**SENATE LEGAL AND CONSTITUTIONAL COMMITTEE**

**Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2005**

**SUBMISSION CONCERNING SCHEDULE 7**

**Summary**


1 This submission is confined to Schedule 7 ("the sedition provisions") of the **Anti-Terrorism Bill (No 2) 2005** ("the Bill").[1]

2 It is respectfully submitted that the Committee should recommend to the Senate that the sedition provisions be omitted from the Bill.

3 Moreover, the existing sedition provisions of the ***Crimes Act* 1914 ("the *Crimes Act*")** should be repealed because they are anachronistic and an affront to Australia's standing as a free and open society: one of world's the longest enduring parliamentary democracies.[2]

4 Even if the repeal of the existing sedition provisions is unacceptable to the Parliament, the omission of the sedition provisions from the Bill would be a clear signal to the world that the Commonwealth of Australia is a mature and self-confident polity whose people value their freedom and a demonstration that, even in times of grave national and international stress and crisis, Australians will not be panicked into yielding up liberties fought for by them and their predecessors throughout 500 years of constitutional development.[3]


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[1] It supplements the short statement of the author's position set out in the letter dated 11 November 2005 (the deadline for the response to the invitation for public submissions) sent by facsimile transmission to the Committee on that day.

[2] The existing sedition provisions in the ***Crimes Act*** need to be read in conjunction with the very detailed scheme embodied in the ***Criminal Code Act* 1995 (Cth)**. Given the exigencies facing the author in seeking to make a submission to (and the unrealised desire to appear before and give evidence to) the Committee, it has not been possible to deal with those important provisions.

[3] The omission of the sedition provisions would, in effect, go a long way towards providing a *de facto* recognition that the existing law is obsolescent.

**The inherent nature of the criminal sanctions on seditious conduct**

5 In his book, ***Free Speech in the United States* (1941)**, the renowned legal scholar Zechariah Chafee Jr, then Langdell Professor of Law in Harvard University, supplied the following useful illustrative historical definition of sedition:

> "*The term sedition has come to be applied practices which tend to disturb internal public tranquility by deed, word, or writing, but which do not amount to treason and are not accompanied by or conducive to open violence. There is some doubt in England whether the noun describes a crime, but the courts have recognized as misdemeanours at common law seditious words, seditious libels, and seditious conspiracies. The use of the adjective signifies that the practices are accompanied by a seditious intent, the legal definition of which has changed, however, with the development of toleration and political rights.*
>
> *Offenses thus described as seditious were originally punishable by death as treason. Thus in the fifteenth century it was treason to accuse the king of murder, call him a fool, and suggest that his horse might stumble and break his neck; to make astrological calculations to predict the time of the king's death; or to publish poems and ballads to the disgrace of the king and his council.*"[4]

6 In its origins a half a millennium ago, the law of sedition criminalised all criticism of the monarch and government on pain of death.[5]

7 Over the years, and especially after England's revolutionary settlement of 1688, the law's severity declined, but until the mid-Nineteenth Century it was still being used as a blunt instrument to silence revolutionary critics (real and imagined), and assorted radicals.

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[4] Harvard University Press, 497-498.

[5] For a range of treatments of the legal history, see eg Starkie, *A Treatise on the Law of Slander*, Vol II, (1830), Ch VIII; Paterson, *The Liberty of the Press, Speech and Public Worship* (1880); Stephen, *A History of the Criminal Law of England* (1883); Wickwar, *The Struggle for the Freedom of the Press 1819-1832* (1928); Chafee, *Free Speech in the United States* (1941), Ch 13; Boasberg, "Seditious Libel v Incitement to Mutiny: Britain Teaches Hand a Lesson" (1990) 10 *Oxford J Leg Studies* 106; Lobban, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770-1820" (1990) 10 *Oxford J Leg Studies* 307; Rabban, *Free Speech in its Forgotten Years* (1997); Ewing and Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (2000); Stone, *Perilous Times: Free Speech in Wartime* (2004). The standard scholarly treatment on the National Party's attack on the rule of law in South Africa is also an indispensable source on the wider issue of the fragility of the rule of law: Dugard, *Human Rights and the South African Legal Order* (1978).

8 The old law report series, the *State Trials*, contains vivid accounts of prosecutions for treason and sedition and other offences against public order. Of the mid-Eighteenth Century prosecutions, among the most notorious were those of:

- John Wilkes, the expelled member of Parliament, arising out of the publication of his newspaper, the ***North Briton* (No 45, 1765)**;[6]
- Henry Sampson Woodfall arising out of the publication of the anonymous, ***Junius's Letters* (1770)**;[7]

9 In the agitation which followed the French Revolution and the ensuing fear of British governments that, like a whirlwind, the tumult in France would spread to and infect England and Ireland, sedition prosecutions were repeatedly used to suppress revolutionaries and dissenters.

10 Perhaps the most notable late Eighteenth Century English prosecution was that of Thomas Paine arising out of the publication of his tract, ***Rights of Man* (1792)**.[8]

11 A survey of the history of the law of sedition demonstrates that:

- Its only purpose and use has been to throttle political dissent;
- By the time the Commonwealth of Australia was established, the law of sedition was obsolescent, if not obsolete;
- The decline of the law of sedition in the Nineteenth Century was the natural consequence of the gradual rise of representative parliamentary government; and,
- Despite the amendments effected in 1986, the Australian law remained obsolescent.

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[6] *Re Wilkes* (1763) 19 Howell's State Trials 981; *R v Wilkes* (1763-1770) 19 Howell's State Trials 1075; *Wilkes v Wood* (1763) 19 Howell's State Trials 1154.
[7] *R v Woodfall* (1770) 20 Howell's State Trials 895.
[8] *R v Paine* (1792) 22 Howell's State Trials 357; See Keane, *Tom Paine: A Political Life* (1995), Ch 9.

12 It is of critical importance to note that, in keeping with (a) the evolution of democratic institutions in the previous two centuries and (b) acceptance of the fact that the emergence of the freedom to denounce government in the most trenchant terms has been fundamental to the health of those institutions, when the Commonwealth Parliament passed the ***Crimes Act* 1914**, it did not see fit to include any provision punishing seditious conduct.

13 The circumstances surrounding the Commonwealth Parliament's passage of the ***War Precautions Act Repeal Act* 1920** and later anti-Communist campaigns demonstrate the inherent nature of sedition laws, namely, that they fulfil the sole purpose of muzzling dissent.

**The lessons of history are unmistakable**[9]

14 As long as seditious conduct remains a crime, governments will succumb to the temptation to use sedition law if there is a sufficient pragmatic or ideological stimulus.

15 The Twentieth Century revival of interest in sedition, chiefly in the early Cold War years, reflected a return to the anti-democratic impulse of the days before representative parliamentary government was firmly established.

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[9] I here draw on "Sounds Dreadful: Broadcasting Regulation, Communism and the Early Cold War Period in Australia" (1991) 18 *Melb Univ L Rev* 368-402; "The Use and Abuse of Sedition" (1992) 14 *Syd L Rev* 287-316; "Tales of the Overt and the Covert: Judges and Politics in Early Cold War Australia" (1993) 21 *Fed L Rev* 151-201; "The Lapstone Experiment and the Beginnings of ASIO" *Labour Hist* No 64, May 1993, 103-118; "Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case" (1994) 16 *Adel L Rev* 1-77; "National Security and Media Self-Censorship: The Origins, Disclosure, Decline and Revival of the Australian D Notice System" (1997) 3 *Aust J of Leg Hist* 171-204; "Downunder McCarthyism: The Struggle Against Australian Communism 1945-1960" (1998) 27 *Anglo-American L Rev* Part 1, 341-389, and Part 2, 438-471; "Half Light Between War and Peace: Herbert Vere Evatt, the Corfu Channel Case and the Rule of International Law" (2005) 9 *Aust J of Leg Hist* 47-83; Book Review, *Labour Hist* No 88, May 2005, 266-268.

16 So far as I have been able to ascertain, little if any attention has been paid in the debate on the Bill to the resort to sedition prosecutions in Twentieth Century Australia.

17 The explanation for this curious lack of historical interest and investigation can only be that, as demonstrated below, since the end of the Second World War both major political parties have been guilty of using sedition in a repressive way.

18 If the Commonwealth Government had some modern empirical support for its claim that it is desirable to "modernise" the law of sedition, why has it not called in aid the use of the law of sedition by the Menzies Governments?

19 The Committee would do well to look at what happened in the recent past. Once the true history of sedition is confronted, the case for formal "modernisation" of the law of sedition is exposed for what it is: a contradiction in terms.

20 The recent Australian historical record is, regrettably, unequivocal in the lessons it supplies:

- Sedition prosecutions have only ever been deployed to suppress dissident speech and highly unpopular groups;
- Sedition has co-existed with criminal law prohibitions on violence (actual or threatened, and whether politically motivated or not). Had there been genuine threats to the maintenance of public order, the conventional criminal law would have been invoked;
- Sedition charges were laid at a time of heightened community anxiety. In the early Cold War years, the fear of Soviet military expansionism and plans for world domination was exploited by the governments of the day;
- In most, if not all cases, the decision to prosecute was based on party political considerations, and in at least one case (Gilbert Burns,

1948), by overriding the unanimous legal advice given to the Commonwealth Government;

- Both major political parties were prepared to advance their political objectives by procuring the imprisonment of dissenters through the use of sedition prosecutions;
- In at least one period (the Chifley Government in 1948-1949), the political nature of the sedition prosecutions was also evidenced in the fact that the decision to prosecute was, in part, a reflection of the Australian Government's abiding discomfort caused by unrelenting pressure exerted on it by the US and UK governments to deal much more firmly with the "Communist menace";[10]
- The statutory requirement that a prosecution requires the Attorney-General's permission[11] has proved to be an illusory safeguard against prosecutorial abuse. [In my view, this is axiomatic because, unlike other situations where the Attorney's permission does not involve the protection of any legislative or other matter under his/her administrative control, the First Law Officer is responsible for the administration of the ***Crimes Act*** and the ***Criminal Code***];
- No matter how weak a sedition case is, the mere laying of a charge has provided a pretext for securing and executing invasive search warrants used for collateral purposes;
- In times of widespread community anxiety (such as that of the early Cold War years) even superior court judges can get taken in by forces prepared to exploit hysteria for political reasons.

**Cause and effect? "Every idea is an incitement"**

21 The existing statutory language "urge" and "excite" makes it plain that it is the alleged *dangerous tendency* of seditious speech (as defined in the ***Crimes Act* 1914** – which is substantially reproduced in cl 12 of Schedule 7 of the Bill) to provoke violent upheaval supposedly supplies its justification.

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[10] The foundation for this claim is embodied in the scholarly literature cited in the works referred to in fn 9 above.

[11] See cl 12 of Schedule 7 of the Bill (proposed s 80.5 of the ***Criminal Code***).

22 How could anyone genuinely committed to the preservation of liberty possibly object to it being made a crime to advocate the use of politically-motivated) force or violence (or any kind of violence)?

23 Posed in such a general form, the rhetorical appeal is highly seductive. But it is a superficial appeal.

24 At an equally general level, it needs to be noted, first, that the existing criminal law specifically protects us against violence (actual and threatened), and, secondly, the law of sedition's reliance upon abstractions like tendency, urging, incitement and disaffection imposes (in substance and effect) a harsh irrebuttable presumption that the remotest supposed tendency will produce the direst of consequences.

25 The superficiality of the rhetorical appeal was well expressed by US Supreme Court Justices Oliver Wendell Holmes Jr and Louis Brandeis in the following observation made apropos sedition laws and the post-World War 1 state-sanctioned purge of American communists, anarchists, and other very vocal "dangerous" revolutionaries:

> *"**Every idea is an incitement**. It offers itself for belief, and, if believed, it is acted on unless some other belief outweighs it, or some failure of energy stifles the movement at its birth. The only difference between the expression of an opinion and an incitement in the narrower sense is the speaker's enthusiasm for the result. Eloquence may set fire to reason. But whatever may be thought of the redundant discourse before us, it had no chance of starting a present conflagration. If, in the long run, the beliefs expressed in totalitarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."*[12] *(my **bold** emphasis)*

26 A similar cautionary analysis was alluded to by Evatt J in ***R v Hush; ex parte Devanny***[13], an appeal arising out of a prosecution under anti-communist amendments to the ***Crimes Act***.

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[12] *Gitlow v New York* 268 US 652 at 673.
[13] (1932) 48 CLR 487 at 517-518.

27 And, more recently, the US Supreme Court emphasised the superficiality of the rhetoric when analysing whether the **US Constitution's First Amendment** stopped short of protecting the advocacy of the violent overthrow of lawfully constituted authority.

28 In the United States, the test is "whether the words are used in 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": ***Schenck v US* 249 US 47 at 52 (1919)**; for modern reaffirmations and applications, see eg ***US v O'Brien* 391 US 367 (1968); *Watts v US* 394 US 705 (1969); *Brandenburg v Ohio* 395 US 444 (1969); *Cohen v California* 403 US 15 (1971); *Hess v Indiana* 414 US 105 (1973)**.[14]

29 Claims that speech which is too "dangerous" to be tolerated in a free and open society are rarely if ever supported by empirical data.[15]

30 Two important questions necessarily arise:

- First, in any given case, is the "dangerous" statement true or false? For example, bigoted statements about entire groups of persons are usually demonstrably false and not believable by any reasonable person. In many if not most situations, such statements simply hold the speaker up to hatred, ridicule and contempt;
- Secondly, what can we sensibly say about the *likely* impact of the "dangerous" statement on a public audience?

31 As a general proposition, speech can, of course, affect human behaviour for better or for worse. It can cause individuals:

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[14] For a comprehensive treatment, see Rotunda and Nowak, *Treatise on Constitutional Law: Substance and Procedure* (3rd Ed, 1999), Vol 4, Ch 20.

[15] This analysis draws on "Migration Act Visitor Entry Controls and Free Speech: The Case of David Irving" (1994) 16 *Sydney L Rev* 358 and "Free Speech and its Postmodern Adversaries" *E Law* (Murdoch University Law School), Vol 8, No 2, June 2001: - *http://www.murdoch.edu.au/elaw/issues/v8n2/maher82.html*.

- To *affirm or change their ideas*;
- To *express ideas and opinions*;
- To *engage in conduct beyond the mere expression of ideas* including:
  - conduct urging others to adopt ideas and opinions,
  - conduct urging others themselves to express ideas and to engage in conduct.

32 But, so far as harm or detriment or dangerous tendency is concerned, the acknowledgment in the preceding paragraph involves saying no more than the obvious, namely, that some feared (or welcome) event might (or might not) happen at some time in the (near or distant) future.

33 In a free and open society, before punishing a citizen for making an alleged dangerous statement, we need to pose the critical empirical sub-questions:

- What is the *gravity of the alleged threat of harm*, and
- *How likely and imminent* is that threat?

34 These discrete questions simply do not arise in the law of sedition which presumptively condemns any dangerous tendency. As contended for above, that is (and always was) its *inherent* purpose. It is that inherent characteristic which makes the law of sedition so antithetical to minimum democratic standards.

35 Much of the public discussion of the sedition provisions has proceeded in an analytical vacuum.

36 The context and analysis alluded to in paragraphs 21-34 above can only be realistically tested by posing hypothetical but nevertheless plausible *concrete* contemporary examples of controversial – preferably what might be characterised as highly outrageous – claims and opinions.

37 For present purposes, the following randomly chosen categorical examples are posited for the Committee's consideration:

- ***Applauding villains***: Does the fact that an individual publicly expresses unequivocal admiration for Osama bin Laden (or, say, Saddam Hussein), in and of itself, warrant punishment?
- ***Fuelling provocative historical controversy***: Denials of the Hitler regime's extermination of European Jews or of the earlier Turkish slaughter of Armenians are pungent examples of opinions that can be profoundly hurtful. But, should people who express them be punished for doing so? Should we tolerate a person who publicly expresses the opinion that a (or the) root cause of the problems of the Middle East is that in 1947-1948 the UN General Assembly effected a profound injustice by imposing a dividing line in what was (The League of Nations) Mandated Palestine? Or a person who proclaims loudly and repeatedly that a real and enduring peace for Palestinians and Israelis alike will only be achieved by the creation (however difficult that may be) of a singular secular state? Should such persons be punished for expressing intolerable *dangerous opinions*?
- ***Supporting one side or another in a violent struggle***: With the instructive experience of the Gilbert Burns, Sharkey and Healy (1948-1949) and W F Burns (1950) sedition cases in mind, should an Australian be prevented on pain of imprisonment, from expressing the opinion that the Iraqi people will only achieve real peace and real freedom when they expel the occupying forces who are only there to aid the plunder of that oil rich nation and/or as part of the cause of advancing US imperialism and that the sooner they do it the better off they and the entire world will be?
- ***Supporting organisations***: Similarly, most Australians[16] would be deeply troubled by expressions of support for organisations pledged to violent social change anywhere in the world. Does that mean that a person who alleges that the Palestinian armed resistance organisation *Hamas* also engages in laudable charitable activities deserve to be punished merely for advancing such a claim?

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[16] The word "Australians" is used, as in the case of the word "citizen" para [47] and n 19 below, in its wide popular sense.

- ***Attacking systems of belief***: What, if any, restrictions should a free and open society place on trenchant criticism of religious belief? Should it be a criminal offence to go about the country asserting that a (or the) root cause of the instability and turmoil in the Middle East is the pernicious influence of fanatics of each of the three great monotheistic religions who regard Jerusalem as a (or the) sacred city. More specifically, should the Australian Government muzzle its critics who assert that the Christian fundamentalist Bush Administration is as guilty of mass murder in Iraq as the insurgents who go about slaughtering innocent Iraqis and that the Australian Government is complicit in the US Government's flagrant violations of international law?

38 It is only when concrete hypothetical examples like these – chosen especially because they are likely to be denounced by the present Australian Government – are analysed that a commitment to robust freedom of expression can be sensibly analysed. It may seem to some as an unpalatable task, but unless the commitment to free speech extends only to the expression of worthy or acceptable ideas and opinions, it is an unavoidable task.

39 If the answer to any of the hypothetical concrete examples involves using some formulation like, "It depends on the specific contextual circumstances", the perils presented by any attempt to disinter the law of sedition become obvious.

**An inherently self-defeating rationale**

40 The existing law of sedition is entirely self-defeating: once the charge is laid in court, the media (and anyone else) is free to publish the dangerous words as part of an accurate court report.

41 This has always occurred, and yet our Commonwealth endured.

42 In the Coronation year (1953), the Menzies Government unsuccessfully prosecuted J N Bone, Adam Ogston and H B Chandler for publishing an

article, "The 'Democratic' Monarchy", a lacerating attack on the British monarchy, in an obscure journal, *Communist Review*.

43 After the men were charged, the entire "dangerous" inflammatory article was published in *The Sydney Morning Herald*.[17]

44 If it is the *mere unarticulated tendency* of alleged seditious words to bring about a state of disorder, then it can scarcely be a just outcome if others can publish the same material with impunity.

45 There is a modern exemplification of this inherent self-defeating characteristic in the widespread publicity given to the hearing of complaints under the Commonwealth and State anti-racial/religious vilification statutes (themselves quasi-sedition laws). A recent prominent example is to be found in the Victorian ***Catch the Fire Ministries* case**, where the offending anti-Islamic views expressed at a meeting attended by a small group of people were subsequently broadcast far and wide in the media in the course of a widely publicised hearing in the Victorian Civil and Administrative Tribunal which occupied more than 30 days over a span of several months.[18]

46 The "Open Justice" principle is a central element of the rule of law in Australia.[19] Limitations of time and space preclude the inclusion in this short submission of an analysis of the likely impact of the unprecedented provisions of the ***National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth)** on the administration of the sedition provisions.

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[17] 1 August 1953.

[18] *Islamic Council of Victoria v Catch the Fire Ministries Inc* (Final) [2004] VCAT 2510 (22 December 2004) and *Islamic Council of Victoria v Catch the Fire Ministries Inc* (Anti Discrimination - Remedy) [2005] VCAT 1159 (22 June 2005). I understand that the unsuccessful respondents have challenged the Tribunal's decision in the Supreme Court of Victoria.

[19] See eg *Scott v Scott* [1913] AC 417 at 47; *Russell v Russell* (1976) 134 CLR 495.

**A clear departure from the rule of law: the inscrutable liability standard**

47 One of the central features of our legal system is that we are governed not by arbitrary/changing rules and *diktats*, but rather by fixed and ascertainable laws.

48 It is fundamental to that element of the rule of law that every citizen[20] is entitled to be placed in a position where he/she can make a reasonably reliable assessment - in advance of engaging in any conduct – of the legal consequences of such conduct.

49 The law of sedition has been an effective political weapon in chilling dissenters partly because it rests on impenetrably vague language.

50 What, for example, does it mean "to ***urge disaffection*** against the Constitution" or "to urge another person to attempt to procure a change, otherwise than by lawful means, to ***any matter established by law of the Commonwealth***" (my italics).

51 The existing provisions have been cut down over the years (most recently in 1986), but what remains is so convoluted as to be an affront to the rule of law because it is impossible to ascertain in advance of speaking what is lawful/unlawful.

52 In paragraphs 60-63 below, it is contended that the sedition provisions will, if enacted, reproduce the substance of the existing law and its impenetrably obscure tests in a widened reach and made worse by the introduction of the new recklessness concept.

**Paying lip service to fundamental freedoms**

[20] Used not in the narrow technical sense of formal legal status conferred by the *Australian Citizenship Act* 1948 (Cth), but in the wider sense of the person present in Australia and subject to its laws.

53 Given the central role which freedom of expression and freedom of association plays in our free, open and mature society, we need to remind ourselves that, as a matter of inherent necessity, free speech:

- Exists to protect the vigorous exchange of ideas and opinions;
- Is only as valuable as it is in the most fraught environment;
- Is a freedom to outrage conventional and deeply held ideas and opinions, and
- Is only as valuable as it disregards the point of view being assailed so that it protects both the noble and the execrable/detestable dissenter.

54 One of England's then foremost judges, Lord Justice Scrutton, said it all (in less than 25 words) in a 1923 UK Court of Appeal case involving internment without trial of an alleged Irish rebel:

> "*You really believe in free speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous.*"[21]

55 The existing and proposed replacement statutory defences requiring the accused person to prove good faith conduct, which reflect the view that freedom of expression cannot extend to highly offensive or profoundly unpopular opinions effectively reverse the onus of proof.

56 In the Anglo-Australian and Anglo-American contexts, the freedom of expression and freedom of association which we enjoy has only been achieved by bitter struggle in the face of determined legislative and executive (and sometimes judicial) resistance.

57 The fact that the existing statutory regime of sedition offences has evolved from its tyrannical genesis does not alter the fact that, at its heart, the law of sedition remains a clear example of the old "tugging of the forelock" concept of free speech: that the citizenry should be profoundly grateful that the government has been so generous in allowing us to voice our opinions.

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[21] *R v Secretary of State for Home Affairs; ex parte O'Brien* [1923] 2 KB 361 at 382.

58 Far from being an appropriate "balance" between the societal interest in maximising freedom of expression and other competing societal interests, the existing and proposed "good faith" defences turn freedom of expression, our most fundamental political liberty, on its head.

59 In the celebrated 1943 school flag salute case in the Supreme Court of the United States, ***West Virginia State Board of Education v Barnette***, Mr Justice Jackson drew attention, in the following terms, to the futility of coerced "uniformity of sentiment in support of some end thought essential to [the] time":

> *"Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp our Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the last failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."*[22]

**The Parliament should not be refurbishing a bad and unjust law**

60 The Bill proposes to re-enact the existing law in a modified form.

61 The Attorney General has candidly acknowledged that Schedule 7 of the Bill is a proposal to "modernise" the law of sedition.[23]

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[22] 319 US 624 at 637 (1943).

[23] See, for example, the Attorney's Op-Ed page piece, "SEDITION: Why the fuss?", *The Age*, 14 November 2005; *The Sydney Morning Herald*, 14 November 2005.

62 If enacted in that form, the proposed Act will make the existing law more potentially menacing than the existing obsolescent regime.

63 The so-called "modernising" replacement provisions not only exhibit all the vices of the existent obsolescent statutory regime, but also extend its scope as exemplified in the following:

- The new "recklessness" element;
- Proposed s 80.2(7) which introduces the new category of seditious intention which is opaque in the extreme;
- The weakening of the Attorney-General's consent provision in proposed s 80.5(2).

**The Government is underestimating the good sense of Australians**

64 The Government has downplayed community concern about the inclusion of the sedition provisions in the Bill.[24]

65 However, given the unbroken history of the oppressive use of the law of sedition, and the extent of the current law criminalising politically motivated violence, the fact that the Commonwealth Government feels compelled to *widen* the scope of the ***Crimes Act***, makes the widespread community concern thoroughly justified.

66 Even if the principled opposition contended for in this submission is unpersuasive, it manifestly clear that there is no case based on necessity which can justify enactment of the sedition provisions.

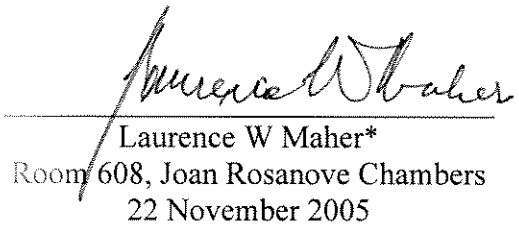
67 One reason why the Australian community is right to be deeply concerned, is to be found in the Attorney General's frank acknowledgment that the Government has cast the net of liability at the lowest common (democratic) denominator:

> *"The measures deal with those who seek to urge the* ***naïve and impressionable*** *to carry out violence against their fellow citizens."*[25]

[24] See n 22 above.

68 With all due respect to the Commonwealth's First Law Officer, this is an oppressive criterion and one which betrays both a disturbing lack of belief in our democratic institutions and an absence of confidence in the good sense of Australians, their commitment to the liberties they enjoy and their capacity for adult decision-making.

69 I will be happy to respond to any queries which the Committee may have concerning this submission.



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[25] See n 22 above.