



LAW COMMISSION  
TE AKA MATUA O TE TURE

March 2007, Wellington, New Zealand | REPORT 96

# REFORMING THE LAW OF SEDITION

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# REFORMING THE LAW OF SEDITION

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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National Library of New Zealand Cataloguing-in-Publication Data

New Zealand. Law Commission.

Reforming the law of sedition.

(Report, 0113-2334 ; 96)

ISBN 978-1-877316-31-9

1. New Zealand. Crimes Act 1961. 2. Sedition—New Zealand.

I. Title. II. Series: New Zealand. Law Commission. Report.

345.930231—dc 22

Report/Law Commission, Wellington, 2007

ISSN 0113-2334 ISBN 978-1-877316-31-9

This report may be cited as: NZLC R96

This report is also available on the Internet at the Law Commission's website: [www.lawcom.govt.nz](http://www.lawcom.govt.nz)



# Reforming the Law of Sedition

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12/3/2007

*The Hon Mark Burton*  
Minister Responsible for the Law Commission  
Parliament Buildings  
WELLINGTON

Dear Minister

I am pleased to submit to you Law Commission Report 96, *Reforming the Law of Sedition*, which we submit under section 16 of the Law Commission Act 1985.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Geoffrey Palmer', with a horizontal line underneath.

*Geoffrey Palmer*  
President

## FOREWORD

Most people probably associate the word “sedition” with revolutionary statements encouraging revolt, insurrection and public riot against lawful authority. In New Zealand, however, the “seditious offences” in the Crimes Act 1961 are a great deal wider than this. The essence of the offences is the making or publishing of a statement with a seditious intention. But a “seditious intention” can range from exciting disaffection against Her Majesty or the New Zealand Government, to inciting lawlessness generally, or exciting ill-will between different classes of people such as may endanger public safety.

In its review of seditious offences, the Law Commission has concluded that the width of the offences means they are an unjustifiable breach of the right of freedom of expression. Furthermore, the linguistic over-inclusiveness of sedition means the offences lack clarity. They have the potential for misuse. Indeed, they have been inappropriately used in New Zealand in times of political unrest and perceived threats to established authority. They have been used to fetter vehement and unpopular political speech. The time has come to remove the seditious offences from the New Zealand statute book. We recommend repeal of the seditious offences. To the extent that inciting offences of public disorder and revolt against lawful authority should be made criminal, these are already proscribed in other offences contained in the Crimes Act 1961.

In a free and democratic society, defaming the government is the right of every citizen. In times beset with threats of terrorism we should not close the open society. To do so would only encourage its enemies. In New Zealand, free speech and public debate must be “uninhibited, robust and wide open”, and it may include “vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials”, as Justice Brennan of the United States Supreme Court once put it.



*Geoffrey Palmer*  
President



**ACKNOWLEDGEMENTS** We are grateful to Professor John Burrows QC (University of Canterbury) for his helpful comments on a final draft of this report, prior to commencing his term as a commissioner at the Law Commission. We thank our peer reviewers, Elisabeth McDonald (Victoria University of Wellington) and Ursula Cheer (University of Canterbury) for their very useful comments on a draft consultation paper of this report. We thank Elizabeth Grant from the Parliamentary Counsel Office for her work in producing a draft bill, attached in appendix 2 to this report.

We also gratefully acknowledge the helpful contributions from those whom we consulted and those who responded to our call for consultation on the issues:

The Hon Justice Hugh Williams, High Court of New Zealand

Her Honour Judge A-M Bouchier, Auckland District Court

Professor William Buss, OK Patton Professor, University of Iowa College of Law, Iowa

Mark Henaghan, Dean of Law, University of Otago

The New Zealand Law Society Criminal Practice Committee

David Johnstone, Meredith Connell, Auckland

Steven Price, Victoria University of Wellington

Scott Optican, University of Auckland

Author of [norightturn.blogspot.com](http://norightturn.blogspot.com)

We thank the following who sent submissions on the consultation draft of the report:

His Hon Chief Judge Russell Johnson on behalf of the District Court Judges

Tony Ellis, President, New Zealand Council for Civil Liberties

Anne Hunt

Paul King

Ministry of Justice

The Media Freedom Committee of the Commonwealth Press Union (New Zealand section)

Inspector Scott Spackman, Senior Legal Adviser, New Zealand Police

Brett Cunningham, solicitor, Auckland

Dr Denys Trussell, New Zealand Society of Authors (PEN NZ Inc)

John AR Cox, Auckland

Brigadier Kevin Riordan, New Zealand Defence Force

The Commissioner responsible for this reference was Sir Geoffrey Palmer, President of the Law Commission, and the legal and policy advisors were Rachel Hayward and Janet November.

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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.



# Summary

- 1 The *Concise Oxford Dictionary* defines the word “sedition” as: “conduct or speech inciting rebellion against the authority of a state or monarch”.<sup>1</sup> However, in New Zealand, the word “seditious” has a legal definition, in the context of seditious offences, which is much broader than this dictionary definition.
- 2 Seditious offences in New Zealand law are set out in sections 81 to 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”. The offences are set out in appendix 1 of this report.
- 3 The Law Commission has been asked to review these seditious offences, and make any recommendations for reform that are necessary and desirable. 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 that has been realised in some periods of our history, when these offences have been used to stifle or punish political speech.
- 4 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.<sup>2</sup> But that case did nothing to demonstrate that the crime is a necessary feature of our statute book.
- 5 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 is hard to see how or why speech uttered against the Government should be a crime; not in a country that values free speech.
- 6 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 that 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 in the Crimes Act 1961 are not an appropriate response to the threat of terrorism. There are other ways of dealing with such conduct.

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<sup>1</sup> The *Concise Oxford Dictionary* (10 ed, Oxford University Press, Oxford, 1999).

<sup>2</sup> *R v Selwyn* (8 June 2006) CRI: 2005-004-11804, District Court Auckland.

- 7 The focus of this report is narrow. It is concerned only with the offences in sections 81 to 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.
- 8 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 Law Reform Commission of Ireland puts it)<sup>3</sup> at particular periods throughout history, and the lack of clarity surrounding what amounts to seditious intention, as well as the width of the seditious provisions, are all reasons for abolishing sedition as a crime.
- 9 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.
- 10 In analytical terms, the case we make for reform depends upon examining the ingredients of the 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 81 to 85 of the Crimes Act 1961 that should continue to attract the attention of the criminal law.
- 11 This report recommends that sections 81 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 provisions of the criminal law. By abolishing sedition, we will better protect the values of democracy and free speech.
- 12 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.
- 13 Were the provisions of sections 81 to 85 of the Crimes Act 1961 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.

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3 Law Reform Commission of Ireland *Report of the Crime of Libel* (LRC 41-1991, Dublin 1991) 10–11.

- 14 In summary, five principal reasons are advanced in the report for repealing the sedition provisions of the Crimes Act 1961:
- the legal profile of the offence is broad, variable and uncertain. The meaning of “sedition” has changed over time;
  - as a matter of policy, the present law invades the democratic value of free speech for no adequate public reason;
  - specifically, the present law falls foul of the New Zealand Bill of Rights Act 1990;
  - the seditious offences can be inappropriately used to impose a form of political censorship, and they have been used for this purpose;
  - the law is not needed because those elements of it that should be retained are more appropriately covered by other offences.

# Chapter 1

## A brief history of the common law relating to sedition

- 15 The first question for this reference is whether conduct that in the past has been labelled seditious should still be a crime in New Zealand in 2007. To answer this 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”. Prosecutions for seditious offences hover on a continuum between prosecutions for a strong expression of political dissent and those for a clear urging of violence against constituted authority. The former should nowadays be protected by rights of free speech, whereas the latter should be covered by other offences.
- 16 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>4</sup> Sedition is thus conceptually linked to treason.<sup>5</sup> The English Statute of Treasons 1351 defined (and still does define) 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 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>6</sup>
- 
- 4 CI Kyer “Sedition Through the Ages: A Note on Legal Terminology” (1979) 37 UT Fac L Rev 266.
- 5 Kyer, above n 4, 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 49, Ottawa, 1986) for a fairly comprehensive history; see also Australian Law Reform Commission *Review of Sedition Laws* (Issues Paper 30, Sydney, 2006) 29.
- 6 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/BlackCJ.pdf](http://www.alrc.gov.au/events/events/alrc/Presentation/BlackCJ.pdf) > (last accessed 31 January 2007), citing Sir John Baker *Oxford History of the Laws of England*, vol VI, 587).



In the reign of Henry VIII, treason was greatly expanded, and an Act of 1534 declared it was treason to act or write anything to the prejudice, slander or disturbance of the King's marriage to Anne Boleyn.<sup>7</sup>

SEDITIOUS LIBEL  
1600–1800

17 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>8</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>9</sup> According to Sir James Stephen, the invention of printing gave a new importance to political writings.<sup>10</sup> By the 1680s there were frequent, and often ruthless, prosecutions for political libel and seditious words, apparently involving “extravagant cruelty”,<sup>11</sup> for simply criticising the Government.

18 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 and width of such offences in *R v Tutchin*:<sup>12</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.

19 In 1792, Fox's Libel Act was passed. It provided that the 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. Among them were 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>13</sup>

7 Hon Chief Justice Black's paper, above n 6, 9. These draconian Acts were repealed on the King's death.

8 Hon Chief Justice Black's paper, above n 6, 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 4.

9 *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 I despite his strong language. See also *R v Uchiltriee* (1631) 3 State Trials 425, 437, cited in Kyer, above n 4.

10 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.

11 See M Head “Sedition – Is the Star Chamber Dead?” [1979] 3 Crim LJ 89, 95.

12 *R v Tutchin* (1704) 14 State Trials (OS) 1096, 1128, cited in Australian Law Reform Commission *Review of Sedition Laws* Issues Paper, above n 5, 29. Tutchin was sentenced to seven years' imprisonment, with a whipping every fortnight, for alleging corruption in the ministry and ill-management in the navy.

13 *Paine* (1792) 22 State Trials (OS) 357 and *Winterbotham* (1793) 22 State Trials (OS) 471 cited in Head “Sedition – Is the Star Chamber Dead?”, above n 11, 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).

- 20 In the 1790s, there was a series of trials in Scotland where the accused were charged with sedition.<sup>14</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>15</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.

- 21 The Reverend Thomas Palmer was another of this group convicted for seditious practices.<sup>16</sup> 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 because they would compel reform of bad ministers; and that it showed a strongly marked attachment to the Constitution.

#### THE NINETEENTH CENTURY – SEDITIONS INTENTION

- 22 The nineteenth century saw a more liberal, democratic political environment, and a changed view of the rights of citizens to freely express criticism of the government. To some extent, the law of seditious libel was restricted. 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>17</sup> However, prosecutions for seditious offences continued where urging others to commit illegal acts or create disorder allegedly led to such acts.<sup>18</sup> Thus, there were prosecutions for seditious conspiracy following the Peterloo massacre in 1819, and during the Chartists' revolts against their capitalist masters and the Government's refusal to respond to their petition, in 1839.<sup>19</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 deep 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>20</sup>
- 23 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>21</sup> Sir James Stephen said that

14 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 4, 268.

15 Mackenzie, above n 13, containing the text of the trial, 82 and following. See also *The Trial of William Skirving* (J Ridgway, HD Symonds, W Ramsey and J Marson, London, 1794).

16 See *Trial of Rev Thomas Fyshe Palmer* (Edinburgh, 1793), 3–6 for the Address; 25–29 for parts of the defence.

17 *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”.

18 Australian Law Reform Commission *Review of Sedition Law*, Issues Paper, above n 5, 31–32.

19 See M Lobban “From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c 1770–1820” (1990) 10 Oxford Jnl of Legal Studies 307.

20 Black, above n 6, 14–15.

21 See a summary of the nineteenth century common law developments in *Boucher v R* [1951] 2 DLR 369, 382–383, per Kellock J.



for all who held this more modern view, no censure of the Government, short of a direct incitement to disorder and violence, would be a seditious libel.<sup>22</sup> 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>23</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.

24 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 and to create public disturbances and disorder. But, on the other hand, if the jury concluded that the defendants had an honest desire to alleviate the misery of the unemployed, by bringing it before the public in a constitutional and legal manner, they should not be too quick to convict for hasty or ill-considered expressions, uttered in the excitement of the moment.<sup>24</sup>

25 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>25</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 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 different classes of Her Majesty's subjects.

26 However, in the same volume, Sir James noted that: "in one word, nothing short of direct incitement to disorder and violence is a seditious libel".<sup>26</sup>

27 The common law remains much as in Sir James's formulation; it is not sufficient to show the words were used with the intention of achieving one of the objects he described; it must also be proved there was an intention to cause violence.<sup>27</sup>

22 Kellock J, above n 21, 383, citing Sir James Stephen *A History of the Criminal Law of England*, above n 10, 375.

23 *R v Sullivan* (1868) 11 Cox CC 44 cited in *Boucher v R*, above n 21, 384. *Sullivan* was one of a series of Irish trials during a time of great political unrest in Ireland.

24 *R v Burns* (1886) 16 Cox CC 355, 363.

25 Stephen *A History of the Criminal Law of England*, above n 10, 298–299, citing Article 93 of Stephen's *Digest of the Criminal Law* (1877), approved in *R v Burns* (1886) 16 Cox CC 355, 377.

26 Stephen, above n 10, 375.

27 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 Article 114 in Stephen's *Digest of the Criminal Law* (4 ed), which was updated from Article 93, but essentially the same in its terms as Article 114 described in n 25 above, and approved in *R v Burns*, above n 25, *R v Aldred* (1909) 22 Cox CC 1 and *Boucher v R* [1951] 2 DLR 369, 382–384.

In *R v Aldred*,<sup>28</sup> Coleridge J instructed the jury in the following terms:

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 the 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 ...

SEDITIONOUS  
INTENTION  
AT COMMON  
LAW TODAY

- 28 In the United Kingdom, sedition is still a common law offence, and the High Court has confirmed that the views expressed as to seditious intention above still apply. In *R v Chief Metropolitan Stipendiary Magistrate: ex parte Choudhury*<sup>29</sup> the High Court said:

In our judgment the common law of sedition and seditious intention was accurately stated in the Supreme Court of Canada in *Boucher v The King* [1951] 2 DLR 369.

- 29 In *Boucher v R*,<sup>30</sup> the Supreme Court of Canada considered the common law of sedition, because seditious intention is required for the seditious offences of the Canadian Criminal Code, but is not defined. The majority judges comprehensively reviewed the nineteenth and early twentieth century common law, and summarised their statements of seditious intention. Although each judge expressed their conclusions as to what “seditious intention” meant slightly differently, the essence of the majority holding is that to render the intention seditious, there must be an intention to incite violence or create public disorder, for the purpose of resisting or disturbing constituted authority.<sup>31</sup>
- 30 “Violence” is not defined in *Boucher*, although words like “tumult”, “insurrection”, “riot” or “uproar” used in the nineteenth-century judgments are quoted. In Sir James’s opinion, only a censure of the Government that had an immediate tendency to produce a breach of the peace that may destroy or endanger life, limb or property ought to be regarded as criminal.<sup>32</sup> Presumably, therefore, incitement to violence or public disorder means incitement to commit aggressive physical force against persons or property, publicly, with the purpose of resisting or defying or disturbing lawfully constituted authority. Seditious intention at common law would appear to include these concepts, but there is a lack of clarity.
- 31 Having set out the development of the common law seditious offences, we turn now to consider the position in New Zealand, where the seditious offences are contained in the Crimes Act 1961.

28 *R v Aldred* (1909) 22 Cox CC 1, 3.

29 *R v Chief Metropolitan Stipendiary Magistrate: ex parte Choudhury* [1991] 1 QB 429, 452.

30 *Boucher v R* [1951] 2 DLR 369.

31 *Boucher*, above n 30, 379 per Kerwin J, 380 per Rand J, 381 per Kellock J, 394 per Estey J, 408–409 per Locke J.

32 Stephen, above n 10, 300, cited in *Boucher*, above n 30, 383, per Kellock J.

# Chapter 2

## New Zealand sedition law

**THE SEDITIOUS OFFENCES** 32 New Zealand’s seditious offences are set out in sections 81 to 85 of the Crimes Act 1961. They appear in appendix 1 of this report. The main offences are making or publishing a statement that expresses a “seditious intention”, or conspiring with a “seditious intention”.

### History of the statutory law in New Zealand

- 33 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 that in the Crimes Act 1961, with some key differences:
- (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 1893 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 1893 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) of the 1908 Act included a definition of seditious libel, being a libel expressive of a sedition intention.

34 The exceptions to the definition of seditious intention in the 1893 Code and 1908 Act were substantially the same as in section 81(2) of the Crimes Act 1961. The range of offences was more limited: 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.

35 During World War I, regulations made under the War Regulations Act 1914 provided:<sup>33</sup>

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.

The seditious offences under these regulations were wider than those provided under section 119 of the Crimes Act 1908, extending to the printing, sale, importation, distribution and possession of seditious material. These regulations remained in force after the war, pursuant to the War Regulations Continuance Act 1920. This Act was repealed in 1947 by the Emergency Regulations Continuance Act 1947.

36 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. The definition of seditious intention provided in that Act was the same as the current definition, and the offences under the Act included the printing, sale, distribution or possession of seditious material, or the use of apparatus for making seditious documents or statements.<sup>34</sup> Sir Kenneth Keith has noted that this legislation was enacted following the 1951 waterfront dispute, amidst a wave of criticism, with the clear intention of limiting avenues of protest and of strengthening the laws of sedition.<sup>35</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>36</sup>

37 The Police Offences Amendment Act 1951 was repealed in 1960,<sup>37</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 that had been set out in sections 3 to 6 of the Police Offences Amendment Act 1951.<sup>38</sup> (The reference to seditious libel in the Crimes Act 1908 was not carried over to the Crimes Act 1961.)

33 Regulations dated 20 September 1915, as amended on 29 November 1915, 24 July 1916 and 2 April 1918.

34 Police Offences Amendment Act 1951, ss 2, 5 and 6.

35 KJ Keith "The Right to Protest" in *Essays on Human Rights* (Sweet & Maxwell NZ Ltd, Wellington, 1968) 49, 55.

36 Police Offences Amendment Act 1951, s 11.

37 Police Offences Amendment Act 1960, s 9.

38 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.

- 38 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 to 85. The Bill was not passed, for reasons unconnected with the proposed abolition of sedition.

## PROSECUTIONS FOR SEDITION IN NEW ZEALAND

- 39 As noted in chapter 1, at common law, a seditious intention requires an intention to incite violence. This is not a requirement for a seditious intention to be established under the New Zealand statutory provisions. In fact, in New Zealand, a person can have a seditious intention under section 81(1)(a) even if he or she does not intend to incite lawlessness, let alone violence. In examining the history of prosecutions for sedition in New Zealand, it is interesting to consider whether any of the cases might have had a different outcome if the common law requirement of an intention to incite violence had also operated here.
- 40 The cases discussed below reflect the fact that, generally, charges relating to seditious offences are laid during times of political or civil unrest, or war. In many of the cases considered, charges were laid and prosecuted against people for criticism of particular legislation or policies of the Government, or advocating an alternative form of government. They were not, by and large, advocating violence against lawfully constituted authority, or, if they did at least allegedly advocate violence, it was in response to the violence of government reaction (sending force against the Māori trying to protect their lands, or against strikers, for example).
- 41 A number of the early prosecutions were not under the Crimes Act 1908 but under the War Regulations Act 1914, made, ad hoc, to cope with wartime conditions. This could have been because the regulations made under that Act were wider than the statutory provisions, and/or because it was easier to use summary rather than indictable procedure.

### Māori land confiscation: the case against Te Whiti and Tohu

- 42 In the late nineteenth century, sedition charges were laid against the Māori leaders, Te Whiti o Rongomai and Tohu Kakahi.<sup>39</sup> Te Whiti had established a movement for Māori peace and development at Parihaka, and had led a campaign of passive, peaceful resistance to Māori land confiscations by the Government. In 1881, the Government's Armed Constabulary invaded and occupied Parihaka. Wholesale arrests were made, villagers evicted and houses and crops destroyed. Te Whiti and Tohu were arrested and held on charges of sedition. At one of the meetings of Māori at Parihaka in 1881, Te Whiti was alleged to have said (as translated) "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>40</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.

39 Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatai* (WAI 143, GP Publications, Wellington, 1996) 199 and following.

40 Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatai*, above n 39, 239, and < <http://norightturn.blogspot.com/2005/11/sedition-by-example-xvi-te-whiti-and.html> > citing *Taranaki Herald*, 12, 14 and 15 November 1881 (last accessed 30 November 2006).

- 43 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 after four days of hearing the trial was postponed, and it was never completed. The Crown prosecutors found the case was weak and reports of the meeting garbled. The Government enacted the West Coast Peace Preservation Act 1882, an Act which provided that neither man should be tried for the offence with which they were charged, but allowed them to be detained indefinitely as the Governor thought fit.<sup>41</sup> Te Whiti and Tohu were not released until 1883.<sup>42</sup>

### Workers on strike

- 44 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.

- 45 On appeal, the Court of Appeal concluded that the jury would have been justified in regarding counsel 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.
- 46 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:

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.

41 West Coast Peace Preservation Act 1882.

42 Waitangi Tribunal *The Taranaki Report: Kaupapa Tuatai*, above n 39, chapter 8; G Palmer *New Zealand's Constitution in Crisis* (John McIndoe, Dunedin, 1992) 65–66.

43 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).

44 *R v Holland* [1914] 33 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.

45 See L Richardson "Hunter, Edward 1885–1959" *Dictionary of New Zealand Biography* updated 7 April 2006 < 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, Auckland, 1995).

## Opposition to conscription in World War I

47 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>

48 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.

49 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.

50 Armstrong was sentenced to 12 months’ imprisonment.<sup>48</sup>

## Twentieth century Māori resistance

51 In 1916, there was a clash between the Tuhoe Māori 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 he

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

47 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”.

48 B Kendrick “Hubert Thomas Armstrong: Miner, Unionist, Politician” (MA Thesis, University of Auckland, 1950); Jim McAloon “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).

spoke at the time of the arrest attempt, for counselling murder or disabling the Police and resisting arrest. There was a mass of conflicting evidence; the Crown case rested on an assumption that an ambush awaited the armed Police, and that Rua gave the signal with the words “Patua, Patua”. Māori evidence was that only one Māori was armed and that the words could only have been part of a cry of despair “Patua au, Patua au” (Kill me, Kill me) uttered when Rua was taken by the Police.<sup>49</sup>

- 52 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. Eight of the jury sent a letter of protest to the *Auckland Star* against the severity of the sentence.<sup>50</sup>

### Communist literature – 1920s

- 53 In 1921, at the beginnings of the “Bolshevik scare”, there was 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*, on the basis that it was a seditious journal which encouraged violence. She was convicted and fined £10 and her studentship at Wellington Training College was terminated, a severe punishment impacting on her career.<sup>51</sup>
- 54 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>52</sup>

### Disaffection against His Majesty or the Government of New Zealand

- 55 In 1922, 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 because he had recounted what was essentially historical fact.<sup>53</sup>
- 56 One of the few reported cases is *Ambrose v Hickey and Glover*.<sup>54</sup> Hickey and Glover were charged with printing and publishing a pamphlet that expressed a seditious intention contrary to the War Regulations of 1915. The report does not say what the content of this seditious intention was. The magistrate dismissed the information on the grounds that the pamphlets did not express a seditious intention against the New Zealand Government. It was held on appeal that there

49 J Binney, G Chaplin and C Wallace *Mihaia: The Prophet Rua Kenana and His Community at Maungapohatu* (Auckland University Press, Auckland, 1996) 111, 124–125.

50 Binney, Chaplin and Wallace, above n 49, 126–27.

51 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.

52 See debate in NZPD Police Offences Amendment Bill, 24 August 1960, 1787.

53 R Sweetman *Bishop in the Dock: The Sedition Trial of James Liston* (Auckland University Press, Auckland, 1997).

54 *Ambrose v Hickey and Glover* [1922] NZLR 96.



was nothing in the Crimes Act 1908 definition of “seditious intention”, or in the regulations, to justify the view that the seditious intention must be expressed against the Government. The case was remitted to the magistrate.

### Recent charges

- 57 Until 2006, prosecutions for sedition had been so rare during the previous half century that it appeared 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.<sup>55</sup>
- 58 Selwyn faced 11 other charges unconnected to these events, relating to obtaining a document, an impersonation, a forgery of a passport, six charges of use of a document; and also 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).
- 59 In summing up to the jury at the sedition trial, Judge 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].
- 60 The Crown argued that it was clear that the accused had an intent to encourage lawlessness or disorder. The Crown referred to the damaged window and axe, the context around the publication of the allegedly seditious 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.
- 61 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, because 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.

55 *R v Selwyn* (8 June 2006) CRI: 2005-004-11804, District Court Auckland.

62 In her sentencing notes, Judge Bouchier 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”.<sup>56</sup> 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’ imprisonment for the fraud-related charges, and a cumulative sentence of two months for the criminal damage conspiracy and publishing a seditious statement.

63 On 16 October 2006, a teenager appeared in the Rotorua District Court and was remanded in custody on charges of sedition and threatening to kill.<sup>57</sup> The sedition charge was laid under section 84(1)(b) of the Crimes Act 1961 (distributing or delivering to the public or any person a document, statement, advertisement or other matter that expresses a seditious intention). The sedition charge was subsequently withdrawn.

## COMMENT

64 In 1968, Sir Kenneth Keith identified a number of interests that have to be recognised and, if need be, reconciled with one another in the area of protest, including:<sup>58</sup>

- The importance in a democracy of free and potentially effective political debate.
- The maintenance of the political system of the State and public order.
- 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?
- The need for certainty in the criminal law: vague laws are likely to have a chilling effect on discussion.

65 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.

66 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 order, and imposing greater restraints than other common law jurisdictions.<sup>59</sup> Following our survey of the New Zealand case law, we agree with Sir Kenneth’s conclusions.

56 *R v Selwyn*, above n 55.

57 *New Zealand Herald*, 18 October 2006.

58 Keith, above n 35, 49, 50–51.

59 Keith, above n 35, 57.

- 67 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 gave 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 unsanitary. 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>60</sup>
- 68 In our view, the New Zealand cases set out above illustrate Sir Kenneth’s concern. The prosecutions brought against Te Whiti and Tohu, and those opposing conscription, can be seen as examples of an attempt to control debate and expressions of political ideas and their consequences, by law. The breadth of the definition of seditious intention means that seditious offences can be used to punish political speech that is essentially criticism of government policy, and not simply used to prevent violence. This raises the real possibility of use of the seditious provisions that is in breach of freedom of expression, a principle that is considered in the following chapter.

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60 Keith, above n 35, 57.

# Chapter 3

## Freedom of expression

INTRODUCTION 69 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>61</sup>

70 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>62</sup>

71 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 the Government must show strong grounds for interference.<sup>63</sup>

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.

72 Because of the importance of freedom of expression in a review about criminalising certain sorts of speech, we have considered it desirable to trace the theoretical basis of the freedom in some detail.

73 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 twenty-first 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 justifiable limits on it.

61 Eric Barendt *Freedom of Speech* (2 ed, Oxford University Press, Oxford, 2005) 1.

62 New Zealand Bill of Rights Act 1990, s 5.

63 Barendt, above n 61, 7.

THEORETICAL  
BASIS OF  
THE RIGHT TO  
FREEDOM OF  
EXPRESSION

- 74 Modern arguments for a right to freedom of expression owe much to John Milton's speech "Areopagitica: A Speech For the Liberty of Unlicensed Printing" in 1644.<sup>64</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>65</sup>
- 75 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 ancient 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>66</sup>
- 76 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>67</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>68</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>69</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>70</sup>
- 77 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>71</sup> The State may be mistaken in their choice of licensers whose very office would allow them to pass nothing but what is "vulgarly received already", that is, what is orthodoxy. And why stop at

64 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) 145.

65 Milton "Areopagitica", above n 64, 149.

66 Milton "Areopagitica", above n 64, 158.

67 Milton "Areopagitica", above n 64, 158.

68 Milton "Areopagitica", above n 64, 172.

69 Milton "Areopagitica", above n 64, 177.

70 Milton "Areopagitica", above n 64, 180–181.

71 Milton "Areopagitica", above n 64, 160.

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>72</sup> including music and singing and conversation.

78 Milton made a further plea, in introducing his speech to Parliament:<sup>73</sup>

... 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.

79 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>74</sup>

The 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.

80 Mill summarised the grounds upon which he argued for freedom of opinion and expression as follows:<sup>75</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].

72 Milton “*Areopagitica*”, above n 64, 162.

73 Milton “*Areopagitica*”, above n 64.

74 JS Mill “*On Liberty*” in *Three Essays* (OUP, Oxford, first published as a World’s Classics paperback, 1991) 14, 21.

75 Mill, above n 74, 59.

- 81 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:<sup>76</sup>

... 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.

- 82 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 (1791) provides that:

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

- 83 Broadly speaking, there are two main interpretations of the First Amendment; the first is 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, which is that of Professor Chafee, amongst many others,<sup>77</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”.

- 84 According to Meiklejohn, the “absolutist” interpretation does not give “freedom of speech” the meaning of “an unlimited license to talk”.<sup>78</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 maintained that the freedom that 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>79</sup> The people have established subordinate agencies, such as the legislature and judiciary, and delegated specific and limited powers to these 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

<sup>76</sup> Mill, above n 74, 62.

<sup>77</sup> Z Chafee *Free Speech in the United States* (Harvard University Press, Cambridge, Mass, 1942).

<sup>78</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 v United States* (1919) 250 US 616).

<sup>79</sup> Compare the court’s examination of the First Amendment in *New York Times v Sullivan* 376 US 254 (1964), which concluded that the meaning was revealed in Madison’s statement that “the censorial power is in the people over the Government, and not in the Government over the people”. See 4 *Annals of Congress* (1794) 934.

people.<sup>80</sup> The Amendment protects 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.

- 85 Thus, all public discussions of public issues, and the 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>81</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 to express ideas. For Meiklejohn:<sup>82</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

- 86 In the twenty-first century, in *Freedom of Speech*,<sup>83</sup> Professor Barendt identifies four commonly held justifications for the principle of free speech:
- the importance of discovering truth;
  - the importance of citizen participation in a democracy;
  - the importance of free speech as an aspect of each individual’s right to self-development;
  - a negative justification, highlighting the evils of regulation of speech: distrust or suspicion of government and an appreciation of the fallibility of political leaders.

#### *Discovering truth*

- 87 This argument, based on the need for open discussion in order to discover truth, is an important part of Milton’s and Mill’s arguments.<sup>84</sup> It has been challenged by thinkers such as Professor Schauer,<sup>85</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>86</sup> However, Schauer does not reject the argument based on 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>87</sup> Therefore, there needs to be freedom to express opinions and debate those that are contrary to status quo doctrines and policies.

80 Meiklejohn “The First Amendment is an Absolute”, above n 78, 252–254.

81 Meiklejohn “The First Amendment is an Absolute”, above n 78, 257.

82 Meiklejohn *Free Speech and its Relation to Self-Government*, above n 78, 18.

83 Barendt, above n 61, 6.

84 The argument from truth has some similarities with the “marketplace of ideas” argument, after OW Holmes J’s famous dissent in *Abrams v United States* (1919) 250 US 616.

85 F Schauer *Free Speech: A Philosophical Enquiry* (Cambridge University Press, Cambridge, 1982).

86 Schauer, above n 85, 27–28 and see ch 2 generally. Thus, free discussion does not necessarily lead to truth: see Barendt, above n 61, 9 – but Mill would not go so far as to claim this was the case.

87 Schauer, above n 85, 33–34.



### *Citizen participation in a democracy*

- 88 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 and discuss political issues in order to participate effectively in the working of democracy.<sup>88</sup> This is essentially Meiklejohn's view. For some commentators, the argument only works if the democratic ideal of equal participation in the process of government is more fundamental than majority rule.<sup>89</sup> Representatives of majorities can be as tyrannical to minorities as despots are to non-conformists; constitutionally guaranteed freedom of speech and freedom of information should, to some extent, safeguard minorities and dissenters. The majority and its agents may not be wise and prudent, as Milton pointed out.

### *An individual's right to self-development*

- 89 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>90</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>91</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. Further, an informed individual exercising full autonomy is better able to participate fully in a democracy.

### *Fallibility of governments*

- 90 Professor Schauer stresses suspicion of governments as an argument for free speech:<sup>92</sup>

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 ...

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. For Schauer, it is the fallibility of governments, together with the democratic process, that provide reasons for treating freedom to discuss public issues and criticise government officials as a special principle.

88 Barendt, above n 61, 18.

89 See Barendt, above n 61, 19–20; and also Schauer, above n 85, 40–42.

90 T Scanlon "Freedom of Expression and Categories of Expression" (1979) 40 U Pittsburg L Rev, 519.

91 See R Amdur "Scanlon on Freedom of Expression" (1980) 9 Philosophy and Public Affairs 287, cited in Schauer, above n 85, 72.

92 Schauer, above n 85, 86.

## Conclusion

- 91 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 authority will defuse violence and that violent rebellions and civil disobedience are often the result of frustration.<sup>93</sup>
- 92 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 because it goes to the heart of the democratic process.
- 93 Freedom of speech or expression generally and in relation to sedition has been discussed by courts in all the jurisdictions that we are covering, and in some cases by their law commissions. We now briefly summarise these discussions, focusing in particular on the United States, because of its rich jurisprudence in this area.

### JUDICIAL AND LAW COMMISSION VIEWS ON FREEDOM OF EXPRESSION

#### United States courts and freedom of speech

- 94 Freedom of speech law is much more complex in the United States than it is in other countries, partly because the Supreme Court has formulated a number of distinctive free speech doctrines and principles over the years, but also in part because the United States courts have grappled with free speech issues for much longer than many other courts.<sup>94</sup>
- 95 The decision in *New York Times v Sullivan*<sup>95</sup> has been described as perhaps the most significant ruling of the Supreme Court since the Second World War on the scope of the First Amendment.<sup>96</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.
- 96 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:<sup>97</sup>

... 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 ...

93 Schauer, above n 85, 79–80.

94 Barendt, above n 61, 55.

95 *New York Times v Sullivan* 376 US 254 (1964).

96 Barendt, above n 61, 154.

97 *New York Times v Sullivan*, above n 95, 270. Section 1 of the Fourteenth Amendment provides, among other things, that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

- 97 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>98</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 advert to the nature of 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.

- 98 Justice Brennan concluded that the constitutional guarantees of the First and Fourteenth Amendments required a federal rule that prohibited a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proved 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>99</sup>
- 99 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 and identifying the central meaning of the First Amendment, that is, it is a core of protection of speech without which democracy cannot function.<sup>100</sup>

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.

- 100 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 that 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>101</sup>

98 *New York Times v Sullivan*, above n 95, 274–275.

99 *New York Times v Sullivan*, above n 95, 279–280.

100 See H Kalven Jr “The New York Times Case: A note on the central meaning of the First Amendment” [1964] *Supreme Court Review* 191.

101 I Hare “Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred” [2006] *PL* 521, 531.

- 101 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, at least if the restriction has been narrowly formulated, so it does not restrict more speech than the compelling interest warrants.<sup>102</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.
- 102 One such test is the “clear and present danger” test, which was first formulated by the Supreme Court in *Schenck v United States*,<sup>103</sup> where Justice Holmes had this to say on the subject of the First Amendment:

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.

- 103 In *Abrams v United States*,<sup>104</sup> the majority of the Supreme Court upheld the defendants’ convictions for conspiring to violate provisions of the Espionage Act 1917 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. Justice Holmes and Justice Brandeis dissented from the majority’s application of the “clear and present danger” test to the facts. In his opinion, Justice Holmes noted:<sup>105</sup>

... 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 realized 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

102 Barendt, above n 61, 50.

103 *Schenck v United States* 249 US 47 (1919).

104 *Abrams v United States* 250 US 616 (1919).

105 *Abrams v United States*, above n 104, 628.

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.

104 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 1917, over the dissents of Justices Holmes and Brandeis.<sup>106</sup> The test has also been described as being “rich in ambiguity”,<sup>107</sup> and has been criticised by Alexander Meiklejohn for its abject surrender of freedom of speech.<sup>108</sup>

105 In 1969, in *Brandenburg v Ohio*,<sup>109</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. 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:<sup>110</sup>

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.

106 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 elements to be satisfied for a successful prosecution:<sup>111</sup>

- (a) express advocacy of law violation (that is, lawless action);
- (b) the advocacy must call for immediate law violation; and
- (c) the immediate law violation must be likely to occur.

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

### New Zealand’s interpretation of “freedom of expression”

107 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.

106 *Pierce v United States* 252 US 239 (1920), *Schaefer v United States* 251 US 466 (1920).

107 H Kalven Jr *The Negro and the First Amendment* (University of Chicago Press, Chicago, 1966) 12.

108 Meiklejohn *Free Speech and its Relation to Self-Government*, above n 78.

109 *Brandenburg v Ohio* 395 US 444 (1969).

110 *Brandenburg v Ohio*, above n 109, 457.

111 B Schwartz *Holmes versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?* (1994) Sup Ct Rev 209, 240–241.

- 108 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>112</sup> In this case, the Court stressed that, because of the importance of freedom of expression, the relevant language of the Films, Videos, and Publications Classification Act 1993 had to be interpreted so that it infringed on the freedom as little as possible. The High Court has said that freedom of expression guarantees to everyone the right “to express their thoughts, opinions and beliefs however unpopular, distasteful or contrary to the general opinion or to the particular opinion of others in the community”.<sup>113</sup> In *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)*,<sup>114</sup> the Court of Appeal said that freedom of expression prevailed over the interest in protecting homosexuals from discrimination.
- 109 However, there are limits on the scope of the freedom, provided they can be demonstrably justified in a free and democratic society.<sup>115</sup> “The right is rendered meaningful only after s 5 [of the New Zealand Bill of Rights Act] is considered.”<sup>116</sup> Perjury, bribery and fraud would be obvious examples of offences that can be justified, despite their infringement on freedom of expression. As in most jurisdictions, political expression (that is, comment about government and government policy) usually enjoys the greatest protection, and is often described as being at the core of the right.<sup>117</sup>
- 110 In *Police v Begg*,<sup>118</sup> the court held that the ability of the Speaker of the House to invoke the Trespass Act 1980 to regulate political protest was limited by the protesters’ rights to freedom of expression and peaceful assembly. In *Hopkinson v Police*,<sup>119</sup> the High Court found that the prohibition on dishonouring the New Zealand flag, in the Flags, Emblems, and Names Protection Act 1981, was prima facie in breach of freedom of expression, and not a justified limit on the freedom.<sup>120</sup>

112 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9.

113 *Solicitor General v Radio New Zealand* [1994] 1 NZLR 48, 59.

114 *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA). Two videos opposed granting non-discrimination rights to homosexuals contending that homosexuality was one of the causes of the spread of AIDS and HIV. They were classified as “objectionable” within the meaning of the Films, Videos, and Publications Classification Act 1993, by the Film and Literature Board. The Court of Appeal set aside this decision. See discussion in A Butler and P Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005) 13.20.7–13.20.10, noting the difficulty of distinguishing between unlawful “hate speech” and legitimate expression of strong opinions of distaste, but considering this should be a question for the expert Board.

115 New Zealand Bill of Rights Act 1990, s 5.

116 P Rishworth, G Huscroft and R Mahoney *The New Zealand Bill of Rights Act* (Oxford University Press, Victoria, 2003) 312.

117 Rishworth et al, above n 116, 312.

118 *Police v Begg* [1999] 3 NZLR 615.

119 *Hopkinson v Police* [2004] 3 NZLR 704 (HC).

120 *Hopkinson v Police*, above n 119, para 77. However, the High Court held that “dishonouring” can mean vilifying, so the statutory provision could be read consistently with the Bill of Rights Act 1991, para 81. Compare the United States Supreme Court which has struck down legislation prohibiting desecration of the flag: *Texas v Johnson* (1989) 491 US 397, cited in Rishworth, above n 116, 314.

- 111 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 New Zealand Ltd*,<sup>121</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: “In a system of representative democracy, the transcendent public interest in the development and encouragement of political discussion extends to every member of the community”.<sup>122</sup> Justice Elias emphasised the importance of political speech and the exchange of information and opinions about the welfare of society.
- 112 The Court of Appeal upheld Her Honour’s decision, holding that generally published statements that directly concern the functioning of representative government (including those about the performance of specific individuals in (or seeking) elected parliamentary office) may be protected by qualified privilege. The statements would need to be about matters of public, not private, concern.<sup>123</sup>
- 113 On appeal to the Privy Council, the case was remitted for reconsideration to the Court of Appeal in light of the House of Lords’ recent decision in *Reynolds v Times Newspapers Ltd*,<sup>124</sup> delivered on the same day and by the same judges (including Lord Cooke of Thorndon) as the *Lange* appeal from New Zealand. The Court of Appeal upheld the earlier decision, but amplified it slightly, saying 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”. But a bona fide communication in the course of political discussion was very likely to attract qualified privilege, the Court said.<sup>125</sup>
- 114 However, the defence is fairly narrow, is limited as to subject matter, and while it covers discussion about members of Parliament, New Zealand courts are being cautious about its development; they did not, for example, take an opportunity to extend it to local government officials.<sup>126</sup>

### Canada: the Supreme Court and the Law Reform Commission

- 115 The Law Reform Commission of Canada, in a 1986 working paper, saw the offences of sedition as outdated and unprincipled. In its view:<sup>127</sup>
- ... 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.

121 *Lange v Atkinson and Australian Consolidated Press New Zealand Ltd* [1997] 2 NZLR 22, 46 (HC); [1998] 3 NZLR 424 (CA).

122 *Lange v Atkinson and Australian Consolidated Press New Zealand Ltd* (HC) above n 121, 46, line 23.

123 *Lange v Atkinson and Australian Consolidated Press New Zealand Ltd* [1998] 3 NZLR 424, 467–468 (CA).

124 *Reynolds v Times Newspapers Ltd* [1999] UKHL 45; [1999] 4 All ER 609; 3 WLR 1010. This case was the English response to protection of political discussion, see para 122, below.

125 *Lange v Atkinson and Australian Consolidated Press New Zealand Ltd* [2000] 3 NZLR 385, para 21.

126 *Vickery v McLean* [2006] NZAR 481. See also, G McLay “*Lange v Atkinson*: Not a Case for Dancing in the Streets” [2000] NZL Rev 427 and discussion in Butler and Butler, above n 114, 13.17.15–13.17.21.

127 Law Reform Commission of Canada *Crimes Against the State* (Working Paper 49, Ottawa, 1986) 35.

- 116 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>128</sup> Rand J stated, echoing Milton and Mills:

Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality ... Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal 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.

- 117 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>129</sup> But, nonetheless, the Court has said that the degree of protection may vary according to context.<sup>130</sup> Extreme speech may be protected for reasons given by Mill; as Dickson CJ said in *Keegstra*: “it is partly through clash with extreme and erroneous views that truth and the democratic vision remain vigorous and alive”.<sup>131</sup>
- 118 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 for the purpose of disturbing constituted authority.<sup>132</sup>
- 119 Hence, in the view of both the Canadian Supreme Court and Law Reform Commission, there should be offences of inciting violence against lawful authority: that much of an infringement upon freedom of expression is justified in a democratic community. The Law Reform Commission considered that such offences were already covered by incitement to commit public order type offences.

### United Kingdom: the courts and the Law Commission

- 120 Freedom of speech has been viewed as a “quintessential British liberty”<sup>133</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 and 13. The courts have noted that the freedom is subject to clearly defined exceptions laid down by common law

128 *Boucher v R* [1951] SCR 265, 288 (the first trial).

129 *Irwin Toy v Quebec (AG)* [1989] 1 SCR 927 cited in Rishworth et al, above n 116, 312.

130 *R v Lucas* [1998] 1 SCR 439, 459.

131 *R v Keegstra* [1990] 3 SCR 697, 765–766 per Dickson CJ. 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.

132 *Boucher v R* [1951] 2 DLR 369, 389.

133 DI Shapiro and O Sands “Free Speech, Hate Speech and Incitement” (2006) *Solicitor’s Journal*, 238.



or statute,<sup>134</sup> but they have defined the freedom widely.<sup>135</sup> Lord Steyn reviewed the objectives of free speech in *R v Home Secretary ex p Simms*,<sup>136</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 United States jurisprudence. Lord Hoffmann has stated:<sup>137</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.

- 121 The European Court of Human Rights in *Handyside v United Kingdom*<sup>138</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.

- 122 As in the United States, Australia and New Zealand, the English courts have considered the extension of defences to defamation in relation to “political discussion”. In *Reynolds v Times Newspapers Ltd*,<sup>139</sup> the House of Lords rejected a specific defence for political discussion. They did not follow the approach of the United States Supreme Court in *New York Times v Sullivan*,<sup>140</sup> nor that of the Australian High Court in *Lange v Australian Broadcasting Corporation*,<sup>141</sup> nor of the New Zealand Court of Appeal in *Lange v Australian Broadcasting Corporation*.<sup>142</sup> But the Lords held that qualified privilege should protect some political discussion in some circumstances. The House gave greater weight to the value of informed public debate (and responsible journalism) than the earlier law had done.<sup>143</sup> Matters to be taken into consideration would include the nature and source of the information, and the public interest in publishing it. The “*Reynolds* defence” has been endorsed in 2006 by the House of Lords in *Jameel v Wall Street Journal Europe Sprl*.<sup>144</sup>

134 *R v Central Independent Television plc* [1994] 3 All ER 641.

135 *Cozens v Brutus* [1973] AC 854 cited in Barendt *Freedom of Speech*, above n 61, 41. Lord Reid construed the word “insulting” in the public order legislation not to cover a demonstration that offended spectators but did not abuse them personally.

136 *R v Home Secretary ex p Simms* [2000] 2 AC 115 (HL).

137 *R v Central Independent Television plc*, above n 134, 652. See also Lord Hoffmann’s judgment in *A v Secretary of State for the Home Department* [2004] UKHL 56, regarding what is meant by “threatening the life of the nation”.

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

139 *Reynolds v Times Newspapers Ltd* [1999] UKHL 45; [199] 4 All ER 609; 3 WLR 1010.

140 *New York Times v Sullivan*, above n 95, see discussion above. The Supreme Court held that a public official cannot recover damages for defamation that relates to his official conduct unless the official can prove malice.

141 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

142 *Lange v Australian Broadcasting Corporation* [1998] 3 NZLR 424.

143 See *Jameel v Wall Street Journal Europe Sprl* [2006] UKHL 44, para 28, per Lord Bingham, applying *Reynolds*, above n 139.

144 *Jameel v Wall Street Journal Europe Sprl*, above n 143.

- 123 In terms of sedition at common law, the cases have held that freedom of expression can be fettered, but only to the extent that the language used incites violence in the particular context and circumstances of the case.<sup>145</sup>
- 124 The United Kingdom 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 Law Reform Commission of Ireland 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”.<sup>146</sup>
- 125 As in Canada, the United Kingdom 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, or a serious breach of the peace, against lawfully constituted authority.

### Freedom of expression in Australia

- 126 There are no formal legislative guarantees of freedom of expression in Australia, except in the Australian Capital Territory and Victoria, the only states that currently possess bills of rights.<sup>147</sup> However, recent High Court cases, *Nationwide News Pty Ltd v Wills*,<sup>148</sup> *Australian Capital Television Pty Ltd v Commonwealth*<sup>149</sup> and *Lange v Australian Broadcasting Corporation*,<sup>150</sup> have held that the Australian Constitution embodies a strongly implied freedom of political communication.
- 127 The *Nationwide News* case concerned a prosecution under section 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:<sup>151</sup>

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 judgements.

145 See JE Boasberg “Seditious Libel v Incitement to Mutiny: Britain teaches Hand and Holmes a Lesson” (1990) 10 Oxf Jnl Legal Studies 106. See too, *Boucher v R*, above n 132.

146 Law Reform Commission of Ireland *Report of the Crime of Libel* (LRC 41-1991, Dublin 1991), above n 3, 10–11.

147 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia* (ALRC 104, Sydney, 2006) 139.

148 *Nationwide News 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.

149 *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 ed, Federation Press, Sydney, 2002) 1158–1179 and 1215–1228.

150 *Lange v Australian Broadcasting Corporation* (1997), above n 141.

151 *Nationwide News Pty Ltd v Wills*, above n 148, 47.

128 In the *Australian Capital Television* case, the High Court invalidated amendments to the Commonwealth broadcasting legislation that 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.

129 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, closely tied to the text of the Constitution. Sections 7 and 24 of the Constitution require the free election of representatives directly chosen by the people, in turn requiring freedom of political discussion. The test for constitutionality was:<sup>152</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 the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people ...

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.

130 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 considered the updated sedition offences that were included in the Criminal Code Act 1995 (Cth) by schedule 7 of the Anti-Terrorism Act (No 2) 2005 (Cth). The review is discussed in further detail in chapter 4 of this report, and in this chapter only in relation to freedom of expression.

131 The ALRC noted strong concerns voiced since November 2005 about the impact of the new sedition provisions in the Criminal Code Act 1995 (Cth) on freedom of expression, including a concern that these offences were unconstitutional.<sup>153</sup> In the ALRC's view, to show the provisions were unconstitutional, it would be necessary to prove more than that the provision "merely 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.<sup>154</sup>

152 *Lange v Australian Broadcasting Commission*, above n 141, 567.

153 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 140.

154 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 143.

- 132 The ALRC considered that the new sedition provisions could not reasonably be construed in this way. On the contrary, the offences in section 80.2(1), (3) and (5) of the Criminal Code Act 1995 (Cth) (see further, chapter 4 of our report) purport to criminalise the urging of conduct by force or violence, not mere criticism of the Government.<sup>155</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>156</sup> But it considers that the provisions in section 80.2(7) and (8) of the Act 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>157</sup>
- 133 Submissions on the ALRC's review of the new sedition laws also indicated concern that there is a risk the offences will be applied unfairly, discriminating against groups or races that are already marginalised, as has happened historically.<sup>158</sup> There was a particular concern that these anti-terrorist provisions could be targeted against Muslim communities.
- 134 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 from the Act the term "sedition" to sever the tie with the old jurisprudence and abuse of the seditious offences, and also to combat possible unfair operation by education and related strategies.<sup>159</sup>
- 135 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 United Kingdom. Those governments were able to reconcile freedom of expression guarantees with quite invasive responses to terrorist speech.<sup>160</sup>
- 136 A final concern of submitters in relation to freedom of expression was that there may not be adequate protection to enable the media to report or comment on matters of public interest; that the provisions in the Criminal Code Act 1995 may "chill" artistic free expression and have the potential to restrict expression of views that ought to be allowed in a liberal democracy. To address these concerns, the ALRC proposed that, for the urging violence offences in section 80.2(1), (3) and (5) of the Criminal Code, the prosecution must prove that the

155 Australian Law Reform Commission *Review of Sedition Laws* (Discussion Paper 71, Sydney, 2006) 118; Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 143. *Coleman v Power* (2004) 220 CLR 1, referring to the United States line of authority that the First Amendment does not protect expression that has the purpose of inciting violence.

156 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 157–159.

157 Australian Law Reform Commission *Review of Sedition Laws*, Discussion Paper, above n 155, 131. Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, List of Recommendations 11-1.

158 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 148.

159 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 151.

160 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 155.

person intended that the force or violence would 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>161</sup>

## LIMITS ON FREEDOM OF EXPRESSION

- 137 The courts and law reform bodies discussed in this chapter generally support a strong principle of freedom of expression as a preferred right that 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.

### Domestic public order offences

- 138 In relation to criminal offences, the most relevant limits on freedom of expression are those that are justifiable in the interests of peace and public order. In the Australian sedition case of *Sharkey*,<sup>162</sup> Dixon J said that the Commonwealth should have the 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. We agree.
- 139 Public order law can be seen as protecting the State, the Constitution, the Government and society from speech or writings urging force or violence against lawfully constituted authority (thus endangering national security or the “fabric of society”).
- 140 New Zealand has a variety of domestic public order offences that 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;
  - (d) threatening to commit various offences.

### International obligations

- 141 The countries considered in this report, including New Zealand, are bound by a number of international obligations, some of which have the effect of limiting freedom of expression. These include recent obligations to counter terrorism with its threats to national security and the infra-structure, economy and, indeed, the existence of the State.

161 Australian Law Reform Commission *Review of Seditious Laws*, Discussion Paper, above n 155, 136. Australian Law Reform Commission *Fighting Words: A Review of Seditious Laws in Australia*, above n 147, List of Recommendations, 9-2, 9-5 and 10-2(a).

162 *R v Sharkey* (1949) 79 CLR 110, 116.

142 Decisions of the United Nations Security Council are binding on members of the United Nations.<sup>163</sup> There are three key resolutions which are relevant in the context of sedition (in terms of urging violence against the State) and freedom of expression, Resolutions 1373 (2001), 1456 (2003) and 1624 (2005).

143 Schedule 4 of United Nations Security Council Resolution 1373 (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 of the Terrorism Suppression Act 2002.

144 United Nations Security Council Resolution 1456 (2003) 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>164</sup>

145 United Nations Security Council Resolution 1624 (2005)<sup>165</sup> condemns:

... 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.

146 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 Covenant 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>166</sup>

147 New Zealand’s Terrorism Suppression Act 2002 was enacted in compliance with many of the recommendations of Resolution 1373 (2001), as well as with the International Convention for the Suppression of Terrorist Bombings 1997 and the International Convention for the Suppression of the Financing of Terrorism 1999. The Foreign Affairs, Defence and Trade Committee has reviewed the provisions of the Act to consider how it has worked in practice and whether change may be necessary. The Committee reported to the House of Representatives

163 Charter of the United Nations, 26 June 1945 [1945] ATS 1, entered into force on 1 November 1945, art 25.

164 UNSC, Resolution 1456 (20 January 2003) S/Res/1456 (2003).

165 UNSC, Resolution 1624 (14 September 2005) S/Res/1624 (2005).

166 United Nations Security Council, Resolution 1624, above n 165.

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.<sup>167</sup>

### *International Covenant on Civil and Political Rights*

148 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 ICCPR says:

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

149 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>168</sup>

150 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. It 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.

151 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.

167 Foreign Affairs, Defence and Trade Committee *Review of the Terrorism Suppression Act 2002* (Wellington, 2005) < [www.parliament.nz](http://www.parliament.nz) > (last accessed 6 December 2006).

168 Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights* (2 ed, Wellington, 2003) 163.

*International Convention on the Elimination of All Forms of Racial Discrimination*

- 152 The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted by the United Nations General Assembly in 1965.<sup>169</sup> New Zealand ratified the CERD in 1972. It has been described as the most important standard-setting instrument in the field of racial discrimination.<sup>170</sup>
- 153 Under the CERD, state parties pledge among other things to make punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, and all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.<sup>171</sup>
- 154 New Zealand's law prohibiting racial discrimination is drawn from its international obligations under the CERD,<sup>172</sup> and the legal framework is provided by the Human Rights Act 1993, which is discussed further in chapter 5.

CONSISTENCY  
WITH SECTION  
14 OF THE  
NEW ZEALAND  
BILL OF RIGHTS  
ACT 1990

- 155 In our view, freedom of expression should be regarded as a preferred right. This means that where there is a conflict with other rights, the scales are weighted in favour of freedom of expression. We now turn to look at the seditious offences in sections 81 to 85 of the Crimes Act 1961 to assess first, their consistency with section 14 of the New Zealand Bill of Rights Act 1990, and secondly, if they are inconsistent with section 14, is this justifiable?
- 156 The first step, in terms of the Court of Appeal's suggested analysis in *Moonen v Film and Literature Board of Review*<sup>173</sup> is to determine the scope of the relevant right. The rationale for abrogation of the right is that other values are seen as predominating over freedom of expression. Nevertheless, the extent of the abrogation must, in terms of section 5 of the Bill of Rights Act, constitute only such reasonable limitation as can be demonstrably justified in a free and democratic society.<sup>174</sup>
- 157 Before considering whether the seditious offences in the Crimes Act 1961 impose reasonable limits on the right, the next step is to identify the different interpretations of the words of the sections. Section 83 of the seditious offence provisions criminalises the making or publishing (or causing the making or publishing) of written or spoken material that expresses any one of the five "seditious intentions" set out in section 81(1). They also make criminal:
- the printing, publication, distribution, possession, or importing (or causing of the same) with a seditious intention of any material expressing any seditious intention (section 84);

169 UNGA Resolution 2106 (XX) (21 December 1965).

170 Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights*, above n 168, 94.

171 UNGA Resolution 2106 (XX) (21 December 1965), Article 4.

172 Ministry of Foreign Affairs and Trade *New Zealand Handbook on International Human Rights*, above n 168, 95.

173 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA). We appreciate that this is not the only method of analysing statutory provisions in terms of the New Zealand Bill of Rights Act 1990 (see *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754) and that, in particular, the order in which questions are considered is debatable. But we consider that we would reach the same conclusion even if using a different method.

174 *Moonen v Film and Literature Board of Review* [2000], above n 173, para 15.



- conspiracies to execute any seditious intention (section 82); and
- using, or causing to be used, apparatus for making seditious documents or statements (section 85).

158 It is apparent that the criminal conduct lies in the “seditious intention”, and it is the meaning of this phrase which is the focus of our interpretation.<sup>175</sup>

159 There are five “seditious intentions” listed in section 81(1), repeated below for ease of reference:

- (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;
- (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;
- (c) to incite, procure or encourage violence, lawlessness, or disorder;
- (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;
- (e) to excite such hostility or ill will between difference classes of persons as may endanger the public safety.

160 The common law requirement of an incitement to violence, or disorder for the purpose of disturbing lawfully constituted authority,<sup>176</sup> is only clearly present in paragraphs (c) and (d). Paragraph (a) is particularly wide. “Exciting disaffection” has been interpreted in Australia to mean expressing disloyalty.<sup>177</sup> Thus “seditious intention” can catch political criticism and agitation, as past cases show. A seditious intention as defined in section 81(1)(b) or (c) could also catch speech or writing encouraging people to break the law even in minor ways, such as encouraging a trespass action on a cordoned off area of parliamentary grounds by way of protest against government policy; or encouraging parents to keep their children from school by way of protest against an abusive teacher.<sup>178</sup> On their face therefore, some of the seditious intentions are extremely wide, and all are in breach of freedom of expression. To say the least, such provisions could have a chilling effect on speech and writing, particularly if it is material critical of government policy.

175 It should be noted that there is a distinction between the wording of section 84 and sections 83 and 85; this is discussed in chapter 5.

176 *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.

177 *Burns v Ransley* (1949) 79 CLR, 101, 112 per Rich J.

178 Inciting people not to register births, deaths and marriages has been held to be inciting unlawfulness in Canada: *R v Labedoff (No 2)* [1950] WWR 899, and there is New Zealand authority that encouraging workmen to refuse to register and pay an unemployment relief tax and to demonstrate and protest was lawlessness: *Police v Martin* (1931) 26 MLR 75. See also *Thompson v Nalder* [1932] GLR 61.

- 161 Pursuant to section 6 of the New Zealand Bill of Rights Act 1990, the “seditious intention” definitions in the Crimes Act must, if possible, be given a meaning that is consistent with the Bill of Rights.<sup>179</sup> As we have seen, freedom of expression, although a strong right, is not absolute. The question is, what would be a possible interpretation of the seditious offences that is consistent with the section 14 freedom in the New Zealand Bill of Rights Act 1990?<sup>180</sup>
- 162 In our view, it is reasonable to proscribe expression that incites or encourages violence against lawfully constituted authority or incites serious criminal offences. But it is most unlikely that a requirement of encouraging or inciting violence would be read into each of the intentions set out in section 81(1) of the Crimes Act 1961, particularly because such a requirement is specified in section 81(1)(c). In a case on appeal from West Africa, the Privy Council held that incitement to violence was not a necessary ingredient of a provision almost identical to section 81(1)(a).<sup>181</sup>

### Is the limitation justified?

- 163 The question, then, is whether the provisions of section 5 of New Zealand Bill of Rights Act 1990 are satisfied: are the limitations on section 14 of the Act created by the seditious offences reasonable and demonstrably justified in free and democratic society? It is necessary to look first at the objectives of the seditious offences provisions.<sup>182</sup> These would seem to be protection of the Government and lawfully constituted authority, of the rule of law, of public safety and of different classes of people. These objectives are undoubtedly important, but are the seditious provisions a proportionate response to such aims? Or, do they, as the Court of Appeal put it in *Moonen*, “use a sledgehammer to crack a nut”?<sup>183</sup> In our view, they do just this.
- 164 As noted above, there can be justified limits on freedom of expression in order to protect national security and public order. Suppressing speech that proximately encourages violence is a justifiable limitation in a democratic society, since national security can outweigh freedom of expression. But the suppression must be only to the extent strictly necessary to prevent the greater harm.<sup>184</sup> Even in times of war or when democracy is fragile, there is a danger that

179 In *Hopkinson v Police* [2004] 3 NZLR 704, for example, it was held that by interpreting the offence of destroying the New Zealand flag “with the intention of dishonouring it” (under s 11(1)(b) of the Flags, Emblems, and Names Protection Act 1981) to mean “with the intention of vilifying it”, the offence provision could be read consistently with section 6 of the Bill of Rights Act 1990. However, the defendant’s conduct in that case (burning the New Zealand flag in protest against Australian support of the United States’ action in Iraq) was held not to fall within s 11(1)(b).

180 Insofar as some courts have considered that an interpretation that has the least limit on the freedom in question must be adopted, we agree with A and P Butler *The New Zealand Bill of Rights Act: A Commentary*, above n 114, 7.8.4, that this is not mandated by the New Zealand Bill of Rights Act 1990, s 6.

181 *Wallace-Johnson v R* [1940] AC 231. See also Sir Kenneth Keith “The Right to Protest”, *Essays on Human Rights* (Sweet & Maxwell NZ Ltd, Wellington, 1968), 49.

182 Again, we are following the *Moonen* method of analysis. We note that A and P Butler *The New Zealand Bill of Rights Act: A Commentary*, above n 114, prefer a section 5 inquiry that follows Richardson J in *Noort v Mot, Curran v Police* [1992] 3 NZLR 260, 283–284.

183 *Moonen v Film and Literature Board of Review*, above n 173, para 18.

184 Compare B Saul “Speaking of Terror: Criminalising Incitement to Violence” 28 UNSW LJ, 868, 884.

excessive censorship can cause unhealthy public resentment.<sup>185</sup> The seditious offences proscribe conduct far wider than inciting of violence or insurrection against lawfully constituted authority. To the extent that they do so, they permit interference more than is necessary with freedom of expression. The wide parameters of the offences, and their lack of clarity,<sup>186</sup> create the potential for abuse by prosecution of people who express unpopular or disturbing opinions, as has happened in the past in times of perceived national threat.

## CONCLUSION

165 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>187</sup> If it does not do so, the ideas could be driven underground and become dangerous.

166 Professor Schauer 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>188</sup> Where should the line between non-interference and interference by the Government be drawn? 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 likely to cause harm to persons or property, then suppression of criticism may be justified. In our view, criminal legislation as a response to “fighting words” needs to be proportionate to the real risk of violence resulting from such words.

167 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 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 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.

185 See, for example, *Billens v Long* [1944] NZLR 710, 729, 735, concerning the Censorship and Publicity Emergency Regulations 1939 that allowed the Director of Publicity to suppress publications “calculated to ferment opposition to the successful prosecution of the war” and “information liable to lend assistance or comfort to the enemy”. The judges in that case noted the danger of excessive censorship and the importance of the regulations not being given a construction that would interfere with freedom to discuss matters of public interest.

186 See discussion in chapter 5, below.

187 Saul, above n 184, 886.

188 Schauer, above n 85, 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”.

168 In our view, 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, which show problems with sedition law similar to those seen in New Zealand. We then consider what should happen to the law relating to sedition in New Zealand in the twenty-first century.

# Chapter 4

## Sedition in other jurisdictions

- UNITED STATES 169 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 \$5,000 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.
- 170 The Sedition Act of 1798 was vigorously enforced, but only against members or supporters of the Republican Party.<sup>189</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>190</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.
- 171 In 1917, Congress enacted the Espionage Act, at the outset of the United States’ entry into World War I,<sup>191</sup> and in 1918, it enacted the Sedition Act of 1918.<sup>192</sup> There were thousands of prosecutions for sedition under these two Acts,

189 G Stone, L Seidman, C Sunstein, M Tushnet *The First Amendment* (Aspen Law and Business, New York, 1999) 7.

190 *New York Times v Sullivan* 376 US 254, 274 (1964).

191 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.

192 The Sedition 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.

particularly for anti-conscription speech and literature.<sup>193</sup> Amongst them was *Fohrwerk v United States*<sup>194</sup> (holding that the First Amendment did not protect seditious acts aimed at preventing recruitment of the Armed Forces), *Schenck v United States*<sup>195</sup> (holding that a pamphlet to discourage recruitment and enlistment was a violation of the Espionage Act 1917) and *Schaefer v United States*.<sup>196</sup> The most infamous of these was perhaps *Debs v United States*, in 1919.<sup>197</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>198</sup>

- 172 There was a resurgence of sedition prosecutions immediately after World War II in response to a fear of Communism.<sup>199</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.
- 173 In 1969, the Supreme Court considered the constitutionality of sedition law in *Brandenburg v Ohio*.<sup>200</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”.<sup>201</sup> He challenged the constitutionality of the criminal syndicalism statute.
- 174 The Supreme Court held that because the statute purported to punish mere advocacy, it fell within the condemnation of the First and Fourteenth Amendments. Freedoms of speech and the press do not permit a state to forbid advocacy of the use of force or of law violation, except where such advocacy is aimed at inciting or producing imminent lawless action and is likely to incite or produce such action.
- 175 Currently, sedition appears in the United States in United States Code (USC) 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

193 J Cohan “Seditious conspiracy, the Smith Act, and prosecution for religious speech advocating the violent overthrow of Government” (2003) 17 St John’s Journal of Legal Commentary 199, 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.

194 *Fohrwerk v United States* 249 US 204 (1919).

195 *Schenck v United States* 249 US 47 (1919).

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

197 *Debs v United States* 249 US 211 (1919).

198 Chafee *Free Speech in the United States*, above n 193, 84, fn 89.

199 See, for example, *Yates v United States* 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 Chafee *Free Speech in the United States*, above n 193.

200 *Brandenburg v Ohio* 395 US 444 (1969).

201 Ohio Rev Code Ann 2923.13.

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.

- 176 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>202</sup>
- 177 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 United States Court of Appeals affirmed the convictions of all the defendants, and upheld the constitutionality of the statute.<sup>203</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 §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.
- 178 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>204</sup> though there would normally need to be some kind of overt act or words spoken to allow a successful prosecution for conspiracy. 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>205</sup>
- 179 While the seditious conspiracy statute has been used in prosecutions since the terrorist attacks on 11 September 2001, in its recent report, the ALRC notes that an analysis of the case law reveals a tendency for 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>206</sup>
- 180 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 *Schenck v United States* of the “clear and present danger” test, discussed in relation to freedom of expression.<sup>207</sup> Since *Schenck*, the Supreme Court has generally adhered to this test, with the focus of the cases

202 Cohan, above n 193, 208, and see *Keyishian v Board of Regents* 385 US 589, 598 (1967).

203 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.

204 Cohan, above n 193, 209.

205 Cohan, above n 193, 213.

206 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 137.

207 *Schenck v United States*, above n 195.

being on its proper application. However, in *Brandenburg*, the Supreme Court overlaid the test with a requirement of “imminent lawlessness”.

- 181 The Alien Registration Act of 1940,<sup>208</sup> also known as the Smith Act, has been described as the companion statute to the seditious conspiracy law.<sup>209</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 that 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.<sup>210</sup>
- 182 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>211</sup> some provisions of which overlap with the sedition provisions, at least in conjunction with threats, attempts or conspiracies.
- 183 The ALRC suggests there is 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>212</sup>

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#### AUSTRALIA

- 184 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>213</sup> However, the code provisions mirrored the common law. The Commonwealth passed the Crimes Act in 1914, which contained 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).
- 185 Although the provisions in the Crimes Act 1914 (Cth) 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 Act, it was an offence to engage in a seditious enterprise or to write, print, utter or publish seditious words with a seditious intention.<sup>214</sup> Seditious intention was defined as:

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208 Alien Registration Act 1940, 18 USC §2385.

209 Cohan, above n 193, 230–231.

210 Cohan, above n 193, 231.

211 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.

212 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 138.

213 See Australian Law Reform Commission *Review of Sedition Laws* (Issues Paper 30, Sydney, 2006), 33. The common law of sedition is retained in Victoria and New South Wales. See Gareth Griffith, New South Wales 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 New South Wales.

214 Australian Law Reform Commission *Review of Sedition Laws* Issues Paper, above n 213, 34.



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

- (a) to bring the Sovereign into hatred or contempt;
- (b) to excite disaffection against the Sovereign or the Government or Constitution of the UK or against either House of Parliament of the UK;
- (c) to excite disaffection against the Government or Constitution of any of the King's Dominions;
- (d) to excite disaffection against the Government or Constitution of the Commonwealth or either House of Parliament of the Commonwealth;
- (e) to excite disaffection against the connexion of the King's Dominions under the Crown;
- (f) 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;
- (g) 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.

186 It was thought that the federal sedition provisions were prompted by concerns about the Bolshevik Revolution in the Union of Soviet Socialist Republics (USSR) and its potential impact on Communist Party members in Australia.<sup>215</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>216</sup> the first federal sedition charges were not brought until 1948, against a member of the CPA, Gilbert Burns.<sup>217</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 six months' imprisonment. Dixon J, in dissent, relying on Sir James Stephen's codification of the common law, said:<sup>218</sup>

It 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.

187 For Justice Dixon, what Mr Burns said was “spoken of as an hypothesis, an hypothesis involving a dilemma. He was not addressing himself to the subject of attachment to or estrangement from constituted authority”.<sup>219</sup>

215 Australian Law Reform Commission *Review of Sedition Laws Issues Paper*, above n 213, 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.

216 There were three reported sedition prosecutions in Queensland in the 1930s, and two in Tasmania and Queensland in the 1940s, see Australian Law Reform Commission *Review of Sedition Laws Issues Paper*, above n 213, 35. See too, S Macintyre *The Reds* (1998) 17 cited in Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 53.

217 *Burns v Ransley* (1949) 79 CLR 101. In *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 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.

218 *Burns v Ransley*, above n 217, 116.

219 *Burns v Ransley*, above n 217, 118.

188 But the majority of 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>220</sup> Mr 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 Mr Burns, Mr 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>221</sup>

189 The ALRC has said that:<sup>222</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 to words or behaviour that incited violence or public disorder ... [and] in stark contrast to the approach adopted by the United States Supreme Court ...

190 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 speech in this country".<sup>223</sup> There was no evidence in these cases that the words were intended to provoke violence or public disorder or any immediate threat.

191 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>224</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" were added into sections 24C and 24D of the Crimes Act 1914 (Cth).

220 *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 two 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).

221 See discussion of the context in which these statements were made, and the defendants "set up" by anti-communist organisations in Head "Sedition – Is the Star Chamber Dead?" above n 220, 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 New South Wales Court of Petty Session, August–September 1953) for publishing seditious articles about the monarchy in the Communist review.

222 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 57.

223 "A Stupid Prosecution" and "Three Sedition Charges Dismissed: Crown to Pay Costs" *Sydney Morning Herald*, 19 September 1953, cited in Griffith "Sedition, Incitement and Vilification", above n 213, 5.

224 Royal Commission on Australia's Security and Intelligence Agencies Report on the Australian Security Intelligence Organisation 91985) 4.101, cited in Australian Law Reform Commission *A Review of Sedition Laws* Issues Paper, above n 213, 39.

192 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>225</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.

193 In 2005 the Australian Government decided to modernise the archaic federal sedition laws in order to adapt them for anti-terrorism measures, due to increasing concerns about national and international security.<sup>226</sup> A Special Meeting of the Council of Australian Governments on 27 September 2005 led to the Anti-Terrorism Bill (No 2) 2005 which included modernisation of the old sedition laws in Schedule 7. 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 directed against other groups within our community, including against Australia’s forces overseas and in support of Australia’s enemies”.<sup>227</sup>

194 There followed a report by the Senate Legal and Constitutional Legislation Committee in November 2005, after three days of public hearings. The Committee recommended that Schedule 7 be removed from the Bill, and a public inquiry be held into the appropriate legislative vehicle to address the issue of incitement to terrorism. If this recommendation was not accepted, the Committee recommended specific amendments to Schedule 7.<sup>228</sup> The Government did not accept the recommended removal of Schedule 7 but, given the considerable interest in the provisions, asked the ALRC to review the new sedition offences.<sup>229</sup>

195 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 (section 80.2(1)).
- Urging another to interfere by force or violence with the lawful process of parliamentary elections (section 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) (section 80.2(5)).

225 H Gibbs, R Watson and A Menzies *Review of Commonwealth Criminal Law: Fifth Interim Report* (Parliamentary Paper 194, Canberra, 1991) 32.12.

226 See Australian Law Reform Commission *Review of Sedition Laws Issues Paper*, above n 213, 1.17–1.24.

227 J Howard “Counter-Terrorism Laws Strengthened” (Press Release, 8 September 2005) cited in Australian Law Reform Commission *A Review of Sedition Laws Issues Paper*, above n 213, 40.

228 Senate Legal and Constitutional Committee, Parliament of Australia *Provisions of the Anti-Terrorism Bill (No 2) 2005* (2005).

229 See Australian Law Reform Commission *Review of Sedition Laws Issues Paper*, above n 213, 1.24–1.35.

- Urging a person to engage in conduct where the offender intends to assist an organisation or country at war with the Commonwealth (section 80.2(7)).
  - Urging a person to engage in armed hostilities against the Australian Defence Force (section 80.2(8)).
- 196 Each offence carries a maximum penalty of seven years' imprisonment. Three of the offences in the Criminal Code Act 1995 (section 80.2(1), (3) and (5)) now expressly contain recklessness as a fault element, but the standard of recklessness is subjective in the Anti-Terrorism Act (No 2) 2005. Unlike incitement, these offences do not require an ulterior intention that the offence incited be committed. There is a defence in section 80.3 of the Criminal Code Act for acts done in "good faith".
- 197 The terms of reference for the review of these new sedition offences directed the ALRC to consider:<sup>230</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.
  - The practical difficulties involved in proving a specific intention to urge violence or acts of terrorism.
- 198 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.
- 199 The ALRC set out its recommendations in its report published in July 2006.<sup>231</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.
- 200 The ALRC concluded that it was not appropriate for the offences set out in section 80.2 of the Criminal Code Act 1995 (Cth) 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.
- 201 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>232</sup>

230 Australian Law Reform Commission *A Review of Sedition Laws* Issues Paper, above n 213, 20.

231 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 21–25.

232 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 207.

202 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 Force. 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 Australian Defence Force.

203 The ALRC 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>233</sup> While non-binding, 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.

204 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 connection with violence. The ALRC's view is that there is a lack of clarity on the issue of intention in the present section 80.2(1), (3) and (5) of the Criminal Code Act 1995, 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>234</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.

205 The ALRC also recommended that the Attorney-General's written consent should not be required for prosecutions.

206 The Commission said that "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>235</sup> But, in determining whether a person intended that the urged force or violence would 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 genuine academic purpose, or in connection with an industrial dispute, for example.

233 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).

234 Australian Law Reform Commission *Fighting Words: A Review of Seditious Laws in Australia*, above n 147, 115–116.

235 Australian Law Reform Commission *Fighting Words: A Review of Seditious Laws in Australia*, above n 147, 257.

UNITED  
KINGDOM

- 207 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 the United Kingdom have been criticised for their adverse impact on freedom of expression and the vagueness of the concept of “glorification”,<sup>236</sup> and the ALRC agreed with these criticisms.
- 208 In the United Kingdom, where the common law seditious libel offences have been retained, prosecutions for seditious offences were few and far between in the twentieth century.<sup>237</sup> The last prosecution by the British Crown was in 1947, in *R v Caunt*,<sup>238</sup> of a newspaper editor for publishing an article containing anti-Semitic bias. The judge told the jury that the question that they had to determine was: “Is it proved beyond all reasonable doubt that by writing and publishing the article, Mr Caunt published that libel with the intention of promoting violence by stirring up hostility and ill-will between different classes of His Majesty’s subjects?” His Honour also stressed the freedom of the press. The editor was found not guilty.
- 209 In 1991, an attempt to bring a prosecution against the author and publishers of *The Satanic Verses*<sup>239</sup> failed on grounds that the seditious intention upon which a prosecution for seditious libel must be founded is an intention to incite violence or to create a public disturbance or disorder against Her Majesty or the institutions of government, following *R v Burns*<sup>240</sup> and the Canadian Supreme Court in *Boucher v R*.<sup>241</sup>
- 210 In 1977, the United Kingdom Law Commission 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.<sup>242</sup> If shown, the defendant would be guilty of either incitement or conspiracy to commit one of those offences. The United Kingdom Law Commission concluded that there was likely to be a sufficient range of other extant offences covering conduct amounting to sedition:<sup>243</sup>

It is 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”.

236 See Hare “Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred”, above n 101; 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.

237 United Kingdom Law Commission Working Paper No 72 (1977), above n 27, 116.

238 *R v Caunt* (unreported, Birkett J, 1947), *The Times*, 18 November 1947, p 3C, was discussed in “Seditious Libel and the Press” [1948] *LQR* 203 and in D Feldman *Civil Liberties and Human Rights in England and Wales* (2 ed Oxford University Press, Oxford, 2002) 898. The publication came out around the time that British soldiers were killed in Palestine leading to anti-Jewish demonstrations in Liverpool and elsewhere.

239 *R v Chief Metropolitan Stipendiary Magistrate: ex parte Choudhury* [1991] 1 *QB* 429.

240 *R v Burns* (1886) 16 *Cox CC* 355, *Cave J*.

241 *Boucher v R* [1951] 2 *DLR* 369, discussed in the next section, and the conclusion to chapter 1.

242 United Kingdom Law Commission Working Paper No 72, above n 27, 116–117.

243 United Kingdom Law Commission Working Paper No 72, above n 27, 117–118.

211 The preliminary view of the United Kingdom Law Commission was, therefore, that there was no need for an offence of sedition. However, the common law offences remain in the United Kingdom.

212 Two recent statutes in the United Kingdom proscribe some of the same type of conduct covered by the seditious offences at common law, namely the Racial and Religious Hatred Act 2006 and the Terrorism Act 2006.

213 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.

214 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 words or material, with intent to stir up racial hatred, are provided in sections 18 to 29 of the Public Order Act 1986. The maximum penalty is two years' imprisonment on indictment.<sup>244</sup>

215 Article 5 of the Council of Europe 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>245</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 members 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.

216 A statement to which the section applies is one likely to be understood, by some or all members of the public to whom it is published, as a direct or indirect encouragement or other inducement to them to commit, prepare or instigate 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.<sup>246</sup>

244 For a critique of this Act see Hare "Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred", above n 101. Hare believes it would not survive scrutiny under the First Amendment.

245 Terrorism Act 2006, s 1(2).

246 Terrorism Act 2006, ss 1(1) and (3). There are other offences relating to bookshops and other disseminators of terrorist publications, offences 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 number of offences which are precursors to (and inducement to) commit terrorist acts. It also strengthens enforcement and penalties.

- 217 As with seditious offences, words alone can be offences under the United Kingdom Terrorism Act 2006. 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 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.
- 218 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>247</sup> The new terrorism offences might also be said to have superseded sedition in the United Kingdom.

## IRELAND

- 219 The Law Reform Commission of Ireland recommended the abolition of the seditious libel offences in 1991<sup>248</sup> on the basis that the ambit of the law was unsettled; that 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 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).

## CANADA

- 220 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 20 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>249</sup> They were sentenced to a year of imprisonment.
- 221 There followed several cases where alleged Communists were tried for sedition in the 1920s and 1930s.<sup>250</sup> In 1936, a partial definition of seditious intention was added, providing that seditious intention would be presumed of one who teaches

247 Feldman *Civil Liberties and Human Rights in England and Wales*, above n 238, 899.

248 Law Reform Commission of Ireland *Report of the Crime of Libel* (LRC 41-1991, Dublin 1991) 10–11.

249 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 or foolish remarks about the Canadian military in bars or shops: *R v Cohen* 25 CCC 302; *R v Trainor* 27 CCC 232, for example.

250 *McLachlan* (1924) 56 NSR 413, 41 CCC 249; *Chambers v R* (1932) 52 Que KB.



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>251</sup>

222 Since the Winnipeg trials, sedition charges have been mostly laid against religious groups, such as Jehovah's Witnesses and the Doukhobors.<sup>252</sup> They have been described as less justifiable even than those against alleged Communists.<sup>253</sup> In 1950, five Doukhobors were convicted of seditious libel in British Columbia for urging all Doukhobors to refuse to obey certain laws, such as the obligation to register births, marriages and deaths. Sedition was very widely interpreted in these cases as it was in the First World War trials of people who merely spoke against the military or made disloyal and unpatriotic remarks,<sup>254</sup> with no requirement of an intention to incite violence.

223 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.

224 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 Canadian Charter of Rights and Freedoms.<sup>255</sup> However, they are still part of the Criminal Code RSC 1985 c C-46. Section 61 provides that:

Everyone who:

- (a) speaks seditious words,
- (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.

225 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.
- (3) A seditious conspiracy is an agreement between two or more persons to carry out a seditious intention.

251 This history is covered in Law Reform Commission of Canada *Crimes Against the State* (Working Paper 49, Ottawa, 1986) 8–10.

252 The Doukhobors are a group of Russian language speaking religious dissenters who migrated to Canada in 1899.

253 Lederman, above n 249, 21.

254 Lederman, above n 249. See, for example, *Duval & Ors v R* (1938) 64 Que KB 270.

255 Law Reform Commission of Canada *Crimes Against the State*, above n 251, ch 4.

(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.

226 There is a good faith exception in section 60. 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’s guarantee of freedom of expression.

227 However, seditious intention has been defined in accordance with the common law in *Boucher v R*.<sup>256</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 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 for the purpose of disturbing or resisting lawfully constituted authority.<sup>257</sup>

228 It was partly because of the requirement to incite such violence or resistance that the Canadian Law Reform Commission recommended the abolition of sedition because it completely overlapped 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.

## CONCLUSION

229 Seditious provisions have been used in many jurisdictions to prosecute those who challenge government policy in times of strife or civil unrest, such as leaders of industrial disputes, 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 generally preferred right; people should no longer be prosecuted merely for extreme criticism of the State.

256 *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.

257 Note that this intention is not as clear as it might be: see discussion in the conclusion to chapter 1.

230 The Australian approach to the federal sedition provisions has been to modernise them, in order to use them as anti-terrorist legislation. The ALRC recommends abolishing the term “sedition” in federal criminal law altogether, because the term is too closely associated in the public mind with its origins and history as a crime rooted in criticising established authority.

231 When considering the steps taken in Australia in relation to sedition, it is important to be aware of the differences in context between Australia and New Zealand. Episodes of racial violence such as those which occurred in Cronulla in December 2005 have increased concerns in Australia about racial vilification and inter-group violence.

232 We must also remember that Australian federal law has a much more limited range of criminal law tools than New Zealand law has to respond to situations in which the seditious offences might be available, because the great bulk of standard criminal law is dealt with by state and territory courts applying state and territory laws.<sup>258</sup> While New Zealand has the option of using other public order offences as an alternative to sedition, many of these are not available in the Australian federal criminal law. As the ALRC noted in its report:<sup>259</sup>

There are substantial intersections between federal law and state and territory criminal laws in the area covered by the new sedition offences in s 80.2. In particular cases there may be a direct overlap of federal, state or territory sedition laws, or there may be an indirect overlap – for example, where the same facts would satisfy the elements of a federal sedition offence and also would constitute a breach of a state or territory criminal law, such as assault, riot or affray.

233 We agree with the conclusions of the Canadian Law Reform Commission, the Law Reform Commission of Ireland and the United Kingdom Law Commission, that seditious offences should be abolished. The New Zealand provisions are steeped in a history of abuse or inappropriate use. In our view, much of the conduct that 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 offences, as discussed in the next chapter.

258 Australian Law Reform Commission *Fighting Words A Review of Sedition Laws in Australia*, above n 147, 37.

259 Australian Law Reform Commission *Fighting Words A Review of Sedition Laws in Australia* above n 147, 37.

# Chapter 5

## Does New Zealand still need a law of sedition?

### OPTIONS FOR REFORM

- 234 There are three main options for dealing with New Zealand's seditious offences:
- (a) maintain the status quo, and leave the current offences unchanged;
  - (b) amend and modernise the seditious offences provisions;
  - (c) abolish the seditious offences provisions.

#### Retaining the current provisions

- 235 The principal argument in favour of maintaining the status quo and retaining the current seditious offences is that we cannot predict the future, and, at some stage, particularly in turbulent times, the offences might be useful. Examples given to us during consultation included statements made by military leaders prior to the 2006 coup in Fiji, or speeches by radical Muslim clerics in New Zealand that call for Jihad or incite hatred against other groups. The concern expressed was that the full extent of the utility of the seditious offences may only become apparent after they are abolished when difficult situations arise, and the offences are no longer available.
- 236 We have given this argument careful consideration, and discuss two key examples in detail below. While we agree that both examples may present behaviour that is of concern, and that the State should be able to suppress, there are other and more appropriate ways that such behaviour can be controlled. The problem with the seditious offences is that they provide a tool for suppressing other types of speech as well, and it is during turbulent times that the temptation to use the offences to this end will be at its greatest.
- 237 The argument in favour of retaining sedition might be framed in the following terms: we do not know what the future will hold, so we should not remove sedition as a weapon from the law enforcement armoury. However, the concern about the offences can be described in the same vein – because we do not know what the future will hold, we must try to ensure that the law does not contain a weapon that might be used by a future regime to suppress dissent.

## Modernising the seditious offences

238 Another approach would be to modernise and amend the seditious offences. There are a number of ways in which this could be done. In Australia, for example, the old federal seditious offences were repealed and new sedition offences enacted by Schedule 7 of the Anti-Terrorism Act (No 2) 2005 (Cth), which commenced on 11 January 2006. The purpose of the new sedition provisions was to modernise the language of the offences, and to “address problems with those who incite directly against other groups within the community”.<sup>260</sup> The ALRC has described the new laws as being better than the laws they replaced, both in terms of the technical operation of the provisions, and their protection of human rights:<sup>261</sup>

Three of the new offences contained in s 80.2 of the Criminal Code shift the emphasis from speech that is merely critical of the established order to exhortations to use force or violence against established authority, voters or particular groups within the community. It is very difficult to understand why exhortations to use force or violence should *not* be prohibited by federal law, provided that the offences are properly framed.

Thus, as a result of the amendments to the old Commonwealth sedition provisions in 2005, the offences in s 80.2 are now conceptually closer to the criminal laws of incitement and riot than they are to ‘sedition’, as the term has been traditionally understood ...

... the substantive provisions demonstrate that mere criticism of government action – unless it urges force or violence and is outside the parameters of the defence in s 80.3 – will not be caught by the main offence provisions.

239 The ALRC has recommended that the provisions should be further amended, and the term “sedition” removed from federal criminal law. It concluded that the term “sedition” does not accurately describe the offences in section 80.2 of the Criminal Code Act 1995 (Cth); and the continued use of this term is problematic because of the history of sedition as an offence.<sup>262</sup>

240 In the New Zealand context, one option would be to modernise the current seditious offences so that they operate only to catch speech with the intention of urging the use of force or violence against lawful authority. This might be done by making amendments to the current provisions, for example:

- deleting section 81(1)(a) of the Crimes Act 1961; and
- amending section 81(1)(b) of the Crimes Act 1961 to require incitement or urging of the public, or any person, to overthrow by *force or violence*, the Constitution, laws or Government of New Zealand; and

260 Commonwealth, Parliamentary Debates, House of Representatives, 3 November 2005, 103 (P Ruddock, Attorney-General), cited in Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 70.

261 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 62.

262 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 66.

- deleting section 81(1)(c) of the Crimes Act 1961 because it relates to general offences, not necessarily offences against lawful authority; and
  - deleting section 81(1)(e) which inappropriately classifies class, race, religion or gender “hate speech” as sedition; and
  - amending section 83 to expressly state that where a person publishes a statement or causes a statement to be published that expresses any seditious intention, that person has only committed a seditious offence if he or she has a seditious intention him or herself; and
  - amending section 85 in a similar way.
- 241 Such amendments might serve to limit the ambit of the seditious offences, and focus them primarily on the prosecution of speech that amounts to an incitement to violence against lawful authority. But if the provisions are to be amended to that extent, what do they add to the existing offences of incitement to commit other crimes already proscribed under the Crimes Act 1961? Moreover, we agree with the ALRC’s conclusion that the very term “sedition” carries with it considerable historical baggage, and is closely associated in the public mind with its origins as a crime rooted in criticising or exciting disaffection against established authority.<sup>263</sup>

### Abolishing the seditious offences

- 242 The third option is to abolish the seditious offences in the Crimes Act 1961. There are five main arguments in support of this option:
- the legal profile of the offence is broad, variable and unclear, and the meaning of “sedition” has changed over time;
  - as a matter of policy, the present law invades the democratic value of free speech for no adequate public reason;
  - specifically, 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 law is not needed because those elements of it that should be retained are more appropriately covered by other offences.
- 243 We have discussed the first four reasons in the above chapters, and summarise them briefly below. We then turn to consider the fifth argument, that other offences more appropriately cover such of the seditious offences as we consider should be proscribed.

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

- 244 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 exciting violence between different classes of people, but also included an intention to incite violence against lawfully constituted authority as an element

<sup>263</sup> Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 67.

of the offence.<sup>264</sup> Statutory developments in the jurisdictions we have studied did not expressly include this latter element. In New Zealand, the statutory provisions have included inciting lawlessness generally. The wording of sections 81 to 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 expressed mens rea varies within the provisions.<sup>265</sup> 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 against established authority.

### Invasion of the democratic value of free speech

245 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>266</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

246 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 appear to be in breach of section 14. In our view, the breach is not justifiable.

### Use of sedition as political censorship

247 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. In our view, the State should be entitled to punish statements or conspiracies advocating imminent violence against the State or the community or individuals, but only if a criminal offence is a likely outcome and there is proof of intention to advocate it.<sup>267</sup>

### UNNECESSARY DUPLICATION

248 It has been argued, both here and overseas, that separate offences of sedition are not necessary, because most seditious offences can already be prosecuted by applying the law of criminal incitement to existing offences.<sup>268</sup> In the following section, we consider the inchoate offences of incitement and conspiracy, other public order offences, and certain other statutory offences that could be used to prosecute conduct that might be considered seditious. We analyse each of the seditious offences in order to decide to what extent the conduct they proscribe should still be offences

264 However, this intention is not altogether clear: see discussion in the conclusion to chapter 1.

265 See paras 308–312, below.

266 *New York Times v Sullivan* (1964) 376 US 254.

267 This is a similar but narrower test than that in *Brandenburg v Ohio* (1969) 395 US 444.

268 Ben Saul “Speaking of Terror: Criminalising Incitement to Violence” (2005) 28 UNSW L J 868, 872; Rt Hon GWR Palmer “The Reform of the Crimes Act 1961” (1990) 20 VUWLR 9, 19. See also United Kingdom Law Commission, Law Reform Commission of Ireland and Canadian Law Reform Commission, above chapters 1 and 4.

in the twenty-first century in New Zealand, and whether there are other, more appropriate mechanisms for controlling conduct that is of concern.

- 249 There are various periods in New Zealand history, such as the Springbok Tour of 1981, where the Police might have used the seditious offences to prosecute behaviour, but where other offences were used instead. In our view, it is significant that there were no prosecutions for seditious offences during that period, although a multitude of charges were laid for other offences.

### Conspiracy and incitement

- 250 The ancillary offences of conspiracy and incitement may be used in conjunction with a range of other offences. 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. They can be used not only in conjunction with offences under the Crimes Act 1961, but also with other offences.

#### *Conspiracy*

- 251 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.

- 252 In *R v Gemmell*,<sup>269</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 ...

#### *Inciting offences*

- 253 Section 311(2) of the Crimes Act 1961 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 expressly provided by this Act or some other enactment.

<sup>269</sup> *R v Gemmell* [1985] 2 NZLR 740, 743.



- 254 “Incite” conveys the sense of urging on, instigating, prompting to action, or encouraging.<sup>270</sup> The courts have held it to mean induce, persuade, threaten or pressure another to commit an offence.<sup>271</sup>
- 255 If the incitement leads to the commission of the crime incited, section 66(1)(d) of the Crimes Act 1961 would apply, and the inciter could be prosecuted as a party to the crime. Section 66 provides:

(1) Everyone is a party to and guilty of an offence who— ...

(d) Incites, counsels, or procures any person to commit the offence.

This section also applies to all offences, not just those under the Crimes Act 1961, unless specifically excluded. But liability under this section presupposes proof of the commission of the offence by a principal party.

- 256 The offence of incitement in section 311(2) of the Crimes Act 1961 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, because 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>272</sup> Nor is it relevant that the minds of persons intended to be persuaded are not persuaded. The *actus reus* of incitement is the persuading behaviour (such as a speech or an article in a magazine exhorting the commission of an offence). As Professor Gillies has said:<sup>273</sup>

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

- 257 In its review of Australian federal sedition offences, the ALRC discussed two arguments in relation to incitement:<sup>274</sup>
- (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.

270 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: Hon Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf, Brookers, Wellington, 1992) CA66.17(2). In Canada it has been held to mean deliberately encouraging or actively inducing: *R v Hamilton* (2005) 255 DLR (4th) 283 (SCC).

271 *Young v Cassells* (1914) 33 NZLR 852; *R v Marlow* [1998] 1 Cr App R (S).

272 See *Adams on Criminal Law*, above n 270, CA311.05, and *R v C* [2005] EWCA Crim 2827. See also Griffith “Sedition, Incitement and Vilification: Issues in the Current Debate”, above n 213, 25–31 on the law of incitement in Victoria (statutory) and New South Wales (common law).

273 P Gillies *Criminal Law* (4 ed, LBC Information Services, North Ryde, NSW, 1997) 663.

274 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 169.

- 258 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.<sup>275</sup>
- 259 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 that incites violence: in other words, the line between speech that we consider should be protected by the principles of freedom of expression, and speech that 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 ulterior intention does not exist, the speech should not be criminalised.
- 260 We also note that in the context of Australian federal law, the range of criminal offences available to support a charge of incitement are more limited than those available in New Zealand criminal law. As will be seen in the analysis below, incitement under section 311(2) of the Crimes Act 1961 can cover a wide area of “sedition type” offences: urging or encouraging treason, and public order offences (whether summary or indictable) such as damage to property, riots, assault, and even offences under the Human Rights Act 1993.

### Other relevant offences

- 261 Incitement and conspiracy might be used in place of the seditious offences in conjunction with any one of a range of offences. Examples include treason, riot, or criminal nuisance,<sup>276</sup> and various offences under the Summary Proceedings Act 1981. There are also other offences that may be used with or without incitement or conspiracy to cover behaviour which might fall under the seditious offences, such as unlawful assembly, the Crimes Act threatening offences, offences under the Terrorism Suppression Act 2002, or inciting racial disharmony. The more relevant of these provisions are detailed below.

#### *Treason: Crimes Act 1961, section 73*

- 262 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

275 Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws in Australia*, above n 147, 170.

276 Crimes Act 1961, s 145.

- (b) levies war against New Zealand;<sup>277</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.

263 It is clear from the terms of the Act that, 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 the House of Lords in 1946 (following earlier authorities), allegiance is owed to their sovereign by natural born subjects, naturalised subjects and those aliens who reside in the realm, being people within the protection of the sovereign.<sup>278</sup> For the purposes of the Crimes Act 1961, a person “ordinarily resident in New Zealand” is one whose home is in New Zealand, or who intends to reside there indefinitely, or is outside New Zealand but intends to return to reside there. It would appear that a temporary visitor could not be prosecuted for treason. Deportation may be an option in some cases.

264 A person who, in New Zealand, aids, incites, counsels, or procures an act of treason overseas by a person not owing allegiance, may commit an offence under section 69 of the Crimes Act 1961, as a party to a crime outside New Zealand.

*Unlawful assembly: Crimes Act 1961, section 86*

265 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>279</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>280</sup>

266 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

277 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 ed) para 79.

278 *Joyce v DPP* [1946] AC 347, 366 per Lord Jowitt LC. The issue in the case was whether an American citizen, previously resident in the United Kingdom for about 24 years, and holding a British passport, owed allegiance to the King and could thus be convicted of treason (assisting the King’s enemies whilst in Germany). The Lords held that he did owe allegiance and dismissed his appeal against conviction. See also *R v Casement* [1917] 1 KB 98.

279 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.

280 *Adams on Criminal Law*, above n 270, CA 86.02.

out their common purpose.<sup>281</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, section 87*

267 A riot is a group of six or more persons, acting together<sup>282</sup> and using violence against persons or property to the alarm of persons in the neighbourhood of that group.<sup>283</sup> Every member of a riot is liable to imprisonment for up to two years.

268 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.

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

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

270 Section 307A is a relatively new section, which was inserted into the Crimes Act 1961 by the Counter-Terrorism Bill in 2003.<sup>284</sup> 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 have 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;
- (c) causing major economic loss to one or more persons;
- (d) causing major damage to the national economy of New Zealand.

271 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.

281 *R v Wolfgramm* [1978] 2 NZLR 184 (CA).

282 *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.

283 Crimes Act 1961, s 87.

284 Counter Terrorism Bill 2002, no 22-2.

- 272 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”. During the third reading of the Counter Terrorism Bill in October 2003, the Minister of Foreign Affairs and Trade, Hon Phil Goff, noted that while the provisions were aimed at dealing with serious terrorist situations that may arise, they could equally well relate to other outcomes where serious harm is caused that might not be terrorist inspired.<sup>285</sup>

It does not have to be terrorist inspired if people are doing significant property damage or harming the health of individuals, to make that sort of protest or advocacy a crime.

- 273 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

- 274 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>286</sup>
- 275 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>287</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.
- 276 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.

285 (21 October 2003) 612 NZPD 9354.

286 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 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.

287 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.

277 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—
  - (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).

278 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.

279 United Nations Security Council Resolution 1624 (2005) 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>288</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 1961 could be used to prosecute “incitement to commit a terrorist act”. As noted in chapter 4, 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 the 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

- 280 The Summary Offences Act 1981 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 used recklessly as to whether a person is alarmed or insulted);

<sup>288</sup> United Nations Security Council Resolution 1624, above n 165.

- (c) section 5A: disorderly assembly (an assembly of three 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 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;
- (e) section 37: unreasonably disrupting any meeting, congregation, or audience.

### Human Rights Act 1993

281 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.

282 Prosecutions under section 131 may only be brought with the consent of the Attorney-General.<sup>289</sup>

283 Section 61(1) of the Act provides that it is unlawful to publish, distribute or broadcast written matter or words that 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 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>290</sup>

289 Human Rights Act 1993, s 132.

290 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, s 61(2).



284 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) to (e). We then compare section 83 (“publishing or causing to be published” statements that express seditious intentions), with section 84 (publication of seditious documents). In each case, we examine whether the offences are necessary, and where they do include conduct that, in our view, should be proscribed, whether that conduct can be more appropriately dealt with by other existing offences.<sup>291</sup>

### Section 81(1)(a)

285 In our view, it should not be an offence in the twenty-first century to make statements or conspire to make statements expressing 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. Statements bringing into contempt Her Majesty or the Government of New Zealand are the sort of dissenting statements 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)

286 It should not be an offence to conspire, or 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 to conspire with such seditious intention, unless there is an intention to incite violence against 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.

287 We consider that the existing offences of incitement or conspiracy to use force for the purpose of overthrowing the New Zealand Government (treason, in section 73(e) and (f)) sufficiently cover the conduct that crosses the line between free speech and advocating violence. Incitement to treason would be a more appropriate means of prosecuting such conduct, because it encapsulates the link between the speech and the violence or revolt against the Government.<sup>292</sup> 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.

291 See appendix 1 for the full text of the seditious offences in the Crimes Act 1961, ss 81 to 85.

292 Such conduct could also be prosecuted as incitement to levy war against New Zealand, in the sense of a “constructive war”, in some circumstances: see Crimes Act 1961, s 73(b).

## Section 81(1)(c)

- 288 The current offences 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 Keith has pointed out.<sup>293</sup> They catch statements and conspiracies that are not specifically directed against the Government or the Constitution or the Sovereign, so not traditionally “seditious”.
- 289 In our view, statements or conspiracies that encourage lawlessness should not be offences unless there is an intention to incite a specific criminal offence. Where this threshold is met, this conduct is adequately covered by incitement or conspiracy to commit various public order offences (such as riot under section 87 of the Crimes Act 1961, riotous damage under section 90, unlawful assembly under section 86). Such conduct may also be covered by the “threatening” offences in section 307A of the Crimes Act 1961, 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.
- 290 In less serious cases, a prosecution under the Summary Offences Act 1981 for incitement to commit disorderly behaviour (section 3), offensive behaviour or language (section 4), disorderly assembly (section 5A), or publishing a document or thing explaining the manufacture of explosives (section 8) may be appropriate.

*Prosecution of persons who urge violence*

- 291 During consultation on our draft report, scenarios illustrating situations where people urged violence were put to us, with the suggestion that possibly it would be useful for the seditious provisions to remain in the event that such cases might occur in New Zealand.
- 292 The Police in their submission gave the following example of a hypothetical case in which sedition might currently be used against a person:

... a radical Muslim Cleric arrives in NZ from England on a British passport and commences making speeches in various NZ mosques. Some of the people he addresses at the mosques are offended and concerned at his speeches and complain to the Police that he is inciting hatred against all Westerners or infidels and making a call for Jihad in New Zealand. He praises the London train bombers as true Islamic martyrs.

293 Keith “The Right to Protest”, above n 35, 49, 57.

Police are informed that he is urging all true believers in Islam to take positive action in the global holy war and make the appropriate sacrifices required for the Jihad. He urges the local Muslims to unite and overcome the Westerners or infidels in NZ and to make the appropriate sacrifice for the Jihad.<sup>294</sup>

293 The Police suggested that under current law, the maker of such statements might be prosecuted under section 81(1)(e) for deliberately exciting hostility or ill-will between different classes of persons as may endanger public safety. Statements of this nature might also currently be prosecuted under section 81(1)(c), as being made with the intention to incite, procure or encourage violence, lawlessness or disorder.

294 An example of the latter situation might be found in the United Kingdom case concerning Abu Qatada, a radical Muslim cleric. He was detained under anti-terrorist legislation on suspicion of fomenting terrorism by his preaching, and released by the Special Immigration Tribunal on conditional bail with control on his movements. The United Kingdom Government intend to extradite him to Jordan and in May 2006 he appealed against this. There has been no suggestion he would be charged with sedition. As a person whose refugee status has lapsed, he may still owe local allegiance, as long as he was under the protection of the Crown and resident in the realm, so could possibly have been charged with incitement to commit treason.<sup>295</sup> However, more appropriate offences, most likely terrorist crimes, or offences under the Racial and Religious Hatred Act 2005, would have been available.

295 A more extreme case was that of Abu Hamza, a British citizen who preached in favour of support for al-Qa'ida, Bin Laden and against the United Kingdom's involvement with the war in Iraq. In October 2004, Hamza was arrested and charged with 16 crimes including:

- six of soliciting murder under the Offences Against the Person Act 1861;
- three of using threatening, abusive or insulting words or behaviour with the intention of stirring up racial hatred under the Public Order Act 1986;
- one of owning records stirring up racial hatred; and
- one of possessing a terrorist encyclopaedia.

296 He was found guilty of all of these offences and sentenced to seven years' imprisonment.

294 The word "Jihad" comes from the Arabic root meaning to strive, to exert, to fight. It may express a struggle against one's evil inclinations, an exertion to convert unbelievers, or a struggle for the moral betterment of the Islamic community. Today it is often used with a meaning more or less equivalent to the English word "crusade". If used in a religious context the adjective "Islamic" or "holy" is added. Jihad is the only legal warfare in Islam, and it is carefully controlled. It must be called by a duly constituted state authority, preceded by a call to Islam and non-combatants not attacked and so on. John L Esposito (ed) *Oxford Dictionary of Islam* (OUP Inc, 2003). Oxford Reference Online, Oxford University Press, 15 January 2007; < [www.oxfordreference.com/views/](http://www.oxfordreference.com/views/) > (last accessed 16 January 2007).

295 See *R v Casement* [1917] 1 KB 98 and *Joyce v DPP* [1946] AC 347 regarding the meaning of owing allegiance to the Crown.

- 297 Neither Abu Qatada nor Abu Hamza was charged with sedition or incitement to commit treason. Presumably treason charges were thought to be inappropriate in both cases. However, the New Zealand treason offences are wider than those in the United Kingdom<sup>296</sup> and include inciting or assisting any person with force to invade New Zealand and using force for the purpose of overthrowing the Government of New Zealand. A speaker who was openly defiant and encouraging serious violence against the New Zealand Government could possibly be charged with treason offences if he or she owed allegiance to the Crown.
- 298 In the example given by the Police, if the statements made were sufficient to support a prosecution under section 81(1)(c) of the Crimes Act 1961, there are various charges that could be laid other than sedition, such as incitement to murder,<sup>297</sup> or to public order offences under the Crimes Act 1961; inciting racial ill-will under the Human Rights Act 1993; or incitement to commit various crimes under the Terrorism Suppression Act 2002 (such as recruiting members of terrorist groups or participating in terrorist groups).

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

- 299 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 offences of public safety or public order (such as riotous damage under section 90 of the Crimes Act 1961, or criminal nuisance under section 145). The “threatening” offences in section 307A of the Crimes Act 1961 could also cover this conduct in some circumstances.

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

- 300 Publishing or making statements or conspiring to excite such hostility or ill-will between different classes of persons as may endanger the public safety (section 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 non-conformity.
- 301 Speech of this sort is often described as “hate speech”. It is beyond our terms of reference to consider New Zealand’s obligations in terms of the International Convention on the Elimination of All Forms of Racial Discrimination 1966 and article 20 of the ICCPR<sup>298</sup> and whether, and to what extent, “hate speech” should be criminalised. But we do not consider that sedition should be used as

296 The Treason Act 1351, as amended, still applies in England. It is directed at war against or personal injury to the Sovereign and his or her family, as well as “adhering to Her enemies” and giving them comfort.

297 A British Muslim, Umran Javed, was convicted of soliciting murder for his words during a protest march against cartoons of the prophet Mohammad in 2006. Over a megaphone, he said that non-believers would pay a heavy price and Denmark would pay with blood: “bomb, bomb Denmark; bomb, bomb USA”. See “Cartoon protester guilty of calling for murder” *Guardian Unlimited*, 5 January 2007 < [www.guardian.co.uk](http://www.guardian.co.uk) > (last accessed 16 January 2007).

298 See para 152.

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.

302 As Professor Hare has said in criticising the Racial and Religious Hatred Act 2005 (UK):<sup>299</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.

303 “Hate speech” in New Zealand is in part regulated by the Films, Videos, and Publications Classification Act 1993.<sup>300</sup> 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(1)(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-will between workers and employers,<sup>301</sup> but the seditious offences have never been used in New Zealand to deal with issues of race or ethnic origin.

304 There are 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 \$7,000;
- the consent of the Attorney-General is required for a prosecution under section 131 of the Human Rights Act 1993.

299 Hare “Crosses, Crescents and Sacred Cows: Criminalising Incitement to Religious Hatred”, above n 101, 532.

300 See A and P Butler *The New Zealand Bill of Rights Act: A Commentary*, above n 114, 13.20.7.

301 *R v Holland* (1914) 33 NZLR 931.

305 As discussed above, the Police, in their submission, gave the example of the radical Muslim cleric as a situation where section 81(1)(e) might be useful, and where other criminal offences might not cover the situation:

For example, a person who directs a speech to the public or to people attending a mosque which encourages them to sacrifice themselves for Allah and is designed to promote a holy war or Jihad, but who cleverly does not direct them to commit a specific crime or offence will not be able to be prosecuted for “incitement” as no specific offence has been incited.

306 In our view, the threshold question must first be whether the speech at issue represents the extreme of speech that should be protected in a democratic society, or whether it is speech that should be curtailed. As noted in chapter 3, speech may well be unreasonable or caustic, but that alone does not justify suppression.

307 If the conduct in the example given by the Police does warrant suppression but cannot be dealt with under other existing offences, which in the absence of a specific example we do not accept, there are alternatives to retaining the wide and potentially problematic seditious offences. While the seditious offences may be wide enough to catch the example given by the Police, they are also wide enough to catch a range of other less serious situations, and that is cause for concern. If the aim is to proscribe the urging of terrorism, or the inciting of religious hostility or ill-will, then, in our view, suitable offences should be located in the appropriate legislation. As noted, the Terrorism Suppression Act 2002 is currently under review. That Act could be amended to specifically comply with the United Nations Security Council Resolution 1624.<sup>302</sup> It may be that section 131 of the Human Rights Act 1993 could be amended to enable a prosecution for inciting religious hostility or ill-will.

#### Publication of seditious documents: section 84 of the Crimes Act 1961 compared with section 83 and 85

308 Section 84 of the Crimes Act 1961 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(1)(a) to (e).

309 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 section 83, arguably it could be found guilty of sedition even if it had only reported a seditious statement made by someone else.<sup>303</sup>

302 See paras 145–146 above: Resolution 1624 calls on states to prohibit by law incitement to commit a terrorist act or acts.

303 J Burrows and U Cheer *Media Law in New Zealand* (5 ed, Oxford University Press, Victoria, 2005) 448.

- 310 Thus, there is a distinction in wording between section 84 and section 83. Under section 84, persons can only be found guilty if they had a seditious intention. Under section 83, literally interpreted, they could be prosecuted simply for publishing material (which could even be a hypothetical theory<sup>304</sup>) that expressed a seditious intention<sup>305</sup> even though they had no such intention themselves.
- 311 Likewise, under section 85, again interpreted literally, a person could be prosecuted for copying allegedly seditious documents even if they had no knowledge of their contents. Section 85 is directed at persons who have printing and photocopying equipment in their possession or control<sup>306</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.
- 312 There is no express requirement in either sections 83 or 85 that the publisher or copier of the statement knowingly or recklessly intended to incite others to commit an unlawful act. However, there is a common law presumption that mens rea is an ingredient of every criminal offence,<sup>307</sup> so it must be presumed that, to have been found guilty, at least the publisher or copier was proved to be aware of the nature of the material. But it is unsatisfactory that on their face, the section 83 and 85 offences seem not to require such knowledge or a subjective seditious intention, only that the material expresses a seditious intention.
- 313 Arguably, offences in sections 123 and 124 of the Films, Videos, and Publications Classification Act 1993, such as making, copying, importing, supplying, and having in one's possession "objectionable" publications, could presently be used to prosecute this type of conduct in some cases. "Publication" is defined in section 2 of the Films, Videos, and Publications Classification Act 1993 and includes print, writing, books, films, videos, and things like discs storing information. "Objectionable" is defined in section 3 and includes such material when it describes acts of torture, physical harm or cruelty; degrades or dehumanises any person; promotes or encourages criminal acts or acts of terrorism; or represents that members of any particular class of the public are inferior to other members of the public by reason of a characteristic that is a prohibited ground of discrimination under the Human Rights Act 1993. Such an offence can be of strict liability (section 123) and punishable by a fine, or if committed with mens rea, is punishable by imprisonment not exceeding 10 years (section 124).

## SEDITION IN FIJI

- 314 During the consultation period for this report, events in Fiji led us to consider the law of sedition in that country, and the implications of repealing the law of sedition if a similar situation arose in New Zealand.

304 See for example, *R v Sharkey* (1949) 79 CLR 121, discussed in chapter 4.

305 See Burrows and Cheer *Media Law in New Zealand*, above n 303, 448.

306 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).

307 *Millar v Ministry of Transport* [1986] 1 NZLR 660.

- 315 The principal provisions relating to sedition in Fiji appear in the Penal Code [CAP 17]. Section 65 of the Penal Code defines a “seditious intention”. The definition is very similar to that set out in section 118 of the New Zealand Crimes Act 1908, and therefore differs from the current New Zealand provisions in a number of respects.<sup>308</sup> In particular, the intentions set out in section 81(1)(c) and (d) of the Crimes Act 1961 do not appear in the Fijian legislation, and the exciting of hostility or ill-will between classes of persons does not need to be such as to endanger the public safety, as it does in New Zealand under section 81(1)(e).
- 316 A prosecution for sedition in Fiji does not need to prove either incitement to violence or the provoking of disorder or violence in order to establish the charge.<sup>309</sup> Unlike in New Zealand, sedition in Fiji extends to doing an act with a seditious intention as well as making, publishing or distributing statements expressing a seditious intention, or conspiring to carry out a seditious intention.
- 317 The seditious offences in Fiji include doing, preparing to do or conspiring to act with a seditious intention; uttering any seditious words; printing, publishing, selling, reproducing, distributing or importing any seditious publication.<sup>310</sup> The penalty is imprisonment for two years for a first offence, or a fine of \$200, or both. For a subsequent offence, the offender is liable to imprisonment for three years.
- 318 The Penal Code contains a number of other offences against the authority of the Sovereign, including treason,<sup>311</sup> instigating invasion,<sup>312</sup> misprision (or hiding the crime) of treason,<sup>313</sup> treasonable felonies,<sup>314</sup> inciting to mutiny,<sup>315</sup> and aiding soldiers or policemen in acts of mutiny.<sup>316</sup> Fiji also has a Public Order Act [CAP 20], which includes a range of offences such as administering an oath to engage in a mutinous or seditious enterprise,<sup>317</sup> incitement to violence and disobedience of the law,<sup>318</sup> and inciting racial antagonism.<sup>319</sup>
- 319 Freedom of expression is protected in Fiji under section 30 of the 1997 Constitution.<sup>320</sup> The Constitution provides that a law may limit the right to freedom of expression in any one of a number of interests, but only to the extent

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308 See appendix 1 of this report.

309 *State v Riogi* [2001] FJHC 61.

310 Penal Code, CAP 17, s 66.

311 Penal Code, s 50.

312 Penal Code, s 51.

313 Penal Code, s 52.

314 Penal Code, s 53.

315 Penal Code, s 55.

316 Penal Code, s 56.

317 Public Order Act, s 6.

318 Public Order Act, s 16.

319 Public Order Act, s 17.

320 Section 2 of the Fiji Islands Constitution Amendment Act 1997 provides that the Constitution is the supreme law of the State, and any law inconsistent with it is invalid to the extent of the inconsistency. Amendments to the Constitution must be passed by both Houses of Parliament and must be supported by a two-thirds majority in each House on the second and third readings – Fiji Islands Constitution Amendment Act 1997, s 191. This requirement will not apply if the Prime Minister certifies an amendment as urgent, and that certification is supported by at least 53 members of the 71 members of the House of Representatives. In that case, the Bill will be deemed to have been duly passed if on its third reading it is passed by a majority of at least 53 members of the House of Representatives – s 191(3). Further special provisions apply to amendments to alter the composition of the House of Representatives – s 192.



that the limitation is reasonable and justifiable in a free and democratic society. The interests listed as justifying a limit on freedom of expression include:

- national security, public safety, and public order;
- the right to be free from hate speech, whether directed against individuals or groups; and
- preventing attacks on the dignity of individuals, groups or communities, or respected offices or institutions in a manner likely to promote ill-will between races or communities.

320 There have been some prosecutions for sedition in Fiji in the last 20 years,<sup>321</sup> but none of the major leaders of any of the four coups that have taken place in that period has been convicted of sedition.<sup>322</sup> The presence of seditious offences on the statute books does not appear to have been an effective deterrent to attacks on established authority, even though the Fijian seditious provisions are broader than those in New Zealand, extending to acts as well as speech.

321 If a military coup were to occur or were to be attempted in New Zealand, there are a number of charges other than sedition which could be laid against the coup leaders. Under the Crimes Act 1961, charges could be laid such as treason or incitement to treason, or incitement to mutiny.<sup>323</sup> Charges could also be laid under the Armed Forces Discipline Act 1971, such as mutiny,<sup>324</sup> failure to report or suppress mutiny,<sup>325</sup> violence to a superior officer,<sup>326</sup> insubordinate behaviour,<sup>327</sup> disobeying a lawful command,<sup>328</sup> or failure to comply with written orders.<sup>329</sup> Of course, if a coup is successful, it is unlikely that charges of any kind will be laid against the leaders.

321 See for example *State v Riogi* [2001] FJHC 61, where the appellant was the leader of a movement which declared itself the new government of the island of Rotuma, and purported to rule the whole island. The respondent was acquitted of a charge of sedition by the Chief Magistrate, but was convicted on appeal by the High Court of Fiji. An earlier case, *State v Mua* [1992] FJCA 23, also concerned sedition charges arising out of events on Rotuma.

322 Sitiveni Rabuka, who led two military coups in 1987, was not convicted of charges in relation to them. He later became Prime Minister of Fiji. George Speight, the principal leader of the May 2000 coup, was convicted of treason in February 2002.

323 Crimes Act 1961, s 77(a): Every one owing allegiance to Her Majesty the Queen in right of New Zealand is liable to imprisonment for a term not exceeding 10 years who, within or outside New Zealand, for any traitorous or mutinous purpose, endeavours at any time to seduce any person serving in the New Zealand forces from his duty.

324 Under section 32 of the Armed Forces Discipline Act 1971 every person who takes part in any mutiny is liable to life imprisonment. Mutiny means a combination between two or more persons subject to service law, or between persons of whom at least two are persons subject to service law, to overthrow or resist lawful authority in a part of the Armed Forces or in a force of another country acting in co-operation with a part of the Armed Forces – s 2.

325 Armed Forces Discipline Act 1971, s 33, punishable by life imprisonment.

326 Armed Forces Discipline Act 1971, s 35. Superior officer, in relation to any member of the Armed Forces, means another member holding a higher rank (not being an honorary rank); and includes another member of equal rank (not being an honorary rank) who is entitled to exercise powers of command over him or her – s 2. The Governor-General is the Commander in Chief of the New Zealand Armed Forces.

327 Armed Forces Discipline Act 1971, s 36.

328 Armed Forces Discipline Act 1971, s 38.

329 Armed Forces Discipline Act 1971, s 39.

CONCLUSION 322 In 1992, Maher argued that:

[S]o 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 ... [A]bolition of sedition offences at both Commonwealth and State level is therefore to be preferred to any attempt to “modernise” the crime of sedition.<sup>330</sup>

323 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 and other offences should adequately suffice to proscribe what are presently labelled “seditious offences”, to the extent that such conduct should be a crime.

324 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 would be easier to establish than incitement to commit an offence.<sup>331</sup> We consider that such “speech only” offences should not be easy to prove, in the interests of freedom of expression.

325 We note that a number of early prosecutions for sedition in New Zealand were instigated pursuant to the War Regulations Act 1914, and that repeal of the Crimes Act 1961 provisions would not, in itself, prevent further ad hoc legislation of this kind. However, we consider that repeal of the seditious provisions would convey the message that broad provisions of sedition and seditious intention are not democratically justifiable. The New Zealand Bill of Rights Act 1990 should also assist to curb any future attempt to reintroduce such provisions.

326 We recommend that the seditious offences set out in sections 81 to 85 of the Crimes Act 1961 be abolished. A Bill drafted by the Parliamentary Counsel Office is attached as appendix 2 to this report.

330 LW Maher “The Use and Abuse of Sedition” (1992) 14 Sydney L Rev 287, 288 cited in Griffith “Sedition, Incitement and Vilification: Issues in the Current Debate”, above n 213, 3.

331 See Australian Law Reform Commission *Fighting Words: A Review of Sedition Laws*, above n 147, 171.



# Appendix 1

## 81 Seditious offences defined

- (1) A seditious intention is 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
  - (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.
- (2) Without limiting any other legal justification, excuse, or defence available to any person charged with any offence, it is hereby declared that no one shall be deemed to have a seditious intention only because he 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.
- (3) A seditious conspiracy is an agreement between 2 or more persons to carry into execution any seditious intention.

- (4) For the purposes of sections 83 to 85 of this Act,—

**to publish** means to communicate to the public or to any person or persons, whether in writing, or orally, or by any representation, or by any means of reproduction whatsoever.

**statement** includes words, writing, pictures, or any significant expression or representation whatsoever; and also includes any reproduction, by any means whatsoever, of any statement.

## 82 Seditious conspiracy

Every one is liable to imprisonment for a term not exceeding 2 years who is a party to any seditious conspiracy.

## 83 Seditious statements

Every one is liable to imprisonment for a term not exceeding 2 years who makes or publishes, or causes or permits to be made or published, any statement that expresses any seditious intention.

## 84 Publication of seditious documents

- (1) Every one is liable to imprisonment for a term not exceeding 2 years who, with a seditious intention,—

- (a) prints, publishes, or sells; or
- (b) distributes or delivers to the public or to any person or persons; or
- (c) causes or permits to be printed, published, or sold, or to be distributed or delivered as aforesaid; or
- (d) has in his possession for sale, or for distribution or delivery as aforesaid; 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.

- (2) Any constable may seize any document, statement, or advertisement, or any other written or printed matter, in respect of which an offence under this section is committed or is reasonably suspected by him to have been committed.

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

Every one is liable to imprisonment for a term not exceeding 2 years who, having in his possession or under his control any printing press, or any mechanical, photographic, or electrical apparatus, or any other apparatus whatsoever,—

- (a) uses it; or
- (b) causes or permits it to be used—

for printing, making, or publishing, or for facilitating the printing, making, or publishing of, any document, statement, advertisement, or other matter that expresses or will express any seditious intention.

# Appendix 2

## **Crimes (Repeal of Seditious Offences) Amendment Bill**

Government Bill

**Explanatory note**  
[To come].

**Clause by clause analysis**  
[To come].

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*Hon Mark Burton*

## **Crimes (Repeal of Seditious Offences) Amendment Bill**

Government Bill

### **Contents**

**The Parliament of New Zealand enacts as follows:**

**1 Title**

This Act is the Crimes (Repeal of Seditious Offences) Amendment Act 2007.

**2 Commencement**

This Act comes into force on 1 January 2008.

**3 Principal Act amended**

This Act amends the Crimes Act 1961.

### **Part 1**

#### **Amendments to principal Act**

**4 New heading substituted**

The heading above section 80 is repealed and the following heading substituted: “Offence of oath to commit offence”.

**5 Sections 81 to 85 repealed**

Sections 81 to 85 are repealed.

### **Part 2**

#### **Amendments to other enactments**

**6 District Courts Act 1947 amended**

The item “Part 5—Crimes Against Public Order” in Part 1 of Schedule 1A of the District Courts Act 1947 is repealed.

**7 Regulations amended**

The regulations specified in the Schedule are amended in the manner set out in that schedule.

**Schedule****s 7****Regulations amended****Efficiency Decoration Regulations 1966 (SR 1966/35)**

Regulation 13: omit “sedition,”.

**Efficiency Medal Regulations 1966 (SR 1966/34)**

Regulation 14: omit “sedition,”.

**Queen’s Medal for Champion Shots of the Air Forces Regulations 1954 (SR 1954/13)**

Regulation 5(2): omit “sedition,”.

**Queen’s Medal for Champion Shots of the New Zealand Naval Forces Regulations 1958 (SR 1959/14)**

Regulation 4(2): omit “sedition,”.

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