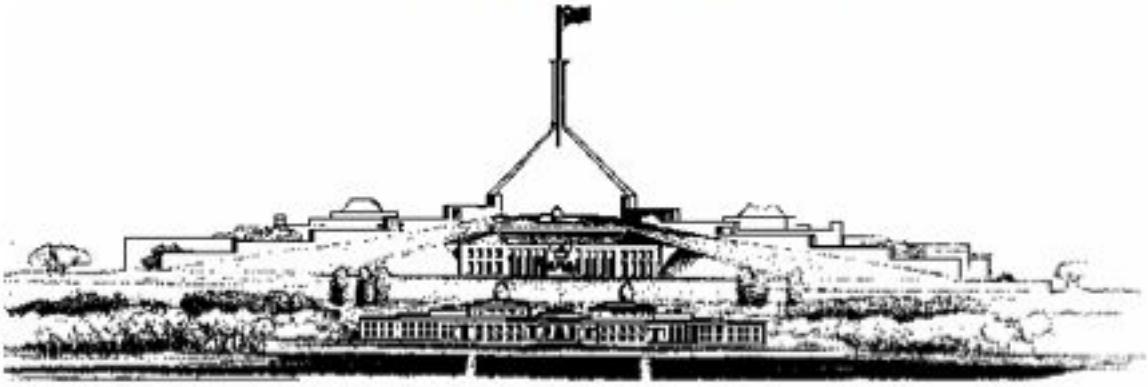
COMMONWEALTH OF AUSTRALIA

PARLIAMENTARY DEBATES



THE SENATE

MATTERS OF PUBLIC INTEREST

Sedition Laws

SPEECH

Wednesday, 18 October 2006

BY AUTHORITY OF THE SENATE

SPEECH

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Questioner		**Responder**	
Speaker	Brandis, Sen George	**Question No.**	

Senator BRANDIS (Queensland) (1.25 pm)—On 13 September, the report of the Australian Law Reform Commission on its review of sedition laws was tabled. The report, No. 104, is called *Fighting words: a review of sedition laws in Australia*. The review was undertaken as a result of a commitment given by the Attorney-General to members of his government backbench committee late last year in the course of discussions concerning proposed antiterrorism legislation, which eventually took the form of the Anti-Terrorism Act (No. 2) 2005. Government members, including Mr Turnbull, the member for Wentworth; Senator Payne; Mr Georgiou, the member for Kooyong; and me, among others, spent many hours with the Attorney-General working to shape legislation which, whilst responding appropriately to the serious national security concerns presented by a new era of terrorism and by the rise of militant Islamic terrorism in particular, nevertheless subjected those new policing powers to safeguards appropriate to a liberal democracy which respects, among its core values, personal freedom and the rule of law.

It was that same concern to ensure that, at a time when the threat of terrorism is a clear and present danger to our democracy, the essential values which animate that democracy are not lost sight of which inspired the remarks of the Chief Justice of Australia, Murray Gleeson, in his address to the Judicial Conference of Australia on 6 October, when His Honour said:

> A test of public commitment to the rule of law comes when the judiciary is required by law to make decisions ... that may compromise the capacity of government to protect public safety and security.
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> Although the problem is especially acute in the face of a threat to public safety from terrorism, it is not unique. Indeed, terrorism itself is not new. Conventional warfare has always created tensions between lawfulness and necessity; and government of civil societies in time of war has brought the need to resolve similar tensions.
>
> Within executive governments, and their agencies, there will always be some pressure to push the exercise of power to its limits ... Public emotions such as anger and fear, may create a climate in which declaring those limits is an unpopular task ... One of the responsibilities of those with executive power is to protect public safety and security. The law sets boundaries on that power. The law limits the capacity of the government to respond to threats to the public. In declaring those limits, courts may attract executive frustration, political criticism and public alarm.

No doubt in saying that His Honour had in mind the great words of Lord Atkin, in one of the most famous judgements of the 20th century, during the darkest hours of the Second World War:

> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.

That same principle was reaffirmed in the United States on 29 June this year by the Supreme Court in Hamdan v Rumsfeld, when the court held by majority that the establishment of special military commissions to try terrorism suspects detained at Guantanamo Bay was unconstitutional.

The decision of the Supreme Court, the words of Lord Atkin and the recent remarks of our own Chief Justice all remind us that the core values of liberal democracy, such as the rule of law and respect for the rights of the individual, do not mean one thing at a time of peace and something different in a time of war. The values of liberal democracy do not alter or abate when liberal democracy is itself under attack; indeed, it is when liberal democracy is under attack that it is more important than ever that its values be affirmed.

They also remind us, just as importantly, that, while national security and public safety are, of course, paramount considerations for the governments of all nation-states, the governments of liberal democracies deal with such questions in a distinctive way. Unlike military dictatorships, theocracies or secular states ruled by totalitarian ideologies, liberal democracies recognise that fidelity to certain core values—the rights of the individual against arbitrary interference by the state, personal freedoms including freedom of political expression and freedom of religious association, democratic governance and the rule of law—demands that the power of the state be limited, and this may mean that considerations of national security are sometimes subordinated to those other values.

Liberal democracies will always be prepared to accept greater risks than other types of societies simply because their values do subjugate the power of the executive government and its agencies to constitutional checks and balances—in particular, parliamentary scrutiny and an independent judiciary—and do impose limits on how the executive powers, including the policing powers of the state, may be used against individual citizens.

So the primacy of the core values of liberal democracies sometimes limits their capacity to deal with terrorism. The debate on torture is a case in point. In Australia, torture is absolutely prohibited. Evidence obtained under torture is inadmissible in our courts. That is how it should be. Yet there is no doubt that, were we to be moved purely by utilitarian considerations, we might allow torture—as many states do—as an efficient means of extracting information from terrorist suspects which would potentially be very useful in the war against terrorism. But we do not do that, we deny ourselves that capacity, for the very good reason that the respect for the rights of every human being, including those suspected of grave crimes such as terrorism, is a greater value for liberal democracies than greater policing efficiencies or greater investigative capability, regardless of how beneficial that greater efficiency or capability might, for some purposes, be.

The debate we are now having in this country over freedom of political speech and its appropriate limits is another example of that selfsame principle. Liberal democracies value freedom of political discourse and freedom of religious observance. Our respect for those values does not abate, even when terrorism threatens us. On the other hand, the law has always, rightly, prohibited the incitement of violence, including politically motivated violence. The criminal law's prohibition upon the incitement of violence is merely a logical extension of one of the central purposes of the criminal law: to protect citizens from violence itself. If it is a crime to perpetrate an act of violence upon another citizen then equally should it be a crime to attempt to do so, to conspire to do so or to incite another to do so. And it should not make any difference whether the motivation for that violence is political, religious, or otherwise.

The current debate on terrorism laws frames in sharp relief the way in which we, as a liberal democracy, should deal with the problem of definition, of boundary drawing, which is presented by the tension between protecting freedom of political speech and religious observance, on the one hand, and criminalising violence, on the other. When does the aggressive denunciation of a government, a political opinion, a social custom or a set of religious beliefs become an incitement to violence? When does the utterance of hostile words against another citizen or a group of citizens defined by a common characteristic—race, religion, custom—become a call to take up arms against them?

This is an exceptionally sensitive issue in a multicultural, multireligious, multiethnic, plural society at a time when, as we must regrettably accept, there are those among us who would use words not merely to denounce but to incite; not merely to express anger but to encourage violence; not merely to proclaim the superiority of their own religious beliefs, political values or social customs but to urge the destruction of those of others. The manner in which we handle that issue will be a vital test of our sophistication as a society and our integrity as a liberal democracy.

So when we write laws which seek to define those boundaries we must do so with care. That is why I and others like me, including Malcolm Turnbull—who, in an earlier phase of his career, was a lawyer notable for his concern for civil liberties—expressed the view last year that in its current form, in section 80.2 of the Criminal Code, the crime of sedition is expressed in inappropriate, indeed obsolete, language which, in some of its resonances, still reflects the medieval origins of the crime in a pre-democratic, religious, monocultural society. In fact, the offence in its current form is practically obsolete, having only ever been prosecuted on a handful of occasions in the years immediately after the Second World War, most recently some 53 years ago.

The recommendations of the Australian Law Reform Commission, which are set out at page 21 of its report and in more detail at appendix 2, include the recommendation that the ancient offence of sedition be replaced with a new offence of 'urging political or intergroup force or violence'. The ALRC also proposes new defences which, in my view, properly recognise the primacy of the freedom of expression which lies at the core of our liberal democracy. The report is a fine piece of work, carrying further and contemporising the work of the Gibbs review of Commonwealth criminal law, which examined this matter in 1991. I urge the government to adopt its recommendations and to give effect to them.

I believe that one day the war on terrorism will be won, but I also fear that that day will be a long time in coming. I also believe that throughout that time of trial—in some ways, as the Prime Minister recently pointed out, analogous to the long twilight struggle of the Cold War and yet in other ways presenting profoundly different

challenges—Australia will continue to be a strong, robust liberal democracy. It is the particular obligation of those of us who have dedicated our careers to advancing liberal democratic values to ensure that it remains so. That objective will never be served by compromising those values in the face of the very terrorism which threatens them. One practical way of advancing those values would be to give effect in this particularly sensitive area of law reform to the recommendations of the Australian Law Reform Commission by restating the law's prohibition on politically motivated violence in language more contemporary and relevant than the existing offence of sedition.