

SPEAKING OF TERROR: CRIMINALISING INCITEMENT TO VIOLENCE

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Propaganda has long been the hand-maiden of violence: inciting, justifying and naturalising it; ploughing the ground for violence by softening our psychological defences to it and desensitising us to its brutalising effects. Much of the power of propaganda stems from what is left unspoken: the vast possibilities of imagination triggered by clever, subtle and insidious emotional provocation. Equally, propaganda can be ruthlessly blunt, by demonising, belittling or degrading the enemy. Contemporary terrorism by extremist, quasi-religious groups has been accompanied by the revival of particularly virulent propaganda, as well as by inflammatory and provocative rhetoric. Facilitated by cheap and portable digital technology, terrorist videos are distributed over the internet or through Arab media channels, sometimes finding their way (in sanitised form) into the western media. The raw, uncensored versions of some of these videos are extraordinarily bleak: filled not only with crude political messages and ideology, but also seething with hate and pathological cruelty. One such video, made in English for a western audience by Brigade Media Jihad in 2005, depicts and glorifies numerous attacks on coalition forces in Iraq, including by showing the ritualistic execution of prisoners of war and the charred remains of enemy soldiers burnt to death.¹ The accompanying words denigrate western forces as ‘pigs’ and are painted in a font dripping with blood, while Islamic music (*nashid*) overlays the production with an impelling rhythm. By invoking religious authority for killing, the propagandists take themselves outside the secular moral code governing propaganda, caring little about appealing to shared conceptions of public reason.

I INCITEMENT TO TERRORISM: THE INTERNATIONAL CONTEXT

How does – and how should – the law respond to words or images that encourage a climate conducive to terrorism, without directly inciting specific terrorist acts? Internationally, pressure to criminalise generalised incitement to

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¹ Almeer 2005 Forums <<http://www.almeer.net/vb/showthread.php?t=32134>> at 17 September 2005.

terrorism has emanated from Europe and the United Nations. In May 2005, the Council of Europe adopted a new *Convention on the Prevention of Terrorism* which requires State parties to criminalise ‘public provocation to commit a terrorist offence’.² ‘Public provocation’ means ‘the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed’.³

The provision concerning ‘public provocation’ stemmed from a working group and expert report which considered both ‘*apologie du terrorisme*’ and ‘incitement to terrorism’.⁴ *Apologie* was understood as the public expression of praise, support, or justification of terrorism.⁵ It is thus broader than ordinary incitement to commit a crime (including terrorism), which is already an offence in many European (and common law) countries. The drafters were conscious that criminalising incitement or *apologie* might interfere in freedom of expression, but argued that it could still constitute a legitimate restriction under human rights law.⁶ The rationale for criminalisation is that such statements create ‘an environment and psychological climate conducive to criminal activity’,⁷ though not inciting any specific offence.

Examples of indirect incitement or *apologie* intended to be captured as ‘public provocation’ include ‘presenting a terrorist offence as necessary and justified’,⁸ and ‘the dissemination of messages praising the perpetrator of an attack, the denigration of victims, calls for funding of terrorist organisations or other similar behaviour’.⁹ Such conduct must be accompanied by the specific intent to incite a terrorist offence. It must also cause a credible danger that an offence might be committed, which may depend on ‘the nature of the author and of the addressee of the message, as well as the context’.¹⁰ These two qualifications substantially narrow the scope of the offence, such that merely justifying or praising terrorism, without more, is not criminalised. The drafters insisted that the crime must be viewed in light of the quality of European judicial systems, the availability of effective remedies, and the guarantee of a fair trial,¹¹ although no ‘good faith’ defence was expressly created. Most importantly, the drafters agreed to

2 *Council of Europe Convention on the Prevention of Terrorism*, opened for signature 16 May 2005, ETS No 196, art 5(2) (not yet in force).

3 *Ibid.*

4 Committee of Experts on Terrorism, ‘*Apologie du terrorisme*’ and ‘*incitement to terrorism*’: *Analytical Report* (3rd meeting, Strasbourg, 6–8 July 2004), CODEXTER (2004).

5 *Ibid.* 5.

6 *Ibid.* 31.

7 Mordechai Kremnitzer and Khalid Ghanayim, ‘Incitement, Not Sedition’ in David Kretzmer and Francine Hazan (eds), *Freedom of Speech and Incitement against Democracy* (2000) 147, 197.

8 *Explanatory Report on Council of Europe Convention on the Prevention of Terrorism* (Adopted by the Committee of Ministers, 925th Meeting, Council of Europe) CM (2005) 34, [98].

9 *Ibid.* [95].

10 *Ibid.* [99]–[100].

11 Committee of Experts on Terrorism, above n 4, 31.

criminalise provocation only on the basis that European human rights remedies were available to protect free expression from undue interference.¹²

Beyond Europe, in September 2005, the United Nations Security Council adopted non-binding Resolution 1624 calling on States to: ‘Prohibit by law incitement to commit a terrorist act or acts’, prevent incitement, and deny safe haven or entry to inciters.¹³ The preamble also repudiates ‘attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts’. The resolution does not go as far as the Council of Europe, since it calls for the *criminalisation* of incitement, but merely *repudiates* the justification or glorification (*apologie*) of terrorism. Nonetheless, it ambiguously refrains from defining ‘incitement’, so it is unclear whether this term extends to indirect incitement, private incitement, or even vague *apologie* for terrorism. This lack of definition is of concern given that the Security Council has also failed to define terrorism itself,¹⁴ allowing governments to unilaterally and subjectively define the scope of criminal liability. Non-definition of incitement may similarly encourage States to excessively restrict free expression.

The resolution was sponsored by the United Kingdom during the aftermath of the July 2005 terrorist bombings in London. Soon after the bombings, the UK announced new policy guidelines governing deportation,¹⁵ which listed ‘unacceptable behaviours’ by non-UK citizens in Britain or abroad, which involved expressing views which:

- foment, justify or glorify terrorist violence in furtherance of particular beliefs;
- seek to provoke others to terrorist acts;
- foment other serious criminal activity or seek to provoke others to serious criminal acts; or
- foster hatred which might lead to inter-community violence in the UK.¹⁶

After hasty consultations, the Home Secretary deleted as a ground ‘the expression of views that the Government considers to be extreme and that conflict with the UK’s culture of tolerance’.¹⁷ In covering ‘other serious criminal activity’, the guidelines exploit public concern about terrorism to extend powers to combat ordinary crime.

In August 2005, the British Prime Minister also proposed a new ‘offence of condoning or glorifying terrorism’ whether in the UK or abroad,¹⁸ partly to

12 Explanatory Report to the *Council of Europe Convention on the Prevention of Terrorism*, [27], [30] <<http://conventions.coe.int/Treaty/EN/Reports/Html/196.htm>> at 13 November 2005.

13 *Threats to International Peace and Security (Security Council Summit 2005)*, SC Res 1624, UN SCOR, 5261st mtg, UN Doc S/Res1624 (2005) 3.

14 See Ben Saul, ‘Definition of “Terrorism” in the UN Security Council: 1985–2004’ (2005) 4 *Chinese Journal of International Law* 141.

15 UK Home Secretary, ‘Tackling Terrorism – Behaviours Unacceptable in the UK’, (Press Release 124/2005, 24 August 2005) <http://www.ind.homeoffice.gov.uk/ind/en/home/news/press_releases/tackling_terrorism.html> at 4 November 2005.

16 *Ibid* [4].

17 *Ibid* [11].

18 Tony Blair, ‘Statement on Anti-Terror Measures’, (UK Prime Minister’s Statement, 5 August 2005) [17] <<http://www.statewatch.org/news/2005/aug/02pm-terror-statement.htm>> at 4 November 2005.

implement the Council of Europe Convention. Previously, UK law only prohibited incitement to terrorism within the UK or abroad,¹⁹ but not the broader offence of condoning or glorifying terrorism. Following significant criticism, including by the independent expert appointed to review the proposals,²⁰ the proposals were replaced in the final Terrorism Bill with a narrower offence of 'encouragement of terrorism',²¹ which nonetheless remains wider than the existing law of criminal incitement.

The proposed offence comes in addition to a 'power to order closure of a place of worship which is used as a centre for fomenting extremism' and the listing of non-citizen Muslims 'not suitable to preach who will be excluded from Britain'.²² Closing mosques amounts to collective punishment, since the religious activities of all worshippers are disproportionately affected by a closure targeting a specific preacher. While it is unclear what statements would be criminalised by the proposed offence, in a speech after the London bombings the UK Prime Minister condemned the 'evil ideology' and 'barbaric ideas' that terrorists sought to impose on others:

They demand the elimination of Israel; the withdrawal of all westerners from Muslim countries, irrespective of the wishes of people and Government; the establishment of effectively Taleban states and Sharia law in the Arab world en route to one Caliphate of all Muslim nations.²³

Similarly, the UK Attorney-General announced that statements on television by Muslim clerics after the London bombings would be examined by police.²⁴ One cleric stated that he would not inform police if he knew that Muslims were planning an attack and that he supported insurgents attacking British forces in Iraq and Afghanistan. Another group, which praised the London bombers as the 'Fantastic Four' (in a secret recording by a journalist), was also referred to police. Such statements might be captured by the new laws, even though they may only be tenuously connected with specific crimes, and even though a robust democracy might be expected to absorb unpalatable ideas without prosecuting them.

19 *Terrorism Act 2000* (UK) c 11, ss 59–61. See Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (2002) 175–7.

20 Lord Carlile of Berriew QC, *Report by the Independent Reviewer on Proposals by Her Majesty's Government for Changes to the Laws against Terrorism*, October 2005.

21 Terrorism Bill (UK House of Commons, 12 Oct 2005) cl 1. It would be an offence to publish a statement if a person knows or has reasonable grounds for believing that members of the public are likely to understand it as a direct or indirect encouragement or inducement to commit, prepare or instigate terrorist acts.

22 Blair, above n 18, [26].

23 Tony Blair, 'Our Third Term Will Be Our Best Yet' (Speech delivered at the National Policy Forum, London, 16 July 2005) [5].

24 Ed Johnson, 'London Bomb Suspects in Court', *The Age* (Melbourne), 9 August 2005.

II URGING VIOLENCE: AUSTRALIAN PROPOSALS

The European and British initiatives spurred on Australia to respond to terrorist incitement or *apologie*, and Australia's proposals have been subsequently legitimised by the Security Council's resolution. In September 2005, Prime Minister Howard announced that the existing federal offence of sedition (*Crimes Act 1914* (Cth) ('*Crimes Act*') ss 24A–24D) would be replaced by an offence of 'inciting violence against the community ... 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'.²⁵ The proposal is based on the Gibbs Review of federal criminal law in 1991.²⁶ In a related proposal, 'the criteria for listing terrorist organisations [would be] extended to cover organisations that advocate violence'.²⁷

The government planned to release the draft bill on 31 October 2005, and require a Senate Committee to report on it by 8 November 2005 – allowing only one week for public scrutiny of these radical laws. However, on 14 October 2005 a confidential draft Anti-Terrorism Bill 2005 (Cth) was leaked to the public by the Australian Capital Territory Chief Minister.²⁸ The final version of the Bill was introduced into Parliament on 3 November 2005. Schedule 7 of the Bill repeals the existing sedition offences in the *Crimes Act*. It then inserts five new sedition offences into the *Criminal Code Act 1995* (Cth) ('*Criminal Code*') by adding a new s 80.2 to the existing offence of treason in s 80.1. Some of the proposed offences follow the recommendations of the Gibbs Review, including increasing the penalty for sedition from three to seven years imprisonment.

Invoking the Gibbs Review is nonetheless misleading in that Gibbs recommended modernising (and narrowing) many of the other archaic 'offences against the government' found in Pt II of the *Crimes Act*, including treason, treachery, sedition, inciting mutiny, unlawful (military) drilling, and interfering with political liberty. Gibbs further urged repeal of the offence of assisting prisoners of war to escape and the offences in Pt IIA of the *Crimes Act* (relating to 'unlawful associations' and industrial disturbances). While treason has since been modernised and relocated to the *Criminal Code*, there has been little action on the other offences. Reforming sedition without reforming the other offences results in unnecessary duplication, since most of the proposed offences can already be prosecuted by applying the existing law of criminal incitement to existing federal offences.

25 John Howard, 'Counter-Terrorism Laws Strengthened' (Press Release, 8 September 2005) [8] <http://www.pm.gov.au/news/media_releases/media_Release1551.html> at 4 November 2005.

26 Harry Gibbs, Ray Watson and Andrew Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report*, Commonwealth Attorney-General's Department (1991).

27 Howard, above n 25, [11].

28 See John Stanhope, 'What's New' (2005) Chief Minister, Australian Capital Territory <http://www.chiefminister.act.gov.au/whats_new.asp> at 5 October 2005; Anti-Terrorism Bill 2005 (Cth) <http://www.chiefminister.act.gov.au/docs/B05PG201_v281.pdf> at 5 October 2005.

The first two new sedition offences occur when a person *urges* another to: (1) overthrow by force or violence the *Constitution* or any Australian government; or (2) interfere by force or violence with lawful election processes for federal Parliament. Neither offence is necessary, since practically identical conduct can already be prosecuted by combining the existing law of incitement (*Criminal Code* s 11.4) with the existing offences of treachery (*Crimes Act* s 24AA)), disrupting elections (*Commonwealth Electoral Act 1918* (Cth) s 327), and interfering with political liberty (*Crimes Act* s 28).

Similarly, the fourth and fifth new offences involve urging a person to assist organisations or countries proclaimed as enemies at war with Australia, or engaged in armed hostilities against it (even if unproclaimed). The new offences are largely redundant because such conduct is already covered by applying the law of incitement to the offences of treason (*Criminal Code* s 80.1) and treachery (*Crimes Act* s 24AA) and offences in ss 6–9 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). Those offences are defined widely and cover much preparatory conduct.

These two new offences may apply even if Australia invades another country in violation of international law. If opposing Australian aggression is interpreted as tacit support for its enemies, Australians may be prosecuted for condemning illegal violence by their government, or for seeking to uphold the *United Nations Charter*. In contrast, under human rights law, the prohibition on propaganda does not prohibit advocacy of the international rights of self-defence or self-determination.²⁹ In this regard it is significant that the Bill extends the geographical scope of the offences beyond Australia to create a quasi-universal jurisdiction, even though international law does not support universal jurisdiction over such conduct (precisely because of the potential conflict with the law on combatant immunity in armed conflict). The third new sedition offence is considered separately below.

The new offences are positive in that they simplify the convoluted existing law of sedition, and narrow it in some respects. Presently, it is an offence to engage in a seditious enterprise (ss 24B–C) or to write, print, utter or publish any seditious words (s 24D), with the intention of causing violence or creating a public disorder or disturbance. Both of these offences require a seditious intention, which is defined in s 24A of the *Crimes Act* as an intention to: (a) bring the Sovereign into hatred or contempt; (d) ‘excite disaffection against’ the Government, *Constitution*, or Parliament; (f) ‘excite Her Majesty’s subjects’ to unlawfully alter ‘any matter in the Commonwealth established by law’; or (g) ‘to promote feelings of ill-will and hostility between different classes of Her Majesty’s subjects so as to endanger the peace, order or good government of the Commonwealth’.

Clearly, the new offences avoid the vague and oppressive concepts in the existing law of exciting ‘disaffection’, promoting feelings of ‘ill-will’, or

29 UN Human Rights Committee, *General Comment No 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Art 20)*, CCPR General Comment No 11 (19th session, 1983) [2].

‘contempt’ of the Sovereign. A person who supported an Australian republic could potentially be prosecuted under the existing law, as could someone who ridiculed the Australian monarch. The Bill also narrows the existing scope of sedition by establishing statutory defences (considered below), which are not expressly provided in existing law.

On the other hand, the Bill widens the existing law of sedition in troubling ways. The existing offences require an intention to utter seditious words or engage in seditious conduct (with a seditious intention), with the further intention of causing violence or creating a public disorder or disturbance. The new offences are drafted so as not to require any such further intention to cause violence.³⁰ The Bill expressly provides that the first three offences may be committed where a person *recklessly* urges others to commit violence, without any specific intent to cause violence. The fourth and fifth new offences do not even require that a person urge violence, let alone intend its commission. It is sufficient that a person urges another to ‘engage in conduct’ that is intended ‘to assist, by any means whatever’ an organisation or country fighting against Australia.

Oddly, the Bill preserves the old definition of sedition in a related proposal (sch 1) for the purpose of declaring as unlawful associations which advocate a seditious intention, thus creating patently inconsistent meanings of sedition between the *Crimes Act* and the *Criminal Code*.³¹ This directly conflicts with Gibbs’ recommendation to repeal the provisions on ‘unlawful associations’ altogether – and not to extend them. Terrorist groups can already be banned as terrorist organisations and a second track of collective proscription is both confusing and unnecessary.

Archaic security offences are little used in practice because they are widely regarded as inappropriate in a modern liberal democracy which values freedom of political expression.³² Paradoxically, the danger in modernising security offences is that prosecutors may seek to use them more frequently, since the new offences are considered better adapted to modern conditions and thus more legitimate. A better approach may be to abandon old-fashioned security offences altogether in favour of using the ordinary criminal law, particularly since such offences may counter-productively mark out and legitimise perpetrators as ‘political’ offenders rather than ordinary criminals. As the Gibbs Review observed, the UK Law Commission found that a crime of sedition was unnecessary, since seditious conduct is already captured by the ordinary offence of incitement to crime. Reviews of criminal law in Canada and New Zealand omitted sedition offences altogether.³³

30 Philip Ruddock, ‘New Counter Terrorism Measures: Incitement of Terrorism’ (Question and Answer Brief – Attorney-General, 17 October 2005) <<http://www.abc.net.au/mediawatch/img/2005/ep33/tpsediton.pdf>> at 15 November 2005.

31 The existing definition of a seditious intention is inserted into the *Crimes Act 1914* (Cth) s 30A.

32 The last sedition convictions in Australia were *Burns v Ransley* (1949) 79 CLR 101 and *R v Sharkey* (1949) 79 CLR 121 (involving members of the Communist Party).

33 Gibbs, Watson and Menzies, above n 26, 304–5.

A Good Faith Defences

The danger of criminalising political opponents is, however, reduced by the Bill's inclusion of five 'good faith' defences (proposed ss 80.3(1)(a)–(e), *Criminal Code*), although the burden of proof lies on the accused. First, it is a defence to try in good faith to show that any of these people are mistaken in their counsels, policies or actions: the Sovereign, Governor-General, State Governor, Territory Administrator, their advisers, or a person responsible for a foreign government. A narrower defence is available to persons who point out in good faith errors or defects, *with a view to reforming those errors or defects*, in: any Australian government; the *Australian Constitution*; Australian legislation; or the administration of justice in any Australian or foreign jurisdiction. Thus criticism which is not considered constructive (a subjective determination) is not protected.

Second, it is a defence to urge in good faith another person to lawfully change any matter established by law in Australia. Next, it is a defence to point out in good faith any matters that may produce feelings of ill-will or hostility between different groups, so as to remove those matters. Finally, anything done in good faith connected with an industrial dispute or matter is also excluded. In considering these defences, the courts may have regard to any relevant matter, including whether the acts were done to prejudice the safety or defence of Australia; to assist an enemy or hostile organisations; or to cause violence, public disorder or disturbance (s 80.3(2)). For the fourth and fifth offences of inciting persons against Australian forces, there is an additional defence excluding conduct for humanitarian purposes (s 80.2(9)).

While these defences seem wide, protecting much legitimate free expression, most of the defences are directed towards protecting political speech, at the expense of other types of expression. By contrast, good faith defences commonly found in state and federal anti-vilification legislation typically protect statements made in good faith for academic, artistic, scientific, religious, journalistic or other public interest purposes. Such statements may not aim to criticise the mistakes of political leaders, the errors of governments or laws, matters causing ill-will between groups, or industrial issues. Such statements may be neither constructive nor in good faith, such as satirical art, theatre or comedy. The range of human expression worthy of legal protection is much wider than these narrowly drawn exceptions, which appear more concerned about not falling foul of the implied constitutional freedom of political communication than about protecting speech as inherently valuable.

Further, the defences provide no express immunity for journalists who simply report, in good faith, the views expressed by others (in contrast to those deliberately publishing and promoting hate-filled propaganda). This is contrary to the 1995 *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, which argue that: 'Expression may not be prevented or punished merely because it transmits information issued by or about an organisation that a government has declared threatens national security'.

The defences are also anachronistic, since they are based closely on the defences to English common law crimes of sedition found in a famous English

criminal law text book of 1887 (Sir James Fitzjames Stephen, *A Digest of the Criminal Law* (3rd ed, 1887) article 93). They are defences for a different era – less rights-conscious, and eager to protect the reputation of Queen Victoria. Such narrow defences have no place in a self-respecting modern democracy.

III INCITEMENT TO GROUP-BASED VIOLENCE

The third new offence modernises an existing seditious provision which prohibits promoting ‘feelings of ill-will and hostility between different classes of Her Majesty’s subjects’. The replacement offence is where:

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

The new offence seeks to criminalise – for the first time in federal law – incitement to violence against racial, religious, national, or political groups. Gibbs explained such a provision as supported by Australia’s human rights treaty obligations to criminalise incitement to violence on national, racial or religious grounds.³⁴ In principle, this is a welcome development for a number of reasons. First, while racial hatred has been *unlawful* under federal law since 1995,³⁵ incitement to racial discrimination or vilification was not hitherto a federal *crime*, as required by art 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination 1969*.³⁶ Second, *religious* vilification had not otherwise been made unlawful at the federal level³⁷ or in New South Wales, even though the *International Covenant on Civil and Political Rights*³⁸ (‘ICCPR’) requires States to prohibit: ‘Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or

34 Ibid 306–7. See generally Louis Henkin, ‘Group Defamation and International Law’ in Monroe Freedman and Eric Freedman (eds), *Group Defamation and Freedom of Speech* (1995) 123.

35 It is unlawful to publicly do an act which ‘is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people’ for reasons of ‘race, colour or national or ethnic origin’: *Racial Discrimination Act 1975* (Cth) s 18C(1), as amended by the *Racial Hatred Act 1995* (Cth). It is also unlawful to incite racial discrimination under the *Racial Discrimination Act 1975* (Cth) s 17(a). See Sally Reid and Russell Smith, *Regulating Racial Hatred, No 79: Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology (1998).

36 In contrast, NSW made serious racial vilification an offence in 1989: ‘A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group’ by means such as threatening physical harm towards the person, group or their property, or by inciting others to threaten such harm: *Anti-Discrimination Act 1977* (NSW) s 20D. There have been no prosecutions to date, despite referrals.

37 Federally, while the Human Rights and Equal Opportunity Commission (‘HREOC’) can inquire into and conciliate complaints about religious discrimination in employment or by the Commonwealth, there is no such protection in other contexts (such as against private perpetrators), and even HREOC’s limited powers do not provide binding rights or remedies.

38 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

violence' (art 20(2)).³⁹ Religious prejudice against Muslim Australians increased significantly after 11 September 2001,⁴⁰ and prohibiting incitement to violence against religious groups sends a vital normative message to the community that religious hatred is unacceptable.⁴¹

However, the form of this provision raises serious concerns. Presenting it as a counter-terrorism law falsely stigmatises group-based violence as terroristic, when it is a conceptually distinct harm which should be treated separately by the criminal law. Collapsing these categories can only reinforce the stereotyping of certain ethnicities or religions as terrorists. Further, characterising incitement to group violence as sedition is an error of classification. The idea of sedition centres on rebellion against, or subversion of, political authority; it has little to do with communal violence between groups. The rationale for protecting one group from violence by another is not to prevent sedition or terrorism, but to guarantee the dignity of members of human groups in a pluralist society. The Bill accordingly manipulates international human rights protections for groups by recasting them as efforts against sedition and terrorism. The appropriate place for such an offence is within the framework of anti-vilification legislation, as suggested by the Labor Opposition's Crimes Act Amendment (Incitement to Violence) Bill 2005 (Cth) proposed in response to the sedition proposals in the Anti-Terrorism Bill 2005 (Cth).

The offence is also too narrow and does not go far enough in protecting groups from harm. First, it only protects religious (or other) groups from incitements which urge *other* groups to violence, and so excludes incitements aimed to provoke individuals, or groups not mentioned in the legislation. Second, requiring that the incitement must also threaten the peace, order and good government of the Commonwealth leaves groups unprotected from incitements which do *not* threaten peace, order or good government. For example, sporadic or isolated incitements to violence might not rise to a level of intensity or prevalence which threatens peace, order or good government – even though such incitements profoundly affect their victims. Neither Gibbs nor international law supports such a limitation. The qualification is also constitutionally unnecessary, since although this phrase prefaces the grant of federal powers in s 51 of the *Australian Constitution*, the courts have found that its words do not limit an

39 In contrast, Queensland, Victoria and Tasmania have prohibited such incitement: Human Rights and Equal Opportunity Commission, Race Discrimination Unit, *Racial Vilification Law in Australia* (October 2002) <http://www.hreoc.gov.au/racial_discrimination/cyber racism/vilification.html> at 4 November 2005.

40 Human Rights and Equal Opportunity Commission, *Isma' – Listen: National Consultations on Prejudice against Arab and Muslim Australians* (2004); Scott Poynting and Greg Noble, *Living with Racism: The Experience and Reporting by Arab and Muslim Australians of Discrimination, Abuse and Violence since 11 September 2001* (2004); Tanja Dreher, "'Targeted": Experiences of Racism in NSW after September 11, 2001' (2005) *UTS: Shopfront Monograph Series No 2* <<http://www.shopfront.uts.edu.au/news/targeted.pdf>> at 11 November 2005.

41 HREOC has also recommended that religious vilification be made unlawful in Australia: Human Rights and Equal Opportunity Commission, above n 39, 6; Human Rights and Equal Opportunity Commission, *Article 18: Freedom of Religion and Belief* (1998) 137, 139; see generally Mark Walters, 'Hate Crimes in Australia: Introducing Punishment Enhancers' (2005) 29 *Criminal Law Journal* 201.

otherwise valid exercise of a federal power.⁴² The external affairs power supports this provision to the extent that it implements a treaty obligation and is a permissible restriction on the implied freedom of political communication.⁴³ In this sense it is doubtful whether incitement to violence against groups based on ‘political opinion’ could be supported as a genuine implementation of human rights treaties, since no such protection is found in those treaties.

Third, the offence is confined to criminalising *incitement* to group-based violence, but there is no attempt to criminalise *actual group violence*. While violence against group members can always be prosecuted as ordinary crime under state, territory or federal law, treating group-based violence or ‘hate crimes’ as ordinary offences fails to recognise the additional psychological element and social harm involved in such cases. It is not sufficient to merely consider racial or religious motives as aggravating factors in sentencing, since that approach does not stigmatise the offending conduct as adequately as *naming* the conduct a racial or religious crime.

Finally, while incitement to *racial* discrimination and vilification is unlawful in federal law, even after the new offence there remains no federal (or NSW) protection from *religious* discrimination or vilification, where such conduct does not incite to violence. The case of *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)*⁴⁴ in Victoria illustrates the utility of broader laws against religious hatred. An evangelical Christian group and two pastors incited ‘hatred against, serious contempt for, or revulsion or severe ridicule of’ Victorian Muslims, contrary to s 8 of the *Racial and Religious Tolerance Act 2001 (Vic)*. They did so by claiming that Muslims are violent, terroristic, demonic, seditious, untruthful, misogynist, paedophilic, anti-democratic, anti-Christian and intent on taking over Australia.⁴⁵ The statutory exemptions for conduct engaged in reasonably and in good faith were unavailable, since the respondents had made fun of Muslims in a ‘hostile, demeaning and derogatory’ way, not in a balanced or serious discussion,⁴⁶ and had not distinguished moderate from extremist beliefs. The case is currently on appeal.

42 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9.

43 By analogy, see *Toben v Jones* (2003) 74 ALD 321 (the Full Federal Court found that the prohibition of racial hatred in the *Racial Discrimination Act 1975* (Cth) Pt IIA was a valid exercise of the external affairs power, since it was reasonably capable of being considered as appropriate and adapted to implementing the *International Convention on the Elimination of all Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969)). See also *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, upholding ss 9 and 12 of the same Act under the external affairs power.

44 [2004] VCAT 2510 (Unreported, Higgins VP, 22 December 2004).

45 *Ibid* [383].

46 *Ibid* [383]–[384].

IV PROSCRIPTION OF ORGANISATIONS WHICH ADVOCATE TERRORISM

A related measure in sch 1 of the Anti-Terrorism Bill 2005 (Cth) is the addition of a new ground for proscribing terrorist organisations under s 102.1(2) of the *Criminal Code*. The Bill proposes that an organisation which ‘advocates the doing of a terrorist act’ may be listed as a terrorist organisation, in addition to the existing grounds of engaging in, preparing, planning, assisting in, or fostering a terrorist act. Advocating terrorism is defined as (a) counselling or urging it; (b) providing instruction for it; or (c) directly praising it. The latter ground indicates an intention to cover indirect incitement or *apologie* of terrorism, or statements which, in a generalised or abstract way, support, justify or condone terrorism. Praising terrorism is a basis for proscribing groups and does not, however, attract criminal liability. Unlike for sedition offences, no good faith defences are available to organisations.

Nevertheless, given that it is an offence to be a ‘member’ of a terrorist organisation (10 years imprisonment) or to ‘associate’ with one (3 years imprisonment) (*Criminal Code* ss 102.3 and 102.8), a member or associate could potentially be prosecuted merely because their organisation praised terrorism – even if the organisation has no other involvement in terrorism; even if the praise did not result in a terrorist act; and even if the person praising terrorism did not intend to cause terrorism. This is an extraordinary extension of the power of proscription and criminal liability, since it collectively punishes members of groups for actions of their associates beyond their control. It is also a misapplication of criminal law to trivial harm, when criminological policy presupposes that criminal law should be reserved for the most serious social harms.

While it may be legitimate to ban groups that actively engage in or prepare for terrorism, it is not justifiable to ban whole groups merely because someone in the group praises terrorism. It is well accepted that speech which directly incites a specific crime may be prosecuted as incitement. It is quite another matter to prosecute a third person for the statements of another; even more so when such statements need not be directly and specifically connected to any actual offence.

The proposal raises the possibility that places of worship such as mosques, where they qualify as ‘organisations’ (meaning a body corporate or unincorporated body: s 100.1, *Criminal Code*), may be closed down merely because someone in it praised a terrorist act, such as where a preacher asks God to grant victory to the *mujahedeen* in Iraq.⁴⁷ This would collectively punish all worshippers for the view of a wayward leader. It may also infringe the express constitutional protection of the free exercise of religion (*Constitution* s 116, and see further below). It could also violate Australia’s obligation to protect freedom of association (*ICCPR* art 22), since it is *disproportionate* to restrict the

47 See the statements in Arabic by Muslim leaders translated in Richard Kerbaj, ‘Clerics Still Preaching Hatred of West’, *The Australian* (Sydney), 3 November 2005, 1; Simon Kearney and Annabelle McDonald, ‘Mosques Could Be Banned’, *The Australian* (Sydney), 4 November 2005, 2.

association of the harmless many to suppress the association of a harmful few. In any case, a statement such as this does not deserve criminal sanction, unless it provoked another to commit (or attempt) violence.

It is also unclear when an organisation can be said to be ‘praising’ terrorism. For example, must the organisation as a whole *formally* praise terrorism (for instance, in its policy documents, articles of association or website), or are the words of a senior leader (or even a single member) attributable to the organisation as a whole? Further, it is not made clear whether praise must take place publicly, or whether praise expressed in private is sufficient.

V INCITEMENT VERSUS ‘INDIRECT’ INCITEMENT

Inciting another to commit a crime can already be prosecuted under existing statutory and common law in most Australian jurisdictions. Federally, s 11.4(1) of the *Criminal Code* creates the offence of incitement for ‘[a] person who urges the commission of an offence’, even if the offence incited is not actually committed, as long as the person intends that the offence incited be committed (s 11.4(2)). Incitement is punishable by lesser penalties, typically half, than for the offence incited. In various jurisdictions, the courts have interpreted incitement by its ordinary textual (or dictionary) meaning, such as to urge, spur on, stir up, prompt to action, instigate or stimulate,⁴⁸ or simply to request or encourage.⁴⁹ Apart from incitement to murder (usually in state or territory law), there have been few prosecutions for incitement in Australia, although the concept also appears outside the criminal law in radio, film, literature and television broadcasting or classification standards, as well as in anti-discrimination and anti-vilification law.

Considering the broad definition of terrorism in federal law (s 100.1, *Criminal Code*) and the extensive array of terrorism offences (ss 101–102), the existing law of incitement already covers a wide range of facilitative or preparatory conduct. Thus it is already an offence to incite someone to: train for terrorism (ss 101.2 and 102.5); possess ‘a thing’ connected with terrorism (s 101.4); collect or make a document connected with terrorism (s 101.5); or do acts preparatory to terrorism (s 101.6).⁵⁰ Since a ‘terrorist act’ includes *threats* to commit terrorism (s 100.1), the above offences are considerably widened; thus it is an offence to incite a person to train to threaten to commit terrorism, or to collect a document for use in such a threat. As indicated above, incitement can also be applied to the many federal security offences.

48 *R v Crichton* [1915] SALR 1 (Way CJ); *Islamic Council of Victoria v Catch the Fire Ministries Inc (Final)* [2004] VCAT 2510 (Unreported, Higgins VP, 22 December 2004) [18]; *Brown v Classification Review Board of the Office of Film and Literature Classification* (1998) 50 ALD 765, 778.

49 *R v Massie* [1999] 1 VR 542, 547.

50 In addition, it is already a crime to incite offences concerning terrorist organisations: directing them, being a member, recruiting for them, funding them, providing support or resources to them, or associating with them: *Criminal Code Act 1995* (Cth) ss 102.2–102.8.

Since incitement to terrorism is already an offence, the Bill appears intended to extend the law to cover *indirect* incitement or even *apologie* (condoning, justifying or glorifying terrorism after the fact or in the abstract), although decisions about whether to prosecute will rest with prosecutors (subject to the Attorney-General's consent: s 80.4). The Attorney-General has asserted that the offence would cover 'any conduct or advocacy that is likely to encourage somebody to carry out a terrorist act',⁵¹ and also that the new offences aim to avoid any requirement that there be a connection between the incitement and a particular terrorist crime.⁵² A spokesperson for the Attorney-General also stated: 'The existing laws create a specific offence: A must incite B to commit violence to C. We are talking about creating a broader offence aimed at those who invite terror attacks'.⁵³ In referring to incitement to 'force' or 'violence', the Bill extends the ordinary law of incitement which only covers violence which also constitutes a crime. This may be significant where violence would ordinarily be excused by criminal law defences, or where violence attracts immunity (such as for combatants under humanitarian law).

Examples of indirect incitement or *apologie* might include distasteful or reckless comments such as: 'Osama is a great man'; '9/11 was a success'; 'America had it coming'; or genuinely held beliefs such as 'we must resist the occupiers'; 'suicide bombing is justified as a last resort'; or old maxims such as 'necessity is the mother of law'. It might also criminalise the wife of the UK Prime Minister: Israel accused Cherie Blair of condoning suicide bombings in a speech in which she said that some Palestinians felt they had 'no hope' but to blow themselves up.⁵⁴

Extending incitement to cover such statements runs counter to the development of the law in the *Criminal Code*, in which the common law meaning of incitement was narrowed by an exclusive reference to *urging* the commission of a crime (thus limiting its common law meaning which extended to counselling, commanding or advising).⁵⁵ The drafters of the *Code* further aimed to limit the impact of incitement offences on free expression: 'Incitement does not extend to ... recklessness with respect to the effects which speech or other communication might have in providing an incentive or essential information for the commission of crime'.⁵⁶ In contrast, the new sedition offences provide that recklessness is a sufficient basis for liability, absent any intention that the person incited commit a criminal act.

Federal law will thus seldom facilitate the prosecution of indirect incitement or *apologie*. There must be proof that a person intended to encourage or induce an offence; the person must advocate, rather than merely cause, the offence.⁵⁷ The

51 Quoted in John Kerin, 'Laws Get Tough on Inciting Violence', *The Australian* (Sydney), 9 September 2005, 9.

52 Ruddock, above n 30.

53 Quoted in Chris Merritt, 'The Barbeque Stopper', *The Australian* (Sydney), 14 September 2005.

54 'PM's Wife "Sorry" in Suicide Bomb Row', *Guardian* (UK), 18 June 2002.

55 Commonwealth Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, Australian Institute of Judicial Administration (2002) 271.

56 *Ibid.*

57 *Ibid* 271–2.

narrow scope of incitement also reflects the normative proposition that responsibility for criminal harm should primarily lie with the perpetrators, who are free agents not bound to act on the words of others. Federal law is largely consistent with the meaning of incitement (or *instigation*) in international criminal law, which requires direct and explicit encouragement,⁵⁸ along with a direct intent to provoke the offence (or an awareness of the likelihood that the crime would result).⁵⁹ The incitement must aim to cause a specific offence,⁶⁰ and vague or indirect suggestions are not sufficient.⁶¹ There must be a 'definite causation' between the incitement and a specific offence.⁶²

At the same time, the law on incitement is not impractically narrow. Plainly, a person who tells another to kill a third person and intends that result will be liable for incitement to murder, but so too will a person who less specifically incites another to 'take care of' a victim where such a statement implies that the person should be killed. For example, the International Criminal Tribunal for Rwanda found that the expression 'go to work' in the context of the Rwandan genocide really signified 'go kill the Tutsis and Hutu political opponents'.⁶³ Incitement may be implicit where its meaning is not in doubt, in light of the cultural and linguistic context and the audience's understanding of the message.⁶⁴

VI IMPLICATIONS FOR FREEDOM OF EXPRESSION

Criminalising incitement plainly restricts free expression, and criminalising indirect incitement or *apologie* necessarily restricts the freedom further. The absence of a human rights framework in Australia has hampered the evolution of a sophisticated jurisprudence on the circumstances in which the crimes of sedition or incitement can legitimately restrict free expression. In international law, it is recognised that freedom of expression 'carries with it special duties and responsibilities' and may be limited by law if necessary to secure 'respect of the rights or reputations of others' or to protect 'national security ... public order ... public health or morals'.⁶⁵

58 Antonio Cassese, *International Criminal Law* (2003) 189.

59 *Kordić and Čerkez* ICTY IT-95-14/2-T (2001) [387].

60 *Akayesu* ICTR-96-4-T (1998) [557]; see also Kriangsak Kittichaisaree, *International Criminal Law* (2002) 247.

61 *Akayesu* ICTR-96-4-T (1998).

62 *Ibid.*

63 *Ruggui* ICTR-97-32-I (2000).

64 *Akayesu* ICTR-96-4-T (1998) [557]; Kittichaisaree, above n 60, 247–8.

65 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 19(3) (entered into force 23 March 1976).

While incitement to racial or religious hatred is specifically prohibited by art 20 of the *ICCPR*,⁶⁶ prohibiting ordinary criminal incitement may also be a permissible restriction on free expression on public order grounds (the prevention of crime).⁶⁷ Suppressing speech which proximately encourages violence is a justifiable restriction in a democratic society, since the protection of life is a higher normative and social value which momentarily trumps free expression – but only to the extent strictly necessary to prevent the greater harm. Human rights law does not permit one person to exercise their rights to destroy the rights of another,⁶⁸ but any restriction on freedom of expression must not jeopardise the right itself.⁶⁹

In the absence of a bill of rights, the *Australian Constitution* impliedly protects only *political* communication (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520), and not speech more generally. This means that Australian courts are less able to supervise seditious or incitement laws for excessively restricting free expression. While the implied freedom was invoked in *Deen v Lamb*⁷⁰ to shield a Queensland election campaign leaflet which vilified Muslims, that decision is at odds with subsequent case law. In *Jones v Scully*,⁷¹ Hely J found that freedom of communication is not absolute, but ‘is limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the *Constitution*’. Justice Hely applied the test for the validity of restrictions on free communication laid down in *Lange v Australian Broadcasting Corporation*⁷² (*‘Lange’*), and found that (1) the legislative object of eliminating racial discrimination is compatible with maintaining responsible and representative government, and (2) the law is reasonably appropriate and adapted to eliminating racial discrimination.

Further, in *Brown v Classification Review Board of the Office of Film and Literature Classification*,⁷³ the Full Federal Court found that a law prohibiting the classification of a publication that ‘instructs in matters of crime’ was a permissible restriction on the implied freedom. Applying *Lange*, the law was compatible with representative and responsible government and appropriate and

66 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 20 (entered into force 23 March 1976). Article 20(1) further requires that ‘[a]ny propaganda for war shall be prohibited by law’. See also UN Human Rights Committee, *General Comment No 11: Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (Art 20)*, CCPR General Comment No 11 (19th session, 1983) [2]. The *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277, art 3(c) (entered into force 12 January 1951), prohibits direct and public incitement to genocide against racial, national, religious or ethnic groups.

67 Andrew Ashworth, *Principles of Criminal Law* (1999) 481.

68 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 5 (entered into force 23 March 1976).

69 UN Human Rights Committee, *General Comment No 10: Freedom of Expression (Art 19)*, CCPR General Comment No 10 (19th session, 1983) [4].

70 [2001] QADT 20 (Unreported, Sofronoff P, 8 November 2001).

71 (2002) FCA 1080 (Unreported, Hely J, 2 September 2002).

72 (1997) 189 CLR 520, 561–2.

73 (1998) 50 ALD 765.

adapted to that end.⁷⁴ There was, however, controversy about whether the publication (an article advising how to shoplift) was even part of *political* discussion.⁷⁵

The problem in these cases is that the question of whether a law is compatible with representative and responsible government is too narrowly drawn to supply general guidance as to when incitement or sedition laws may legitimately restrict freedom of expression generally. The Australian test protects speech only as an incident of protecting the constitutional system, whereas American constitutional law values and protects speech as an end in itself, even where it is unrelated to politics. In the leading case of *Brandenburg v Ohio*⁷⁶ ('*Brandenburg*'), the United States Supreme Court found that the First Amendment to the *United States Constitution* did not 'permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action'.⁷⁷ The twin requirements of the imminence and likelihood (or probability) of crime ensure that speech is not prematurely restricted; there must be a sufficiently proximate connection or causal link between the advocacy and the eventuality of crime.

Such a test would likely invalidate attempts to criminalise indirect incitement or *apologie* of terrorism in the US. Whereas the ordinary criminal law of incitement aims to protect against imminent criminal harm, there is no comparable proximity between indirect incitement/*apologie* and actual terrorist harm. In contrast, not only does Australian law fail to protect non-political speech, under this more subjective and deferential test even political communication could be restricted by laws criminalising indirect incitement, since it would be open to the courts to find that such a law is both compatible with responsible and representative government and appropriate and adapted to preventing terrorism.

The US test is not ideal, however, since it permits speech to be restricted to prevent *any* lawless action. Arguably, the *Brandenburg* test should be supplemented by a requirement that only very serious criminal harms should permit the restriction of free speech; a proportionality element might allow that free speech could be restricted more readily where the consequences of an incitement are greater. Not all acts of terrorism are equally serious, particularly acts of preparation or support; for example, it is difficult to see why, under Australian law, inciting a person to collect a document to be used in a threat to commit terrorism should be criminalised.

On the other hand, the express constitutional protection for freedom of religion in Australia (*Constitution* s 116) raises a different challenge to the offence of

74 Ibid [238E], [246G], [258C]–[258D].

75 Ibid [246A]–[246B], [258B]–[258C] (Heerey and Sundberg JJ) (finding that the article was not political), [238D]–[238E] (French J) (finding that it was).

76 395 US 444 (1969).

77 Ibid [6]. See generally Steven Heyman (ed), *Hate Speech and the Constitution, Volume 2* (1996); Kent Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech* (1995); Ronald Dworkin, 'The Coming Battles of Free Speech', *New York Review of Books*, 11 June 1992, 190.

incitement to *religious* violence. The Commonwealth cannot make any law ‘for prohibiting the free exercise of religion’, which may be interpreted to include freely communicating religious ideas – even those urging violence. While such a challenge is in uncharted waters due to the scarcity of case law, even express constitutional rights are not absolute and proportional restrictions on violent religious speech may be upheld by the High Court. In contrast, the proposed power to ban an organisation for ‘praising’ terrorism may excessively restrict freedom of religious association, since it disproportionately affects all worshippers to control the statements of a few.

While the right of free speech is not absolute and may be limited to prevent serious social harms, it cannot be restricted because of mere speculation that it leads to terrorism. Only incitements which have a direct and close connection to the commission of a specific crime are justifiable restrictions on speech. Criminalising general statements of support for terrorism risks unjustifiably criminalising a range of legitimate expression in a democratic society, including attempts by academics, journalists and religious leaders to fathom (and hence to reduce) the causes of, and motivations for, terrorism.

Inevitably, it will always be difficult to distinguish genuine criticism from incitement to violence, and there is a real question whether judges are well placed for making such evaluations. Such defences may also privilege speech by elites: academics, journalists, artists, and politicians. Yet, short of collapsing the public/private divide and reconstituting the political sphere, such defences are the most effective devices for differentiating violent speech from speech that has a countervailing and justifiable social purpose.

There is also a real danger that criminalising the expression of support for terrorism will drive such beliefs underground. Rather than exposing them to public debate – which allows erroneous or misconceived ideas to be corrected and ventilates their poison – criminalisation risks aggravating the grievances often underlying terrorism, and thus increasing, not reducing, its likelihood. It is true that some speech (the illogical, the absurd, or the fundamentalist) cannot be rationally countered by other speech, and it is plain that this is not an ideal world of deliberative and respectful public reason. Yet, the place for combating stupid or ignorant ideas, or even blood fantasies, lies in the cut and thrust of public debate, and more broadly in the political, social, cultural, religious and private realms. The criminal law is ill-suited to reforming expressions of poor judgment, bad taste, or odious beliefs. Suppressing *public* incitement may succeed only in intensifying *private* incitement, which may be more damaging precisely because of the atmosphere of secrecy and the psychological pressure which can be applied in close relationships.

VII CONCLUSION

Speech is the foundation of all human communities and without it, politics becomes impossible. Unless we are able to hear and understand the views of our political adversaries, we cannot hope to turn their minds and convince them that

they are wrong, or even to change our own behaviour to accommodate opposing views that turn out to be right. At the same time, as Hannah Arendt argued, ‘speech is helpless when confronted with violence’⁷⁸ and freedom of speech reaches its natural limit when it urges unlawful violence against a democracy. Quite rightly, the criminal law has always allowed the prosecution of those who directly encourage another person to commit a specific crime, including terrorism.

In contrast, extending the law of incitement through new sedition offences and the power to proscribe organisations is a hasty and imprudent overreaction which inevitably criminalises valuable contributions to public discussion. The hurried nature of the new offences is highlighted by the government’s announcement of a departmental review of them in early 2006 – before they are even enacted into law in late 2005.⁷⁹ Lack of confidence in the provisions is unsurprising, given their archaic origins and their controversial historical application to political opponents. Considerable public concern was expressed about the new provisions.⁸⁰ Any review should not be internal, but should engage independent law reform bodies or external experts and revise the whole gamut of security offences considered by Gibbs, in light of their impact on Australia’s international human rights obligations.

While every society has the highest public interest in protecting itself and its institutions from violence, no society should criminalise speech that it finds distasteful when such speech is remote from the actual practice of terrorist violence by others. While ‘[e]very idea is an incitement’,⁸¹ some incitements are more dangerous than others and only these deserve criminalisation. A robust and mature democracy should be expected to absorb unpalatable ideas without prosecuting them.

78 Hannah Arendt, *On Revolution* (1990) 19.

79 It is significant that the Anti-Terrorism Bill 2005 (Cth) as a whole was introduced before a joint parliamentary committee and an independent review had even reported on the effectiveness of existing laws, thus pre-empting whether there is even a need for further laws.

80 See, eg, ‘Proposed Offences for Sedition’, Submission to the Senate Legal and Constitutional Committee, Parliament of Australia, 27 October 2005 (Chris Connolly); Advice from Bret Walker SC and Peter Roney to *Media Watch*, ABC Television, 24 October 2004 <<http://abc.net.au/mediawatch/img/2005/ep34/advice.pdf>> at 7 November 2005; Submission to the Senate Legal and Constitutional Committee, Parliament of Australia, 11 November 2005 (Australian Press Council) <http://www.presscouncil.org.au/pcsite/fop/fop_subs/antiterror.html> at 15 November 2005.

81 *Gitlow v New York*, 268 US 652, 673 (1925) (Holmes J, dissenting).