



The New South Wales Bar Association

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submission to the Australian Law Reform Commission
on the Review of Sedition laws

1. It is the view of The New South Wales Bar Association that ss80.2 to 80.6 of the *Criminal Code* should be repealed.
2. The essential problem with sedition, however defined, is that it is to be found in mere words, always susceptible of different construction and interpretation by different minds, and always dangerous to the individual who offends someone in high office, (or a member of ASIO). The offences created by s80.2 of the *Criminal Code Act* are made no less problematical by the introduction of the notion of recklessness into the equation. A person is reckless with respect to a *circumstance* or a *result* if aware of a substantial risk that one or the other will exist, and if, having regard to the known circumstances, it is unjustifiable to take the risk (s2). Robust political commentators may have a fragile hold on freedom if their writings or utterances are to be judged by whether they were 'justifiable' in 'taking a risk'. What is meant by 'it is unjustifiable'? Is the test objective, or subjective to the person on trial? The Australian cases and the early English cases all bespeak the great danger to a free society of having public discourse measured against a scale of things which might upset government sufficiently to prosecute, and of having such discourse constantly examined through the ever suspicious prism of ASIO or police.

3. We believe it is important to dwell on the history of sedition prosecutions because they reveal a tendency of government to misuse the offence for political ends or to just over-react. Against this, it may be said there has not been a prosecution in Australia since 1960, and no federal prosecution since 1953, which of course lends support to the proposition that we do not need the law at all. Whether frequently used or not, the Bar's position is that it is dangerous to have such laws remaining in the statute books.
4. The law under review should be considered against its historical background.

ENGLISH HISTORY

5. The subject of seditious libel is dealt with at some length by Stephen¹. He traces the law of libel from the Plantagenets (to whom it was unimportant) through the Tudors and Charles I (where seditious libel became highly important and prominent) and Fox's *Libel Act* of 1792.
6. By the time of the Star Chamber, the invention of printing, and writings upon religious and political subjects, became matters much sensitive to the Tudor and Stuart monarchs. Mere criticism of those in high office was enough to justify a prosecution for treason or seditious libel. A view of the law as expressed by Stephen seems to contain the genesis of the 'good faith' provisions in *Criminal Code Act* s80.3:

If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken his mistakes should be pointed out with the utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority.²

7. Unlike the approach of Governor Darling in New South Wales in the 1820's, by 1838 in England it seems:

The change of public sentiment as to the free discussion of political affairs has practically reduced the law as to political libels unimportant, inasmuch as it has particularly restricted prosecutions for libel to cases in which a libel amounts either to a direct incitement to crime, or to false imputations upon an individual, of disgraceful conduct in relation to either public or private affairs.

Seditious libel remains an offence in England but prosecutions are rare.

AUSTRALIAN HISTORY

8. Australia: the Commonwealth, the states, and the pre-federation colonies, have an unlovely history of the misuse of the law of sedition, largely to stifle freedom of expression, for political ends. It is difficult to track down all the cases, some of which were disposed of at summary level and few of which were reported.
9. Seditious libel found its way to the colony of New South Wales early in the 19th century and was used as a blunt instrument to deter the early newspaper editors from publicly criticising the governor. Governor Darling's persecution of Dr Wardell, a joint owner with W.C. Wentworth of 'The Australian', and Edward Smith Hall, owner and editor of 'The Sydney Monitor', is a disgraceful bit of history. Each prosecution – and there were many, particularly against Hall – had much more to do with the governor's wounded dignity than the security of the colony.³
10. It is well known that some of the Eureka Stockade rioters were tried, and acquitted, of treason. It is perhaps less well known that in 1855 Henry Seekamp, the editor of the 'Ballarat Times' was convicted and sent to prison for six months for sedition, for calling on 'his fellow-countrymen, on nature and on Heaven itself for a 'vengeance deep and terrible' for 'the foul massacre' of human beings' (by the military at the Stockade). His deeply felt

emotions as expressed in the words were scarcely calculated to cause a serious insurrection in Victoria.⁴

11. In 1896 John Norton was tried for seditious libel for publishing an article in Truth highly insulting of four monarchs – George III, George IV, William IV and Victoria – but which did not invite violence or insurrection or anything of the sort. The jury failed to agree.⁵
12. There have been various state prosecutions. In 1930 F.W. Paterson was charged in Queensland for uttering seditious words saying, amongst other things, 'if the workers shed a little blood in their own interests as they did for the capitalists in the War they will be emancipated'. The words seem no more than colourful communist rhetoric. He was acquitted.⁶
13. In 1960 Rohan Rivett the editor of the South Australian 'News' was prosecuted for seditious libel for injuring the feelings of the Chief Justice and three other judges by giving prominence to criticism of them during the Stuart Royal Commission. Rivett's offence was to publish headlines such as:

Shand QC indicts Sir Mellis Napier
 These Commissioners cannot do the job
 Commission Breaks up Shand Blasts Napier
 Shand Quits 'you won't give Stuart Fair Go'

The jury acquitted Rivett of eight of the nine charges and could not agree on the ninth.⁷

14. Early in the cold war there were three federal prosecutions in Sydney, all of communists. The first was against Gilbert Burns in 1949 because, in response to a hypothetical question at a public meeting, he gave a hypothetical answer beginning 'If Australia was involved in such a war (between Soviet Russia and the West) it would be between Soviet Russia and America and British Imperialism... we would oppose the war'. He was convicted and sentenced to six months imprisonment. In the subsequent High Court hearing Dixon and

McTiernan JJ held the words were merely expressive of a hypothesis; the majority held the case had been made out.

15. The second was against Lance Sharkey also in 1949, who was convicted and sentenced to three years imprisonment for articulating what seems no more than an unlikely hypothesis, that is (in part) 'If Soviet Forces in pursuit of aggression entered Australia, Australian workers would welcome them'. The High Court held the words were capable of being expressive of a seditious intent. *Burns and Sharkey* were not products of the High Court's finest hour.⁸
16. In 1950 William Burns was tried before a magistrate in Sydney, charged with publishing seditious words published in *Tribune* when he urged resistance to Australian involvement in the Korean war. After a convoluted summary trial and an appeal before a famously eccentric judge (Berne J) and then Lloyd J he was sentenced to six months imprisonment. It is difficult to see in the words published any more than robust criticism of government policy.⁹
17. Burns was again prosecuted in 1953 because ASIO took affront to an article in the *Communist Review* critical of the monarchy. He was acquitted.¹⁰
18. The last sedition case before the High Court was *Cooper* in 1961 which went on appeal from the Supreme Court of Papua New Guinea. Cooper had spoken to 'a number of natives' urging them, amongst other things, to expel all the white people. He seems to have been a little mad. The case was marked by the reception of hopelessly irrelevant evidence introduced from ASIO to the effect that Cooper was a communist, an atheist, and disliked missionaries. He received six months imprisonment, confirmed on appeal. Cooper's case is probably one of the very few in Australian history where the words uttered were actually intended to be seditious.¹¹

OTHER OFFENCES

19. The sedition laws should be considered also in light of Australian prosecutions for offences other than sedition, but with the same ultimate object, that is, to

assert the right of government to prosecute people whose words are interpreted by government to be criminal. In the process other people are deterred from speaking or publishing freely. We give some examples.

20. In 1916 the Hughes government decided war was too serious a subject to be lampooned. Tom Barker, the editor of 'Direct Action' in Western Australia went to gaol for twelve months (refusing to pay a fine) for publishing a cartoon by Syd Nicholls. The cartoon depicted the crucifixion of an Australian soldier, and images of the rich industrialists who flourished because of the Great War. Barker was charged with 'prejudicing recruitment' under the *War Precautions Act*. The prosecution was clearly designed to intimidate cartoonists and editors, and it probably succeeded.¹²
21. In 1932 a communist called Devanny was prosecuted under the 1926 amendments to the *Crimes Act (Cwth)* which made it an offence to solicit contributions of money to an unlawful association (in this case, the Communist Party of Australia). As Evatt J in the High Court put it:

'...the words 'protect' and 'subversive' are ambiguous and general words and are, for that reason, still of value in concealing vague and loose generalities.'

The High Court was unimpressed with the prosecution.¹³

22. Kenneth Gee recounts the 1940 prosecution of 'Comrade Roper' for distributing a subversive publication by putting in Paddington letterboxes a Trotskyite leaflet on the need to transform the A.I.F. into the 'Peoples Militia'. Comrade Roper served six months goal, refusing to pay a fine. The leaflet seems unlikely to have put at risk the security of the nation. The author of the leaflet, John Wishart, was subsequently imprisoned for six months following a conviction for endeavouring by the leaflet to cause disaffection amongst members of the second A.I.F., contrary to the *National Security Act*. An application to the High Court for special leave failed.¹⁴

23. We should also learn from the current gross abuse of sedition by countries such as Uganda, Bangladesh, Pakistan, Malaysia, the Maldives, Yemen, Zimbabwe and Singapore, nearly all involving prosecutions against journalists or opposition politicians for criticising governments.¹⁵

THE LEGISLATION

24. The law is anachronistic and should be discarded entirely. An indicia of its real antiquity lies in its close relation to treason, both being in Division 80. It remains treason to kill or kidnap the Governor-General or the Prime Minister; to do the same to anyone else is merely murder or abduction. The punishment for intentionally killing the Prime Minister is the same as for intentionally killing the Leader of the Opposition. One can only assume that in this context the references to the Governor General and the Prime Minister remain because of the very special penalties treason once attracted, that is, hanging, drawing and quartering and, if a man, having one's bowels and genitals burned as one watched (not having any longer much interest in either). Women were spared this immodest indignity by being totally burned alive.¹⁶ Also, of course, a sentence of death for treason once also required attainder and its consequences, forfeiture and corruption of blood. It is unlikely such penalties will reappear on the statute books, at least in Australia. Why do we retain such anachronisms?

25. As the law now stands:

treason s80(1) *Criminal Code* (formerly s.24 *Crimes*
stays: *Act*)

treachery s24AA *Crimes Act*. It covers some of the same
stays: ground as treason.

sedition defined by *Crimes Act* s30A(3) but,
intent: significantly, its application is now limited to

unlawful associations: *Crimes Act* s30A(1)(b)

sedition: a new offence created by s80(2) of the *Criminal Code Act*. It replaces offences previously found in *Crimes Act* ss24A to 24D

26. There is a significant difference in the new law of sedition as opposed to the now repealed *Crimes Act* provisions. We had a definition of *sedition* – for example an intention to bring the Sovereign into hatred, or to excite disaffection against the government, followed by various offences committed with *that intention* (for example, using seditious words with the intention of created public disorder). To commit an offence one had to do one of the things proscribed, with a seditious intent. That is no longer the case.
27. The definition of seditious intent is now limited to the seditious intent which may be a mark of an unlawful association. The new offences of sedition do not require proof of a seditious intention. As we have said, they can be committed by mere recklessness, and they carry a new penalty of seven years. The 'good faith' exception seems to be a reversal of the onus of proof. The practical effect of the new legislation is that a person accused of doing any of the things in the *Criminal Code* s80(2) bears the onus of showing he or she did not act with a seditious intent. This is repugnant to our notions of fair process.
28. It is difficult to see why we need any offence of sedition or seditious words in our criminal law. If the law is intended to protect the community from incitement to violence, whether against a government or a class of people, the existing criminal law is adequate for the purpose: e.g. *Criminal Code Act* ss11.4 and 11.5 and the common law offence of incitement¹⁷.
29. Section 80.2(7) makes it an offence to assist an organisation or country which is 'at war' with the Commonwealth, even if the 'war' is defined only by administrative proclamation. Sub-section 8 creates the offence of urging another person to engage in conduct to assist an organisation or country if the organisation or country is engaged in armed hostilities against the Australian

Defence Forces. What does all this mean? Is Iraq engaged in armed hostilities against Australian soldiers? If we go back to the 2003 invasion, there would seem to be little doubt that the Australian Defence Forces were engaged in armed hostilities against Iraq, and vice versa. If in such a situation the government took the view that criticism of the use of Australian troops may help the other country there may be an offence. We should remember the earlier prosecutions of the 1940's and 1950's and recoil from such legislation.

30. It is the view of the Bar Association that s80.2 to s80.6 of the *Criminal Code Act* should be repealed entirely, and sedition should not reappear in Australian law.

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- ¹ Stephen, *A History of the Criminal Law of England* (1838) Vol 2, p.298.
- ² Stephen, p.299.
- ³ Barker, *Sorely Tried: Democracy and Trial By Jury in New South Wales* (2003) at 270.
- ⁴ Manning Clark *A History of Australia* Vol.IV p.79 and Laurence Gibbons *Encourage Sedition not Sedation* a paper delivered at the Sydney Writers' Centre on 29 November 2005.
- ⁵ Barker, p.88.
- ⁶ Maher, *The Use and Abuse of Sedition* (1992) 14 Sydney Law Review 261.
- ⁷ Inglis, *The Stuart Case* (1961) at 279-292.
- ⁸ *Burns v Ransley* (1949) 79 CLR 101; *The King v Sharkey* (1949) 79 CLR 121.
- ⁹ Douglas, *The Ambiguity of Sedition: The Trials of William Fardon Burns* (2005) 9 Australian Journal of Legal History 227.
- ¹⁰ Douglas, p.247.
- ¹¹ *Cooper v The Queen* (1961) 105 CLR 177.
- ¹² The Daily Telegraph 7/2/2006 *Cartoonists light the flames of contention.*
- ¹³ *The King v Hush; Ex parte Devanny* (1933) 48 CLR 487.
- ¹⁴ Kenneth Gee *Comrade Roberts* (2006) p.32, *Wishart v Fraser* (1941) 64 CLR 470.
- ¹⁵ Gibbons, 29/11/2005.
- ¹⁶ 4 *Blackstone's Commentaries* p.92.
- ¹⁷ See the cases listed at p.1-4352 Watson Blackmore and Hosking *Criminal Law (NSW)*.