can be started.

One Queensland case involving religious vilification is *Deen v Lamb*,¹⁹⁴ where the Chairman of the Islamic Council of Queensland complained about a pamphlet distributed at a Federal election. This Federal context proved decisive in the case, as it was found that the pamphlet was protected by the Commonwealth Constitution's implied freedom of political communication. No breach of the incitement to religious hatred provisions was found, on the basis that voters had a right to know the views of their candidates. Conversely, section 124A of the Queensland *Anti-Discrimination Act 1991* would have been invalid as it infringed the freedom to communicate on political matters. It was saved from constitutional invalidity by virtue of the 'good faith' exceptions embodied in section 124A(2)(c). This provides that it is not unlawful to do a public act with the relevant tendency to incite provided it is done reasonably and in good faith for a purpose in the public interest, including public discussion or debate and exposition on any matter.

By section 19 of the Tasmanian *Anti-Discrimination Act 1998*, 'A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of ... the religious belief or affiliation or religious activity of the person or any member of the group'. This provision is qualified by section 55 which provides for defences on various grounds, including where a public act is done in good faith for 'academic, scientific or research purposes, or any purpose in the public interest'.

7.8 The Anti-Discrimination Amendment (Religious Tolerance) Bill 2005 (NSW)

Summary: The introduction of a similar law in NSW has been the subject of some debate over the past few months, with the introduction of a Private Member's bill in the Legislative Council on 15 September 2005 – the Anti-Discrimination Amendment (Religious Tolerance) Bill 2005, sponsored by the Hon Peter Breen MLC.

The Bill mirrors present arrangements under the *Anti-Discrimination Act*, for example, by reproducing the definition of 'public act' found elsewhere in the legislation. It also creates, subject to 'good faith' and other defences, a two-tiered system, with one provision (proposed section 49ZZB) making religious vilification unlawful, and with another

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[2001] QADT 20.

(proposed section 49ZZC) creating a new offence of serious religious vilification. This last criminal offence provision is modeled on 20D(1) of the Act which creates the offence of ‘serious racial vilification’. Neither the existing nor proposed sections state expressly that ‘intent’ is a requirement for the offence, although as discussed earlier the relevant criminal provisions of the *Anti-Discrimination Act 1977* have been interpreted in this way by the Administrative Decisions Tribunal, consistent with the common law.

Proposed section 49ZZC(1) provides

A person must not, by public act, threaten physical harm towards, serious contempt for, or serious ridicule of, a person or group of persons on the ground of the religious belief or activity of the person or members of the group by means which include

- (a) threatening physical harm towards, or towards any property of, a person or group of persons, or
- (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

The maximum penalty in the case of an individual is 50 penalty units or imprisonment for 6 months (or both), and 100 penalty units in the case of a corporation. As a safeguard against vexatious or other misguided proceedings, prosecutions can only commence with the consent of the Attorney General. The full text of the Bill is found at Appendix A.

The Bill’s definition of ‘religious belief or activity’ is in similar terms to that found in the Victorian *Racial and Religious Tolerance Act 2001*. The Bill defines the phrase to mean: (a) holding a religious belief or view and includes not holding a religious belief or view, and (b) engaging in a religious activity, and includes not engaging in or refusing to engage in a religious activity.

Arguments against: Even before the bill had been introduced the then Premier, Bob Carr, launched a pre-emptive strike against religious vilification legislation in any form. Answering a question on 21 June 2005 he described such laws as ‘highly counterproductive’. Illustrating the difficulties and ‘misuse’ that had arisen in Victoria under the *Racial and Religious Tolerance Act 2001*, Mr Carr argued:

Religious vilification laws are difficult because just about anyone can have resort to them and because determining what is or is not a religious belief is difficult. It can be defined as just about anything. It is subjective. It is a personal question. As they are used in practice religious vilification laws can undermine the very freedom they seek to protect – freedom of thought, conscience and belief.¹⁹⁵

Similar sentiments were reflected in Piers Akerman’s commentary on the sedition laws. Akerman wrote:

There is a huge irony in the fact that Victoria’s Premier Steve Bracks led the premier’s charge against the proposed changes to the sedition clauses of the Crimes Act earlier this week. His Government’s Racial and Religious Tolerance Act – a measure that former NSW premier Bob Carr refused to adopt – has done far more

¹⁹⁵ NSWPD, 21.6.2005, p 17086.

damage to free speech in Australia than any prosecution under sedition laws.¹⁹⁶

Premier Carr's view was that sufficient practical protection is offered already under the anti-discrimination law, by reference to 'ethno-religious' groups. According to Mr Carr, 'This protects ethnic groups from out-and-out vilification, the sort of thing that seeks to stir up racism. Ethno-religious groups – those whose religion is closely connected to their ethnicity – are included in the definition of race for these purposes'. He concluded by quoting from JS Mill's *On Liberty* and referring to the Government's 'strong commitment to the principles of racial and social harmony', to a harmonious society where 'faiths respect one another, co-exist and learn from each other'. Leaving no room for doubt, he ended, 'These are the values at the core of this Government's policy, and that is why we do not support the extension of vilification laws to religion'. By reference to *Fletcher v The Salvation Army*,¹⁹⁷ Carr asked 'why should a government tribunal waste time and money on such a question, instead of leaving it to the commonsense of citizens to work their way through?'¹⁹⁸

The Opposition has also opposed the bill. In the Legislative Council, it described the bill as 'flawed in its concept, and misguided in its name, and will have the opposite effect of its intended outcome'.

Justice Young is also among the ranks of those who hopes that 'the Victorian experience and the speeches being made about the matter by concerned politicians in Canberra will mean that the Breen Bill will never become law'.¹⁹⁹

Arguments for: In his wide-ranging Second Reading speech for the Bill, the Hon Peter Breen presented the case on its behalf on the grounds of the defence of human rights, offering a different interpretation of JS Mill to that favoured by Carr. Commenting on initiatives taken in the sporting world, he said that such bodies as the Australian Football League recognize that 'religious vilification can be even more harmful than racial vilification'. He argued too that the bill protected 'secularists and people of no belief from religious zealots'. Referring to the views of the NSW Law Reform Commission, as well as the earlier Samios report, he said that the inclusion of 'ethno-religious' in the definition of 'race' under the anti-discrimination legislation is no substitute for the express inclusion of vilification laws on the ground of religion. With specific reference to the Muslim community, he stated:

Muslim women, in particular, experience more racial violence and intimidation than Muslim men because the women are physically different by wearing the hijab or Muslim women scarfs. Strictly speaking, derogatory remarks on the basis of the

¹⁹⁶ P Akerman, 'Assume the sedition position – head in sand', *The Daily Telegraph*, 17.11.2005.

¹⁹⁷ [2005] VCAT 1523 (1 August 2005).

¹⁹⁸ *NSWPD*, 21.6.2005, p 17086.

¹⁹⁹ 'Current issues – Anti-vilification laws', n 184, p 409.

headgear might be said to be religious rather than racial vilification. It is certainly impossible to identify Muslims with one nationality, Islam being the world's biggest single religion.²⁰⁰

Supporting the Bill, Simon Rice, a Lecturer in Law at Macquarie University, commented:

While the politics of anti-vilification laws have always been sensitive, they have become particularly so recently around the issue of religion. Indeed, it would seem that the rapidly growing importance of conservative Christians to contemporary politics led the then NSW Premier, Bob Carr, to declare to the Hillsong congregation in Sydney that there will be no religious vilification laws in NSW.²⁰¹

Rice's view is that religious vilification laws of the kind in place in Victoria are 'unremarkable', in that their limitations on free speech are combined with familiar safeguards or defences for public, academic and other debate that is conducted in good faith. As for Carr's argument that vilifying attacks are better answered by 'the commonsense of citizens', Rice argues it is hard to make sense of this as 'a position of public policy', stating 'There is a wide range of conduct that is prevented by law that blind faith and wishful thinking would leave to 'the commonsense of citizens. On that rationale we would repeal a great many of our laws'.

The report of the Legislation Review Committee: The report of the NSW Parliament's Legislation Review Committee to the Anti-Discrimination Amendment (Religious Tolerance) Bill 2005 began by noting that 'consideration of whether religion or any specific characteristic should be the subject of anti-vilification laws is outside the scope of its functions under s 8A of the Legislation Review Act'. In other words, its remit is not to argue for or against the Bill, but to consider its implications for personal rights and liberties as required by section 8A of the *Legislation Review Act 1987* (NSW).

For this purpose, the report considered various rights under the International Covenant on Civil and Political Rights, including the right to freedom of speech (Article 19), freedom of religion (Article 18) and the right to be free from discrimination on a number of grounds, including religion (Articles 2(1) and 26), with the committee commenting on the restrictions that can apply to the right to free speech. The Committee concluded in respect to the Bill:

- The Committee is of the view that the rights to free speech and to freely practice religion or no religion are fundamental human rights essential to an open and democratic society. As such, they should not be restricted except on compelling public interest grounds.

²⁰⁰ NSWPD, 15.9.2005, pp 17827-17833.

²⁰¹ Simon Rice, 'Do Australians have equal protection against hate speech', Democratic Audit of Australia, September 2005
<http://democratic.audit.anu.edu.au/Papers-2005/RiceVilificationLawsSept05.pdf>

- The Committee is also of the view that preventing religious vilification, which is inconsistent with an open and democratic society and which can have a serious and detrimental effect on individuals and society as a whole, is a highly compelling public interest reason to limit free speech.
- The Committee notes the safeguards in the Bill to avoid undue restriction on free speech while protecting people from vilification.
- Having regard to these safeguards and the compelling public interest in preventing and punishing religious vilification, the Committee is of the view that the Bill does not unduly trespass on the right to free speech.

7.9 Comment

As with all questions touching on free speech proposed legislation prohibiting religious intolerance and hate speech is sure to be controversial. The Victorian *Racial and Religious Tolerance Act 2001* is a case in point. In NSW, the Anti-Discrimination Amendment (Religious Tolerance) Bill 2005 is opposed by both the Government and Opposition on policy grounds. Nonetheless, it is an opportunity to revisit this area of anti-discrimination law in NSW. Among other things, there is the opportunity to reconsider the meaning of the term ‘ethno-religious origin’ in the definition of ‘race’.

8. CONCLUSION

Without question, with the rise and spread of terrorism, we face unprecedented security challenges. Neither the new threats posed by global terrorism nor the problems involved in formulating adequate and appropriate responses to it are to be underestimated. Complex and sometimes conflicting issues arise, as do countervailing public interests.

The current debate reviewed in this paper confirms that liberty and security make uneasy bedfellows. Whether the concerns expressed about the new sedition laws, their ‘chilling effect’ on free speech and so forth, are likely to eventuate in practice remains to be seen. Nonetheless, laws against sedition, or any other laws curtailing free speech, should rightly be subject to careful scrutiny. Their potential ‘chilling effect’ on free speech is real enough. Moreover, sedition (and vilification) offences tend to cut across areas of the law already covered by existing incitement offences, thus raising the question of their practical value.

In NSW, sedition laws belong primarily to the common law. A question this paper has asked is whether, given the scope of the new Commonwealth sedition offences there is really much, if any, practical scope or need for comparable laws at the State level? It could be argued that, while the Commonwealth sedition regime does not intend to ‘cover the field’, it is in fact sufficiently broad to accommodate most foreseeable contingencies. This Federal regime is combined with State laws against incitement, which confine still further any prospective role for local anti-sedition laws to play. Admittedly, in NSW statutory sedition law is limited to the largely consequential provision relating to seditious libel found in the *Imperial Acts Application Act 1969*. Is there a case for either repealing or updating that provision? In the context of the recent disturbances in Cronulla, the *Crime Prevention Act 1916* (NSW) has been relied upon to prosecute those charged with incitement to violence.

As for anti-vilification law, is there a case for revisiting the terminology used in this context and, possibly, for extending coverage to prohibit vilification on the ground of religion, consistent with the position in Victoria, Queensland and Tasmania? Defining religion for legal purposes is no easy matter. Guarding against the abuse or frivolous use of such legislation can also be difficult. Symbolic law can have value, in educational and other ways, but it can also carry dangers of unintended consequences. Practically, the underlying issue is whether there is a significant social problem and, if so, should it be tackled by the kind of legislative response proposed by the Anti-Discrimination Amendment (Religious Tolerance) Bill 2005? The Government has opposed such a move, as has the Opposition. Again, the overriding consideration is that laws curtailing free speech should be subject to careful scrutiny. Their introduction should only be contemplated on the strongest policy grounds.

APPENDIX A

Anti-Discrimination Amendment (Religious Tolerance) Bill 2005



New South Wales

Anti-Discrimination Amendment (Religious Tolerance) Bill 2005

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Anti-Discrimination Act 1977* to promote religious tolerance.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act 60 days after the date of assent.

Clause 3 is a formal provision that gives effect to the amendments to the *Anti-Discrimination Act 1977* set out in Schedule 1.

Schedule 1 Amendments

Schedule 1 [1] inserts proposed Part 4H (proposed sections 49ZZA–49ZZC) in the *Anti-Discrimination Act 1977* (the *principal Act*). The amendment provides that religious vilification is unlawful. The amendment also creates a criminal offence of serious religious vilification with a maximum penalty of 50 penalty units or 6 months

Anti-Discrimination Amendment (Religious Tolerance) Bill 2005

Explanatory note

imprisonment or both in the case of an individual and 100 penalty units in the case of a corporation.

Schedule 1 [2] and [3] make consequential amendments. These amendments allow for a complaint of religious vilification to be lodged with the President of the Anti-Discrimination Board. Such a complaint may be resolved by way of conciliation by the President of the Board or may be referred to the Administrative Decisions Tribunal (the *Tribunal*). The Tribunal may take action including dismissing the complaint, awarding damages up to \$40,000, enjoining the respondent from continuing or repeating any conduct rendered unlawful by the principal Act or requiring the respondent to publish an apology.

Schedule 1 [4] and [5] insert savings and transitional provisions consequential on the enactment of the proposed Act.



New South Wales

Anti-Discrimination Amendment (Religious Tolerance) Bill 2005

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New South Wales

Anti-Discrimination Amendment (Religious Tolerance) Bill 2005

No. , 2005

A Bill for

An Act to amend the *Anti-Discrimination Act 1977* to promote religious tolerance;
and for other purposes.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Anti-Discrimination Amendment (Religious Tolerance) Act 2005*.

2 Commencement

This Act commences 60 days after the date of assent.

3 Amendment of Anti-Discrimination Act 1977 No 48

The *Anti-Discrimination Act 1977* is amended as set out in Schedule 1.

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Schedule 1 Amendments

(Section 3)

[1] Part 4H

Insert after Part 4G:

Part 4H Religious vilification

49ZZA Definitions

In this Part:

public act includes:

- (a) any form of communication to the public including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
- (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
- (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for or severe ridicule of, a person or group of persons on the ground of the religious belief or activity of the person or members of the group.

religious belief or activity means:

- (a) holding a religious belief or view and includes not holding a religious belief or view, and
- (b) engaging in a religious activity, and includes not engaging in or refusing to engage in a religious activity.

49ZZB Religious vilification unlawful

- (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the religious belief or activity of the person or members of the group.
- (2) Nothing in this section renders unlawful:
 - (a) a fair report of a public act referred to in subsection (1), or

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| (b) | a communication or the distribution or dissemination of any matter comprising a publication referred to in Division 3 of Part 3 of the <i>Defamation Act 1974</i> or which is otherwise subject to a defence of absolute privilege in proceedings for defamation, or | 1 2 3 4 5 |
| (c) | a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate and expositions of any act or matter. | 6 7 8 9 |
| 49ZZC | Offence of serious religious vilification | 10 |
| (1) | A person must not, by public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the religious belief or activity of the person or members of the group by means which include: | 11 12 13 14 |
| (a) | threatening physical harm towards, or towards any property of, the person or group of persons, or | 15 16 |
| (b) | inciting others to threaten physical harm towards, or towards any property of, the person or group of persons. | 17 18 |
| | Maximum penalty: | 19 |
| | In the case of an individual—50 penalty units or imprisonment for 6 months, or both. | 20 21 |
| | In the case of a corporation—100 penalty units. | 22 |
| (2) | A person is not to be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution. | 23 24 |
| [2] | Section 87 Definitions | 25 |
| | Omit “or 49ZXB” from the definition of <i>vilification complaint</i> . | 26 |
| | Insert instead “, 49ZXB or 49ZZB”. | 27 |
| [3] | Section 89B Prosecution for serious vilification | 28 |
| | Omit “or 49ZXC” wherever occurring from section 89B (1), (2) and (5). | 29 |
| | Insert instead “, 49ZXC or 49ZZC”. | 30 |
| [4] | Schedule 1 Savings and transitional provisions | 31 |
| | Insert at the end of clause 1 (1): | 32 |
| | <i>Anti-Discrimination Amendment (Religious Tolerance) Act 2005</i> | 33 |

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| [5] Schedule 1, Part 6 | 1 |
| Insert at the end of the Schedule: | 2 |
| Part 6 Anti-Discrimination Amendment (Religious Tolerance) Act 2005 | 3 |
| | 4 |
| 17 Operation of amendment | 5 |
| (1) The amendments made by the amending Act do not apply in respect of anything done or omitted to be done before the commencement of Schedule 1 to the amending Act. | 6 |
| | 7 |
| | 8 |
| (2) This Act continues to apply to anything done or omitted to be done before the commencement of Schedule 1 to the amending Act as if the amendments made by the amending Act had not been enacted. | 9 |
| | 10 |
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| (3) In this clause: | 13 |
| <i>the amending Act</i> means the <i>Anti-Discrimination Amendment (Religious Tolerance) Act 2005</i> . | 14 |
| | 15 |

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