Proposed Offences for Sedition in the Anti-Terrorism (No. 2) Bill 2005

Submission to the Senate Legal and Constitutional Committee

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The Sedition Act undermines the right of free speech, which has ever been justly deemed the only effectual guardian of every other right.

James Madison[1], 1778

[1] Fourth US President and "founder" of the US Constitution.

Preface

Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
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Dear Committee Secretary and Senators,

I am a Visiting Fellow in the Law Faculty of the University of New South Wales, where I have lectured in the Masters program since 1996. I am also the Director of one of the University's research centres and a supervisor in the University's social justice program.

Like many other Australians, I am very concerned at the proposed Sedition offences in the *Anti Terrorism (No. 2) Bill* 2005.

I note that he Attorney General has acknowledged a need for a review of Australia's sedition laws, and I welcome the review. However, the Bill before the Senate still contains the proposed sedition offences and related provisions.

It is of great concern that the proposed sedition provisions may become law in advance of the promised review. The sedition provisions, contained in Schedule 7 of the Bill, should be removed at this stage and made the subject of a formal public inquiry at a later date.

The rest of the bill can continue to be the subject of this Senate Inquiry.

I enclose a detailed analysis on the proposed sedition provisions and the history of sedition laws in Australia and elsewhere for your consideration.

I also wish to note that the timeframe for the inquiry into the *Anti Terrorism (No. 2) Bill* 2005 is entirely inadequate for such important legislation.

Please do not hesitate to ask if you require any further information. I am happy for this submission to be made public and I am happy to appear at any public hearings you may hold as part of this inquiry.

Yours sincerely,

Chris Connolly
Law Faculty, University of New South Wales.

1. Overview

The proposed *Anti Terrorism (No. 2) Bill* 2005 seeks to update and reinstate "sedition" as a major offence in Australian law, purportedly as a means of targeting activity that is generally linked to terrorism, but lacks a specific link to a single terrorist act.

This is a dangerous proposal that re-awakens an ancient and oppressive law in Australia. Sedition law is the sleeping giant of authoritarianism, and it has the potential to inhibit free speech and restrict open democracy. This submission presents an analysis of the sedition proposals in the Bill, and recommendations about their removal or amendment.

The proposed Bill contains three types of rules on sedition:

1. Sedition and treason offences that require an element of force or violence (generally updated from existing law).
2. New sedition and treason offences that do not require an element of force or violence – they simply require support of "any kind" for "the enemy". These are new offences and the burden falls on the accused to mount a defence based on very limited "good faith" exceptions.
3. A slightly expanded test for banning an "unlawful association" based on a very broad definition of "seditious intention". No force, violence or support for the enemy is required, and no "good faith" defence is available.

In addition, the proposals increase the penalty for the main sedition offences from three to seven years.

The proposals open the door for a wider range of sedition prosecutions and a broad test for banning associations.

The proposals reawaken a law that has an appalling track record, here and abroad, of abuse by Government - especially at times of national stress. This submission argues that the proposals should be abandoned on the following grounds:

— Sedition laws are not required to tackle terrorism as we already have appropriate laws in place to prohibit racial vilification, terrorist acts, terrorist funding and membership of (banned) terrorist organisations;

— Sedition laws have no place in a modern democracy as they inhibit free speech and restrict open democracy – essentially delivering a victory to those who oppose democratic values;

— Sedition laws have an appalling history of abuse by Governments and they politicise the criminal law – there are no other (active) laws in Australia that are so heavily politicised;

— The sedition laws, as proposed, introduce new offences where there is no link to force or violence, reversing the history of this area of law in Australia;

— The sedition laws, as proposed, place an undue burden on the accused to prove their innocence, thus reversing the accepted onus of proof in Australia criminal law;

— The sedition laws, as proposed, provide only a very limited defence of good faith in particular circumstances, which does not include a general good faith defence that might cover general discussion, education, journalism, artistic expression, satire and other forms of free speech; and

— The sedition laws, as proposed, carry an excessive punishment for activity that might only amount to encouragement or support rather than the actual carrying out of an act.

In addition to these general objections to the proposed sedition laws, extreme concern needs to be raised regarding the proposed ability to ban "unlawful associations" for expressions of a broadly defined "seditious intention". These are of great concern for the following reasons:

— The ability to ban "unlawful associations" does not require any link whatsoever to force, violence or assisting the enemy;

— The ability to ban "unlawful associations" is not subject to any "good faith defence" or humanitarian defence;

— The ability to ban "unlawful associations" as set out in the 2005 proposal appears to have no link at all to terrorism; and

— The ability to ban "unlawful associations" is linked to an archaic definition of "seditious intention" that covers practically all forms of moderate civil disobedience and objection (including boycotts and peaceful marches).

The practical impact of the "unlawful associations" proposal would be to provide the Government with the ability to ban any organisation that opposes a Government decision and encourages protest or dissent that falls outside the law, no matter how slight or technical the breach. There is absolutely no link between this section of the proposal and terrorism.

This submission recommends the abandonment of these proposals. Alternatively, some further detailed restrictions on their use are proposed, to ensure a fairer balance between anti-terrorism measures and free speech.

2. Proposed offences

The proposed Bill contains three types of rules on sedition:

1. Sedition and treason offences that require an element of force or violence (generally updated from existing law).
2. New sedition and treason offences that do not require an element of force or violence – they simply require support of "any kind" for "the enemy". These are new offences and the burden falls on the accused to mount a defence based on very limited "good faith" exceptions.
3. A slightly expanded test for banning an "unlawful association" based on a very broad definition of "seditious intention". No force, violence or support for the enemy is required, and no "good faith" defence is available.

These three types of sedition laws replace old sedition laws in Sections 24A to 24E of the *Crimes Act* with new sections in the *Criminal Code* (sedition and treason), and update Section 30A of the *Crimes Act* (unlawful associations).

2.1. Sedition offences requiring force or violence

The proposals create a new section of the *Criminal Code - 80.2 Sedition*. This creates three sub-offences:

> **Urging the overthrow of the Constitution or Government**
>
> A person commits an offence if the person urges another person to overthrow by force or violence:
>
> > (a) the Constitution; or
> >
> > (b) the Government of the Commonwealth, a State or a Territory; or
> >
> > (c) the lawful authority of the Government of the Commonwealth.
>
> **Urging interference in Parliamentary elections**
>
> A person commits an offence if the person urges another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament.
>
> **Urging violence within the community**
>
> A person commits an offence if:
>
> > (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 other groups (as so distinguished); and
> >
> > (b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Each of these provisions requires the offender to encourage an act of force or violence.

2.2. Sedition offences not requiring force or violence

The proposals expand the new section of the *Criminal Code - 80.2 Sedition* - through the inclusion of two further offences that do NOT require a link to force or violence. These proposed offences are:

> **Urging a person to assist the enemy**
>
> A person commits an offence if:
>
> (a) the person urges another person to engage in conduct; and
>
> (b) the first-mentioned person intends the conduct to assist, by any means whatever, an organisation or country; and
>
> (c) the organisation or country is:
>
> > (i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and
> >
> > (ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth.
>
> **Urging a person to assist those engaged in armed hostilities**
>
> A person commits an offence if:
>
> (a) the person urges another person to engage in conduct; and
>
> (b) the first-mentioned person intends the conduct to assist, by any means whatever, an organisation or country; and
>
> (c) the organisation or country is engaged in armed hostilities against the Australian Defence Force.

2.3. Unlawful associations with "seditious intentions"

Section 30A of the Crimes Act allows the Attorney General to apply to ban an "unlawful association", including:

> "Any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a seditious intention"[2].

The proposed new definition of seditious intention is a slightly updated version of the archaic definition of seditious intention described in the "History of Sedition offences" chapter below. It reads:

> (3) In this section, seditious intention means an intention to effect any of the following purposes:
>
> (a) to bring the Sovereign into hatred or contempt;

[2] Section 30A (b)

(b) to urge disaffection against the following:

(i) the Constitution;

(ii) the Government of the Commonwealth;

(iii) either House of the Parliament;

(c) to urge another person to attempt, otherwise than by lawful means, to procure a change to any matter established by law in the Commonwealth;

(d) to promote feelings of ill-will or hostility between different groups so as to threaten the peace, order and good government of the Commonwealth.

2.4. Defences

A defence is available to the two offences relating to assisting the enemy if it relates to conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature. However, the onus of proof is on the accused to show that their conduct meets this defence.

There is also a defence available for all of the proposed sedition offences (except for banning unlawful association with seditious intentions) for acts done in good faith. Again, the onus of proof is on the accused to show that their conduct meets this defence.

Good faith is defined as applying to a person who:

(a) tries in good faith to show that any of the following persons are mistaken in any of his or her counsels, policies or actions:

(i) the Sovereign;

(ii) the Governor-General;

(iii) the Governor of a State;

(iv) the Administrator of a Territory;

(v) an adviser of any of the above;

(vi) a person responsible for the government of another country; or

(b) points out in good faith errors or defects in the following, with a view to reforming those errors or defects:

(i) the Government of the Commonwealth, a State or a Territory;

(ii) the Constitution;

(iii) legislation of the Commonwealth, a State or a Territory or another country;

(iv) the administration of justice of or in the Commonwealth, a State, a Territory or another country; or

(c) urges in good faith another person to attempt to lawfully procure a change to any matter established by law in the Commonwealth, a State, a Territory or another country; or

(d) points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; or

(e) does anything in good faith in connection with an industrial dispute or an industrial matter.

There are no defences available to the provisions on banning unlawful association for seditious intentions.

3. History of sedition offences

3.1. International history

Sedition has a long and undignified history. It is hard to go past the Bible for the most famous of sedition trials. Both Barabbas[3] and Jesus[4] faced charges of sedition. The charges against Jesus were said to be at least in part a result of his encouragement of others to refuse to pay taxes to Rome.

There are numerous other important figures in history who have been charged and sometimes imprisoned for sedition, including both Ghandi[5] and Nelson Mandela[6].

The clear lesson from the history of sedition laws is that they are used routinely by oppressive regimes, or are used by more liberal regimes at times of great national stress. Their use is nearly always the subject of considerable regret at a later date.

It is also difficult to find a single example of a sedition trial that resulted in a useful long-term outcome for the ruling authorities. The sedition charges are either the last desperate gasp of an authoritarian regime (eg Ghandi) or the extreme and sometimes ludicrous result of a regrettable moment in national history (eg McCarthyism).

In 2005, sedition is most often encountered as the desperate tool of undemocratic regimes such as Zimbabwe and, on occasion, China. Sedition may rear its head elsewhere, although it is probably used more sparingly than people realise. For example, Singapore recently charged two Internet bloggers with sedition, but it was the first use of the charge in Singapore in more than thirty years.

3.2. Sedition in Australia

The somewhat sad history of sedition offences in Australia shows that the crime has come in and out of fashion. There have been times when it has laid dormant for decades, but in keeping with global experience, it has been used at times of national stress.

Sedition charges were famously used against the rebels and their supporters following the Eureka Stockade. Most charges were a mix of sedition and “high treason” and almost all were unsuccessful (in jury trials). Some of the rebel leaders such as Peter Lalor later became Members of Parliament and it could be argued that many of the principles of democracy we enjoy today are a result of their alleged sedition[7].

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[3] Luke 23

[4] John 18:28-40

[5] http://www.gandhiserve.org/whos_gandhi.html

[6] http://www.anc.org.za/ancdocs/history/mandela/1960s/treason.html

[7] Their chief demand was “one person one vote”.

However, Henry Seekamp, the editor of the Ballarat Times was not so lucky - he was jailed for six months[8] for sedition for writing positively about the Eureka Stockade rebels[9]. One of the four articles on which he was convicted contained the following prophetic words:

> This league [the Ballarat reform league] is nothing more or less than the germ of Australian independence. The die is cast, and fate has cast upon the movement its indelible signature. No power on earth can now restrain the united might and headlong strides for freedom of the people of this country ... The League has undertaken a mighty task, fit only for a great people – that of changing the dynasty of the country.

The second significant use of the sedition provisions was to "shut down" the Sydney arm of the Industrial Workers of the World (IWW) in 1916. The IWW was a left wing labor organisation opposed to conscription and Australia's involvement in World War 1. Twelve of its members were imprisoned for sedition and membership of an unlawful association.

Monty Miller was probably the best-known of the accused. He was 77 at the time and was sentenced to six months' hard labour. He was freed after a public outcry and by 1920 all twelve men had been released.

The final significant case of sedition[10] was against the General Secretary of the Australian Communist Party, Laurence Louis Sharkey (Lance Sharkey) in 1949. He was jailed for three years[11] for sedition after answering a hypothetical question from a journalist about whether the Australian public would welcome the Soviets here.

His answer (according to the journalist) included the following words:

> If Soviet Forces in pursuit of aggressors entered Australia, Australian workers would welcome them. Australian workers would welcome Soviet Forces pursuing aggressors as the workers welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis. Invasion of Australia by forces of the Soviet Union seems very remote and hypothetical to me. I believe the Soviet Union will go to war only if she is attacked, and if she is attacked I cannot see Australia being invaded by Soviet troops. The job of Communists is to struggle to prevent war and to educate the mass of people against the idea of war. The Communist Party also wants to bring the working class to power, but if fascists in Australia use force to prevent the workers gaining that power, Communists will advise the workers to meet force with force.

Sharkey pleaded not guilty, noting amongst other things that he was responding to a question over the telephone by a persistent journalist, rather than addressing a crowd. However, he was convicted by a jury and the conviction was affirmed by the High Court in 1949[12].

The case is still relevant today as it was based on a definition of "seditious intention" that is virtually identical to the current proposal. In addition, a series of "good faith" defences were available to Sharkey (again very similar to the current proposals), but none of these saved him from conviction. Anti-communist sentiment was strong – at sentencing the trial judge described Sharkey as "exercising an evil disproportionate influence over the life of this country".

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[8] He served three months.

[9] http://eprint.uq.edu.au/archive/00002363/01/Eureka.pdf

[10] Several other minor sedition offences had been pressed in Australia, often related to the "troubles' in Ireland rather than Australian issues or politics.

[11] Later reduced to eighteen months.

[12] R v Sharkey (1949) 79 CLR 121

Sharkey was charged under Section.24 of the Commonwealth Crimes Act 1914. The Section was amended slightly in 1986 to require an additional element – "the intention of causing violence or creating public disorder or a public disturbance" There have been no prosecutions since that amendment.

In 1991 the *Fifth Interim Report* of the Committee of Review of Commonwealth Criminal Law (the Gibbs Report) proposed that the Act should be amended to repeal sedition and to rely on the crimes of incitement and treason where there was a clear intention of violent interference with the democratic process. However, no amendment had been prepared until the current proposals – and the current proposals are a more substantial revision of the sedition laws than recommended by Gibbs – and largely contrary to the Gibbs recommendations.

Overall, the history of sedition offences in Australia is fairly unflattering. Their use against the Eureka Stockade Rebels in the 1850s, left leaning anti-conscriptionists during World War 1, and communists in the late 1940s is a fairly blunt reflection of the political stress of the day.

4. Concerns

This is a dangerous proposal that re-awakens an ancient and oppressive law in Australia. Sedition law is the sleeping giant of authoritarianism, and it has the potential to inhibit free speech and restrict open democracy.

This section sets out some key concerns with the proposals.

4.1. The proposed sedition laws are unnecessary

Sedition laws are not required to tackle terrorism as we already have appropriate laws in place to prohibit racial vilification, terrorist acts, terrorist funding and membership of (banned) terrorist organisations;

Ben Saul[13] has noted:

> Old-fashioned security offences [such as sedition] are little used because they are widely regarded as discredited in a modern democracy that values free speech. Paradoxically, the danger in modernising these offences is that prosecutors may seek to use them more frequently, since they are considered more legitimate. A better approach is to abandon archaic security offences altogether in favour of using the ordinary criminal law of incitement to crime, particularly since security offences counterproductively legitimise ordinary criminals as "political" offenders. It is already possible to prosecute incitement to the many federal terrorism crimes.[14]

4.2. Unintended consequences

It is possible that the Government and Premiers did not intend to produce laws that have such a broad reach. The fault could be in the drafting – especially in the unlawful associations section.

Some guidance on the intention of the Government can be found in their published statements regarding this section of the Bill. For example, the Attorney General's Department provided the following information to *The Age* newspaper, in defence of the sedition provisions:

> Advocating a terrorist act (which includes directly praising such acts) is only relevant to determining whether an organisation should be listed as a terrorist organisation. Sedition is a different offence - it does not refer to advocating terrorism. There have been sedition offences in the Crimes Act for many years and they cover a person who engages in a "seditious enterprise" with the intention of causing violence, or creating public disorder or a public disturbance, or who writes, prints, utters or publishes any seditious words with the intention of causing violence or creating public disorder or a public disturbance.

[13] Ben Saul is director of the bill of rights project at the University of NSW's Gilbert + Tobin Centre of Public Law.

[14] http://www.theage.com.au/news/opinion/watching-what-you-say/2005/10/18/1129401253378.html

> The new offence will address problems with those who incite terrorism directly against other groups within our community, including against Australia's forces overseas and in support of Australia's enemies. The old offences refer to incitement against classes of people and are a relic of the Cold War.[15]

It is possible that in attempting to "update" sedition laws, they have been drawn too broadly. It is possible that the Government did not intend to create a provision that allows an organisation with no links to terrorism to be banned as an "unlawful association" for basic acts or encouragement of civil disobedience (eg boycotts or peaceful protests). Nevertheless, that will be the result of the current drafting.

The above statement from the Attorney General's Department also contains an implied criticism of existing sedition laws as relics of the Cold War. Perhaps, then, the Government might accept an argument that the proposal reawakens this Cold War relic and breathes new life into it, at the same time as expanding the scope of sedition laws and reducing the available defences.

4.3. The unlawful associations provisions are too broad

Extreme concern needs to be raised regarding the proposed ability to ban "unlawful associations" for expressions of a broadly defined "seditious intention". These are of great concern for the following reasons:

- The ability to ban "unlawful associations" does not require any link whatsoever to force, violence or assisting the enemy;
- The ability to ban "unlawful associations" is not subject to any "good faith defence" or humanitarian defence;
- The ability to ban "unlawful associations" as set out in the 2005 proposal appears to have no link at all to terrorism; and
- The ability to ban "unlawful associations" is linked to an archaic definition of "seditious intention" that covers practically all forms of moderate civil disobedience and objection (including boycotts and peaceful marches).

The practical impact of the "unlawful associations" proposal would be to provide the Government with the ability to ban any organisation that opposes a Government decision and encourages protest or dissent that falls outside the law, no matter how slight or technical the breach. There is absolutely no link between this section of the proposal and terrorism.

Organisations that could be banned under this provision include the following:

1. A trade union could be banned for advocating that the rulings of the new fair pay commission be ignored (breach of IR laws) while appeals are lodged or a campaign is conducted to reform the terms of reference of the commission.

2. A small business tax reform association could be banned for advocating slow payment of GST (breach of tax legislation) while they advocate for the removal of red tape.

3. An environmental organisation could be banned for encouraging members to march on a port (without permission) while they argue for a ban on the import of radioactive waste.

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[15] http://www.theage.com.au/news/war-on-terror/should-we-be-afraid-of-the-terror-laws/2005/10/17/1129401197536.html

4. An indigenous organisation could be banned for establishing a tent embassy on Commonwealth land (trespass) while they lobby for a treaty.

4.4. No link to force or violence

Two of the proposed categories of sedition offences - the assisting the enemy provisions - do not require any link to force or violence.

This reverses the history of sedition offences in Australia. In fact, sedition offences have been strengthened on several occasions to ensure that there was a link between the offence and force or violence. Originally sedition laws were couched in terms of revolution or sabotage. A broader interpretation of sedition was used to convict Sharkey and the IWW members, but in 1986 the Crimes Act was amended to include a new test of the intention of "causing violence, or creating public disorder or a public disturbance".

It appears this 1986 test has been abandoned in the "assisting the enemy" sections of the proposed sedition laws. In those offences assistance can be "of any kind", and there is no link to either the intention or result of force or violence.

4.5. Defences are limited

A humanitarian defence is available for the "aiding the enemy" provisions, and a "good faith" defence is available for all the sedition offences except the section on banning unlawful associations with seditious intentions (and related offences, such as being an office holder of an unlawful association or selling the publications of an unlawful association).

However, the "good faith" defence is extremely limited. It only appears to apply to a very specific form of political debate where there is an intention to point out a mistake by the Government.

Ben Saul has noted:

> However, although these defences seem wide, in fact they largely protect only political expression at the expense of other types of democratic speech. In contrast, wider defences in anti-vilification law protect statements made in good faith for an academic, artistic, scientific, religious, journalistic or other public-interest purpose. Such statements may not aim to criticise the mistakes of political leaders, the errors of governments or laws, matters causing hostility between groups or industrial issues. The range of expression worthy of legal protection is much wider than these narrow exceptions.

It seems clear the "good faith" defence does not extend to the following forms of free speech:

— **Education**
This might include teaching a class about the views of opponents, conducting a student debate or conducting academic research.

— **Journalism**
This might include presenting a variety of views during a discussion, debate or interview, or straight reportage on the statements of others[16].

[16] See Brett Walker SC's advice to Media Watch for more details on the application of the proposed laws to journalism.

— **Artistic expression**
This might include writing fiction, plays, films, music and other artistic expression and interpretation of events and views[17].

4.6. No defences available for "unlawful associations"

The ability for the Attorney General to seek to ban an organisation under the unlawful associations section of the Crimes Act (Section 30 A) for seditious intentions is not subject to any defences whatsoever. This includes a long list of related offences, such as being an office holder of an unlawful association or selling the publications of an unlawful association.

This may be a drafting error, or it may be the intention of the Government to provide a broad power to ban unlawful associations.

It is important to remember that there are *other* provisions that provide the Government with the ability to ban terrorist organisations. There is no apparent link between Section 30A of the Crimes Act (as proposed) and terrorism.

4.7. The onus of proof for parts of the proposed sedition laws is reversed

The limited defences that are available to those accused of sedition reverse the onus of proof. An allegation of sedition requires the accused to prove beyond reasonable doubt that they are acting in good faith. This is a rare and dangerous reversal of Australia's normal assumption that a person is innocent until proven guilty, and that the burden for proving guilt falls on the prosecution.

This "reversed" onus of proof was the subject of significant public outrage and criticism during the recent trial of Schapelle Corby in Indonesia on drug related charges. Yet we are being asked to accept this reversed onus of proof under the proposed sedition laws in Australia.

4.8. The proposed penalties for sedition are too severe

The penalties for the proposed sedition offences are set at a maximum of seven years imprisonment. This is despite the fact that no force or violence is involved in some of the offences, and that the accused may not have perpetrated any act themselves.

The ACT Director of Public Prosecutions has questioned the need for such severe penalties:

> It does not seem to me, however, that the penalty for sedition should be increased as the essence of the offence consist only of urging another to act, and does not involve any actual act of violence in itself.[18]

[17] For further discussion of sedition and the arts see Appendix 1.

[18] http://www.chiefminister.act.gov.au/docs/DPPadvice.pdf

4.9. Sedition laws are always politicised

Sedition laws have an appalling history of abuse by Governments and they politicise the criminal law – there are no other (active) laws in Australia that are so heavily politicised.

The Australian parliamentary research service has noted the constant politicisation of sedition laws in Australia and elsewhere:

> One should also not overlook the political nature of laws such as those governing treason, or the related crimes of sedition and sabotage. Australian communist Lawrence Sharkey was jailed for sedition during the Cold War era. Nelson Mandela was charged with treason and later jailed for sabotage. Their actions may well seem criminal to many at a certain point in time, but their actions should be characterised as, most of all, political actions. Their activities were first and foremost political activities.[19]

In fact, sedition is a charge that is often used loosely in political debates. Monarchists have been quick to remind Republicans that these arcane laws are still on the books whenever a push for reform gains momentum. For example, consider the following extract from Hansard regarding Paul Keating's proposal for a Republic:

> The Prime Minister, the Australian Labor Party and their band of followers, which it appears of late includes Sir Ninian Stephen, ought to be careful about the way they handle debate on the flag. If they are not, they could be in breach of the Crimes Act 1914, charged with sedition, and serve three years' imprisonment.[20]

Re-awakening dormant sedition laws in the name of anti-terrorism will make these laws available for the broader inhibition of free speech and repression of the normal democratic process.

[19] http://www.aph.gov.au/library/pubs/CIB/2002-03/03cib22.htm

[20] http://www.anzacatt.org.au/prod/parlment/hansart.nsf/V3Key/LA19920501025

5. Recommendations

Recommendation 1.

The proposed section on sedition laws should be abandoned. Terrorism should continue to be tackled by existing laws, including:

— Existing incitement to commit crime offences;

— Existing terrorism related offences; and

— Existing provisions allowing terrorist organisations to be banned.

Recommendation 2 (Alternative)

If the Government insists on including a section on sedition offences in the proposed *Anti-Terrorism (No. 2) Bill* 2005, substantial amendments will be required.

— All sedition offences (not just selected offences) should require a link in some form to force or violence;

— All sedition offences (not just selected offences) should allow a broad good faith defence;

— The good faith defence should be expanded to include general public interest free speech, including speech for academic, journalistic or artistic purposes;

— The onus of proof for the good faith and humanitarian defences should not be reversed. The burden of proving an allegation of sedition should remain with the prosecution, even where a good faith or humanitarian defence is raised.

— The proposed section on banning "unlawful associations" for seditious intentions should be deleted or amended to include a link to force or violence and a broad good faith defence.

— Penalties for sedition offences should be proportionate to the alleged harm. The maximum penalty should remain at the current level - three years imprisonment.

6. Appendix - Sedition in the Arts

The best known use of sedition laws to attack the arts community is, of course, the period of McCarthyism in the USA in the 1950s. The arts community, and Hollywood in particular, bore the brunt of successful and unsuccessful allegations of "Un-American Activities", and some of the greatest artists and thinkers of that time spent long periods out of work or underground. These included Charlie Chaplin, Dashiell Hammett and Arthur Miller.

However, sedition offences have been used as a tool to silence criticism for many centuries, and the arts community have not been immune. It appears no section of the arts community has remained untouched.

Some of the better known examples are listed below (with apologies for the Anglo-Western-centric selection):

— **Poets**
Robbie Burns was threatened with a charge of sedition in 1794. He is rumoured to have "tempered his writing", and even written letters and articles under assumed names as a result of the threat[21]. William Blake was charged with sedition in 1803 for exclaiming "damn the King and damn his soldiers" in a heated moment[22] (he was acquitted in 1804). John Keats was never charged with sedition, but he was famously accused of "lisping sedition" by his critics.

— **Novelists**
The best-known novelist charged with sedition was Daniel Defoe, author of *Robinson Crusoe*. His satirical piece mocking church and state - *The Shortest Way With Dissenters* (1702) - saw him fined and imprisoned. Salman Rushdie managed to fight off a private prosecution for sedition following publication of *The Satanic Verses* in 1991[23].

— **Playwrights**
Ben Jonson – famous for writing *Volpone* - was imprisoned in 1597 for sedition for writing *The Isle of Dogs*[24]. In the 1660s Molière's satirical play *Tartuffe* was banned by Louis XIV for sedition, although the ban was later lifted.

— **Cartoonists**
Honore Daumier's famous cartoon *Gargantua*, a lithograph depicting the French King as a corpulent giant feeding upon the riches of his people, landed him in jail for 6 months on sedition charges in 1831. Joseph Johnson – a cartoonist in Rhodesia (now Zimbabwe) was charged and ultimately exiled for sedition in the 1970s.

— **Filmmakers**
Robert Goldstein, the maker of *The Spirit of '76*, which depicted British atrocities in the American Revolution, was charged under the US Sedition Act 1917 during World War One. The judge was concerned that the film might cause Americans "to question the good faith of our ally, Great Britain". The filmmaker was sentenced to 10 years in prison, but was released after 3 years. It was his only film.

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[21] http://www.freescotland.com/burns.html

[22] He had discovered a drunken soldier urinating in his garden.

[23] R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury [1991] 1 QB 429

[24] The play is lost, so the exact content is uncertain, but it was thought to be a political satire. The Government also shut down the entire theatre community for six months as a warning to other playwrights.