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LAW COMMISSION  
REFORMING THE LAW OF SEDITION:  
CONSULTATION DRAFT  
OCTOBER 2006

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## Call for Submissions

The Law Commission welcomes your comments on this consultation draft, which is also available on the Law Commission's website at [www.lawcom.govt.nz](http://www.lawcom.govt.nz). The closing date for submissions is **15 December 2006**. Submissions should be sent to: Submissions, The Law Commission, PO Box 2590, Wellington 6140; or by email to [sedition@lawcom.govt.nz](mailto:sedition@lawcom.govt.nz)

The Law Commission is subject to the Official Information Act 1982. Copies of submissions made to the Law Commission will normally be made available on request, and the Commission may refer to submissions in its final report. Requests for the withholding of information on grounds of confidentiality or for any other reason will be determined in accordance with the Official Information Act 1982.

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## Terms of Reference

### REVIEW OF SEDITIOUS OFFENCES TERMS OF REFERENCE

The Commission will review the existing seditious offences set out in sections 80 to 85 of the Crimes Act 1961, and make proposals for any changes to the New Zealand law that are necessary and desirable.

The matters to be considered by the Commission will include:

- (a) Relevant existing and proposed legislation, including the New Zealand Bill of Rights Act 1990;
- (b) Developments in other comparable jurisdictions;
- (c) Any other relevant matters.

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## Summary

1 Few New Zealanders have ever heard of the crime of sedition. If they have heard of it they could not tell you what it is. That is not a propitious start for an offence that is punishable by two years imprisonment.

2 A dictionary definition of the word “sedition” is:<sup>1</sup>

- conduct or language inciting to rebellion against the constituted authority in a state;
- agitation against the authority of the state.

“Seditious” means engaged in promoting disaffection or inciting revolt against duly constituted authority. However, in New Zealand the word “seditious” has a legal definition, in the context of seditious offences, which extends beyond this dictionary definition.

3 Seditious offences in New Zealand law are set out in sections 81–85 of the Crimes Act 1961. The main offences are making or publishing a statement that expresses a “seditious intention”, or conspiring with a “seditious intention”. Section 81(1) defines the expression “seditious intention” as an intention:

(a) To bring into hatred or contempt, or to excite disaffection against, Her Majesty, or the Government of New Zealand, or the administration of justice; or

(b) To incite the public or any persons or any class of persons to attempt to procure otherwise than by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand; or

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<sup>1</sup> Concise Oxford English Dictionary.

- (c) To incite, procure, or encourage violence, lawlessness, or disorder; or
- (d) To incite, procure, or encourage the commission of any offence that is prejudicial to the public safety or to the maintenance of public order; or
- (e) To excite such hostility or ill will between different classes of persons as may endanger the public safety.

4 Section 81(2) provides some defences. No one will be deemed to have a seditious intention only because he (or she) intends, in good faith:

- (a) To show that Her Majesty has been misled or mistaken in her measures; or
- (b) To point out errors or defects in the Government or Constitution of New Zealand, or in the administration of justice; or to incite the public or any persons or any class of persons to attempt to procure by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand; or
- (c) To point out, with a view to their removal, matters producing or having a tendency to produce feelings of hostility or ill will between different classes of persons.

5 Section 82 of the Act provides that everyone who is party to any seditious conspiracy is liable to imprisonment for a term not exceeding two years. A seditious conspiracy is an agreement between two or more people to carry out any seditious intention (section 83(2)).

6 Section 83 provides that everyone is liable to imprisonment for a term not exceeding two years who makes or publishes, or causes or permits to be made or published, any statement that expresses any seditious intention.

7 Section 84 provides for a term of imprisonment not exceeding two years for everyone who with a seditious intention:

- (a) Prints, publishes, or sells; or
- (b) Distributes or delivers to the public or to any person; or
- (c) Causes or permits to be printed, published, or sold, or to be distributed or delivered; or
- (d) Has in his possession for sale, or for distribution or delivery; or
- (e) Brings or causes to be brought or sent into New Zealand,—  
any document, statement, advertisement, or other matter that expresses any seditious intention.

- 8 Section 85 of the Act provides that everyone is liable to imprisonment for a term not exceeding 2 years who uses or causes or permits to be used any apparatus for printing, publishing etc any material that expresses a seditious intention.
- 9 The Law Commission has been asked to review these seditious offences, and make any recommendations for reform which are necessary. The Commission has concluded that the seditious offences set out in the Crimes Act 1961 are overly broad and uncertain. They infringe on the principle of freedom of expression, and have the potential for abuse – a potential which has been realised in some periods of our history, when these offences have been used to stifle or punish political speech.
- 10 Sedition has an ancient and unsatisfactory history. It has virtually fallen into disuse in almost all countries with which New Zealand compares itself. It had fallen into disuse in New Zealand, too, until the prosecution of Timothy Selwyn in 2006. But that case did nothing to demonstrate that the crime is a necessary feature of our statute book.
- 11 Sedition law in New Zealand flows from words not actions. Defamation is no longer a crime in New Zealand. It was repealed by the Defamation Act 1992. But defaming or libelling the government remains a crime under the law of sedition. In a democracy where, under democratic theory, the people govern themselves, it hard to see how or why speech uttered against the government should be a crime. Not in a country that values free speech.
- 12 Where the protection of public order or the preservation of the Constitution or the Government is at stake, in the Commission's view, there are other and more appropriate criminal offences that can be used to prosecute offending behaviour; offences which do not carry with them the risk of abuse or the tainted history that attaches to the seditious offences. Similarly, in these days of terrorism, while it might be tempting to look to sedition to contribute to the suppression of terrorism, in our view the seditious offences are not an appropriate response to terrorism. There are other ways of dealing with such conduct.
- 13 The focus of this report is narrow. It is concerned only with the offences in sections 81-85 of the Crimes Act 1961. It is not concerned with blasphemy, or



possible hate speech offences. Nor is it concerned with recommending measures required to suppress terrorism. Those matters are beyond the ambit of this report.

- 14 This report recommends that sections 80 to 85 of the Crimes Act 1961, which contain the seditious offences, should be repealed. Nothing should replace them. To the extent that conduct that would be covered by the existing sedition provisions needs to be punished, it can be more appropriately dealt with by other existing provisions of the criminal law. We will lose nothing of value by abolishing sedition, but we will better protect the values of democracy and free speech.
- 15 The case for change proceeds by recounting a brief history of the common law as it relates to sedition. The use of sedition for “political muzzling” (as the Irish Law Reform Commission put it) at particular periods throughout history and the lack of clarity surrounding what amounts to seditious intention, as well as long periods when the provisions are not used, are all reasons for abolishing sedition as a crime.
- 16 The report sets out the New Zealand law and its history. We look at the use of seditious offences in New Zealand and find they have been used at times of perceived threats to the established authority. The same conclusion follows from our review of the law of the United Kingdom, Australia, Canada and the United States.
- 17 In analytical terms, the case we make for reform depends upon examining the ingredients of seditious offences in New Zealand; identifying the public interests they protect; assessing their impact on freedom of expression; and considering whether there are matters covered in sections 80-85 that should continue to attract the attention of the criminal law. We reach the conclusion that those matters which should still be covered by the criminal law are already provided for in other more appropriate offences under the Crimes Act.
- 18 The heart of the case against sedition lies in the protection of freedom of expression, particularly of political expression, and its place in our democracy. People may hold and express strong dissenting views. These may be both unpopular and unreasonable. But such expressions should not be branded as

criminal simply because they involve dissent and political opposition to the government and authority.

19 Were the provisions of sections 80 to 85 of the Crimes Act to be introduced into the New Zealand statute book today, they would attract an adverse report under the New Zealand Bill of Rights Act 1990. These provisions impose an unreasonable restriction on free speech, and they should be jettisoned.

20 In summary, six principal reasons are advanced for repealing the sedition provisions of the Crimes Act:

- the legal profile of the offence is broad, vague, variable and uncertain. The meaning of “sedition” has changed over time;
- the present law invades the democratic value of free speech for no adequate public reason;
- the present law falls foul of the New Zealand Bill of Rights Act 1990;
- the seditious offences can be misused to impose a form of political censorship, and they have been used for this purpose;
- the provisions of sedition law have generally fallen into disuse, not only in New Zealand, but other jurisdictions we have studied. This is a policy indication that the law is not needed;
- the law is not needed because those elements of it that should be retained are more appropriately covered by other offences. Duplication should be eliminated.

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## Chapter 1: A brief history of the common law relating to Sedition

- 20 The first question for this reference is whether conduct which in the past has been labelled seditious should still be a crime in New Zealand in 2006. To answer that question, it is necessary to start with a brief history of how offences of sedition came into being, in order to show both the changing meaning of “seditious offences” and the different uses to which prosecutions for such offences have been put over time. There is a resulting uncertainty about the term “sedition” and a conclusion that prosecutions for seditious offences hover on the line between prosecutions for a strong expression of political dissent and a clear urging of violence against constituted authority. The former should nowadays be protected by rights of free speech, whereas the latter may – or may not – be covered by other offences.
- 21 The term “sedition” is derived from the Latin word “seditio” which in Roman times meant “an insurrectionary separation (political or military); dissension, civil discord, insurrection, mutiny”.<sup>2</sup> Sedition is thus conceptually linked to treason.<sup>3</sup> In 1351, the English Statute of Treasons defined many types of offences against the King as treasonable, including compassing or imagining the death of the King, levying war against the King in his realm and adhering to the King’s enemies. The treason offences were increasingly used to prosecute people who spoke or wrote

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<sup>2</sup> CI Kyer “Sedition through the Ages: A Note on Legal Terminology” (1979) 37 UT Fac L Rev 266.

<sup>3</sup> Above n 2, and see Sir James F Stephen *A History of the Criminal Law of England* (London 1883) vol 2, ch 24 for a comprehensive history of sedition law to that date, and Law Reform Commission of Canada *Crimes against the State* Working Paper (1986, Ottawa, 1986) for a fairly comprehensive history; also Australian Law Reform Commission *Review of Sedition Laws* Issues Paper 30, (Sydney 2006), 29.

words publicly in opposition to the King. In 1477 the courts held that to prognosticate [predict] the King's death using magic was treason. In Tudor times the courts interpreted the 1351 Act to include constructive treason such that serious public protests were considered to be a constructive levying of war against the King.<sup>4</sup> In the reign of Henry VIII, treason was greatly expanded, and Parliament attained [convicted] for treason a Holy woman who prophesied against the King's marriage to Anne Boleyn and predicted he would soon die.

#### SEDITIONOUS LIBEL 1600-1800

- 22 The prosecution for seditious libel of people who used words that could urge insurrection against those in authority, or who censured public men for their conduct, or criticised the institutions of the country, was made possible by the *De Libellis Famosis* decision of the Star Chamber court in 1606.<sup>5</sup> This decision in effect created a very wide offence of seditious libel. In 1629, in *R v Elliot*, three men were charged with uttering seditious speeches in Parliament, speeches that “tended to the sowing of discord and sedition betwixt His Majesty and his most loyal subjects”.<sup>6</sup> According to Sir James Stephen the invention of printing gave a new importance to political writings.<sup>7</sup> By the 1680s there were frequent, and often ruthless, prosecutions for political libel and seditious words, apparently containing “extravagant cruelty”,<sup>8</sup> for simply criticising the government.

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<sup>4</sup> See Hon Chief Justice of Federal Court of Australia ME Black “Five Approaches to Reforming the Law: 650 Years of Treason and Sedition” Keynote Address to the Australasian Law Reform Agencies Conference 2006, [www.alrc.gov.au/events/events/alrc/Presentation/Black\\_CJ.pdf](http://www.alrc.gov.au/events/events/alrc/Presentation/Black_CJ.pdf), citing Sir John Baker Oxford History of the Laws of England, vol VI, 587.

<sup>5</sup> Hon Chief Justice Black's paper, above n 4, 13-14, citing *De Libellis Famosis* (1606) 5 Co Rep 125a, 251. However, prior to this, in 1588, libel that had the effect of turning people against those in authority had been described as seditious libel: *R v Knightly et al* (1588) 1 State Trials 1263, cited in Kyer, above n 1.

<sup>6</sup> *R v Elliot et al* (1629) 3 State Trials 293, although in *Pine's case* (1629) 3 State trials 359 14 common law judges refused to convict a man who spoke disrespectfully of Charles 1 despite his strong language. See also *R v Uchiltriee* (1631) 3 State Trials 425, 437, cited in Kyer, above n 2.

<sup>7</sup> Sir James F Stephen *A History of the Criminal Law of England* (London 1883) vol 2, 302. Stephen also noted that the practical enforcement of the seditious libel offence “was wholly inconsistent with any serious public discussion of political affairs” and “so long as it was recognised as the law of the land all such discussion existed only on sufferance”, 348.

<sup>8</sup> See M Head “Sedition – Is the Star Chamber Dead?” [1979] 3 Crim LJ 89, 95.

23 Over the next three centuries the speaking of inflammatory words, publishing certain libels, and conspiring with others to incite hatred or contempt for persons in authority became known as seditious offences in England. In 1704 Holt LCJ justified the existence of and width of such offences in *R v Tutchin*:<sup>9</sup>

. . . nothing can be worse to any government, than to endeavour to procure animosities as to the management of it; this has been always looked upon as a crime and no government can be safe without it be punished.

24 In 1792 Fox's Libel Act was passed, providing that whole matter in issue in libel cases was to be decided by the jury, not the judges. This did not have the immediate effect of reforming the law for the many who were prosecuted in this era, seen as supporters of the French Revolution, including Tom Paine for publishing the *Rights of Man* and Reverend Winterbotham for preaching a sermon in favour of the French Revolution and against taxes.<sup>10</sup>

25 In the 1790s there were a series of trials in Scotland where the accused were charged with sedition.<sup>11</sup> Thomas Muir and several others were sentenced to 14 years transportation for advocating universal suffrage, annual elections and equal representation. Muir, in his lengthy defence, said that sedition was a term:<sup>12</sup>

the most vague and undefined - a term which has been applied in one age to men rejected by society, but whose names were honoured by after times, and upon whose virtues and sufferings in the succeeding age, the pillars of the Constitution were erected.

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<sup>9</sup> *R v Tutchin* (1704) 14 State Trials (OS) 1096, 1128, cited in Australian Law Reform Commission Issues Paper, above n 3, 29. Tutchin was sentenced to 7 years imprisonment, with a whipping every fortnight, for alleging corruption in the ministry and ill-management in the navy.

<sup>10</sup> *Paine* (1792) 22 State Trials (OS) 357 and *Winterbotham* (1793) 22 State Trials (OS) 471 cited in M Head, above n 8, 96. It is likely that juries were packed as alleged in Thomas Muir's trial: see P Mackenzie *The Life of Thomas Muir Esq., Advocate* (WR M'Phun, Trongate, Glasgow (1831).

<sup>11</sup> One defence counsel argued that the speeches and meeting with a view to obtaining political reform, such as universal suffrage, were not actually sedition, but could only be "seditious merely on account of their tendency to excite commotion and risings of the people, which is really sedition": *R v Gerrald* (1794) 23 State Trials 803, 841, cited in Kyer, above n 2, 268

<sup>12</sup> P Mackenzie *The Life of Thomas Muir Esq., Advocate* (WR M'Phun, Trongate, Glasgow (1831) containing the text of the trial, 82-82. See also *The Trial of William Skirving* (J Ridgway, HD Symonds, W Ramsey and J Marson, London 1794).

- 26 The Reverend Thomas Palmer was another of this group convicted for seditious practices,<sup>13</sup> and his defence counsel argued that the writing or distribution of an allegedly “wicked, seditious or inflammatory” address to the weavers was surely warranted by the liberty of the Press and first principles of government; that its censures were praiseworthy as they would compel reform of bad ministers; and that it showed a strongly marked attachment to the Constitution.

#### THE NINETEENTH CENTURY – SEDITIOUS INTENTION

- 27 During the nineteenth century the more liberal democratic political environment changed the views of citizens’ rights to freely express criticism of the government, and to some extent tightened the law of seditious libel. In 1820 the judge in *Burdett* told the jury that they were to consider whether an allegedly seditious paper was a “sober address to the reason of mankind, or whether it was an appeal to their passions calculated to incite them to acts of violence and outrage”.<sup>14</sup> However, prosecutions for seditious offences continued where urging others to commit illegal acts or create disorder allegedly lead to such acts.<sup>15</sup> Thus there were prosecutions for seditious conspiracy following the Peterloo massacre in 1819, during the Chartists’ revolts against their capitalist masters and the government’s refusal to respond to their petition, in 1839.<sup>16</sup> In 1854 in Australia, Henry Seekamp, editor of the *Ballarat Times*, was found guilty of sedition for printing a series of inflammatory articles before the Eureka Stockade attack. Seekamp urged the diggers to “strike at the root of rottenness and reform the Chief Government... The voice of the people must be raised for a free and British constitution and their wishes enforced by the strongest means”.<sup>17</sup>

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<sup>13</sup> See *Trial of Rev Thomas Fyshe Palmer*, (Edinburgh 1793), 3-6 for the Address; 25-29 for parts of the defence.

<sup>14</sup> *Burdett* (1820) 4 B&Ald 95. See also *Lovett* (1839) 9 Car & P 462, 466 per Littledale J who told the jury “if this paper has a direct tendency to cause unlawful meetings and disturbances, and to lead to a violation of the laws, that is sufficient to bring it within the terms of this indictment and it is a seditious libel”.

<sup>15</sup> Australian Law Reform Commission *Review of Sedition Laws* Issues paper, above n 3, 31-32.

<sup>16</sup> See M Lobban “From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c 1770-1820” (1990) 10 (Aut) *Oxford Jnl of Legal Studies* 307.

<sup>17</sup> Hon ME Black, above n 4, 14-15.

28 In the nineteenth century a view of sedition based on the idea that the Sovereign or Government was the servant of the people, rather than a divine appointee who could do no wrong, was gaining acceptance.<sup>18</sup> Sir James Stephen said that for all who hold this more modern view, no censure of the Government, short of a direct incitement to disorder and violence, would be a seditious libel. The intention to incite violence thus became an element of the offence at common law. In his address to the grand jury in *R v Sullivan*, Fitzgerald J said, similarly, that there was no sedition in criticising the servants of the Crown, or seeking redress of grievances, noting that:<sup>19</sup>

You should remember that you are the guardians of the liberty and freedom of the press and that it is your duty to put an innocent interpretation on these publications if you can. But if on the other hand, from their whole scope, you are coerced to the conclusion that their object and tendency is to foment discontent and disaffection, to excite tumult and insurrection . . . [then you should] send the case to be tried.

29 In *Burns*, Cave J instructed the jury that the defendants could be found guilty if they had a seditious intention to incite the people to violence, to create public disturbances and disorder. But on the other hand:<sup>20</sup>

if you come to the conclusion that they were actuated by an honest desire to alleviate the misery of the unemployed – if they had a real bona fide desire to bring that misery before the public by constitutional and legal means, you should not be too swift to mark any hasty or ill-considered expression which they might utter in the excitement of the moment.

30 By the end of the nineteenth century the term sedition was no longer used in the sense of an insurrection or revolt; it now described the act of inciting or encouraging the revolt. In 1883 Sir James Stephen pointed out that there was no such offence as sedition, but he defined a seditious intention as:<sup>21</sup>

. . . an intention to bring into hatred or contempt, or to excite disaffection against the person of Her Majesty, her heirs and successors, or the Government and

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<sup>18</sup> See summary of the nineteenth century common law developments in *Boucher v R* [1951] 2 DLR 369, 382-383, by Kellock J.

<sup>19</sup> *R v Sullivan* (1868) 11 Cox CC 44 cited in *Boucher v R*, above n 18, 384. *Sullivan* was one of a series of Irish trials during a time of great political unrest in Ireland.

<sup>20</sup> *R v Burns* (1886) 16 Cox CC 355, 363.

<sup>21</sup> Kyer, above n 2, citing Sir James F Stephen *A History of the Criminal Law of England* (London 1883) vol 2, 298. See also Article 93 in Stephen's *Digest of the Criminal Law* (1877) approved in *R v Burns* (1886) 16 Cox CC 355, 377 and *R v M'Hugh* [1901] 2 IR 569, 578.

Constitution of the United Kingdom, as by law established, or either House of Parliament, or the administration of justice, or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, or to raise discontent or disaffection amongst Her Majesty's subjects, or to promote feelings of ill-will and hostility between difference classes of Her Majesty's subjects.

- 31 The common law remains very much as in Stephen's formulation. For seditious libel, it has been held that it is not sufficient to show the words were used with the intention of achieving one of the objects set out in Article 93; it must also be proved there was an intention to cause violence.<sup>22</sup> In *R v Aldred*,<sup>23</sup> Coleridge J instructed the jury thus:

Nothing is clearer than the law on this head – namely, that whoever by language, either written or spoken, incites or encourages others to use physical force or violence in some public matter connected with the State, is guilty of publishing a seditious libel . . . you are entitled to look at all the circumstances surrounding the publication with a view of seeing whether the language used is calculated to [promote public disorder or physical violence in a matter of State]; that is to say you are entitled to look at the audience addressed, because language which would be innocuous, practically speaking, if used to an assembly of professors or divines, might produce a different result if used before an excited assembly of young and uneducated men . . .

- 32 The issue of seditious intention was canvassed in the courts of the jurisdictions researched for this reference, particularly in the Canadian case of *Boucher v R*.<sup>24</sup> Seditious intention is required for the seditious offences of the Canadian Criminal Code but not defined, so the judges had recourse to the common law. After a review of the nineteenth and early twentieth century common law, it was held in *Boucher* that there must be an intention to incite violence or resistance or defiance, for the purpose of disturbing constituted authority.<sup>25</sup>

#### TWENTIETH CENTURY – A NEED FOR SEDITIOUS OFFENCES?

- 33 Prosecutions for seditious offences were few and far between in the twentieth century in the countries we have considered for this reference. In the United

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<sup>22</sup> The United Kingdom Law Commission Working Paper no 72 Second Programme Item XVIII *Codification of the Criminal Law – Treason, Sedition and Allied Offences* (1977) referring to *R v Burns*, above n 21, *R v Aldred* (1909) 22 Cox CC 1, approved in *R v Boucher* [1951] 2 DLR 369, 382-384.

<sup>23</sup> In *R v Aldred* (1909) 22 Cox CC 1, 4.

<sup>24</sup> *Boucher v R* [1951] 2 DLR 369.



Kingdom, where the common law seditious libel offences have been retained, this has been particularly the case.<sup>26</sup> In 1991, a prosecution of the author and publishers of *The Satanic Verses*<sup>27</sup> failed on grounds that a necessary element of the offence of inciting violence or disorder is that there must be the purpose of disturbing constituted authority, following *R v Burns*<sup>28</sup> and the Canadian Supreme Court in *Boucher v R*.<sup>29</sup> The Law Commission in the United Kingdom has said that to satisfy such a test of intention, it would have to be shown that the defendant has incited or conspired to commit either offences against the person, or offences against property or urged others to riot or to assemble unlawfully. If shown, the defendant would be guilty of either incitement or conspiracy to commit the one of those offences. Thus the Law Commission concluded that there was likely to be a sufficient range of other extant offences covering conduct amounting to sedition. It was:<sup>30</sup>

better in principle to rely on these ordinary statutory and common law offences than to have resort to an offence which has the implication that the conduct in question is “political”.

- 34 The Commission’s preliminary view in 1977 was, therefore, that there was no need for an offence of sedition. The last prosecution by the British Crown was in 1949.<sup>31</sup> However, the common law offences remain in the UK in 2006. The Law Reform Commission of Ireland also recommended the abolition of the seditious libel offences in 1991<sup>32</sup> on the basis that the ambit of the law was unsettled; it was strongly arguable that the law was inconsistent with Article 40.6.i of the Irish Constitution which refers to “rightful liberty of expression, including criticism of Government policy”; and because of the unsavoury history of suppression of Government criticism, using seditious libel offences as a “political muzzle”. In addition, the Law Reform Commission considered that the matter which is the

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<sup>25</sup> *Boucher*, above n 24, 389.

<sup>26</sup> The Law Commission Working Paper no 72 (1977), above n 22, 116.

<sup>27</sup> *R v Chief Metropolitan Stipendiary Magistrate: ex parte Choudhury* [1991] 1 QB 429.

<sup>28</sup> *R v Burns* (1886) 16 Cox CC 355, Cave J.

<sup>29</sup> *Boucher v R* [1951] 2 DLR 369.

<sup>30</sup> Law Commission Working Paper no 72, above n 22, 117-118

<sup>31</sup> *R v Caunt* (unreported, Birkett J, 1947) cited in ALRC *Review of Sedition Issues Paper* above n 3, 32; ALRC *Fighting Words Review of Sedition Laws in Australia* Report 104, July 2006, 52. The defendant was acquitted.

subject of the offence was now punishable by other provisions of Irish legislation (such as the Offences against the State Act 1939 and Broadcasting Authority Act 1960).

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<sup>32</sup> Law Reform Commission of Ireland, *Report of the Crime of Libel*, (LRC 41-1991, Dublin 1991), 10-11.

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## Chapter 2: New Zealand Seditious Law

### THE SEDITIOUS OFFENCES

35 The seditious offences are set out in sections 81 – 85 of the Crimes Act 1961. They appear in the Summary of this report, but for ease of reference are repeated here. The main offences are making or publishing a statement that expresses a “seditious intention”, or conspiring with a “seditious intention”. Section 81(1) defines the expression “seditious intention” as an intention:

(a) To bring into hatred or contempt, or to excite disaffection against, Her Majesty, or the Government of New Zealand, or the administration of justice; or

(b) To incite the public or any persons or any class of persons to attempt to procure otherwise than by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand; or

(d) To incite, procure, or encourage violence, lawlessness, or disorder; or

(d) To incite, procure, or encourage the commission of any offence that is prejudicial to the public safety or to the maintenance of public order; or

(e) To excite such hostility or ill will between different classes of persons as may endanger the public safety.

36 Section 81(2) provides some defences. No one will be deemed to have a seditious intention only because he (or she) intends, in good faith:

(a) To show that Her Majesty has been misled or mistaken in her measures; or

(b) To point out errors or defects in the Government or Constitution of New Zealand, or in the administration of justice; or to incite the public or any persons or any class of persons to attempt to procure by lawful means the alteration of any matter affecting the Constitution, laws, or Government of New Zealand; or

(c) To point out, with a view to their removal, matters producing or having a tendency to produce feelings of hostility or ill will between different classes of persons.

- 37 Section 82 of the Act provides that everyone who is party to any seditious conspiracy is liable to imprisonment for a term not exceeding two years. A seditious conspiracy is an agreement between two or more people to carry out any seditious intention.<sup>33</sup>
- 38 Section 83 provides that everyone is liable to imprisonment for a term not exceeding two years who makes or publishes, or causes or permits to be made or published, any statement that expresses any seditious intention. Under this section, the seditious intention attaches to the statement itself, rather than to the person publishing or making it.
- 39 Section 84 provides for a term of imprisonment not exceeding two years for everyone who with a seditious intention:
- (a) Prints, publishes, or sells; or
  - (b) Distributes or delivers to the public or to any person; or
  - (c) Causes or permits to be printed, published, or sold, or to be distributed or delivered; or
  - (d) Has in his possession for sale, or for distribution or delivery; or
  - (e) Brings or causes to be brought or sent into New Zealand,—  
any document, statement, advertisement, or other matter that expresses any seditious intention.
- 40 Section 85 of the Act provides that everyone is liable to imprisonment for a term not exceeding 2 years who uses or causes or permits to be used any apparatus for printing, publishing etc any material that expresses a seditious intention.

### **History of Statutory Law in New Zealand**

- 41 New Zealand inherited the British common law on sedition. The law was codified in the Criminal Code of 1893, and set out again in the Crimes Act 1908. The definition of seditious intention in section 118 of the Crimes Act 1908 was similar to the Crimes Act 1961, with some key differences:

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<sup>33</sup> Crimes Act 1961, s 81 (3).

- (a) it included an intention “to raise discontent or disaffection amongst Her Majesty’s subjects”;
- (b) the intention to promote feelings of ill-will and hostility between different classes of subjects was not qualified by the current requirement that it be such as may endanger the public safety (in section 81(1)(e) of the Crimes Act 1961);
- (c) neither the Code nor the 1908 Act included the intention to incite, procure or encourage the commission of offences prejudicial to public safety or the maintenance of public order which appears at section 81(1)(d) of the Crimes Act 1961;
- (d) neither the Code nor the 1908 Act included the intention to incite, procure or encourage violence, lawlessness or disorder which appears at section 81(1)(c) of the Crimes Act 1961;
- (e) section 118(4) included a definition of seditious libel, being a libel expressive of a sedition intention.

42 The exceptions to the definition of seditious intention in the 1893 Code and 1908 Act were substantially the same as section 81(2) of the Crimes Act 1961. The range of offences was shorter: section 119 of the Crimes Act 1908 provided that everyone was liable to two years’ imprisonment who spoke any seditious words or published any seditious libel or was a party to any seditious conspiracy.

43 During World War I, regulations made under the War Regulations Act 1914 provided:

No person shall print, publish, sell, distribute, have in his possession for sale or distribution, or bring or cause to be brought or sent into New Zealand, any document which incites, encourages, advises, or advocates violence, lawlessness, or disorder, or expresses any seditious intention.<sup>34</sup>

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<sup>34</sup> Regulations dated 20 September 1915, as amended on 29 November 1915, 24 July 1916 and 2 April 1918.

- 44 These regulations remained in force after the war, pursuant to the War Regulations Continuance Act 1920.<sup>35</sup> In relation to prosecutions under this sort of wartime emergency legislation, the New Zealand record is not a good one. One academic commentator who surveyed it concluded that the legislation was “astonishingly wide in terms of the lengths to which it went in sacrificing individual liberties to the exigencies of the moment . . .”<sup>36</sup>
- 45 In 1951, sedition also became an offence under the Police Offences Amendment Act 1951, punishable on summary conviction by a term of imprisonment of up to three months and/or a fine of up to £100. Sir Kenneth Keith has noted that this legislation was enacted following the 1951 waterfront strike, amidst a wave of criticism, with the clear intention of limiting avenues of protest and of strengthening the laws of sedition.<sup>37</sup> Sedition still remained an offence under the Crimes Act 1908, but a person could plead previous acquittal or conviction under one Act if a prosecution was brought for the same matter under the other Act.<sup>38</sup>
- 46 The Police Offences Amendment Act 1951 was repealed in 1960,<sup>39</sup> but its definition of seditious intention was carried over to the Crimes Act 1961, together with the offences of seditious statements, seditious conspiracy, publication of seditious documents and use of apparatus for making seditious documents or statements which had been set out in sections 3 to 6 of the Police Offences Amendment Act 1951.<sup>40</sup> (The reference to seditious libel in the Crimes Act 1908 was not carried over to the Crimes Act 1961).

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<sup>35</sup> The War Regulations Continuance Act 1920 was repealed in 1947, by the Emergency Regulations Continuance Act 1947, s 7.

<sup>36</sup> R Boast “Emergency Powers in New Zealand Legal History” (Unpublished Paper written for the Law Commission, on file at Victoria University of Wellington, March 1989) cited in G Palmer *New Zealand’s Constitution in Crisis* (John McIndoe, Dunedin, 1992,) 67.

<sup>37</sup> KJ Keith, *The Right to Protest*, in *Essays on Human Rights*, Sweet & Maxwell NZ Ltd, Wellington, 1968, 49 at 55.

<sup>38</sup> Police Offences Amendment Act 1951, s 11.

<sup>39</sup> Police Offences Amendment Act 1960, s 9.

<sup>40</sup> Under the Police Offences Amendment Act 1951, in relation to the offences of publication of seditious documents and use of apparatus for making seditious documents or statements, once it was proved that the defendant had possession of the material in question, or was in occupation of the premises, he was deemed to have it for sale, or had it under his control, unless he could provide evidence to the contrary. These provisions were not carried over to the Crimes Act 1961.

- 47 In 1989, a Bill to reform the Crimes Act 1961 was placed before Parliament. If passed into law, the Bill would have repealed the seditious offences set out in sections 81 – 85. The Bill was not passed, for reasons unconnected with the proposed abolition of sedition.

## PROSECUTIONS FOR SEDITION IN NEW ZEALAND

- 48 The cases considered below reflect the fact that, generally, charges relating to seditious offences are laid during times of political or civil unrest, or war. But generally too, those prosecuted were simply voicing criticism, at times vehemently, of government policies. They were not, by and large, advocating violence.

### **Maori land confiscation: the case against Te Whiti and Tohu**

- 49 In the late nineteenth century, sedition charges were laid against the Maori leaders, Te Whiti and Tohu. Te Whiti-o-Rongomai III had led a campaign of passive, peaceful resistance to Maori land confiscations by the Government. The Government's Armed Constabulary invaded the village of Parihaka and hugely disrupted a passive, orderly crowd of Maori. Wholesale arrests were made, villagers evicted, and houses and crops destroyed. At one of the meetings of Maori at Parihaka in 1881, Te Whiti was alleged to have said “the land belongs to me”, “the people belong to me” and “this is the main quarrel – war? – of this generation”; or, according to one version: <sup>41</sup>

This is the chief quarrel of this generation...Mine is the land from the beginning. I say to all Kings, Governors, Prophets and wise men stand up with your weapons to-day, but the land will not be released. The quarrel is arranged by us to be here. Neither the King nor the Governor shall turn us off the land today. . .we quarrel for the place which is said to be the land of the Government.

- 50 Te Whiti was charged with sedition for allegedly uttering these words in language calculated to promote disaffection, and Tohu was charged with a similar offence. Both were jailed awaiting trial but the trial never came. The Crown prosecutors

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<sup>41</sup> See Waitangi Tribunal Report *The Taranaki Report Kaupapa Tuatai* WAI 143 (1996, GP Publications, Wellington), 239, and <http://norightturn.blogspot.com/2005/02/sedition-by-example-xvi-te-whiti-and.html> citing *Taranaki Herald*, November 12, 14 and 15, 1881, and

found the case was weak and reports of the meeting garbled. The Government enacted the West Coast Peace Preservation Act 1882, an Act which acquitted both men of the sedition charges, but allowed them to be detained indefinitely as the Governor thought fit. Te Whiti and Tohu were not released until 1883.<sup>42</sup>

### **Workers on strike**

- 51 In 1913, Henry (Harry) Holland (later leader of the Labour party) made a speech at a strike of waterfront workers in Wellington, in which he suggested that if violence was resorted to, and the Navals were ordered to shoot, they should remember where their class interests lay and point their guns accordingly. He continued:<sup>43</sup>

The railway men should not carry free labourers. Let the trains rot and rust. The strike was not made by the working classes, but by the master classes, who are pouring their armed hundreds into Wellington, not in daylight but like thieves in the night . . . The uniformed police can deal a staggering blow by tearing off their uniforms and standing by the watersiders.

- 52 On appeal the Court of Appeal concluded that the jury would have been justified in regarding counsels of that kind as intended to promote feelings of ill will and hostility between waterside workers and employers, and in treating the case as one within the terms of section 118(1)(d) of the Crimes Act 1908,<sup>44</sup> that is, capable of being construed as expressive of seditious intention. Holland's convictions were confirmed and he served three and a half months of his 12 month prison sentence.
- 53 Another tried for sedition at this time was Edward Hunter, who spoke on behalf of the miners on strike.<sup>45</sup> An excerpt from an address allegedly included the words:

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<sup>42</sup> See Waitangi Tribunal Report *The Taranaki Report Kaupapa Tuatai* WAI 143 (1996, GP Publications, Wellington) chapter 8; G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 65-66;

<sup>43</sup> The words are taken from the Chief Justice's judgment and may not have been an accurate transcript of Holland's speech. See *Twelve Months for Sedition - Harry Holland's Speech and the Chief Justice's Remarks in Delivering Sentence* ("The Worker" Printery, Wellington, 1914)

<sup>44</sup> *R v Holland* [1914] NZLR 931. This was an appeal by case stated for the opinion of the Court of Appeal which held a plea of *autrefois acquit* was not available.

<sup>45</sup> See L Richardson, "Hunter, Edward 1885-1959" *Dictionary of New Zealand Biography* updated 7 April 2006, [www.dnzb.govt.nz/](http://www.dnzb.govt.nz/) last accessed 10 October 2006; L Richardson *Coal, Class and Community: The United Mineworkers of New Zealand 1880-1960* (Auckland University Press, 1995).



“There is no one instance from the workers’ ranks where we have caused any bloodshed. Now, if they are going to shed our blood, why should we look on at our women and children being clubbed, and offer no retaliation? Now if they want a revolution they can have it. If they force it on us they can have a revolution.”

Hunter was convicted of uttering seditious words and sentenced to 12 months probation.

### **Opposition to conscription in World War I**

- 54 During World War I, sedition charges were laid against Bob Semple, Fred Cooke, James Thorn, Peter Fraser and Tom Brindle for speeches made in relation to their opposition to conscription under the Military Service Act 1916. Semple, for example, said: “Conscription and liberty cannot live in the one country. Conscription is the negation of human liberty. It is the beginning of the servile state.” The prosecutions were brought under regulations made under the War Regulations Act 1914 and the prosecution had only to prove that the words used “had a seditious intention or tendency”. All defendants spoke in their own defence and noted that the regulations denied the exercise of the right of freedom of discussion or criticism of Parliament. All five were convicted and sentenced to 12 months imprisonment, some with hard labour.<sup>46</sup>
- 55 In 1918 the *New Zealand Herald* reported the conviction and 11 month prison sentence of the Reverend James Chapple for two counts of sedition for a speech against the war including the words: “A war is blasphemy”, and glorifying the Russian revolution. He said:<sup>47</sup>

Russia wanted war, England wanted war, the upper class in New Zealand wanted war. Never has there been such a wonderful five days [meaning the days of the Russian Revolution]. The old Russia has gone and the new Russia has come in. I hope before I die to see a similar movement in New Zealand. I hope the day will come in New Zealand when these war lords will be repudiated

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<sup>46</sup> The trials are described in *1916 Sedition Trials (The Maoriland Worker Printing and Publishing Co Ltd, Wellington, 1917)*.

<sup>47</sup> See G Chapple “Chapple, James Henry George 1865-1947” *Dictionary of New Zealand Biography* updated 7 April 2006; [www/dnzb.govt.nz/](http://www.dnzb.govt.nz/) (last accessed 3 October 2006); see too, *New Zealand Herald* 11 May 1918 “Clergyman charged”, and 18 May 1918 “Guilt of a Clergyman”.

- 56 Hubert Armstrong, a miner, (and later a Minister in the first Labour Government) was also prosecuted in 1917 for an anti-conscription speech held to excite disaffection against the government, including:

I claim the right to criticise the government of the country. I claim the right to criticise any piece of legislation enacted by the government of this country, that, to my mind is against the interests of the people of the country, whether military service, or any other Act and I am going to do so. . . Semple, Cooke and the rest of them are in gaol today because they are said to be disloyal to their country. . . I say their names in the near future will be honoured when the name of the Wards and the Masseys will be looked on as the greatest gang of political despots that ever darkened the pages of this country's history.

- 57 Armstrong was sentenced to a year's imprisonment.<sup>48</sup>

### **20<sup>th</sup> Century Maori resistance**

- 58 In 1916 there was a clash between the Tuhoe Maori followers of the prophet Rua Kenana and the police, after which the police attempted to arrest Rua. He was later prosecuted for sedition on the basis of alleged seditious words at the time of the arrest attempt. The police versions of the words varied, but the import was apparently that Rua said that the English were no good and had no King, and that he would support the Germans; and that the English had no right to New Zealand which belonged to the Maori. Rua claimed he wanted one law for both Pakeha and Maori.
- 59 The jury acquitted Rua of sedition but he was found guilty of resisting arrest, ("moral resistance" was the verdict) and sentenced to 12 months hard labour, to be followed by 18 months imprisonment, a draconian sentence by any standards for such an offence. Ten of the jury were astounded at the severity of the sentence.<sup>49</sup>

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<sup>48</sup> B Kendrick "Hubert Thomas Armstrong: Miner, Unionist, Politician" (MA Thesis, University of Auckland, 1950); McAloon, Jim. "Armstrong, Hubert Thomas 1875 – 1942". *Dictionary of New Zealand Biography*, updated 7 April 2006 [www.dnzb.govt.nz/](http://www.dnzb.govt.nz/), (last accessed 3 October 2006).

<sup>49</sup> J Binney, G Chaplin and C Wallace *Mihaia The Prophet Rua Kenana and His Community at Maungapohatu* (Auckland University Press, Auckland, 1996) especially 124 and 127.

## **Workers of the world unite**

- 60 In 1921, at the beginnings of the “Bolshevik scare”, there were a series of prosecutions for sedition of those distributing communist literature. For example, a young woman student, Hedwig Weitzel, was charged with selling “The Communist” as a seditious journal which encouraged violence. She was convicted and fined £10 and her studentship at Wellington Training College was terminated.<sup>50</sup> In 1921 Walter Nash (later Prime Minister) was charged with bringing into New Zealand a document entitled “The Communist Programme of the World Revolution” and a communist pamphlet, both of which were said to encourage violence and lawlessness. He was fined £5. He later discovered the forbidden works were held in the Parliamentary Library.<sup>51</sup>

## **Disaffection against His Majesty**

- 61 Bishop Liston was charged with sedition for inciting disaffection against His Majesty and promoting hostility between different classes of subjects when, at a St Patrick’s Day gathering in Auckland, he commemorated those who died for a free Ireland in 1916, executed, shot or murdered by “foreign troops”. He was tried and acquitted as he had recounted what was essentially historical fact.<sup>52</sup>
- 62 One of the few reported cases is *Ambrose v Hickey and Glover*.<sup>53</sup> Hickey and Glover were charged with printing and publishing a pamphlet which expressed a seditious intention contrary to the War Regulations 1915. The report does not say what the content of this seditious intention was. The magistrate dismissed the information on the ground that the pamphlets did not express a seditious intention against the New Zealand Government. It was held on appeal that there was nothing in the Crimes Act 1908 definition of “seditious intention”, or in the

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<sup>50</sup> R Openshaw “‘A Spirit of Bolshevism’: the Weitzel case of 1921 and its Impact on the New Zealand Educational System” 33 *Political Science*, 127; *Evening Post*, 18 August 1921.

<sup>51</sup> See debate in NZPD Police Offences Amendment Bill, 30 November, 1960, 1220-1229.

<sup>52</sup> R Sweetman *Bishop in the Dock: the Sedition Trial of James Liston* (Auckland University Press, 1997).

<sup>53</sup> *Ambrose v Hickey* [1922] NZLR 96.

regulations, to justify the view that the seditious intention must be expressed against the Government. The case was remitted to the magistrate.

- 63 Many of those convicted were prosecuted for criticism of particular legislation or policies of the government, or advocating an alternative form of government. They were exercising their freedom to express political criticism. Most did not advocate violence, or, if they did at least allegedly advocate violence, it was in response to the violence of government reaction (sending force against the Maori trying to protect their lands, and against the strikers, for example).

**R v Selwyn (2006)**<sup>54</sup>

- 64 Until 2006, prosecutions for sedition had been so rare during the previous half century that it appeared that the crime had fallen into disuse in New Zealand. Then in 2006, Tim Selwyn was prosecuted for sedition (among other charges), following emails calling for militant action against the Government's foreshore and seabed legislation, an attack with an axe breaking the glass of the Prime Minister's electoral office window, and the publication of two sets of pamphlets. The first set spoke of the broken glass and called upon like-minded New Zealanders to carry out similar acts; the second set of pamphlets called upon New Zealanders to carry out their own acts of civil disobedience.
- 65 Selwyn was charged with eleven other police charges unconnected to these events, relating to obtaining a document, an impersonation, a forgery of passport, six charges of use of a document; and also with four Inland Revenue Department charges of using a document. He pleaded guilty to all of these charges. He also pleaded guilty to conspiracy to commit criminal damage, and was tried by jury on two counts of publishing seditious statements that expressed a seditious intention, namely the intention to encourage lawlessness or disorder (a section 81(1) (c) type intention).

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<sup>54</sup> *R v Selwyn* (8 June 2006) CRI: 2005-004-11804, District Court Auckland.

66 In her summing up to the jury on at the sedition trial, Judge Josephine Bouchier said that the Crown had to prove the publication of the statements, and the relevant seditious intentions. She expressed this as follows:

“Did the pamphlets or flyers express a seditious intention; namely an intention to encourage lawlessness or disorder and that [the accused] knew that at the time of publication of those pamphlets or flyers...The key is whether the statement shows an intent to encourage lawlessness or disorder . . . The query is whether the accused knew that these two statements had the seditious intent [required].”

67 The Crown argued that it was clear that the accused had an intent to encourage lawlessness or disorder, and that he knew it at the time, referring to the damaged window and axe (the context around the publication of the statement). Selwyn’s defence was that he intended symbolic protest action only (the broken glass symbolising what he saw as broken promises by the Government). He maintained he had no seditious intention to encourage violence, lawlessness or disorder, and the defence argued that lawlessness and disorder is something more than civil disobedience.

68 The jury found the accused guilty of one count of publishing statements with the seditious intention charged, in relation to the pamphlets referring to the broken glass. The context may have been an important factor, as the damaged window and axe demonstrated possible acts of disobedience and these criminal acts were clearly examples of lawlessness. In other words, the criminal damage charge supported the seditious intention.

69 In her sentencing notes,<sup>55</sup> the judge noted that Mr Selwyn presented a perplexing sentencing problem to the court, in particular with reference to the sedition charge. She divided the offending into two groups – the fraud-related offending, and the conspiracy and sedition charges. She thought that “if one were to take each group of offending on its own and consider them separately . . . the matter could be dealt with by way of a community based sanction”. But looking at the totality of offending, the deterrence and denunciation aims of sentencing must be the overriding factors here. She therefore imposed a sentence of 15 months for the

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<sup>55</sup> *R v Selwyn* (18 July 2006) CRI: 2005-004-11804, District Court Auckland.

fraud related charges, and a cumulative sentence of two months for the criminal damage conspiracy and publishing a seditious statement.

- 70 It seems clear that had sedition been the only offence for which Selwyn was convicted, the judge would not have sentenced him to imprisonment.

## CONCLUSION

- 71 In all the cases considered above, it is interesting to consider what would have happened if the various defendants had been charged with incitement in conjunction with a public order offence, rather than with seditious offences. If such charges had been laid, in our view it is likely that in most of the cases the prosecution would have been unable to prove the requisite mens rea, because there was no proof of intention to create an imminent riot, or overthrow the government, or endanger the lives, safety or health of the public, or provoke violence.
- 72 A “seditious intention”, on the other hand, is a much more problematic and unclear concept. It has varied over time, and in the jurisdictions we have studied for this reference, it has often not been necessary to prove that the speech advocated or urged imminent violence for the intention to be established. This has meant that seditious offences have been misused to punish speech that is essentially criticism of the government and political speech.

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## Chapter 3: Freedom of Expression

### INTRODUCTION

- 73 In liberal democracies, freedom of expression has long been regarded as an important right deserving of significant protection from state regulation or suppression: debate about freedom of expression in such democracies is usually concerned with the scope of the freedom, rather than the issue of whether it should be protected at all.<sup>56</sup>
- 74 In New Zealand, section 14 of the New Zealand Bill of Rights Act 1990 protects freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. Like the other rights and freedoms contained in the Act, freedom of expression should be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.<sup>57</sup>
- 75 As the New Zealand Bill of Rights Act 1990 recognises, a free speech principle need not entail absolute protection for any exercise of freedom of expression. Most proponents of strong free speech guarantees concede that its exercise may properly be restricted in some circumstances, but the principle does mean that government must show strong grounds for interference.

In short, a free speech principle means that expression should often be tolerated, even when conduct which produces comparable offence or harmful effects might properly be proscribed. And that must be because speech is particularly valuable, or perhaps because we have special reason to mistrust its regulation.<sup>58</sup>

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<sup>56</sup> E Barendt, *Freedom of Speech*, (2ed, Oxford University Press, Oxford) 2005, 1.

<sup>57</sup> New Zealand Bill of Rights Act 1990, s 5.

<sup>58</sup> Barendt, *Freedom of Speech*, (2ed, Oxford University Press, Oxford) 2005, 7.

- 76 The critical question for this report is whether the seditious offences set out in the Crimes Act 1961 are a reasonable limit on freedom of expression, which can be demonstrably justified in New Zealand's free and democratic society in the 21<sup>st</sup> century. In this chapter, we examine freedom of expression, its theoretical basis, the way in which it has been interpreted and considered in courts in New Zealand and overseas, and its relationship with seditious offences here and in other jurisdictions.

#### THEORETICAL BASIS OF THE RIGHT TO FREEDOM OF EXPRESSION

- 77 Modern arguments for a right to freedom of expression owe much to John Milton's speech "Areopagitica: For the Liberty of Unlicensed Printing" in 1644.<sup>59</sup> This was a plea for freedom from pre-publication censorship for books and other writing, in response to the Licensing Order of 1643, which reinstated such censorship as had been in force under the Star Chamber. Milton's main argument was that such an order would be "primely to the discouragement of all learning and the stop of Truth, not only by disexercising and blunting our abilities in what we know already, but by hindering and cropping the discovery that might be yet further made both in religious and civil Wisdom".<sup>60</sup> To destroy a good book at its "birth" was to kill reason itself, said Milton.
- 78 As to the argument that bad books should not be allowed to circulate and defile the pure, Milton had three answers. First, he put the argument from Christianity, or freedom to choose between good or evil. He quoted from the Bible and the ancients Greeks the sayings that knowledge cannot defile, nor consequently can books, if the will and conscience be not defiled. Christians are free to choose between good and evil. If citizens are to be treated as children and protected from evil, "what wisdom can there be to choose, what continence to forbear without the knowledge of evil?"<sup>61</sup>

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<sup>59</sup> J Milton "Areopagitica: A Speech For the Liberty of Unlicensed Printing" to the Parliament of England in 1644, in J Milton *Prose Writings* (Everyman's Library, JM Dent & Sons Ltd London, 1958) 146.

<sup>60</sup> Milton "Areopagitica" above n 59, 149.

<sup>61</sup> Milton "Areopagitica" above n 59, 158.



79 Related to this argument was the necessity for people to scan error in order to confirm truth “by reading all manner of tractates and hearing all manner of reason”.<sup>62</sup> Truth and understanding were not such wares as to be monopolised and traded in by tickets and statutes and standards of licensers. “Truth is compared in Scripture to a streaming fountain; if her waters flow not in perpetual progression, they sicken into a muddy pool of conformity and tradition”.<sup>63</sup> The “plot of licensing” would lead to the incredible loss and hindrance of truth and learning. Where there is much desire to learn “there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making”.<sup>64</sup>

Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties. . . Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter.<sup>65</sup>

80 In addition, there was the problem of the fallibility of the licensers: those who regulated what writing was or was not fit to be published would need to be very wise and learned men, free from corruption or mistake, and where could such men be found to do such a job?<sup>66</sup> The State may be mistaken in their choice of licensers whose very office will allow them to pass nothing but what is “vulgarly received already”, that is, what is orthodoxy. And why stop at licensing books? “If we think to regulate Printing, thereby to rectify manners, we must regulate all recreations and pastimes, all that is delightful to man”,<sup>67</sup> including music and singing and conversation.

81 Milton made further plea, in introducing his speech to Parliament:

. . . when complaints are freely heard, deeply considered and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for.

While his speech was ignored by Parliament at the time, it has lived to inspire the English notion of civil liberty.

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<sup>62</sup> Milton “Areopagitica” above n 59, 158.

<sup>63</sup> Milton “Areopagitica” above n 59, 172.

<sup>64</sup> Milton “Areopagitica” above n 59, 177.

<sup>65</sup> Milton “Areopagitica” above n 59, 180-181.

<sup>66</sup> Milton “Areopagitica” above n 59, 160.

<sup>67</sup> Milton “Areopagitica” above n 59, 162

- 82 More recent theoretical underpinnings for freedom of expression are often derived from the nineteenth century writing of John Stuart Mill, in particular a passage from his essay, *On Liberty*<sup>68</sup>

[t]he only purpose for which power can be rightfully exercised over any member of a civilised community against his will, is to prevent harm to others...The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

- 83 Mill summarised the grounds upon which he argued for freedom of opinion and expression as follows:<sup>69</sup>

First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.

Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.

Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational ground.

Fourthly, the meaning of the doctrine itself will be in danger of being lost or enfeebled...becoming a mere formal profession...[if not contested and challenged]

- 84 According to Mill, human beings are fallible and no one doctrine should be incontestable. However, the liberty of an individual to act or express opinions is limited. In his view: "...opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer".<sup>70</sup>

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<sup>68</sup> JS Mill "On Liberty" in *Three Essays* (OUP, Oxford, first published as a World's Classic's paperback in 1991) 14, 21.

<sup>69</sup> Mill, above n 68, 59.

<sup>70</sup> Mill, above n 68, 62.

85 In the twentieth century, the American philosopher Alexander Meiklejohn wrote about freedom of speech in relation to the First Amendment of the United States Constitution. The First Amendment provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging freedom of speech or of the press; or the right of people peaceably to assemble, and petition the Government for a redress of grievances.

86 Broadly speaking, there are two main interpretations of the First Amendment; the first that it is “absolute”; the second is that the rights thereby guaranteed are subject to other rights, and need to be balanced against those other rights and freedoms. In this view, that of Professor Chafee amongst many others,<sup>71</sup> some laws abridging those freedoms may be justified. Meiklejohn was an absolutist. But it is important to note what he (and others) meant by “absolute” in the context of the First Amendment, and also how he interpreted the Founding Fathers’ phrase “freedom of speech”.

87 According to Meiklejohn the “absolutist” interpretation does not give “freedom of speech” the meaning of “an unlimited license to talk”.<sup>72</sup> This would be entirely inconsistent with constitutional prohibitions on libel, slander, perjury, false advertising, complicity by encouragement, and counselling murder, for example. Speech may be regulated, just as lighting a fire or shooting a gun may be regulated. Meiklejohn maintains that the freedom which the First Amendment protects is the freedom of self-government. This is because the constitutional authority to govern the people of the United States belongs to the people themselves.<sup>73</sup> The people have established subordinate agencies, such as the legislature and judiciary, and delegated specific and limited powers to these

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<sup>71</sup> Z Chafee *Free Speech in the United States* (Harvard University Press, Cambridge, Mass, 1942).

<sup>72</sup> A Meiklejohn “The First Amendment is an Absolute” [1961] *Supreme Court Review* 245, 249. See A Meiklejohn *Free Speech and its relation to Self-Government* (Harper & Bros , New York, 1948) for Professor Meiklejohn’s earlier development of his thesis, the paradox that although the First Amendment means what it says, some speech may be regulated, and his consequent disagreement with the Supreme Court’s interpretation of the principle of free speech at that date (the “clear and present danger” test in *Abrams* (1919) 250 US 616).

<sup>73</sup> Compare the Court’s examination of the First Amendment in *New York Times v Sullivan* 376 US 254 (1964) concluding that the meaning was revealed in Madison’s statement that

agencies. The revolutionary intent of the First Amendment is to deny to these agencies authority to abridge the freedom of the electoral power of the people.<sup>74</sup> The Amendment is protecting the activities of thought and communication by which the people govern, so it is concerned not with a private right, but with a public power and civic responsibility.

- 88 Thus all public discussions of public issues and spreading of information and opinions of those issues must have freedom, unabridged by the legislature and the courts, as also must peaceful assemblies, arts and literature, science, philosophy and education, in part to educate people for self-government.<sup>75</sup> But the uttering of words such as “falsely shouting fire in a theatre” can be forbidden by legislation. Such a person is not exercising a public right of to express ideas. For Meiklejohn:<sup>76</sup>

Words which incite men to crime are themselves criminal and must be dealt with as such. Seditious and treasonous may be expressed by speech or writing. And, in those cases, decisive repressive action by the government is imperative for the sake of the general welfare.

### **The main theoretical arguments for freedom of expression**

- 89 In the 21st century, in *Freedom of Speech*,<sup>77</sup> Professor Barendt identifies four arguments commonly put forward to justify the principle of free speech:

- arguments concerned with the importance of discovering truth;
- the argument from citizen participation in a democracy;
- free speech as an aspect of each individual’s right to self-development;
- suspicion of government.

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“the censorial power is in the people over the Government, and not in the Government over the people.” See 4 Annals of Congress p 934 (1794).

<sup>74</sup> A Meiklejohn, (1961) above n 72, 252-254.

<sup>75</sup> A Meiklejohn, (1961) above n 72, 257.

<sup>76</sup> Above n 72, A Meiklejohn *Free Speech and its relation to Self-Government*, 18.

<sup>77</sup> E Barendt, *Freedom of Speech*, (2ed, Oxford University Press, Oxford, 2005), 6.

*Arguments concerned with the importance of discovering truth.*

- 90 This argument, based on the importance of open discussion to the discovery of truth, is an important part of Milton's and Mill's arguments.<sup>78</sup> It has been challenged by thinkers such as Professor Shauer<sup>79</sup> partly on grounds that there is no evidence to show that people generally have the capacity to separate truth from error, and that circulating some unsound ideas (such as the rightness of slavery or the inferiority of some races) can be harmful.<sup>80</sup> However, Shauer does not reject the argument from truth entirely; he supports its focus on the fallibility of people, including governments, to know what is true and to suppress what is false.<sup>81</sup> Thus there needs to be freedom to express opinions and debate those which are contrary to status quo doctrines and policies.

*The argument from citizen participation in a democracy*

- 91 This argument is that freedom of expression is critical to the working of a democratic constitution: the primary purpose of free speech is to protect the right of citizens to understand political issues in order to participate effectively in the working of democracy.<sup>82</sup> This is essentially Meiklejohn's view. For some commentators, the argument from democracy only works if the ideal of equal participation in the process of government is more fundamental than majority rule.<sup>83</sup> Equal participation would demand free access to information and freedom of expression, but like the argument from truth it rests on an assumption of competence and rationality of the people. The majority and its agents may not be wise and prudent as Milton pointed out. It is, for Shauer, this fallibility of

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<sup>78</sup> The argument from truth has some similarities with the "marketplace of ideas" argument, after OW Holmes J's famous dissent in *Abrams v US* (1919) 250 US 616.

<sup>79</sup> F Schauer *Free Speech: a philosophical enquiry* (Cambridge University Press, Cambridge, 1982).

<sup>80</sup> F Schauer *Free Speech: a philosophical enquiry* (Cambridge University Press, Cambridge, 1982) 27-28 and see ch 2 generally. Thus free discussion does not necessarily lead to truth: see Barendt, above n 77, 9 – but Mill would not go so far as to claim this was the case.

<sup>81</sup> Shauer, above n 80, 33-34.

<sup>82</sup> E Barendt, *Freedom of Speech*, above n 77, 18.

<sup>83</sup> See Barendt, above n 77, 19-20; and also Shauer, above n 80, 40-42. Shauer argues, with others, that if the people are sovereign there is no reason why they would not entrust their agents with power to restrict freedom of speech. But representatives of majorities can be as tyrannical to minorities as despots are to non-conformists; constitutionally guaranteed freedom of speech should to some extent safeguard minorities and dissenters.

governments, together with the democratic process, that provide reasons for treating freedom to discuss public issues and criticise government officials as a special principle. This position is in the end similar to that of Meiklejohn.

*Free-speech as an aspect of each individual's right to self-development*

- 92 This argument put forward by Professor Scanlon, is based on the natural rights premise that mental self-fulfilment is a primary good and that the communication of ideas develops the intellect and reasoning faculties.<sup>84</sup> Related to a right to mental development is a right to autonomy. The rational individual's right in the final resort to decide for him or herself, and to make as informed decisions as possible, requires freedom of expression particularly from the receiver's point of view.<sup>85</sup> This is related to Milton's argument from Christianity; there can be no wisdom or virtue in choosing good if all that is deemed evil is suppressed.

*Suspicion of government*

- 93 Shauer stresses this argument for free speech. "Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders."<sup>86</sup> In this view, the Press, for example, has an important role to play as part of the checks and balances upon government, as do public meetings and petitions, demonstrations and marches against public policy, and Hyde Park corner speakers.

**Conclusion**

- 94 There are other arguments in support of a free speech principle, one being the "catharsis" or "safety valve" argument that assumes that freedom to challenge

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<sup>84</sup> T Scanlon "Freedom of Expression and Categories of Expression" (1979) 40 U Pittsburg L Rev, 519.

<sup>85</sup> See R Amdur "Scanlon on Freedom of Expression" 9 Philosophy and Public Affairs (1980) 287, cited in Shauer, above n 80, 72.

<sup>86</sup> Shauer, above n 80, 86. Barendt has criticised this argument as a foundation for free speech.

authority will defuse violence and that violent rebellions and civil disobedience are often the result of frustration.<sup>87</sup>

- 95 We support the reasoning that the democratic process and human fallibility, including that of governments, together with the search for truth, provide reasons for treating freedom to discuss and criticise public issues and government officials as a special principle. In our view that principle is not absolute; but it should be a preferred freedom as it goes to the heart of the democratic process.
- 96 Freedom of speech or expression in relation to sedition has been discussed by courts in all jurisdictions which we are covering, most particularly in the United States, and in some cases by their Law Commissions. We now briefly summarise these discussions, focussing especially on United States jurisprudence.

## JUDICIAL AND OTHER VIEWS OF FREEDOM OF EXPRESSION

### **United States courts and freedom of speech**

- 97 Freedom of speech law is much more complex in the United States than it is in other countries, partly because that the Supreme Court has formulated a number of distinctive free speech doctrines and principles over the years, but also in part simply because the United States courts have grappled with free speech issues for much longer than other courts.<sup>88</sup>
- 98 The decision in *New York Times v Sullivan*,<sup>89</sup> has been described as perhaps the most significant ruling of the Supreme Court since the last war on the scope of the First Amendment.<sup>90</sup> The case involved a civil suit for an allegedly defamatory attack on the conduct of a public official, an elected Commissioner of the City of Montgomery, Alabama. The trial judge submitted the case to the jury with the instruction that the statements in the advertisement were libellous per se. The jury awarded Sullivan damages of \$500,000.

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<sup>87</sup> Shauer, above n 80, 79-80.

<sup>88</sup> E Barendt *Freedom of Speech*, above n 77, 55.

<sup>89</sup> *New York Times v Sullivan* 376 US 254 (1964).

<sup>90</sup> E Barendt *Freedom of Speech*, above n 77, 154.

99 The Supreme Court reversed the judgment, and held that the rule of law applied by the Alabama courts was constitutionally deficient for failure to provide the safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments. In his decision, Justice Brennan stated:

...we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials...<sup>91</sup>

100 Delivering the opinion of the Court, Justice Brennan discussed the history of the Sedition Act of 1798, noting that this statute first crystallised a national awareness of the central meaning of the First Amendment. Justice Brennan laid particular emphasis on Madison's view in the Virginia Resolutions of 1798:<sup>92</sup>

[Madison's] premise was that the Constitution created a form of government under which "The people not the government possess the absolute sovereignty". . . . This form of government was altogether different from the British form under which the Crown was sovereign and the people were subjects. . . Madison had said: "If we avert to the nature of the republican government, we shall find that the censorial power is in the people over the government and not in the Government over the people." 4 Annals of Congress p 934 (1794) . . . The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.

101 Justice Brennan concluded that the constitutional guarantees of the First and Fourteenth Amendments required a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with actual malice, that is, knowledge that it was false, or with reckless disregard of whether it was false or not.<sup>93</sup>

102 The decision in *New York v Sullivan* has been described as putting the theory of the freedom of speech clause "right side up" for the first time": identifying the central meaning of the First Amendment – a core of protection of speech without which democracy cannot function.

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<sup>91</sup> *New York Times v Sullivan*, above n 89, 270.

<sup>92</sup> *New York Times v Sullivan* above n 89, 274-275.

<sup>93</sup> *New York Times v Sullivan* 376 US 254, 279 – 280 (1964).



This is not the whole meaning of the Amendment. There are other freedoms protected by it. But at the center there is no doubt what speech is being protected and no doubt why it is being protected...[The] central meaning of the Amendment is that seditious libel cannot be made the subject of government sanction.<sup>94</sup>

- 103 It has been suggested that the experience of the Supreme Court in dealing with successive free speech controversies over the years, such as those presented by the McCarthy era, the Civil Rights movement and the anti-Vietnam protests have led it to fashion a structure for the analysis of First Amendment disputes which does not require the court simply to balance the competing claims of government regulation against the intrinsic value of the speech in question. Instead the Court considers the manner in which the state has set about the task of free speech regulation and whether it is seeking to intervene on the basis of the content of the speech, and more particularly, on the viewpoint expressed by the speaker. If so, the regulation is subject to the most searching judicial scrutiny and will almost inevitably fail to pass the test of constitutionality.<sup>95</sup>
- 104 The Supreme Court balances free speech and other important rights and interests, such as public order and decency, or national security, and where these interests are found to be compelling, or in some cases substantial, they must justify restriction on the exercise of speech rights, as least if the restriction has been narrowly formulated, so it does not restrict more speech than the compelling interest warrants.<sup>96</sup> There is a strong presumption in favour of free speech, and the Court has developed a number of principles designed to give speech more protection than it would enjoy if courts treated it and the other competing interests as factors of equal weight or importance in the balancing process.
- 105 One such test is the clear and present danger test, which was first formulated by the Supreme Court in *Schenk v United States*,<sup>97</sup> where Mr Justice Holmes had this to say on the subject of the First Amendment:

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<sup>94</sup> See H Kalven Jnr "The New York Times case: a note on the central meaning of the First Amendment" [1964] Supreme Court Review 191.

<sup>95</sup> I Hare "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred" [2006] PL Autumn 521, 531.

<sup>96</sup> E Barendt *Freedom of Speech* (Oxford University Press, Oxford 2005) 50.

<sup>97</sup> *Schenk v US* 249 US 47 (1919).

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done... The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.

106 In *Abrams v United States*,<sup>98</sup> the majority of the Supreme Court upheld the defendants's convictions for conspiring to violate provisions of the Espionage Act in relation to the publication and distribution of pamphlets denouncing President Wilson as a hypocrite and a coward for sending troops into Russia, and urging support for the Russian revolutionists. Mr Justice Holmes and Mr Justice Brandeis dissented from the majority's application of the "clear and present danger" test to the facts. In his opinion, Justice Holmes noted:

... as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned. Congress certainly cannot forbid all effort to change the mind of the country...

... when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment... While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

107 The dissent in *Abrams* is identified with the emergence of clear and present danger as a highly speech protective doctrine. However, in several post-*Abrams* decisions, the Court upheld further convictions under the Espionage Act, over the

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<sup>98</sup> *Abrams v US* 250 US 616 (1919).

dissents of Justices Holmes and Brandeis.<sup>99</sup> The test has also been described as being “rich in ambiguity”,<sup>100</sup> and has been criticised by Alexander Meiklejohn for its abject surrender of freedom of speech.<sup>101</sup>

- 108 In 1969, in *Brandenburg v Ohio*,<sup>102</sup> the Supreme Court clarified and amplified the “clear and present danger” test. Justice Douglas discussed the line of World War I cases that “put the gloss of ‘clear and present danger’ on the First Amendment”, noting how easily the test could be manipulated, and that great misgivings were aroused by the way in which the test had been applied.<sup>103</sup> He referred to the example usually given by those who would restrict speech, of a person who falsely shouts “fire” in a crowded theatre, and noted:

This is, however, a classic case where speech is brigaded with action...They are indeed inseparable and a prosecution can be launched for the overt acts actually caused. Apart from rare instances of that kind, speech is, I think, immune from prosecution.

- 109 The decision in *Brandenburg v Ohio* laid down a test of imminence: prosecution for subversive advocacy would be constitutional only if the advocacy was directed to inciting or producing imminent lawless action and was likely to incite or produce such action. The decision has been interpreted as requiring three things:<sup>104</sup>

- (a) Express advocacy of law violation;
- (b) The advocacy must call for immediate law violation; and
- (c) The immediate law violation must be likely to occur.

The Court has adhered to *Brandenburg v Ohio* in subsequent decisions.

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<sup>99</sup> *Pierce v United States*, 252 US 239 (1920), *Schaefer v United States* 251 US 466.

<sup>100</sup> H Kalven Jr, *The Negro and the 1st Amendment*, University of Chicago Press, Chicago, 1966, 12.

<sup>101</sup> A Meiklejohn, *Free Speech and its relation to Self-Government*, above n 76.

<sup>102</sup> *Brandenburg v Ohio*, 395 US 444.

<sup>103</sup> *Brandenburg v Ohio*, above n 102, 452.

<sup>104</sup> Schwartz, *Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?* 1994 Sup.Ct. Rev. 209, 240 – 241.

## New Zealand's interpretation of "freedom of expression"

110 Section 14 of the New Zealand Bill of Rights Act 1990 guarantees freedom of expression:

Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

111 The right is broadly worded, "as wide as human thought and imagination" as the Court of Appeal said in *Moonen v Film and Literature Board of Review*.<sup>105</sup> However there are limits on the right, provided they can be demonstrably justified in a free and democratic society.<sup>106</sup> Perjury, bribery and fraud would be obvious examples of offences that can be justified despite their infringement on freedom of expression.

112 In a civil context, a defence of "political expression" has been raised in support of freedom of expression. In *Lange v Atkinson and Australian Consolidated Press NZ Ltd*<sup>107</sup> the plaintiff sued the writer and publisher of an article that criticised his performance as Prime Minister of New Zealand, and the defendants pleaded "political expression" as a defence. In the High Court, Elias J said that a form of qualified privilege attached to political discussion communicated to the general public. In Her Honour's view, "[d]iscussion which bears upon the function of electors in a representative democracy by developing and encouraging views upon government" should be protected. Elias J emphasised the importance of political speech and the exchange of information and opinions about the welfare of society. The Court of Appeal upheld this decision. On appeal to the Privy Council the case was remitted for reconsideration to the Court of Appeal which upheld its earlier decision. The Court emphasised that the application of the political discussion privilege depends on such things as "the identity of the publisher, the context in which the publication occurs, and the likely audience, as well as the actual content of the information".

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<sup>105</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

<sup>106</sup> New Zealand Bill of Rights Act 1990, s 5. See for example *Solicitor General v Radio NZ* [1994] 1 NZLR 48.

<sup>107</sup> *Lange v Atkinson and Australian Consolidated Press NZ Ltd* [1997] 2 NZLR 22, 46 (HC); [1998] 3 NZLR 424 (CA).

113 In 1968, Sir Kenneth Keith identified a number of interests which have to be recognised and, if need be, reconciled with one another, in the area of protest:<sup>108</sup>

- (a) The importance in a democracy of free and potentially effective political debate;
- (b) The maintenance of the political system of the state, and public order;
- (c) The concern of individuals for privacy and for their reputations;
- (d) The interest of the group: should the law protect racial and other groups from verbal assaults, or should it intervene in such cases only to protect the public order?
- (e) The interest in the use of public places for other purposes (eg passage, reverence for certain monuments);
- (f) The need for certainty in the criminal law: vague laws are likely to have a chilling effect on discussion.

114 Sir Kenneth cited the law of sedition as the prime example of an attempt to control by law expressions of political ideas and their consequences. He suggested that in time of political difficulties, nearly all vigorous criticism of government might be viewed as resulting from an intention to bring the government into hatred or contempt. Concern about such a potentially wide-ranging restraint on political and other public debate had led courts in a number of jurisdictions to require an extra, comparatively objective and liberalising element of an intention to incite violence or public disorder, allowing intervention only to prevent violence, and not to prevent political and other social debate.

115 But Sir Kenneth considered it very doubtful that the law in New Zealand required an intent to incite violence as an essential, additional element of seditious intention, and concluded that our sedition law is potentially very restrictive of free political debate, going further than is necessary to protect the state and public

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<sup>108</sup> KJ Keith, "The Right to Protest" in *Essays on Human Rights* (Sweet & Maxwell NZ Ltd, Wellington, 1968) 49, 50-51.

order, and imposing greater restraints than other common law jurisdictions.<sup>109</sup> He noted that in *Wallace-Johnson v R*,<sup>110</sup> the Privy Council had discussed a Gold Coast decision based on similar sedition provisions to those in the New Zealand statute, and held that incitement to violence was not a necessary ingredient of the offence.

- 116 Sir Kenneth considered the inclusion in the definition of seditious intention of the intent to incite, procure or encourage violence, lawlessness or disorder (section 81(1)(c)). He noted that this provision is potentially very wide, and gives two possible examples where its use would be questionable: a Union leader who calls for a stoppage to protest the Arbitration Court's decision, and a group of parents who suggest that children stay away from a particular school because it is unsafe or insanitary. Both are suggesting violation of the law. They might well also be "encouraging lawlessness". Should they be guilty of the most serious offence of sedition and be liable to two years imprisonment?<sup>111</sup>

### **Canada: freedom of expression and sedition**

- 117 The Law Reform Commission of Canada in 1986 saw the offences of sedition as outdated and unprincipled. In its view:

it is essential to the health of a parliamentary democracy such as Canada that citizens have the right to criticize, debate and discuss political economic and social matters in the freest possible manner.<sup>112</sup>

- 118 This has been recognised by sections 2 and 3 of the Canadian Charter of Rights and Freedoms, and also by the Supreme Court in such cases as *Boucher v R*.<sup>113</sup> Rand J stated, echoing Milton and Mills:

Freedom in thought and speech and disagreement in ideas and belief, 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

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<sup>109</sup> KJ Keith, *The Right to Protest*, above n 108, 57.

<sup>110</sup> *Wallace-Johnson v R* [1940] AC 231.

<sup>111</sup> KJ Keith, *The Right to Protest*, above n 108, 57.

<sup>112</sup> Law Reform Commission of Canada, *Crimes Against the State*, Working Paper 49, 1986, 35.

<sup>113</sup> *Boucher v R* [1951] SCR 265, 288 (the first trial).

the latter with illegality...Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a moral sin; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in clarification of thought and, as we believe, in the search for the constitution and truth of things generally.

- 119 The Canadian Supreme Court has said that freedom of expression includes any activity or communication that conveys a meaning so long as it does so in a non-violent manner.<sup>114</sup> But nonetheless the Court has said that the degree of protection may vary according to context.<sup>115</sup> Extreme speech may be protected for Millian reasons, as Dickson CJ said in *Keegstra*:<sup>116</sup> “it is partly through clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive”. However, in that case, the Supreme Court upheld the constitutionality of the proscription of racist hate speech, finding that such speech plays no part in the discovery of truth, its message injures self-fulfilment of the people targeted, and it deters them from participating in the democratic process.
- 120 The Law Reform Commission noted that the Supreme Court in *Boucher* had tried to deal with the inconsistency between freedom of expression and the seditious offences by applying the narrow common law view of seditious intention. The Court held that there must be an intention to incite violence or resistance or defiance, for the purpose of disturbing constituted authority.<sup>117</sup> However, that meant in the Commission’s view, that there was no longer a need for a separate offence of sedition, because the only conduct that would be proscribed could just as well be dealt with an incitement (to conspiracy, contempt of court, hate propaganda and so on).
- 121 Hence in the view of both the Canadian Supreme Court and the Law Reform Commission, there should be offences of inciting violence or resistance against

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<sup>114</sup> *Irwin Toy v Quebec (AG)* [1989] 1 SCR 927 cited in P Rishworth, G Hustcroft, S Optican and R Mahoney *The New Zealand Bill of Rights Act* (Oxford University Press, Victoria, 2003) 312.

<sup>115</sup> *R v Lucas* [1998] 1 SCR 439, 459.

<sup>116</sup> *R v Keegstra* [1990] 3 SCR 697, 765-766 per Dickson CJ. McLachlin J dissented vigorously.

<sup>117</sup> *Boucher v R* [1951] 2 DLR 369, 389.

lawful authority: that much of an infringement upon freedom of expression is justified in a democratic community. The Canadian Law Reform Commission considered that such offences were already covered by incitement to commit public order type offences.

### **England: views of the government, the courts and the Law Commission**

- 122 Freedom of speech has been viewed as a “quintessential British liberty”<sup>118</sup> enjoyed at common law and now affirmed in the European Convention of Human Rights and Fundamental Freedoms, and protected to some extent in the Human Rights Act 1998, sections 12-13. The courts have noted that the freedom is subject to clearly defined exceptions laid down by common law or statute,<sup>119</sup> but they have defined the freedom widely.<sup>120</sup> Lord Steyn reviewed the objectives of free speech in *R v Home Secretary ex p Simms*<sup>121</sup> stating that it promotes self-fulfilment of individuals, enables the discovery of truth in the marketplace and provides the lifeblood of a democracy, similarly to the United States jurisprudence. Lord Hoffmann has stated:<sup>122</sup>

Freedom [of speech] means the right to [say] things which the government and judges, however well-motivated, think should not be [said]. It means the right to say things which ‘right-thinking people’ regard as dangerous or irresponsible.

- 123 The European Court of Human Rights in *Handyside v United Kingdom*<sup>123</sup> said, on the first of many occasions:

Article 10(1) is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.

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<sup>118</sup> D I Shapiro and O Sands “Free Speech, Hate Speech and Incitement” (2006) Solicitor’s Journal, 238.

<sup>119</sup> *R v Central Independent Television plc* [1994] 3 All ER 641.

<sup>120</sup> *Cozens v Brutus* [1973] AC 854 cited in Barendt *Freedom of Speech*, above n 77, 41. Lord Reid construed the word “insulting” in the public order legislation not to cover a demonstration which offended spectators but did not abuse them personally.

<sup>121</sup> *R v Home Secretary ex p Simms* [2000] 2 AC 115, HL

<sup>122</sup> Above n 119.

<sup>123</sup> *Handyside v United Kingdom*, Eur Ct HR Series A, No 24, Judgment of 7 December 1976, 1 EHRR 737, para 49.



124 The Prime Minister, on the other hand, has said in Parliament that free speech exists in England, but had to be “exercised responsibly”.<sup>124</sup> This would mean an extreme restriction on freedom of speech. There are recent legislative moves to further limit freedom of speech, such as the Racial and Religious Hatred Act 2005, which makes it an offence to use threatening words or display threatening behaviour intended to stir up religious hatred. The Terrorism Act 2006 makes it an offence to encourage terrorism by statements intended to induce acts of terrorism, directly or indirectly, intentionally or recklessly, including glorifying the commission or preparation of such acts. Both Acts have been criticised by commentators.<sup>125</sup>

125 However, the courts’ approach is rather more liberal. As Lord Hoffmann has said in *A v Secretary of State for the Home Department*, (in discussing laws providing for detention without charge under anti-terrorism legislation):<sup>126</sup>

The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.

126 Seditious prosecutions at common law have been rare in the twentieth century and have been curtailed by the courts’ requirement of an intention to incite violence or physical force in a public matter connected with the State. It was stated at the beginning of the twentieth century that such intention is to be derived from both the language used and the context in which the words are used.<sup>127</sup> This is arguably the same test as that in the US case of *Brandenburg v Ohio*,<sup>128</sup> being in both cases an amalgamation of that of Judge Learned Hand<sup>129</sup> and Justice Oliver Wendell Holmes.<sup>130</sup> Freedom of expression can be fettered, but only to the extent that the

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<sup>124</sup> D I Shapiro and O Sands “Free Speech, Hate Speech and Incitement” above n 118.

<sup>125</sup> I Hare, *Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred* [2006] P.L. Autumn 521, 528-538.

<sup>126</sup> *A v Secretary of State for the Home Department* [2004] UKHL 56, para 97.

<sup>127</sup> *R v Aldred* (1909) 22 Cox CC 1. See JE Boasberg “Seditious Libel v Incitement to Mutiny: Britain Teaches Hand and Holmes a Lesson (1990) 10 Oxf Jnl Legal Studies 106, arguing that *Aldred* anticipated the amalgam of the Hand and Holmes tests.

<sup>128</sup> *Brandenburg v Ohio* 395 US 444 (1969).

<sup>129</sup> *Masses Publishing Co v Patten* 244 F 535 (SDNY 1917) focussing on the words themselves as “triggers of action”.

<sup>130</sup> *Schenck v US* 249 US 47 (1919) and *Abrams v US* 250 US 616 (1919) focussing on the circumstances surrounding the words to see if there is a “clear and present danger”.

language used incites violence in the particular context and circumstances of the case. More recently, the English courts have approved the Canadian decision in *Boucher*, and confirmed the common law view that an intention to incite violence or physical force against lawfully constituted authority is the mens rea element of seditious offences.

- 127 The English Law Commission saw no need for the seditious offences for similar reasons as the Canadian Law Reform Commission (that incitement or conspiracy to commit other offences would suffice), not specifically for reasons to do with infringement of freedom of expression. However, the Irish Law Reform Commission concluded that sedition should be abolished in part because it was strongly arguable that it was inconsistent with “rightful liberty of expression, including criticism of Government policy”.
- 128 As in Canada therefore, the English courts are generally protective of freedom of expression, and would limit sedition by narrowing its ambit to cases where there is an intention to incite violence against lawfully constituted authority. If that intention has to be proved by both the language used and the circumstances and context, free expression would trump in most prosecutions for sedition.

### **Freedom of expression in Australia**

- 129 There are no formal legislative guarantees of freedom of expression in Australia, except in the Australian Capital Territory and Victoria, the only states which currently possess bills of rights.<sup>131</sup> However, recent High Court cases, *Nationwide News Pty Ltd v Wills*,<sup>132</sup> *Australian Capital Television Pty Ltd v Commonwealth*<sup>133</sup> and *Lange v Australian Broadcasting Corporation*<sup>134</sup> have held that the Australian Constitution embodies a strong implied freedom of political communication.

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<sup>131</sup> Australian Law Reform Commission *Fighting Words Review of Sedition Laws* R 104 July 2006, 139.

<sup>132</sup> *Nationwide New Pty Ltd v Wills* (1992) 177 CLR 1 (HCA): a right to freedom of expression could be implied from the Constitution’s description of Australia as a democracy

<sup>133</sup> *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. Both cases are discussed in T Blackshield and G Williams *Australian Constitutional Law and Theory* (3<sup>d</sup> ed Federation Press, Sydney, 2002) 1158-1179, and 1215-1228.

130 The *Nationwide News* case concerned a prosecution under s 299(1)(d)(ii) of the Industrial Relations Act 1988 (Cth), which provided that: “A person shall not...by writing or speech use words calculated...to bring a member of the Industrial Relations Commission or the Commission into disrepute”. The Court held that the section was invalid as infringing an implied freedom of political discussion. Brennan J emphasised an argument from democracy:

To sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential: it would be a parody of democracy to confer on the people a power to choose their Parliament but to deny the freedom of public discussion from which the people derive their political judgments.

131 In the *Australian Capital Television* case the High Court invalidated amendments to the Commonwealth broadcasting legislation which had prohibited election campaign advertising in return for allocation of free time, largely for established political parties. The Court held the scheme was discriminatory against new parties, thus inhibiting free discussion of political issues.

132 In *Lange v Australian Broadcasting Corporation* the High Court confirmed that the Constitution must be read as impliedly protecting political discourse, although the Court noted that the implied freedom does not create any personal free speech rights; rather it curtails legislative and executive power. The rationale for the implied freedom was, in this case, more closely tied to the text of the Constitution. Sections 7 and 24 require the free election of representatives directly chosen by the people, in turn requiring freedom of political discussion. The test for constitutionality was:<sup>135</sup>

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people?

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<sup>134</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

<sup>135</sup> *Lange v ABC*, above n 134, 567.

The Court also confirmed that a law burdening the implied freedom would be upheld if it was reasonable to serve a legitimate aim, such as national security or public order.

- 133 In its recent review of Australia's sedition laws, the Australian Law Reform Commission (ALRC) noted that sedition laws historically have been used in Australia, and elsewhere, in a manner that did not pay due regard to the modern conception of freedom of expression. The review is discussed in more detail in Chapter 4.
- 134 The ALRC noted strong concerns voiced since November 2005 about the impact of the new sedition provisions on freedom of expression, including a concern that these offences were unconstitutional. In the ALRC's view, to show the provisions were unconstitutional, it would be necessary to show more than that the provision burdens a broad notion of freedom of political communication: it would be necessary to show that it infringes the right to engage in public criticism of the government or government action.
- 135 The ALRC considers that the sedition provisions cannot reasonably be construed in this way. On the contrary the offences in sections 80.2(1), (3) and (5) (see chapter 4) purport to criminalise the urging of conduct by force or violence, not mere criticism of the government.<sup>136</sup> While the sedition offences involve some dilution of an absolute notion of freedom of expression, in the ALRC's view the new provisions are not an unwarranted or unlawful burden on freedom of expression.<sup>137</sup> But it considers that the provisions in sections 80.2(7) and (8) do not draw a clear enough distinction between legitimate dissent and expression whose purpose or effect is to cause the use of force or violence within the state, and has recommended the repeal of these provisions.<sup>138</sup>

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<sup>136</sup> ALRC *Review of Sedition Laws* Discussion Paper 71, May 2006, 118; ALRC *Fighting Words* above n 131, 143. *Coleman v Power* (2004) 220 CLR 1, referring to the US line of authority that the First Amendment does not protect expression that has the purpose of inciting violence.

<sup>137</sup> ALRC *Fighting Words* above n 131, 157 – 159.

<sup>138</sup> ALRC *Review of Sedition Laws* Discussion Paper 71, May 2006, 131. ALRC *Fighting Words*, report 104, above n 139, List of Recommendations 11-1.

- 136 Submissions to the ALRC indicated concern that there is a risk the offences will be applied unfairly, discriminating against groups or races which are already marginalised, as has happened historically.<sup>139</sup> There was a particular concern that anti-terrorist provisions such as these could be targeted against Muslim communities.
- 137 The ALRC was of the view that the legislation itself was not discriminatory, but was aware that sedition has been used to criminalise political dissent in a discriminatory way and in a manner not compatible with notions of free speech in a liberal democracy. The ALRC has therefore proposed both removing the term “sedition” to sever the tie with the old jurisprudence and abuse of the seditious offences, and also combating possible unfair operation by education and related strategies.
- 138 The ALRC noted that the fact that a jurisdiction has a bill of rights does not prevent it from introducing robust anti-terrorist legislation, as shown by legislative amendments in the United States and the United Kingdom. Those governments were able to reconcile freedom of expression guarantees with quite invasive responses to terrorist speech.
- 139 A final concern of submitters was that there may not be adequate protection to enable media to report or comment on matters of public interest; or that the provisions may “chill” artistic free expression; and that they have the potential to restrict expression of views that ought to be allowed in a liberal democracy. To address these concerns the ALRC proposes that for the urging violence offences in section 80.2(1(3) and (5), the prosecution must prove that the person intended that the force or violence will occur. Proof of this intention would involve the trier of fact looking at the context, particularly whether the statement was made in the course of an artistic work or academic debate, or for a report or commentary about a matter of public interest.<sup>140</sup>

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<sup>139</sup> ALRC *Fighting Words* above n 131, 148.

<sup>140</sup> ALRC Discussion Paper, above n 138, 136. ALRC *Fighting Words*, report 104, above n 139, List of Recommendations, 9-2, 9-5 and 10-2(a).

## LIMITS ON FREEDOM OF EXPRESSION

- 140 The courts and law reform bodies discussed in this chapter generally support a strong principle of freedom of expression as a preferred right which may only be abridged in certain limited circumstances. However, as noted above, freedom of expression is not an absolute: it may be subject to reasonable and demonstrably justified limits. Freedom of expression may conflict with other rights, and the law seeks to balance or reconcile the competing interests. For example, the law of defamation establishes principles for balancing freedom of expression against the right to reputation.
- 141 In relation to seditious offences, the most relevant limits on freedom of expression are those which are justifiable in the interests of peace and public order. Public order law can be seen as protecting the State, the Constitution, the Government and society against speech or writings urging force or violence against lawfully constituted authority (thus endangering national security or the “fabric of society”). In the Australian sedition case of *Sharkey*<sup>141</sup> Dixon J said that the Commonwealth should have power to impose measures for the suppression of incitements to the actual use of violence, for the purpose of resisting the authority of the Commonwealth, or effecting a revolution.

### **Domestic Public Order Offences**

- 142 New Zealand has a variety of domestic public order offences which may operate to limit freedom of expression in some cases, usually in conjunction with the ancillary offences of incitement or conspiracy. We consider those offences in more detail in chapter 5, but briefly, the relevant offences include:

- (a) Treason;
- (b) Unlawful assembly;
- (c) Riot;

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<sup>141</sup> *Sharkey* (1949) 79 CLR 110, 116.

- (d) Criminal nuisance;
- (e) Threatening to commit various offences.

### **International obligations**

143 New Zealand has a number of obligations under international law, not only to respect human rights such as freedom of expression, but also more recent obligations to counter terrorism with its threats to national security and the infrastructure, economy and indeed the existence of the state.

144 Decisions of the United Nations Security Council are binding on members of the United Nations.<sup>142</sup> There are three key resolutions which are relevant in the context of sedition and freedom of expression, Resolution 1372 (2001), 1456 and 1624.

145 Schedule 4 of United Nations Security Council Resolution 1372 (2001) in part declares that all States shall:

- (e) Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.

This provision is set out in New Zealand in Schedule 4(1) of the Terrorism Suppression Act 2002 (NZ).

146 United Nations Security Council Resolution 1456 states, amongst other things, that all United Nation states “must take urgent action to prevent and suppress all active and passive support of terrorism”.<sup>143</sup>

147 United Nations Security Council Resolution 1624 (14 Sept 2005)<sup>144</sup> condemns:

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<sup>142</sup> Charter of the United Nations, 26 June 1945 [1945] ATS 1, into force on 1 November 1945, art 25

<sup>143</sup> UN SC Resolution 1456 4688<sup>th</sup> mtg UN Doc S/Res/1456 (2003)

<sup>144</sup> UN CS Resolution 1624, 5261<sup>st</sup> mtg, UN DocS/Res/1624 (14 September 2005) set out in ALRC Review of Sedition Laws p 83

in the strongest terms, all acts of terrorism irrespective of their motivation, whenever and by whomsoever committed, as one of the most serious threats to peace and security, and reaffirming the primary responsibility of the Security Council for the maintenance of international peace and security under the Charter of the United Nations;

also in the strongest terms, the incitement of terrorist acts and repudiating attempts at the justification or glorification (apologie) of terrorist acts that may incite further terrorist acts

148 States must still comply with their other obligations under international law as Resolution 1624 makes clear. This Resolution also explicitly notes “the right of freedom of expression” in article 19 of the Universal Declaration of Human Rights 1948 and article 19 of the International Convention on Civil and Political Rights (ICCPR), and states that “any restrictions thereon shall only be such as are provided by law and are necessary on the grounds set out in paragraph 3 of Article 19 of the ICCPR.”<sup>145</sup>

149 New Zealand’s Terrorism Suppression Act 2002 was enacted in compliance with many of the recommendations of Resolution 1372, as well as the International Convention for the Suppression of Terrorist Bombings 1997 and the International Convention for the Suppression of Financing Terrorism 1999. The 2002 Act is presently under review. The Foreign Affairs, Defence and Trade Committee reported to the House of Representatives in November 2005, mentioning, among other things, Resolutions 1456 and 1624 and the question of whether there should be a general offence of committing a terrorist act.

*International Covenant on Civil and Political Rights*<sup>146</sup>

150 In New Zealand, treaty-based international law only becomes part of the domestic law by statute. The ICCPR was signed by New Zealand on 12 November 1968 and ratified on 28 December 1978. Article 20 of the International Covenant on Civil and Political Rights says:

1. Any propaganda for war shall be prohibited by law;

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<sup>145</sup> United Nations Security Council, Resolution 1624, UN SC 5261<sup>st</sup> mtg, UN Doc S/Res/1624 (2005).

<sup>146</sup> The ICCPR was signed by New Zealand on 12 November 1968 and ratified on 28 December 1978.



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

151 The New Zealand Government, having legislation in the areas of advocacy of national and racial hatred and the exciting of hostility or ill will against any group or persons, (namely section 138 of the Human Rights Act 1993) and having regard to the right to freedom of speech, has reserved the right not to introduce further legislation with regard to Article 20.<sup>147</sup>

152 Article 19 of the ICCPR states:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. I may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public) or of public health or morals.

153 Thus the right of freedom of expression in article 19 of the ICCPR is limited by specific restrictions laid down by the law of the state and in respect of the rights or reputations of others, and the protection of national security or of public order or of public health or morals.

#### ARE NEW ZEALAND'S SEDITIONOUS OFFENCES CONSISTENT WITH THE NEW ZEALAND BILL OF RIGHTS ACT 1990?

154 We have considered the principle of freedom of expression, guaranteed by section 14 of the New Zealand Bill of Rights Act 1990, and have identified its status as a preferred right. This means that where there is a conflict with other rights, the scales are weighed in favour of freedom of expression. We now turn to look at the

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<sup>147</sup> Ministry of Foreign Affairs and Trade, *New Zealand Handbook on International Human Rights*, (2ed Printlink, Wellington 2003) 163.

sedition offences in sections 81 to 85 of the Crimes Act 1961 to assess first, their consistency with the New Zealand Bill of Rights Act 1990, particularly with section 14 (freedom of expression), and also with section 25(c) (the right to be presumed innocent until proved guilty). Secondly, if they are inconsistent with these rights, are there justifiable limitations?

### **Seditious offences and consistency with rights**

#### *Freedom of expression*

155 The seditious offences are prima facie in breach of freedom of expression. They criminalise the making or publishing (or causing the making or publishing) of written or spoken material which expresses any one of the five “seditious intentions” set out in section 81. They also make criminal:

- the printing, publication, distribution, possession, or importing (or causing of the same) with a seditious intention of any material expressing seditious intention (section 84);
- conspiracies to execute any seditious intention (section 82); and
- using, or causing to be used, apparatus for making seditious documents or statements (section 85).

To say the least, such provisions could have a chilling effect on speech and writing, particularly if it is material critical of government policy.

#### *Right to be presumed innocent*

156 The seditious offences are very wide, their parameters are uncertain and, apart from the “seditious intention” required, it is quite unclear what the specific mens rea (criminal intention) for each offence is. For section 83 offences, the making or publishing of a statement that expresses a seditious intention, or causing or permitting such a statement to be made or published, is the actus reus (criminal act) of the offence. A person could be prosecuted for simply making or publishing a statement which allegedly brought into contempt the Queen or the Government. Vehement criticism of the Government can be prosecuted successfully as a

sedition offence without any proof of a subjective intention to incite a criminal offence or even to bring the Government into contempt; indeed, the New Zealand cases show that this has been done.

157 There is no expressed requirement in section 83 that the maker or publisher of the statement knowingly or recklessly intended to incite others to commit an unlawful act. A person could be prosecuted for making or publishing a statement (which could even be hypothetical<sup>148</sup>) which others considered “expressed a seditious intention”, although that was not the subjective intention of the maker of the statement. Under section 85 a person could be prosecuted for printing or photocopying material which others considered expressed a seditious intention, even though the copier may not have any idea what the material was about. The good faith defences in section 81(2) depend on the knowledge of the defendant so would not avail the copier.

158 Although there is a common law presumption that mens rea is an ingredient of every criminal offence,<sup>149</sup> the cases show that many have been convicted without the prosecution needing to prove that the defendant subjectively intended any seditious intention. This interpretation is not consistent with section 25(c) of the Bill of Rights Act (the presumption of innocence or the duty of the prosecution to prove the defendant’s guilt). The section 83 and section 85 offences are prima facie of strict liability and have been so interpreted. Although the section 82 and section 84 offences can only be committed “with seditious intention”, this is not the case for the section 83 and section 85 offences.

### **Are there justifiable limitations?**

159 The existing seditious offences are not consistent with freedom of expression as guaranteed by section 14 of the New Zealand Bill of Rights Act 1990, nor (at least for sections 83 and 85) with the presumption of innocence as guaranteed by section 25(c). The question then is whether the provisions of section 5 of that Act satisfied: are the limitations the seditious offences create on these rights

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<sup>148</sup> See for example *R v Sharkey* (1949) 79 CLR 121, discussed in chapter 4.

<sup>149</sup> *Millar v Ministry of Transport* [1986] 1 NZLR 660.

reasonable and demonstrably justified in free and democratic society? In our view, the seditious offences go beyond what is reasonable and justifiable. The wide parameters and vagueness of the offences, and the lack of clarity as to mens rea create the potential for abuse by prosecuting advocates of unpopular or disturbing opinions.

- 160 The rationale for any abrogation of freedom of expression is that other values are seen as predominating.<sup>150</sup> As noted above, there can be justified limits on freedom of expression in order to protect national security and public order. Suppressing speech which proximately encourages violence is a justifiable limitation in a democratic society, since national safety has a higher normative value than freedom of expression, but the suppression must be only to the extent strictly necessary to prevent the greater harm.<sup>151</sup> The limitations must be the least restrictive means of protection, that is, they must be proportionate to the prevention of the greater harms.
- 161 New Zealand's seditious offences aim to protect national security and public order, but they are not the least restrictive means of limiting freedom of expression. Framing a test for when freedom of speech may be overridden is the main issue that the United States sedition cases have grappled with during the twentieth century.
- 162 In our view, the state should be entitled to prevent incipient revolt or violence for the benefit of the community, but only if there is proof of an intention to urge or incite behaviour that is presently a criminal offence.<sup>152</sup> The current sedition provisions fail this test. It appears to us that should the sedition provisions be introduced today they would receive an adverse report under section 7 of the New Zealand Bill of Rights Act.

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<sup>150</sup> *Moonen*, above n 105, 16.

<sup>151</sup> Compare B Saul "Speaking of Terror: Criminalising Incitement to Violence" 28 UNSW LJ, 868, 884.

<sup>152</sup> This is a similar test to that in *Brandenburg v Ohio* 395 US 444 (1969).

## CONCLUSION

- 163 Our policy is to protect freedom of expression to the greatest extent possible while ensuring that inciting violence against the government and public order is proscribed. The problem is to distinguish genuine, even if unreasonable, vehement or irresponsible criticism of the Government, from incitement to violence. As an Australian commentator has said: “A robust and mature democracy should be expected to absorb unpalatable ideas without prosecuting them”.<sup>153</sup> If it does not do so, the ideas could be driven underground and become dangerous.
- 164 Shauer suggests looking at criticism of government as a spectrum – from non-inflammatory criticism, to criticism where the tone of the words and the context encourage lawlessness, to criticism with specific admonitions to violate the law, to speech directly and exclusively intending to incite violence.<sup>154</sup> Where should the line between non-interference and interference by the government be drawn? For Shauer, “recognition of the import of the Free Speech Principle entails the conclusion that limiting criticism of the government is a more serious harm than is the risk of some violence”. Where speech is merely critical of the status quo, protection of that speech is mandated by a strong free speech principle. But if disobedience to law is intended and likely to follow from words spoken, and if such disobedience is serious, then suppression of criticism may be justified.
- 165 The protection of freedom of expression is a crucial value in a democratic society, as demonstrated by such writers as Milton, JS Mill and Alexander Meiklejohn. In particular, it is important in relation to political speech as endorsed by the Australian decisions confirming an implied freedom of political communication. But, while freedom to express opinions on matters of government, and to dissent vehemently from lawfully constituted authority, should always be protected, if such speech crosses the line into incitement to commit a criminal act, advocating

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<sup>153</sup> Saul “Speaking of Terror”, above n 151, 886.

<sup>154</sup> Shauer, above n 79, 192-193. Compare the two poles of the spectrum as identified in *Scheiderman v US* (1942) 320 US 156 “There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and mere doctrinal justification”.

imminent violent action against the State, or riot or danger to the public, the State should be entitled to protect itself and its citizens by proscribing such speech.

166 In our view it is clear that the current law of sedition is not the appropriate way to achieve a policy of protecting freedom of expression to the greatest extent possible, while ensuring that urging or inciting or advocating violence against lawfully constituted authority is criminalised. To reinforce this argument, we look next at the use (and abuse) of statutory offences of sedition in the United States, Australia, England and Canada showing the problems with sedition law, similar to those in New Zealand. We then consider what should happen to the law relating to sedition in New Zealand in 2006.

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## Chapter 4: Sedition in some other jurisdictions

### UNITED STATES

- 167 The first statute proscribing sedition in the United States was the Sedition Act of 1798, enacted by the Federalists. The United States was on the verge of war with France, and many of the ideas generated by the French Revolution aroused fear and hostility in segments of the United States population. The Sedition Act of 1798 made it a crime, punishable by five years in prison and a \$5000 fine, “if any person shall write, print, utter or publish...any false, scandalous and malicious writing or writings against the government of the United States, or either house of Congress...or the President, with intent to defame...or to bring them, or either of them, into contempt or disrepute, or to excite against them, or either of them, the hatred of the good people of the United States.” The Act allowed a defence of truth.
- 168 The Sedition Act was vigorously enforced, but only against members or supporters of the Republican Party.<sup>155</sup> It was condemned by many as unconstitutional, but the Supreme Court did not rule on its constitutionality at the time, and it expired of its own force in 1801. In *New York Times v Sullivan*,<sup>156</sup> Justice Brennan set out evidence of a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.

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<sup>155</sup> G Stone, L Seidman, C Sunstein, M Tushnet, *The First Amendment*, Aspen Law and Business, New York 1999, 7.

<sup>156</sup> *New York Times v Sullivan*, 376 US 254, 274.

- 169 In 1917, Congress enacted the Espionage Act, at the outset of the United States' entry into World War I,<sup>157</sup> and in 1918, it enacted the Sedition Act of 1918.<sup>158</sup> There were thousands of prosecutions for violation of sedition under these two Acts, particularly for anti-conscription speech and literature.<sup>159</sup> Amongst them was *Fohrwerk v US*<sup>160</sup> (holding that the First Amendment did not protect seditious acts to prevent recruiting for the Armed Forces) and *Schenck v US*<sup>161</sup> (holding that a pamphlet to discourage recruitment and enlistment was a violation of the Espionage Act 1917), and *Schaefer v US*.<sup>162</sup> The most infamous of these was perhaps *Debs v US*.<sup>163</sup> Eugene Debs began serving a 10 year prison sentence at age 63 for an exposition of socialism. He was released at Christmas in 1921 but without restoration of citizenship.<sup>164</sup>
- 170 There was a resurgence of sedition prosecutions immediately after World War II in response to a fear of Communism.<sup>165</sup> Prosecutions for sedition in one form or another also arose during the Vietnam War and the black liberation movement of the 1960s and 1970s for what were deemed to be subversive political ideas.

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<sup>157</sup> While the Act was mainly directed at espionage and the protection of military secrets, it also made it a crime when the nation was at war for any person to make false reports or statements with the intention to interfere with the military success of the United States, or to promote the success of its enemies; to wilfully cause or attempt to cause insubordination, disloyalty or mutiny in the military or naval forces; or to wilfully obstruct the recruiting or enlistment service of the United States.

<sup>158</sup> The Seditions Act of 1918 made it criminal to utter, print, write or publish any disloyal, profane, scurrilous or abusive language intended to cause contempt or scorn for the form of government of the United States, the Constitution or the flag, or to utter any words supporting the case of any country at war with the United States or opposing the cause of the United States. The Act was repealed in 1921.

<sup>159</sup> J Cohan, "Seditious conspiracy, the Smith Act, and prosecution for religious speech advocating the violent overthrow of Government" 17 St John's J Legal Comment 199 (2003), 203. See also Zechariah Chafee *Free Speech in the United States* (Harvard University Press, Cambridge, Mass, 1942) for District and Supreme Court case studies of some of the more infamous World War I sedition trials, chapters 2-3.

<sup>160</sup> *Fohrwerk v US* 249 US 204 (1919).

<sup>161</sup> *Schenck v US* 249 US 47 (1919).

<sup>162</sup> *Schaefer v US* 251 US (1920) affirming convictions and sentences of five and two years for articles glorifying Germany and attacking the sincerity of the United States.

<sup>163</sup> *Debs v US* 249 US 211 (1919).

<sup>164</sup> Z Chafee *Free Speech in the United States*, above n 159, 84, fn 89.

<sup>165</sup> See for example, *Yates v US* 354 US 298 (1956) – 14 petitioners were indicted in 1951 as communists trying to overthrow the government; and *Dennis v US* 341 US 494 (1951) – affirming convictions of Communist party members for conspiring to overthrow the government. Many other examples are covered in Z Chafee *Free Speech in the United States* above n 159.



171 In 1969, the Supreme Court considered the constitutionality of sedition law in *Brandenburg v Ohio*.<sup>166</sup> The appellant, a Ku Klux Klan leader, was convicted under the Ohio Criminal Syndicalism statute for “advocat[ing]...the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” and for “voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.” He challenged the constitutionality of the criminal syndicalism statute.

172 The Supreme Court held that since the statute purported to punish mere advocacy, it fell within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

173 Currently, sedition appears in the United States in United States Code Title 18, chapter 115, which deals with treason, sedition and subversive activities. USC 18 §2384 provides:

If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall each be fined under this title or imprisoned not more than twenty years, or both.

174 The statute requires no overt act as an element of the offence. Cohan notes that §2384 only uses the word seditious in the caption to the statute, commenting that the courts have noted that “sedition” as a term does not define a criminal offence with sufficient definiteness to allow ordinary people to understand what conduct is prohibited.<sup>167</sup>

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<sup>166</sup> *Brandenburg v Ohio*, 395 US 444 (1969).

<sup>167</sup> J Cohan, “Seditious conspiracy, the Smith Act, and prosecution for religious speech advocating the violent overthrow of Government” 17 *St John’s J Legal Comment* 199 (2003), 208, and see *Keyishian v Board of Regents*, 385 US 589, 598 (1967).

- 175 The constitutionality of the seditious conspiracy statute was considered in the 1994 indictment and conviction of Sheik Omar Abdel Rahman, a radical Islamic cleric, and nine others, based on a plot to wage a war of urban terrorism against the United States in violation of the statute. The Court of Appeals affirmed the convictions of all the defendants, and upheld the constitutionality of the statute.<sup>168</sup> The Court commented that it remains fundamental that while the state may not criminalise the expression of views – even including the view that violent overthrow of the government is desirable – it may nonetheless outlaw encouragement, inducement or conspiracy to take violent action. The Court considered that to be convicted under Section 2384, one must conspire to use force, not just to advocate the use of force, and that there was no doubt that this passed the test of constitutionality.
- 176 The statute has been criticised on the grounds that it essentially deals with a crime of the mind – a person does not have to do anything, they just have to think it.<sup>169</sup> Cohan suggests that it may be politically wise to require overt action in seditious conspiracy cases to allay fears concerning the prosecution of a particular religion or particular religious speech.<sup>170</sup>
- 177 While the seditious conspiracy statute has been used in prosecutions since the terrorist attacks on 11 September 2001, in its recent report, the Australian Law Reform Commission notes that an analysis of the case law reveals a tendency for

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<sup>168</sup> Rahman was convicted of a number of other charges, including soliciting the murder of the Egyptian President Hosni Mubarak and soliciting an attack on American military installations, conspiracy to murder Mubarak and bombing conspiracy – *US v Rahman* 189 F. 3d 88, 103. His role in the seditious conspiracy was to incite his followers to undertake subversive action, by providing encouragement to them by means of religious advice and the religious propriety of some of their specific plans including murders and bombings. He instructed his followers to wage violent jihad against the United States, creating an imminent danger to the nation's security.

<sup>169</sup> J Cohan, *Seditious conspiracy, the Smith Act, and prosecution for religious speech advocating the violent overthrow of Government* 17 St John's J Legal Comment 199 (2003), 209.

<sup>170</sup> J Cohan, "Seditious conspiracy, the Smith Act, and prosecution for religious speech advocating the violent overthrow of Government" 17 St John's J Legal Comment 199, 213 (2003).

such prosecutions to be brought where there is a combination of seditious speech and conduct forming part of a violent plot against the United States.<sup>171</sup>

- 178 The seditious conspiracy statute does not set out any criteria for determining at what point the First Amendment protection is lost and a conspiracy occurs. The courts have developed a standard over the years, beginning with the establishment in *Schenk v USA* of the “clear and present danger” test, discussed in relation to freedom of expression.<sup>172</sup> Since *Schenk*, the Supreme Court had generally adhered to this test, with the focus of the cases being on its proper application. However, in *Brandenburg*, the Supreme Court overlaid the test with a requirement of “imminent lawlessness”.
- 179 The Alien Registration Act of 1940,<sup>173</sup> also known as the Smith Act, has been described as the companion statute to the seditious conspiracy law.<sup>174</sup> The Act makes it a crime to knowingly or wilfully advocate or teach the duty, necessity, desirability or propriety of overthrowing the Government of the United States, or of any state or political subdivision, by force or violence: to publish or distribute any material advocating such action, if done with intent to overthrow the government, or to be a member of, or to organise, any group which has as its purpose the overthrow of the government, knowing the purposes of the group. Unlike seditious conspiracy, the Smith Act relates to the mere advocacy or teaching of concrete violent action, but like seditious conspiracy it has been interpreted to apply only to concrete violent action, rather than the teaching of abstract principles related to the forcible overthrow of the Government.
- 180 The United States has a number of anti-terrorist Acts, including the Anti-Terrorism and Effective Death Penalty Act 1996 and the USA Patriot Act 2001,<sup>175</sup>

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<sup>171</sup> Australian Law Reform Commission *Fighting Word: Review of Sedition Laws* R 104 (July 2006), 138.

<sup>172</sup> 249 US 47 (1919).

<sup>173</sup> 18 USC §2385.

<sup>174</sup> J Cohan, “Seditious conspiracy, the Smith Act, and prosecution for religious speech advocating the violent overthrow of Government” 17 *St John’s J Legal Comment* 199, 230 (2003)

<sup>175</sup> See J Van Bergen “In the Absence of Democracy: the Designation and Material Support Provisions of the Anti-Terrorism Laws” [2003] 2 *Cardozo Pub Law Policy & Ethics J* 107 for a critique of some aspects of these laws as not complying with the Bill of Rights.

some provisions of which overlap with the sedition provisions, at least in conjunction with threats, attempts or conspiracies.

- 181 The Australian Law Reform Commission suggests there is some evidence that sedition is now viewed as an outdated and inappropriate offence in the United States, as demonstrated by a recent trend to pardon those convicted of sedition, including 78 people of German descent convicted during World War I.<sup>176</sup>

## AUSTRALIA

- 182 The Australian states and territories inherited the common law in relation to sedition but Western Australia, Queensland and Tasmania codified the law at the end of the nineteenth or early twentieth century.<sup>177</sup> However, the code provisions mirrored the common law. The Commonwealth passed the Crimes Act in 1914, containing a number of offences against the Government including treason, and the sedition offences were added in 1920. This was also the date of the foundation of the Communist Party of Australia (CPA).
- 183 Although these provisions again mirrored the common law they did not require proof of subjective intention and incitement to violence or public disturbance. Pursuant to sections 24C and 24D of the Crimes Act (Cth) it was an offence to engage in a seditious enterprise or to write, print, utter or publish seditious words with a seditious intention.<sup>178</sup> Seditious intention was defined as:

An intention to effect any of the following purposes, that is to say:

to bring the Sovereign into hatred or contempt;

to excite disaffection against the Sovereign or the Government or Constitution of the UK or against either House of Parliament of the UK; against the Government or Constitution of any of the King's Dominions; against the Government or Constitution of the Commonwealth or either House of Parliament of the Commonwealth; against the connexion of the King's Dominions under the Crown;

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<sup>176</sup> ALRC *Fighting Words*, above n 171, 138.

<sup>177</sup> See Australian Law Reform Commission *Review of Sedition Laws* Issues Paper 30, 2006, 33. The common law of sedition is retained in Victoria and New South Wales. See Gareth Griffith NSW Parliamentary Library Research Service "Sedition, Incitement and Vilification: Issues in the Current Debate", Briefing Paper No 1/06, February 2006, chapter 3 for the law of sedition in NSW.

<sup>178</sup> ALRC Issues Paper, above n 177, 34.

to excite His Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the commonwealth;

to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order and good government of the Commonwealth.

- 184 It was thought that the federal sedition provisions were prompted by concerns about the Bolshevik Revolution in the USSR and its potential impact on communist party members in Australia.<sup>179</sup> However, although state sedition laws were used several times during this era, mainly to prosecute anti-conscriptionists during the First World War and members of the CPA,<sup>180</sup> the first federal sedition charges were not brought until 1948, against a member of the CPA, Gilbert Burns.<sup>181</sup> At a public debate, in response to a demand for a “direct answer” to a hypothetical question about a war between the USSR and the West, Mr Burns had said: “All right we would oppose that war. We would fight on the side of the Soviet Union”. He was convicted and sentenced to 6 months imprisonment. Dixon J, in dissent, relying on Sir James Stephen's codification of the common law, said:<sup>182</sup>

[I]t is not sufficient that words have been used upon which a seditious construction can be placed, unless on the occasion when they were used they really conveyed an intention on the part of the speaker to effect an actual seditious purpose.

- 185 For Justice Dixon, what Mr Burns said was “merely a hypothetical answer to a hypothetical question, and did not amount to excitation of disaffection”.

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<sup>179</sup> ALRC Issues Paper, above n 177, 35 citing, amongst other articles, L Maher “Dissent, Disloyalty and Disaffection: Australia's last Cold War Sedition Case” (1994) 16 *Adelaide L Rev* 1, 12.

<sup>180</sup> There were three reported sedition prosecutions in Queensland in the 1930s, and 2 in Tasmania and Queensland in the 1940s, see ALRC Issues Paper, above n 177 35. See too, S Macintyre *The Reds* (1998) 17 cited in ALRC *Fighting Words Review of Sedition Laws in Australia* Report 104, July 2006, 53.

<sup>181</sup> *Burns v Ransley* (1949) 79 CLR 101. In *Fighting Words Review of Sedition Laws in Australia* Report 104, July 2006, 55 the ALRC noted that “it appears” that this was the first federal prosecution, referring to R Douglas “Saving Australia from Sedition: Customs, the Attorney-General's Department and the Administration of Peacetime Political Censorship” (2002) 30 *Federal L Rev* 135.

<sup>182</sup> *Burns v Ransley*, above n 181, 116 quoted in Hon ME Black “Five Approaches to Reforming the Law: 650 Years of Treason and Sedition” Keynote address to the Australasian Law Reform Agencies Conference 2006.

186 But the High Court, under Latham CJ, held that, unlike under common law, proof of subjective intention and incitement to public violence was not necessary. Another CPA member was successfully prosecuted for uttering seditious words in 1949 and sentenced to 13 months prison.<sup>183</sup> Sharkey had prepared a statement in response to a request by a journalist, emphasising that the Communist Party was against war but “if fascists in Australia use force to prevent the workers gaining... power Communists will advise the workers to meet force with force.” Like Burns, Sharkey seems to have been a victim of the sedition laws being used to punish people for expressing radical political views when pressed to answer hypothetical questions.<sup>184</sup>

187 The Australian Law Reform Commission has said that:<sup>185</sup>

The High Court’s interpretation of the federal sedition provisions – which in effect enabled them to be used to punish expression of disloyalty – stands in contrast with the common law, which had in the previous century narrowed sedition or words or behaviour that incited violence or public disorder . . . [and] in stark contrast to the approach adopted by the United States Supreme Court . . .

188 In 1953, about the time of the Coronation of Elizabeth II, three members of the Communist Party were prosecuted unsuccessfully for publishing an article in the Communist review criticising the monarchy as a “bulwark of conservatism against social change” and an instrument of class rule. The *Sydney Morning Herald* commented that “Another verdict would have seriously endangered freedom of

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<sup>183</sup> *R v Sharkey* (1949) 79 CLR 121. See also *Cooper* (1961) 105 CLR 177, a case on appeal from New Guinea in which Cooper was convicted and sentenced to 2 months prison for a tirade to the “natives” encouraging a revolt against the constituted authority, cited in M Head “Sedition – Is the Star Chamber Dead?” [1979] 3 Crim LJ 89, 105-106. Head concluded that “The Australian High Court has shown a clear propensity to perpetuate the history of politicisation that has dogged the history of seditious offences ever since they were invented by the Star Chamber.” (107)

<sup>184</sup> See discussion of the context in which these statements were made, and the defendants “set up” by anti-communist organisations in M Head “Sedition – Is the Star Chamber Dead?” above n 183, 99-107, and LW Maher “The Use and Abuse of Sedition” (1992) 14 Syd LR 287, 295-305, especially 301. There was an unsuccessful prosecution of *Chandler, Ogston and Bone* in 1953 (unreported NSW Court of Petty Session, August- September 1953, for publishing seditious articles about the monarchy in the Communist review.

<sup>185</sup> ALRC *Fighting Words* Report 104, above n 181, 58.

speech in this country”.<sup>186</sup> There was no evidence in these cases that the words were intended to provoke violence or public disorder or any immediate threat.

- 189 In 1984 the Hope Royal Commission on Australia’s Security and Intelligence Agencies examined federal sedition offences as part of its review of national security offences, and criticised the decisions in *Burns* and *Sharkey*. The Hope Commission said that “mere rhetoric or statements of political belief should not be a criminal offence, however obnoxious they may be to constituted authority”.<sup>187</sup> The recommendation was acted upon in 1986 and the words “with the intention of causing violence or creating public disorder or a public disturbance” added into sections 24C and 24D of the Crimes Act (Cth).
- 190 The provisions were reviewed again by the committee of Review of Commonwealth Criminal Law (the Gibbs Committee) in 1991. The Gibbs Committee criticised the federal provisions as archaic and excessively wide, and recommended they be rewritten to accord with a modern democratic society.<sup>188</sup> It recommended replacement with a provision that would make it a criminal offence to incite another person to overthrow by violence the constitution or established Government of the Commonwealth, with similar recommendations about interference with parliamentary elections and inciting violence within the community. These were not immediately acted upon.
- 191 Then in 2005 the Australian Government decided to modernise the federal sedition laws in order to adapt them for anti-terrorism measures. The Government stated that “sedition is just as relevant as it ever was” in an anti-terrorist context, particularly to “address problems with those who communicate inciting messages

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<sup>186</sup> “A Stupid prosecution” and “Three Sedition Charges Dismissed: Crown to pay costs” *Sydney Morning Herald*, 19 September 1953, cited in G Griffith “Sedition, Incitement and Vilification”, above n 177, 5.

<sup>187</sup> Royal Commission on Australia’s Security and Intelligence Agencies report on the Australian Security Intelligence organization 91985) 4.101, cited in ALRC Issues paper, above n 177, 39.

<sup>188</sup> H Gibbs, R Watson and A Menzies *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991), 32.12.

directed against other groups within our community, including against Australia's forces overseas and in support of Australia's enemies".<sup>189</sup>

192 The new sedition offences were enacted by Schedule 7 of the Anti-Terrorism Act (No 2) 2005, which created five new sedition offences in section 80.2 of the Criminal Code Act 1995 (Cth). In summary the offences are:

- Urging another to overthrow, by force or violence, the Constitution or Government of the Commonwealth, a state or territory or lawful authority of the Government (s 80.2(1));
- Urging another to interfere by force or violence with the lawful process of parliamentary elections (s 80.2(3));
- Urging a group or groups to use force or violence against another group or groups where the force or violence would threaten the peace, order and good government of the Commonwealth (a group in this context being distinguished by race, religion, nationality or political opinion) (s 80.2(5));
- Urging a person to engage in conduct where the offender intends to assist an organisation or country at war with the Commonwealth (s 80.2(7));
- Urging a person to engage in armed hostilities against the Australian Defence Force (s 80.2(8)).

193 Each offence carries a maximum penalty of 7 years. Three of the offences (sections 80.2(1)(3) and (5)) now expressly contain recklessness as a fault element, but only in relation to some of the physical elements required for the offence, namely the circumstances or results that arise from the person's "urging". There is no express requirement of intentional urging, though the Attorney General's Department maintained that intention applies as the fault element by

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<sup>189</sup> J Howard "Counter-Terrorism Laws Strengthened" (Press Release 8 September 2005) cited in ALRC Issues paper, above n 177, 40.



default under section 5.6 of the Criminal Code.<sup>190</sup> Unlike incitement, these offences do not require an ulterior intention that the offence incited be committed. There is a defence in section 80.3 for acts done in “good faith”.

194 The Australian Law Reform Commission (ALRC) was asked to review these new sedition offences. The terms of reference directed the ALRC to consider:<sup>191</sup>

- The circumstances in which individuals or organisations intentionally urge others to use force or violence against any group within the community, Australians overseas, Australia’s forces overseas or in support of an enemy at war with Australia; and
- The practical difficulties involved in proving a specific intention to urge violence or acts of terrorism.

195 The ALRC was to have particular regard to, amongst other things, whether the amendments in Schedule 7 of the Anti-Terrorism Act (no 2) 2005 effectively address the problem of urging the use of force or violence; and whether “sedition” is the appropriate term to identify this conduct.

196 The ALRC set out its recommendations in its Report published in July 2006.<sup>192</sup> It recommended the retention, in modified form, of the existing offences dealing with urging force or violence to overthrow the Constitution or Government, and the urging of the use of force or violence to interfere in parliamentary elections.

197 The ALRC concluded that it was not appropriate for the offences set out in section 80.2 to be described as “sedition”. Rather, to the extent that the offences should be retained, they should be characterised as offences of urging political or inter-group force or violence. The ALRC recommended that the term “sedition” be removed from federal criminal law (and eventually from State and territory law), because of its historic associations with punishing speech that is critical of the established order.

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<sup>190</sup> ALRC *Fighting Words: Review of Seditious Laws* Report 104, July 2006, 176 – 179. The ALRC accepted this.

<sup>191</sup> ALRC Issues paper, above n 177, 20.

198 In relation to inter-group violence, the ALRC recommended that the distinguishing feature of a group include national origin. Most submissions had supported an offence of urging inter-group violence as a step in implementing Australia's obligations under international law to proscribe advocacy of racial, religious and national hatred, but did not think such an offence should be characterised as sedition.<sup>193</sup>

199 The ALRC recommended the repeal of the offences of urging a person to assist the enemy, or those engaged in armed hostilities with the Australian Defence Forces. The related (and presently overlapping) treason offences should be amended so that the offences of assisting the enemy make it clear that they apply to cases of intentionally and materially assisting an enemy to wage war on Australia, or engage in armed hostilities against the ADF.

200 It further recommended that the three remaining provisions be amended to require that the person must *intentionally* urge force or violence *and intend that the urged force or violence will occur*. A number of submitters to the ALRC's Discussion Paper were concerned that the current 2005 offences do not require a direct link between the conduct and actual violence. Stakeholders submitted that guidance may be obtained from the Johannesburg Principles on National Security, Freedom of Expression and Access to Information (1995).<sup>194</sup> While nonbinding, these are persuasive and principle 6 states that:

Expression may be punished as a threat to national security only if a government can demonstrate that (a) the expression is intended to incite imminent violence; (b) it is likely to incite such violence; and (c) there is a direct and immediate connection between the expression and the likelihood or occurrence of such violence.

201 Article 19 of the International Covenant on Civil and Political Rights (ICCPR) allows limitation of freedom of expression where there is any direct or indirect

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<sup>192</sup> ALRC *Fighting Words: Review of Sedition Laws* Report 104, July 2006, 21-25.

<sup>193</sup> ALRC *Fighting Words*, above n 192, 207.

<sup>194</sup> The Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights convened by ARTICLE 19, the International Centre Against Censorship, in collaboration with the Centre for Applied Legal Studies of the University of the Witwatersrand, in Johannesburg. [www.article19.org](http://www.article19.org) last accessed 11 October 2006

connection with violence. The ALRC's view is that there is a lack of clarity on the issue of intention in the present sections 80.2(1), (3) and (5), and that the offences in section 80.2(7) and (8) are too broadly worded, and can be interpreted to encompass non-violent criticism of the Australian Government and others. All provisions thus could fall foul of article 19 of the ICCPR, especially if the impugned expression were to be "political speech".<sup>195</sup> Clarifying the intention required would ensure the offences do not breach article 19 of the ICCPR (or the implied constitutional right to engage in political criticism) and would allow freedom of legitimate political dissent as one of the essential requirements of democracy.

- 202 The ALRC also recommended that the Attorney-General's written consent should not be required for prosecutions.
- 203 The "good faith" defence should not be applicable to the section 80.2 offences; it should not in any event be necessary because of the need to prove the mens rea of the offences.<sup>196</sup> But in determining whether a person intends that the urged force or violence will occur, the trier of fact must have regard to the context of the conduct and matters such as whether the conduct was done for an artistic exhibition or for a genuine academic purpose, or in connection with an industrial dispute, for example.
- 204 The ALRC recommended that an offence of "glorification" or "encouragement of terrorism" should not be introduced in Australia. Both recent terrorist offences and the racial and religious hatred offences enacted in England have been criticised for their adverse impact on freedom of expression and the vagueness of the concept of "glorification",<sup>197</sup> and the ALRC agreed with these criticisms.

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<sup>195</sup> ALRC *Fighting Words*, above n 192, 115-116.

<sup>196</sup> ALRC *Fighting Words*, above n 192, 257.

<sup>197</sup> See I Hare "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred" [2006] PL 521; House of Lords and House of Commons Joint Committee on Human Rights *Counter-Terrorism Policy and Human Rights: Terrorism Bill and Related Matters*, Third Report of Session 2005-2006 (2005) 3; E Barendt "Threats to Freedom of Speech in the United Kingdom" (2005) 28 University of NSW LJ 895.

## UNITED KINGDOM

- 205 As noted, the sedition offences have been rarely used in the twentieth century in the UK.<sup>198</sup> The last prosecution was in 1947, in *R v Caunt*, of a newspaper editor for publishing an article containing anti-Semitic bias. The editor was found not guilty.<sup>199</sup> The judge told the jury that words intended to stir up hatred were seditious; there was no need to find they led to violence or were likely to do so. However, in 1991 an attempted prosecution of the author and publishers of *The Satanic Verses*<sup>200</sup> for seditious libel failed on grounds that a necessary element of the offence of inciting violence or disorder is that there must be the purpose of disturbing lawfully constituted authority, following *R v Burns*<sup>201</sup> and the Canadian Supreme Court in *Boucher v R*.<sup>202</sup>
- 206 Two recent statutes in England proscribe some of the same type of conduct covered by the seditious offences at common law. They are the Racial and Religious Hatred Act 2006 and the Terrorism Act 2006.
- 207 The Racial and Religious Hatred Act 2006 provides offences of stirring up hatred against persons on racial or religious grounds, amending the Public Order Act 1986. Thus section 29B states:
- (1) A person who uses threatening words or behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred.
- 208 The offence can be committed in a public or private place but there is no offence if the words are not heard or seen except by others inside a dwelling. It is also an offence to publish or distribute written material which is threatening, with the intention to stir up religious hatred, including, in some cases, to present a play or broadcast visual images. Similar offences of using or publishing threatening

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<sup>198</sup> The Law Commission Working Paper no 72 (1977), 116.

<sup>199</sup> *R v Caunt* (unreported 1947, Birkett J) discussed in D Feldman *Civil Liberties and Human Rights in England and Wales* (2d ed Oxford University Press, Oxford, 2002) 898, and 1948 64 LQR 203. The publication came out around the time that British soldiers were killed in Palestine leading to anti-Jewish demonstrations in Liverpool and elsewhere.

<sup>200</sup> *R v Chief Metropolitan Stipendiary Magistrate: ex parte Choudhury* [1991] 1 QB 429. An attempted prosecution for blasphemy also failed.

<sup>201</sup> *R v Burns* (1886) 16 Cox CC 355, Cave J,

<sup>202</sup> *Boucher v R* [1951] 2 DLR 369.

words or material, with intent to stir up racial hatred, are provided in sections 18-29 of the Public Order Act 1896. The maximum penalty is two years imprisonment on indictment.<sup>203</sup>

209 Article 5 of the European Convention on the Prevention of Terrorism requires States to establish an offence of “public provocation to commit a terrorist act”. The Terrorism Act 2006 provides for an offence of encouragement of terrorism if a person.<sup>204</sup>

(a) publishes a statement to which the section applies or causes another to publish such a statement; and

(b) at the same time intends member of the public to be directly or indirectly encouraged or otherwise induced by the statement to commit, prepare or instigate acts of terrorism or Convention offences, or is reckless as to whether they do so.

210 A statement to which the section applies is one likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences. Such statements include those that glorify the commission or preparation of such acts or offences, and from which those members of the public could reasonably be expected to infer that what is being glorified is conduct that should be emulated by them in existing circumstances.<sup>205</sup>

211 As with seditious offences, words alone can be offences under the UK Terrorism Acts. Thus terrorism includes a threat of action that involves serious violence, endangers another person’s life, creates a serious risk to the health and safety of the public, or a section of the public, or is designed to seriously disrupt an electronic service; and is designed to influence the government or intimidate the

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<sup>203</sup> For a critique of this Act see I Hare “Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred” [2006] PL 521. Hare believes it would not survive scrutiny under the First Amendment.

<sup>204</sup> Terrorism Act 2006, s 1(2).

<sup>205</sup> Terrorism Act 2006, s 1(1) and (3). There are other offences relating to bookshops and other disseminators of terrorist publications, offence of the preparation of terrorist acts and further terrorist training offences. The Act amends and adds to the Terrorism Act 2000, the Anti-terrorism, Crime and Security Act 2001 and the Prevention of Terrorism Act 2005 a

public, or a section of the public, or an international governmental organisation. It is also now a terrorist offence to make a statement encouraging such a threat of action, as well as encouraging the act of terrorism itself. This latest offence has been introduced to comply with the requirements of Article 5 of the Council of Europe Convention on the Prevention of Terrorism.

- 212 Professor David Feldman has said that the sedition offences have been superseded by public-order legislation including the statutory crime of inciting racial hatred.<sup>206</sup> The new terrorism offences might also be said to have superseded sedition in the United Kingdom.

#### CANADA

- 213 Canada is another Commonwealth jurisdiction that inherited the common law of sedition but incorporated it into statute. A Criminal Code was passed in 1892 which covered treasonable offences (derived from the English Draft Criminal Code). The sedition sections (except for the definition of seditious intention) were adopted in the 1892 Code. During the Winnipeg General Strike of 1919 the Code was amended to criminalise illegal associations, and the penalty for sedition offences was increased from two to twenty years, but this was reversed in 1930. In the meantime the “Bolshevik” leaders of the strike were prosecuted and all but two convicted on seven charges of sedition, including seditious conspiracy to overthrow the Government and introduce a form of Socialist rule in its place.<sup>207</sup> They were sentenced to a year’s imprisonment.
- 214 There followed several cases where alleged Communists were tried for sedition in the 1920s and 1930s.<sup>208</sup> In 1936 a partial definition of seditious intention was

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number of offences which are precursors to (and inducement to commit terrorist acts). It also strengthens enforcement and penalties.

<sup>206</sup> D Feldman *Civil Liberties and Human Rights in England and Wales* (2<sup>nd</sup> ed, OUP, 2002) 899.

<sup>207</sup> PR Lederman “Sedition in Winnipeg: An Examination of the trials for Seditious Conspiracy Arising from the General Strike of 1919” (1976-1977) 3 Queen’s LJ 3. The article compares the Winnipeg trials of the “Red Scare” years with the trials of the First World War years where there were successful prosecutions for sedition of people making offensive remarks or foolish about the Canadian military in bars or shops: *R v Cohen* 25 CCC 302; *R v Trainor* 27 CCC 232, for example.

<sup>208</sup> *McLachlan* (1924) 56 NSR 413, 41 CCC 249; *Chambers v R* (1932) 52 Que KB

added, providing that seditious intention would be presumed of one who teaches or advocates, or publishes or circulates any writing that advocates the use, without authority of law, of force as a means of accomplishing governmental change in Canada.<sup>209</sup>

215 Since the Winnipeg trials, sedition charges have been mostly laid against religious groups such as Jehovah's Witnesses and have been described as less justifiable even than those against alleged communists.<sup>210</sup> As in the First World War trials of people who merely spoke against the military or made disloyal and unpatriotic remarks,<sup>211</sup> sedition was very widely interpreted with no requirement of an intention to incite violence.

216 In 1953 there were extensive revisions to the Criminal Code and treason offences were updated, but not seditious offences. Everyone who speaks seditious words, publishes a seditious libel, or is party to a seditious conspiracy is guilty of an indictable offence and liable to imprisonment for 14 years. "Seditious" is not defined and "seditious intention" is only defined partly, as above.

217 In 1989 the Canadian Law Reform Commission proposed that seditious offences be abolished because they overlapped with other provisions, were uncertain as to scope and meaning (especially as to intention), were out of date and may well infringe the Charter.<sup>212</sup> However, they are still part of the Criminal Code RS c C-34. Section 61 provides that

Everyone who (a) speaks seditious words, or (b) publishes a seditious libel, or (c) is a party to a seditious conspiracy, is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

218 The seditious offences are defined in section 59 in a circular fashion:

(1) Seditious words are words that express a seditious intention.

(2) a seditious libel is a libel that expresses a seditious intention.

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<sup>209</sup> This history is covered in Law Reform Commission of Canada *Crimes against the State* Working Paper 49, Ottawa, 1986, 8-10.

<sup>210</sup> PR Lederman above n 207, 21

<sup>211</sup> PR Lederman, Above n 207. See, for example, *Duval & ors v R* (1938) 64 Que KB 270.

<sup>212</sup> LRCC *Crimes against the State*, above n 209, ch 4.

(3) A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention

(4) Without limiting the generality of the meaning of the expression “seditious intention”, every one shall be presumed to have a seditious intention who (a) teaches or advocates. Or (b) publishes or circulates any writing that advocates, the use, without the authority of law, of force as a means of accomplishing a governmental change within Canada.

219 There is a good faith exception in section 60. However, other than in section 59(4), seditious intention is not actually defined, and the presumption that section 59(4) does not encompass an exhaustive definition could mean that the provisions infringe the Charter guarantee of freedom of expression.

220 However, seditious intention has been defined in accordance with the common law in *Boucher v R*.<sup>213</sup> The Supreme Court set aside the conviction of a Jehovah’s Witness for seditious libel for publishing a pamphlet entitled “Quebec’s Burning Hate for God and Christ and Freedom”. The pamphlet had referred to attacks upon Jehovah’s Witnesses by individuals and mobs, and the animosity of the police and of public officials, and of the Roman Catholic clergy who had instigated prosecutions against members of the sect. Further, the pamphlet said that the Roman Catholic Church had influenced the courts in the administration of justice. It was held (by the majority) that the seditious intention upon which a prosecution for seditious libel is founded is an intention to incite violence or create public disturbance or disorder against His Majesty or the institutions of government. There must be proof of incitement to violence or resistance for the purpose of disturbing constituted authority.

221 It was partly because of the requirement to incite such violence or resistance that the Canadian Law Reform Commission recommended the abolition of sedition as completely overlapping with the general offences as they apply to other public order offences. Incitement or conspiracy to commit other public order type offences should be available to prosecute the sort of statements alleged to be intending to incite violence or create a public disturbance.

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<sup>213</sup> *Boucher v R* [1951] 2 DLR 369 following such cases as *R v Burns* 16 Cox CC 355 and *R v Aldred* 22 Cox CC 1.



## CONCLUSION

- 222 Seditious provisions have been used in many jurisdictions to prosecute those who challenge government policy in times of strife or civil unrest, people like strike leaders; those opposed to conscription in war time, members of the Communist party, and even those who have different religious beliefs from the majority in a State. In many of the cases considered, the words used were forceful, even strident, but in few cases were they advocating imminent violence or even lawless actions. While the law may have developed in former times in order to stem vehement criticism of the government, freedom of expression is now a guaranteed and preferred right; people should no longer be prosecuted merely for extreme criticism of the State.
- 223 The Australian approach to the federal sedition provisions has been to modernise them, in order to use them as anti-terrorist legislation. The Australian Law Reform Commission recommends abolishing the term “sedition” in federal criminal law, altogether, as the term is too closely associated in the public mind with its origins and history as a crime rooted in criticising established authority.
- 224 It is important to remember that the Australian sedition provisions arise out of a different context: not just because of the different experiences of Australia and New Zealand in relation to terrorism and racial vilification, but also because of the limits of Australian federal criminal law. Where other jurisdictions, including New Zealand, have the option of using other public order offences as an alternative to sedition, many of those wider public order offences are not available in the federal criminal law.
- 225 We agree with the conclusions of the Canadian Law Reform Commission and the United Kingdom Law Commission, that seditious offences should be abolished. The New Zealand provisions are steeped in a history of abuse and misuse. Much of the conduct which has been the subject of seditious charges in the past should in fact be protected by the principles of freedom of expression. Where speech goes further, and crosses the line into inciting violence, rather than using the archaic and politically charged offences of sedition, we consider that such conduct can be adequately and more appropriately dealt with by charges of incitement to

commit other public order offences. We turn now to consider those other possible charges.

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## Chapter 5: Does New Zealand still need a law of sedition?

### SUMMARY OF THE ARGUMENTS SO FAR

226 We advance six main arguments for repealing the seditious offences in the Crimes Act 1961. These are:

- the legal profile of the offence is broad, vague, variable and uncertain. The meaning of “sedition” has changed over time;
- the present law invades the democratic value of free speech for no adequate public reason;
- the present law falls foul of the New Zealand Bill of Rights Act 1990;
- the seditious offences can be misused to impose a form of political censorship, and they have been used for this purpose;
- the provisions of sedition law have generally fallen into disuse, not only in New Zealand, but other jurisdictions we have studied. This is a policy indication that the law is not needed;
- the law is not needed because those elements of it that should be retained are more appropriately covered by other offences. Duplication should be eliminated.

227 We have discussed the first four reasons in the above chapters, and summarise them briefly below.

### **Changing meaning of sedition and present provisions broad and unclear**

228 As the history of the use of the seditious offences has shown, the meaning of sedition has changed over the centuries, from meaning an insurrection or revolt to describing the act of inciting or encouraging the revolt. The common law added an intention to incite violence against lawfully constituted authority as an element of the offence. However, statutory developments in the jurisdictions we have studied did not expressly include this element. The wording of sections 81-85 of the Crimes Act 1961 is outdated and cumbersome, the terminology is loaded with the unsavoury history of suppression of Government criticism, and the mens rea is unclear and varies within the provisions. In New Zealand, unlike in many other jurisdictions, it is possible to be found to have had a seditious intention without ever having intended to incite violence.

### **Invasion of the democratic value of free speech**

229 The offences are prima facie in breach of freedom of expression, and have been used to punish dissent. We agree with the views of Justice Brennan in the *New York Times* case, that debate on public issues should be “uninhibited, robust and wide-open”, even if it includes “vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials”.<sup>214</sup> Prosecution for statements alone should thus only be permitted where it is justifiable to prevent a greater harm than abridgement of freedom of expression – and then only in proportion to the aim of preventing the harm.

### **Breach of the New Zealand Bill of Rights Act 1990**

230 A strong principle of freedom of expression is endorsed by section 14 of the New Zealand Bill of Rights Act 1990. The present seditious offences are in breach of section 14. Further, at least some of the seditious provisions have been interpreted as in breach of section 25(c) of the Bill of Rights Act. In neither case is the breach reasonable and justifiable

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<sup>214</sup> *New York Times V Sullivan*, 376 US 254,

## **Misuse of sedition**

- 231 As illustrated by our summaries of the developments of the law and its application, the seditious offences have been used in the jurisdictions we have studied to prosecute and punish speech that may be inflammatory, vehement and unreasonable, but where there was no proved intention to urge immediate violence or any likelihood of such violence or resistance. In our view, the State should be entitled to punish statements or conspiracies advocating imminent violence against the State or the community, but only if a criminal offence is a likely outcome and there is proof of intention to advocate it.<sup>215</sup>
- 232 The remaining two arguments will now be addressed: the disuse of sedition, and the issue of other offences more appropriately covering such of the seditious offences as we consider should be proscribed.

## SEDITION PROVISIONS HAVE FALLEN INTO DISUSE

### **The doctrine of desuetude**

- 233 Desuetude is the concept that a long-continued and well-settled failure to enforce a widely ignored statute, or part thereof, amounts to an implied repeal of that statute or those provisions. If it were otherwise, the argument is that it would lead to a gross injustice, essentially because the sudden ad hoc enforcement of the provisions after years of ignoring them does not give violators fair notice that the law is still operative.<sup>216</sup> As well, a long-unenforced statute may sometimes become unconstitutional in the sense that it could not be enacted today.
- 234 The doctrine of desuetude originated with the Romans so was initially a civil law tradition. The Roman jurist Julian said that:<sup>217</sup>

Long continued custom is not improperly regarded as equivalent to statute, and what is...established by usage is law...Whereof very rightly this also is held, that

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<sup>215</sup> This is a similar but narrower test than that in *Brandenburg v Ohio*, 395 US 444 (1969).

<sup>216</sup> See generally AE Bonfield "The Abrogation of Penal Statutes by Nonenforcement" (1963) 49 Iowa L Rev 389.

<sup>217</sup> Digest 3,32,1 cited in AE Bonfield, above n 216, 395.

statutes may be abrogated not only by a vote of the legislator, but also by desuetude with the tacit consent of all.

235 Desuetude would only apply however, if the failure to apply the law was in the face of a public disregard so prevalent and long established that one could deduce a custom of non-observance. The Roman doctrine was somewhat submerged during the ages of the absolute monarchs, but in the nineteenth century there was a group of German jurists called the Historical School who agreed with the Romans that a statute could be abrogated by desuetude. The doctrine was also adopted in Scotland, but according to *Brown v Magistrates of Edinburgh*,<sup>218</sup> there must be not only non-usage but a usage contrary to the statute, and attempts to enforce it would be evidence of its continuing validity. In England it seems that the will of Parliament is the deciding factor. As Blackstone put it: “no custom can prevail against an express act of parliament.”<sup>219</sup>

236 In the United States, however, desuetude has been recognised by some courts and leading academics. According to Professor Arthur Bonfield it requires two things.<sup>220</sup>

First, it requires a sufficiently widespread and notorious violation of the statute to assure that the administrative failure to apply it evidences a clear policy of completely disregarding its violation. Second, it demands a period of absolute nonenforcement of such duration and visibility as to clearly and firmly establish the well-settled and reliable nature of that administrative policy congruent with the relevant body politic.

237 The rationale is based on the need for fair notice to the public and due process so that law enforcement is not arbitrary and ad hoc. If enforcement agencies are able to revitalise long-unenforced statutes, this is giving them an arbitrary discretion,

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<sup>218</sup> *Brown v Magistrates of Edinburgh* [1931] Scots LTR 456, 458, cited in Bonfield, above n 216, 403-404.

<sup>219</sup> 1 Blackstone's commentaries 76-77 (2d ed 1766) 76-77 cited in Bonfield, above n 216, 407.

<sup>220</sup> Bonfield, above n 216, 420 and also 425- citing *Wright v Crane* 13 S&R 447, 452 (Pa 1826), *Hill v Smith* 1 Morris 95 (Iowa 1840) See also, AM Bickel *The Least Dangerous Branch: the Supreme Court and the bar of politics* (2<sup>nd</sup> ed, Yale University Press, Newhaven, 1986, first published 1962) 143-156 discussing *Poe v Ullman* 367 US 497 (1961) concerning a long unenforced statute prohibiting the use of any contraceptive drug; there had been only one attempt to enforce it during 83 years, where the Court in effect avoided the issue of desuetude. Bonfield argues that the state cases and dicta of the US Supreme Court which deny desuetude a place in US law were not decided on adequate

unrelated to present legislative policy. Where breaches of the Act went unpunished for many years, but then suddenly become punishable because of an ad hoc decision of a prosecutor, there is no fair notice to the people and it is almost as if a new crime has been created.

- 238 Although desuetude is not currently an accepted legal principle to invalidate statutes in New Zealand, as an argument it has force when considering, from a policy point of view, whether to change the law. We agree with Professor Bonfield that there are circumstances where long-unenforced statutory provisions should be considered obsolete and impliedly repealed. Arguably this is the case for the seditious offences which were enforced through the early twentieth century, and thereafter only very sporadically. From this perspective, the prosecutorial decision to charge Selwyn with sedition seems an aberration and not in accordance with due process and fair notice.

#### DUPLICATION

- 239 It has been argued, both here and overseas, that separate offences of sedition are not necessary, as most seditious offences can already be prosecuted by applying the law of criminal incitement to existing offences.<sup>221</sup> In the following section, we consider other public order offences in New Zealand, the offences of incitement and conspiracy, and certain other statutory offences which could be used to prosecute conduct which might be considered seditious. We then analyse each of the seditious offences in order to decide to what extent the conduct they proscribe should still be offences in 2006 in New Zealand, and whether there are other, more appropriate mechanisms for controlling conduct which is of concern, such as incitement or conspiracy to commit a public order offence.

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consideration of the relevant policy considerations and those that acknowledge the doctrine were based on a far more fully reasoned position, at 440.

<sup>221</sup> Ben Saul "Speaking of Terror: Criminalising Incitement to Violence" (2005) 28 UNSW L J 868, 872; Rt Hon G W R Palmer, *The Reform of the Crimes Act 1961*, (1990) 20 VUWLR, 9,19. See also UK Law Commission and Canadian Law Reform Commission, above chapter 1 and 3.

## Offences against public order

240 The seditious offences are among a number of offences against public order. Others include treason and other crimes against the Queen and state; unlawful assembly, riots and breaches of the peace; piracy; slave dealing; participating in a criminal gang; and smuggling and trafficking in people.

*Treason: Crimes Act 1961, s 73*

241 Treason encompasses causing or plotting harm against the Queen, levying war against the Crown or lawful Government, or using force to overthrow the Government. Punishment upon conviction is life imprisonment. Treason is set out in section 73 of the Crimes Act 1961:

Every one owing allegiance to Her Majesty the Queen in right of New Zealand commits treason who, within or outside New Zealand,—

(a) Kills or wounds or does grievous bodily harm to Her Majesty the Queen, or imprisons or restrains her; or

(b) Levies war against New Zealand;<sup>222</sup> or

(c) Assists an enemy at war with New Zealand, or any armed forces against which New Zealand forces are engaged in hostilities, whether or not a state of war exists between New Zealand and any other country; or

(d) Incites or assists any person with force to invade New Zealand; or

(e) Uses force for the purpose of overthrowing the Government of New Zealand; or

(f) Conspires with any person to do anything mentioned in this section.

242 As is clear from the terms of the Act, unlike the seditious offences, treason requires an allegiance to Her Majesty the Queen in right of New Zealand, and a betrayal of that allegiance. According to Adams on criminal law, “natural allegiance” is owed to the Sovereign by natural-born subjects; and by former aliens who become naturalised subjects; “local allegiance” is owed by aliens residing in the realm (unless being an open enemy).<sup>223</sup> A person who, in New

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<sup>222</sup> At common law, to levy war included a constructive war against the Government, or public authority, beyond a riot, united local insurrection and civil disobedience: 11(1) Halsbury’s *Laws of England* (4<sup>th</sup> ed) para 79.

<sup>223</sup> Adams on Criminal Law, CA 73.01.



Zealand, aids, incites, counsels, or procures an act or omission of treason overseas by a person not owing allegiance, may commit an offence under section 69 of the Crimes Act 1961.

*Unlawful Assembly: Crimes Act 1961, s 86*

- 243 An unlawful assembly is a gathering of three or more people who assemble with intent to carry out any common purpose, and conduct themselves so as to cause people in the neighbourhood to fear on reasonable grounds that they will use violence or needlessly provoke others to violence.<sup>224</sup> However, nobody can be deemed to have provoked others to violence by saying or doing anything he or she is lawfully entitled to say or do.<sup>225</sup>
- 244 In terms of the common purpose, not only must the members of the assembly have assembled or conducted themselves in such a way as to cause the kind of fear described in the section, but the conduct causing alarm must be “referable” to the common purpose in the sense that it was expected or reasonably anticipated by the members of the assembly at the time they had formed the intent to carry out their common purpose.<sup>226</sup> The common purpose itself may be lawful or unlawful. Every member of an unlawful assembly is liable to a term of imprisonment not exceeding one year.

*Riot: Crimes Act 1961, s 87*

- 245 A riot is a group of six or more persons, acting together<sup>227</sup> and using violence against persons or property to the alarm of persons in the neighbourhood of that group.<sup>228</sup> Every member of a riot is liable to imprisonment for up to two years.

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<sup>224</sup> In other words, a peaceful lawful assembly which provokes a violent reaction from others does not infringe section 86 (although the police may order the assembly to disperse in those circumstances): Crimes Act 1961, s 86.

<sup>225</sup> *Adams on Criminal Law*, CA86.02.

<sup>226</sup> *R v Wolfgramm* [1978] 2 NZLR 184 (CA).

<sup>227</sup> *R v Ruru* (1989) 4 CRNZ 526. The accused participated in a spontaneous fight between rival gangs. This was held to be contrary to the notion of “acting together”, the court having taken the view that the essence of “acting together” is a purpose common to all the participants in the group.

<sup>228</sup> Crimes Act 1961, s 87.

246 Section 90 of the Crimes Act 1961 sets out the offence of riotous damage, being unlawful damage of property by any person who is a member of a riot. The offence is punishable by up to seven years in prison.

*Criminal Nuisance: Crimes Act 1961, s 145*

247 Under section 145 of the Crimes Act 1961, every one commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety, or health of the public, or the life, safety, or health of any individual. The offence does not require that anyone be actually harmed. “Endanger” is used in the sense of putting a person in peril of something untoward, or to cause the danger of something untoward happening.<sup>229</sup> Every one who commits criminal nuisance is liable to imprisonment for a term not exceeding one year.

*Threatening to commit specific offences: Crimes Act 1961 Part 11*

248 Part 11 of the Crimes Act 1961 deals with threatening, conspiring and attempting to commit offences.

249 Section 307A is a relatively new section, which was inserted into the Crimes Act 1961 in 2003. It proscribes two forms of conduct, both of which must be committed with one or more of the specific intents defined in subsection (2). The first is threatening to do an act likely to create one of the results defined in subsection (3), and the second is communicating false information about an act likely to have one or more of the results defined in subsection (3). Those results are:

- (a) creating a risk to the health of one or more people;
- (b) causing major property damage;

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<sup>229</sup> For example, it will be enough to prove an act or omission which materially increased the risk of someone being infected by something which would put that person’s life in peril: *R v Turner* (1995) 13 CRNZ 142 (CA), at p 151; *R v Mwai* [1995] 3 NZLR 149; (1995) 13 CRNZ 273 (CA), at p 156.

- (c) causing major economic loss to one or more persons;
- (d) causing major damage to the national economy of New Zealand.

250 The intention required is to achieve the effect of causing a significant disruption to:

- (a) the activities of the civilian population of New Zealand; or
- (b) something that is or forms part of an infrastructure facility in New Zealand; or
- (c) civil administration in New Zealand (which is widely defined to include not only Government administration and local authorities, but also District Health Boards and Boards of Trustees of schools); or
- (d) commercial activity in New Zealand.

251 There is some overlap between the offences set out in this section and terrorist acts under section 5 of the Terrorism Suppression Act 2002, although section 307A does not use the word “terrorist”.

252 Section 307A(4) specifically provides, for the avoidance of doubt, that the fact that a person engages in any protest, advocacy or dissent, or engages in any strike, lockout or other industrial action is not, by itself, a sufficient basis for inferring that a person has committed an offence against section 307A(1). Offences under section 307A(1) are punishable by a term of imprisonment of up to seven years.

### **Terrorism Suppression Act 2002**

253 The purpose of the Terrorism Suppression Act 2002 is to make further provision in New Zealand law for the suppression of terrorism and for the implementation in New Zealand of our obligations under a number of United Nations conventions.<sup>230</sup>

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<sup>230</sup> Terrorism Suppression Act 2002, s 3. The conventions are: the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations at New York on 15 December 1997; the International Convention for the

254 The Act creates a number of specific offences relating to terrorist bombing, the financing of terrorism, dealing with property owned or controlled by a designated “terrorist entity”<sup>231</sup> or associated entity, or making property or financial services available to any such entity. It also provides for offences relating to harbouring or concealing terrorists, recruiting or participating in terrorist groups, and relating to unauthorised possession or use of plastic explosives or nuclear or radioactive material.

255 Unlike the Australian anti-terrorism statute, the Terrorism Suppression Act 2002 does not attempt to modernise the so-called seditious offences, and focuses specifically on what the Act terms “terrorist acts”. However, there could be some overlap with current seditious offences.

256 Section 5 of the Act defines a terrorist act as follows:

(1) An act is a terrorist act for the purposes of this Act if—

(a) the act falls within subsection (2); or

(b) the act is an act against a specified terrorism convention (as defined in section 4(1)); or

(c) the act is a terrorist act in armed conflict (as defined in section 4(1)).

(2) An act falls within this subsection if it is intended to cause, in any 1 or more countries, 1 or more of the outcomes specified in subsection (3), and is carried out for the purpose of advancing an ideological, political, or religious cause, and with the following intention:

(a) to induce terror in a civilian population; or

(b) to unduly compel or to force a government or an international organisation to do or abstain from doing any act.

(3) The outcomes referred to in subsection (2) are—

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Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations at New York on 9 December 1999; Resolution 1373 (2001) of the Security Council of the United Nations, adopted under Chapter VII of the United Nations Charter on 28 September 2001; the Convention on the Physical Protection of Nuclear Material, New York and Vienna, 3 March 1980. the Convention on the Marking of Plastic Explosives for the Purpose of Detection, Montreal, 1 March 1991

<sup>231</sup> The Prime Minister can designate an entity as a terrorist entity or an associated entity under section 20 (interim designations) or section 22 (final designations). In terms of designation, the relevant issue is whether the entity has knowingly carried out, participated in or facilitated the carrying out of a terrorist act.

(a) the death of, or other serious bodily injury to, 1 or more persons (other than a person carrying out the act):

(b) a serious risk to the health or safety of a population:

(c) destruction of, or serious damage to, property of great value or importance, or major economic loss, or major environmental damage, if likely to result in 1 or more outcomes specified in paragraphs (a), (b), and (d):

(d) serious interference with, or serious disruption to, an infrastructure facility, if likely to endanger human life:

(e) introduction or release of a disease-bearing organism, if likely to devastate the national economy of a country.

(4) However, an act does not fall within subsection (2) if it occurs in a situation of armed conflict and is, at the time and in the place that it occurs, in accordance with rules of international law applicable to the conflict.

(5) To avoid doubt, the fact that a person engages in any protest, advocacy, or dissent, or engages in any strike, lockout, or other industrial action, is not, by itself, a sufficient basis for inferring that the person—

(a) is carrying out an act for a purpose, or with an intention, specified in subsection (2); or

(b) intends to cause an outcome specified in subsection (3).

257 Section 25 of the Act explains what is meant by “carrying out or facilitating terrorist acts”:

(1) For the purposes of this Act, a terrorist act is carried out if any 1 or more of the following occurs:

(a) planning or other preparations to carry out the act, whether it is actually carried out or not:

(b) a credible threat to carry out the act, whether it is actually carried out or not:

(c) an attempt to carry out the act:

(d) the carrying out of the act.

(2) For the purposes of this Act, a terrorist act is facilitated only if the facilitator knows that a terrorist act is facilitated, but this does not require that—

(a) the facilitator knows that any specific terrorist act is facilitated:

(b) any specific terrorist act was foreseen or planned at the time it was facilitated:

(c) any terrorist act was actually carried out.

258 United Nations Security Council resolution 1624 calls on States to “prohibit by law incitement to commit a terrorist act or acts, prevent such incitement, and deny

safe haven or entry to inciters”.<sup>232</sup> Incitement is not defined. The Terrorist Suppression Act 2002 has no general offence of committing a terrorist act so it seems unlikely that section 311 of the Crimes Act could be used to prosecute “incitement to commit a terrorist act”. The Terrorist Suppression Act 2002 is currently under review. In 2005 the Report of the Foreign Affairs, Defence and Trade Committee was presented to Parliament and it does not mention United Nations Security Council resolution 1624. It does, however, note that there is ongoing debate as to the definition of “terrorist act” in negotiations on a draft United Nations Comprehensive Convention on International Terrorism.

### **Summary Offences Act 1981**

259 The Summary Offences Act contains a number of offences against public order that can be prosecuted and punished summarily. The most relevant for present purposes are:

- (a) section 3: disorderly behaviour (in or within view of any public place, behaving, or inciting or encouraging any person to behave in a riotous, offensive, threatening, insulting, or disorderly manner that is likely in the circumstances to cause violence against persons or property to start or continue);
- (b) section 4: offensive behaviour or language, (which includes the use of threatening, alarming or insulting words in a public place, either intending to insult a person or recklessly as to whether a person is alarmed or insulted);
- (c) section 5A: disorderly assembly (an assembly of 3 or more people who assemble or so conduct themselves when assembled as to cause a person in the immediate vicinity of the assembly to fear on reasonable grounds that they will use violence against persons or property; or will commit an offence against section 3 of the Act). This section does not

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<sup>232</sup> United Nations Security Council *Resolution* 1624, UN SC 5261<sup>st</sup> mtg, UN Doc S/Res/1624 (2005). Such Resolutions are binding on New Zealand as a member state of the UN: see

apply to any group of persons who assemble for a demonstration in a public place;

- (d) section 8: publishing a document or thing explaining the manufacture of explosives, incendiary device or restricted weapon.

### **Human Rights Act 1993**

260 Inciting racial disharmony is an offence under the Human Rights Act 1993.

Section 131 of that Act provides:

(1) Every person commits an offence and is liable on summary conviction to imprisonment for a term not exceeding 3 months or to a fine not exceeding \$7,000 who, with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons,—

(a) Publishes or distributes written matter which is threatening, abusive, or insulting, or broadcasts by means of radio or television words which are threatening, abusive, or insulting; or

(b) Uses in any public place (as defined in section 2(1) of the Summary Offences Act 1981), or within the hearing of persons in any such public place, or at any meeting to which the public are invited or have access, words which are threatening, abusive, or insulting,—

being matter or words likely to excite hostility or ill-will against, or bring into contempt or ridicule, any such group of persons in New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons.

261 Prosecutions under section 131 may only be brought with the consent of the Attorney-General.<sup>233</sup>

262 Section 61(1) of the Act provides that it is unlawful to publish, distribute or broadcast written matter or words which are threatening, abusive, or insulting, where the written matter or words are likely to excite hostility against or bring into contempt or ridicule any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that

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<sup>233</sup> Charter of the United Nations, 26 June 1945 [1945] ATS 1 (into force 1 November 1945). Human Rights Act 1993, s132.

group. It is also unlawful to use such words in a public place, or in any place if the person knew the words were reasonably likely to be published or broadcast.<sup>234</sup>

### **Conspiracy and incitement**

263 The ancillary offences of conspiracy and incitement may be used in conjunction with many of the offences already listed. Conspiracy and more particularly incitement, like sedition, can be a “thought or intention crime,” which may exist irrespective of whether any actual conduct, which was the subject of the conspiracy or incitement, has come to fruition.

#### *Conspiracy*

264 Section 310 of the Crimes Act 1961 provides:

(1) Subject to the provisions of subsection (2) of this section, every one who conspires with any person to commit any offence, or to do or omit, in any part of the world, anything of which the doing or omission in New Zealand would be an offence, is liable to imprisonment for a term not exceeding 7 years if the maximum punishment for that offence exceeds 7 years' imprisonment, and in any other case is liable to the same punishment as if he had committed that offence.

(2) This section shall not apply where a punishment for the conspiracy is otherwise expressly prescribed by this Act or by some other enactment.

(3) Where under this section any one is charged with conspiring to do or omit anything anywhere outside New Zealand, it is a defence to prove that the doing or omission of the act to which the conspiracy relates was not an offence under the law of the place where it was, or was to be, done or omitted.

265 In *R v Gemmell*<sup>235</sup> the Court of Appeal held:

A criminal conspiracy...consists in an intention which is common to the mind of the conspirators and the manifestation of that intention by mutual consultation and agreement among them. It is of the essence of a conspiratorial agreement that there must be not only an intention to agree but also a common design to commit some offence.

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<sup>234</sup> Reporting a breach of subsection 1 is not itself a breach of the subsection, if the report accurately conveys the intention of the person who published or distributed the matter or broadcast or used the words – Human Rights Act 1993, s61(2).

<sup>235</sup> *R v Gemmell* [1985] 2 NZLR 740, 743.



## *Inciting offences*

266 Section 311(2) of the Crimes Act provides that

(2) Every one who incites, counsels or attempts to procure any person to commit any offence, when that offence is not in fact committed, is liable to the same punishment as if he had attempted to commit that offence, unless in respect of any such case a punishment is otherwise provided by this Act or some other enactment.

If, on the other hand the incitement leads to the commission of the crime incited, section 66(1)(d) of the Crimes Act would apply and the inciter could be prosecuted as a party to the crime.

267 “Incite” conveys the sense of urging on, instigating, prompting to action, or encouraging.<sup>236</sup> The courts have held it to mean induce, persuade, threaten or pressure another to commit an offence.<sup>237</sup> But it is not relevant that the minds of persons intended to be persuaded are not persuaded. The actus reus of incitement is persuading behaviour (such as a speech or an article in a magazine exhorting the commission of an offence). As Professor Gillies has said:<sup>238</sup>

The criminality of incitement consists simply in its potential to cause or encourage another to commit a crime.

268 The offence of incitement requires proof of two mental elements. First, the inciter must know of any circumstances specified by the definition of the offence incited. Secondly, the inciter must also intend that the person incited will act with the criminal intention (mens rea) required for the offence incited. But as liability does not depend on the commission of the offence incited, the actual state of mind (if any offence is committed) of the person incited is not relevant.<sup>239</sup>

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<sup>236</sup> The Concise Oxford Dictionary meaning of “incite” is to urge, or stir up. The primary meaning of “counsel” is to advise or recommend, though in a narrower sense it is sometimes treated as equivalent to inciting or instigating *Adams on Criminal Law*, ed JBR Robertson, CA66.17(2). In Canada it has been held to mean deliberately encouraging or actively inducing: *R v Hamilton* (2005) 255 DLR (4<sup>th</sup>) 283 (SCC).

<sup>237</sup> *Young v Cassells* (1914) 33 NZLR 852; *R v Marlow* [1998] 1 Cr App R (S).

<sup>238</sup> P Gillies *Criminal Law* (4<sup>th</sup> ed, LBC Information Services, 1997) 663.

<sup>239</sup> See *Adams on Criminal Law*, CA311.05, and *R v C* [2005] EWCA Crim 2827. See also NSW Parliamentary Library Research Service G Griffith *Sedition, Incitement and Vilification: Issues in the Current Debate* Briefing Paper No 1/06, 25-31 on the law of incitement in Victoria (statutory) and NSW (common law).

269 In its review of Australian federal sedition offences, the Australian Law Reform Commission discussed two arguments in relation to incitement:

- (a) that the sedition offences were unnecessary because the conduct they covered might constitute incitement to commit other offences;
- (b) that to the extent that the sedition offences extend criminal responsibility beyond incitement, they are too broad and should be wound back.<sup>240</sup>

270 The ALRC rejected these arguments. It considered that the ancillary offence of incitement could not cover conduct proscribed by the existing sedition offences because incitement requires an ulterior intention on the part of the inciter, that the offence incited be committed. By way of contrast, the Australian sedition offences do not require an ulterior intention that the conduct urged be committed.

271 While we acknowledge this distinction, in our view, it serves to demonstrate the line between conduct that might be described as vehement speech and conduct which incites violence: in other words the line between speech which we consider should be protected by the principles of freedom of expression, and speech which should be limited in the interests of public order and safety. Calls for generalised force or violence to bring down the government could be treated as incitement to treason, depending on the context in which they were uttered, and if the ulterior intention could be proved. If that ancillary intention does not exist, the speech should not be criminalised.

272 We also note that in the context of federal law, the range of criminal offences which are available to support a charge of incitement are more limited than those available in New Zealand criminal law.

#### ANALYSIS OF SEDITIOUS OFFENCES AND SEDITIOUS INTENTIONS

273 We examine first, the offences of participating in seditious conspiracies (section 82 of the Crimes Act 1961); or making, or causing to be made, statements that

express seditious intention (section 83) in conjunction with the various seditious intentions set out in section 81(1) (a)-(e). We then consider “publishing or causing to be published” statements that express seditious intentions with a discussion of section 84 (publication of seditious documents). In each case, we examine whether the offences are necessary, and where they do include conduct that should be proscribed, whether that conduct can be more appropriately dealt with by other existing offences.

### **Section 81(1)(a)**

- 274 In our view it should not be an offence in 2006 to make statements or conspire with a section 81(1)(a) intention, namely an intention to bring into hatred or contempt, or excite disaffection against Her Majesty or the Government of New Zealand or the administration of justice. This is the sort of dissenting statement that, without more, should be protected by the principles of freedom of expression, and that a healthy democracy should be able to absorb.

### **Section 81(1)(b)**

- 275 It should not be an offence to make or publish statements expressing a seditious intention set out in section 81(1)(b), namely an intention to incite the public or any persons to attempt to procure, otherwise than by lawful means, the alteration of any matter affecting the Constitution, laws, or Government of New Zealand, or conspire with such seditious intention, unless there is an intention to incite violence against the lawfully constituted authority. The current wording of the seditious intention in section 81(1)(b) reflects the essential sedition offences, whose width has led to prosecutions for such matters as advocating universal suffrage or communism, where there has been no intention on the part of the advocate to incite revolt or violence or the commission of a criminal offence.
- 276 We consider that the existing offences of incitement or conspiracy to use force for the purpose of overthrowing the New Zealand Government (treason, in sections

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<sup>240</sup> ALRC *Fighting Words: Review of Sedition Laws* Report 104, July 2006, 169.

73(e) and 73(f))<sup>241</sup> sufficiently covers the conduct which crosses the line between free speech and advocating violence, and would be a more appropriate means of prosecuting such conduct, as it encapsulates the link between the speech and the violence or revolt. In other words, if a person were to urge or encourage another person to use force for the purpose of overthrowing the Government of New Zealand, this could be prosecuted as incitement to treason, rather than by way of the sedition offences.

### **Section 81(1)(c)**

- 277 The current offence of making or publishing statements expressing the seditious intention set out in section 81(1)(c), namely an intention to incite, procure or encourage violence, lawlessness or disorder, or conspiring with such intention, are wide and general offences, as Sir Kenneth has pointed out.<sup>242</sup> They catch statements and conspiracies which are not specifically directed against the Government or the Constitution or the Sovereign.
- 278 In our view, statements or conspiracies which encourage lawlessness should not be offences unless there is an intention to incite a specific criminal offence and the statements or conspiracies are likely to do so. Where this threshold is met, this conduct is adequately covered by incitement or conspiracy to commit various public order offences (such as riot under s 87 of the Crimes Act 1961, riotous damage under s 90, unlawful assembly (s 86)). Such conduct may also be covered by the “threatening” offences in s 307A, if the specific intentions (such as causing a significant disruption to part of the infrastructure of New Zealand) and results required (such as major property damage) are established.
- 279 In less serious cases a prosecution under the Summary Offences Act 1981 for incitement to commit disorderly behaviour (section 3) or disorderly assembly (section 5A), or publishing a document or thing explaining the manufacture of explosives (section 8) may be appropriate.

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<sup>241</sup> It could also possibly be a prosecution for incitement to levy war against New Zealand, in the sense of a “constructive war”: see Crimes Act 1961, s 73(b).

### **Section 81(1)(d)**

280 In our view the current offence of publishing or making statements or conspiring with the intention set out in section 81(1)(d), to incite, procure or encourage the commission of any offence that is prejudicial to the public safety or the maintenance of public order, is too wide. Speech of this sort should only be proscribed if there is an intention to incite the behaviour prejudicial to specific aspects of public safety or public order. The “threatening” offences in s 307A of the Crimes Act 1961 could also cover this conduct in some circumstances.

### **Section 81(1)(e)**

281 Publishing or making statements or conspiring to excite such hostility or ill will between different classes of persons as may endanger the public safety (s 81(1)(e)) has been one of the seditious provisions that has been unfairly enforced in the past against members of particular groups or classes. It has the potential to be used indiscriminately against religious or racial groups. Proscribing this sort of speech in this way has enabled abrogation of freedom of expression and punishment of political nonconformity.

282 It is beyond our terms of reference to consider New Zealand’s obligations in terms of the International Covenant on Elimination of all Forms of Racial Discrimination 1966 and art 20 of the ICCPR<sup>243</sup> and whether, and to what extent, “hate speech” should be criminalised. But we do not consider that sedition should be used as the legislative vehicle to do so. Whether New Zealand needs further legislation to proscribe “vilification” is a separate debate; it is not in our view appropriate for part of the old sedition law to be retained in place of such legislation. The freedom of expression principle needs careful consideration in the debate. We note that anti-vilification laws in Australia rely primarily on civil rather than criminal mechanisms.

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<sup>242</sup> KJ Keith, “The Right to Protest” in *Essays on Human Rights* (Sweet & Maxwell NZ Ltd, Wellington, 1968) 49, 57.

<sup>243</sup> Art 20 requires states to prohibit “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”.

283 As Professor Hare has said in criticising the Racial and Religious Hatred act 2005 (UK):<sup>244</sup>

Justifications for restrictions on speech based on the effect such expression may have on its audience (for example by making them think less highly of a particular group) is an inevitably speculative, and potentially dangerous, basis for the imposition of legal sanction. This must be especially true where the restriction occurs through the criminal process. Government fails in its duty to treat us as autonomous and rational agents if it purports to prohibit speech on the basis that it might persuade us to hold what it considers to be dangerous or offensive convictions. It will be remembered that one of the main justifications for the protection of speech is the persuasive impact it may have on the minds of others. To use the impact speech may have on its audience as the basis for censorship turns a good deal of the principled basis for free speech protection on its head. –

284 The Human Rights Act 1993 creates a limited offence in relation to racial groups, but it extends only to the grounds of colour, race, or ethnic or national origins, whereas section 81(e) of the Crimes Act 1961 refers to exciting ill-will between different classes of person. This has been used where the words were such as to excite hostility and ill between workers and employers,<sup>245</sup> but the seditious offences have never been used in New Zealand to deal with issues of race or ethnic origin.

285 There are some other significant differences between the terms of the Human Rights Act 1993 and this seditious intention. In particular:

- under the Human Rights Act the words or material need only be such as to excite hostility or ill will against a group, or bring that group into contempt or ridicule, while a seditious intention requires that the hostility or ill-will be such as may endanger public safety;
- as well as being likely to excite hostility, the words or matter under the Human Rights Act 1993 have to be threatening, abusive or insulting. There is no such additional requirement for a seditious intention;
- the penalty for inciting racial disharmony under the Human Rights Act 1993 is limited to up to three months imprisonment, or a fine of up to \$7000;

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<sup>244</sup> I Hare “Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred” [2006] PL Autumn 521, 532.

- consent of the Attorney-General is required for a prosecution under section 131 of the Human Rights Act 1993.

### **Publication of seditious documents: sections 83 and 84 of the Crimes Act 1961**

- 286 Section 84 provides for liability by persons who print, publish, sell, distribute or deliver material that expresses a seditious intention, together with those who possess such material for sale or delivery, or cause it to be brought to New Zealand. But in all cases, to attract liability the person must have so acted with one of the seditious intentions set out in section 81(a)-(e).
- 287 This is not the case with publication under section 83, where a person need only publish a statement that expresses a seditious intention. The authors of *Media Law in New Zealand* have noted that if a newspaper were to be prosecuted under s 83, arguably it could be found guilty of sedition even if it had only reported a seditious statement made by someone else.<sup>246</sup> Such an interpretation would be in breach of the prosecution's duty to prove mens rea as discussed in chapter 3, because a reporter could be convicted without any requirement that the prosecution had to prove that he or she intentionally or knowingly published a statement with seditious intent. In our view, too, this sort of offence (of publication, distribution and so on,) of the words of others, is generally in breach of freedom of speech.
- 288 The conduct proscribed by both sections 83 and 84 should not be an offence unless it amounts to incitement to commit another offence.

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<sup>245</sup> *R v Holland* (1914) 33 NZLR 931.

<sup>246</sup> J Burrows and U Cheer, *Media Law in New Zealand* (5 ed, Oxford University Press, Victoria 2005), 447.

## Use of apparatus for making seditious documents or statements: section 85

289 Section 85 is directed at persons who have printing and photocopying equipment in their possession or control<sup>247</sup> and who cause or permit such equipment to be used for purposes such as printing or publishing documents that express a seditious intention. There is no need for the person to have a seditious intention so long as the material does. So, as for section 83, the offence is prima facie of strict liability, in breach of the prosecution's duty to prove mens rea. In our view, this sort of conduct should not be an offence unless it amounts to incitement to commit the public order offences discussed.

## CONCLUSION

290 In 1992 Maher argued that:

So 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.<sup>248</sup>

291 We agree. As long as the New Zealand sedition offences remain on the statute book there is the potential for their misuse against people who criticise the government publicly, especially at times of civil unrest and of perceived concern for national security. It is not appropriate to modernise or clarify the provisions; nor is it necessary to do so. Prosecutions for incitement to commit various existing public order offences will adequately suffice to proscribe what are presently labelled "seditious offences", to the extent that such conduct should be a crime.

292 In the recent Australian review of sedition, one of the arguments made by the Attorney-General's Department for retaining the new seditious offences, rather than relying on incitement, was that there was no doubt that the new offences

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<sup>247</sup> To be "under their control" the person must have some right to manage or direct the use of the equipment: *R v Crooks* [1981] 2 NZLR 53 (CA).

<sup>248</sup> LW Maher "The Use and Abuse of Sedition" (1992) 14 Sydney L Rev 287, 288 cited in Gareth Griffith NSW Parliamentary Library Research Service "Sedition, Incitement and Vilification: Issues in the Current Debate", Briefing Paper No 1/06, February 2006, 3.



would be easier to establish than incitement to commit an offence.<sup>249</sup> We consider that such “speech only” offences should not be easy to prove, in the interests of freedom of expression.

- 293 We recommend that the seditious offences set out in sections 81 to 85 of the Crimes Act 1961 be abolished.

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<sup>249</sup> See ALRC *Fighting Words: Review of Seditious Laws* Report 104, July 2006, 171.