

# The Use and Abuse of Sedition

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*It is an outstanding feature of every sedition act that the way it is enforced differs from the way it looks in print as much as a gypsy moth differs from the worm from which it has grown.<sup>1</sup>*

*You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous . . . ?<sup>2</sup>*

## 1. Introduction

Sedition is a remnant of that part of the criminal law which inhibits freedom of speech.<sup>3</sup> In the twentieth century it has been so seldom employed in peacetime to deal with dissident groups or individuals that it is obsolescent.<sup>4</sup> The High Court last considered aspects of the law of sedition in 1960 in a case from the then Territory of Papua New Guinea.<sup>5</sup> It appears that the last State sedition prosecutions were in South Australia in 1960 (in a case arising out of the Royal Commission inquiring into the Stuart murder case<sup>6</sup>) and before that in Queensland in 1912 and 1930.<sup>7</sup>

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1 Chafee, Z Jr, *Free Speech in the United States* (1941), at 459.

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

3 There is no separate offence. The generic term "sedition" is conventionally used as shorthand for several distinct categories of common law misdemeanours or statutory offences, namely, (a) uttering seditious words, (b) publishing or printing a seditious libel, (c) undertaking a seditious enterprise, and (d) seditious conspiracy.

4 Sedition is primarily a peacetime weapon. In time of war the Commonwealth government is amply equipped to implement a policy of total mobilisation for the prosecution of the war effort. This last occurred in Australia following the outbreak of war in Europe in 1939. The basic legal mechanism was the *National Security Act 1939* and the Regulations made under the Act. The Commonwealth was able to exercise extensive control over the dissemination of information and opinion by (a) the imposition of rigid censorship, (b) the prohibition of certain organisations (such as the Communist Party of Australia (CPA)) whose aims and activities were considered by the Government to be inimical to the war effort, and (c) the internment of alleged subversives.

5 *R v Cooper* (1961) 105 CLR 177.

6 Inglis, K S, *The Stuart Case* (1961) at 279-92.

7 *R v Paterson* (Supreme Court of Queensland, 15 April 1930). Frederick Woolnough Paterson was charged with having spoken and published seditious words, namely, "If the workers shed a little blood in their own interests as they did for the capitalists in the War they will be emancipated. They should take the law into their own hands. Although I hope I will not have to shed any of my blood, if the necessity arises I am willing to do in conjunction with the workers as a whole but before I do so the workers will have to be thoroughly organised to have a successful issue. There was no harm in the spilling of blood in the late War in the capitalistic interest so why could it not be spilt in the workers' interests who could not be much worse off than they are now". Paterson was acquitted. He later enjoyed a distinguished career at the Queensland Bar, was the only person ever elected to an Australian Parliament as an endorsed CPA candidate, and appeared as counsel in most of the Cold War sedition cases examined later in this article. *R v Bossone*

Both the Chifley and Menzies Governments resorted to the law of sedition as one element of their divergent campaigns against the Communist Party of Australia ("CPA") in the early Cold War years. The Chifley Government's action led to the draconian majority High Court decisions in *Burns v Ransley*<sup>8</sup> and *R v Sharkey*<sup>9</sup> as a result of which Gilbert Burns and L L Sharkey were sent to prison for doing no more than expressing highly unpopular political opinions — the former in an orderly public debate and the latter in a series of telephone conversations with a journalist. The last sedition prosecution by the Commonwealth, another episode in the Menzies Government's anti-communist crusade, was in 1953.<sup>10</sup>

This article examines fragments of the history of sedition and like prosecutions in Australia, the United Kingdom and the United States of America in the twentieth century. It argues that, as long as the various sedition offences remain, governments will inevitably be tempted to use them improperly, especially when highly unpopular opinions are expressed,<sup>11</sup> that the law of sedition is anachronistic and an unjustified interference with freedom of expression, and that abolition of sedition offences at both Commonwealth and State level is therefore to be preferred to any attempt to "modernise" the crime of sedition.

## 2. *The Elements of the Commonwealth Offences*

Since 1920 Australia has had, at the Commonwealth level, what amounts to a codified law of sedition in ss24A-24F of the *Crimes Act 1914*.<sup>12</sup> These

(Supreme Court of Queensland, 18 September 1930). Bossone was found guilty of having spoken and published the following seditious words: "Oh, yes. To Hell with the King. To Hell with the Union Jack. The Red Flag is what we want to see flying here." He was bound over for two years. *R v Munro* [1912] QWN No 21. See MacPherson, B, *History of the Supreme Court of Queensland* (1989); Lee, H P, *Emergency Powers* (1984) ch IV; Coleman, P, *Obscenity, Blasphemy, Sedition* (1962) ch 5. See also *R v Holland* (1914) 33 NZLR 931; *R v Young* (1914) 33 NZLR 1191; O'Farrell, P J, *Harry Holland: Militant Socialist* (1964) at 32-36, 58-59, 75.

8 (1949) 79 CLR 101.

9 (1949) 79 CLR 121.

10 *Sweeny v Chandler; Sweeny v Ogston; Sweeny v Bone*: Sydney Court of Petty Sessions, Nos 5722, 5723, 5724, 5725, heard 10, 18-21, 28 August 1953, decision delivered on 18 September 1953. The Magistrate dismissed all the charges with costs. Australian Archives ("AA"), (NSW) SP 782/1, Deputy Crown Solicitor's Office, Correspondence Files, Item 64/1991; AA (ACT), CRS A432, Attorney-General's Department, Correspondence Files, Annual Single Number Series 1929, Item 1953/734. Large portions of these files continue to be withheld from public access in reliance on exemptions claimed pursuant to s33 of the *Archives Act 1983* (Cth). In 1989 in the United Kingdom an unsuccessful attempt was made to institute a private prosecution of the author Salman Rushdie and the publishers of his controversial book, *The Satanic Verses*, for both blasphemous libel and seditious libel: *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* [1991] 1 QB 429.

11 During the 1991 Gulf War talk of active opposition to Australia's participation in the United Nations military action against Iraq revived interest in sedition as a means of silencing such opposition. See, eg, "War Dissenters Must not be Saddam's Fifth Column" *The Age* 23 January 1991; "Calls of 'Treason' Could Backfire on all of Us" *Sunday Herald* 27 January 1991; "Sedition's Scope" *Herald-Sun* 18 February 1991.

12 War Precautions Act Repeal Act 1920. See Ricketson, S, "Liberal Law in a Repressive Age: Communism and the Law 1920-1950" (1976) 3 *Mon LR* 101; Head, M, "Sedition: Is the Star Chamber Dead?" (1979) 3 *Crim LJ* 89; Barendt, E, *Freedom of Speech* (1987) at 152-160.

provisions coexist with obsolescent State sedition laws.<sup>13</sup> The elements of the Commonwealth statutory scheme can be summarised as follows.

First, s24D of the *Crimes Act* 1914 makes it an offence punishable by up to three years imprisonment to write, print, utter or publish seditious words. Section 24C makes it an offence to engage in or agree or undertake to engage in, conspire to carry out or counsel, advise or attempt to procure the carrying out of, a seditious enterprise. This writer has been unable to locate any record of a prosecution of a seditious enterprise under s24C.<sup>14</sup> In Australia, as in the UK and the US, the focus of prosecutorial attention has been on the perceived mischief of allegedly seditious spoken or printed words.

Secondly, s24B provides that seditious words are words expressive of a seditious intention and that a seditious enterprise is an enterprise undertaken in order to carry out a seditious intention.

Thirdly, s24A of the Act provides that an intention to effect any one of certain specified purposes is a seditious intention. Originally, those purposes were:

- (a) to bring the Sovereign into hatred or contempt;
- (b) *to excite disaffection against the Sovereign or the Government or Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom;*
- (c) *to excite disaffection against the Government or Constitution of any of the King's Dominions;*
- (d) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;
- (e) *to excite disaffection against the connexion of the King's Dominions under the Crown;*
- (f) to excite His Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth; or
- (g) to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth.<sup>15</sup>

The paragraphs in italics were repealed by s11 of the *Intelligence and Security (Consequential Amendments) Act* 1986 ("the 1986 Act") which was

13 Lee, H P, *Emergency Powers* (1984) ch IV. In Victoria, as a part of its investigation of its human rights reference, the Parliamentary Legal and Constitutional Committee issued a Discussion Paper No 3, *Freedom of Expression in Victoria* in May 1986, in which it stated that "it may well be necessary to review the desirability of [sedition's] application to Victoria", Discussion Paper No 43, but the Committee's *Report on the Desirability or Otherwise of Legislation Defining and Protecting Human Rights* (1987) omitted mention of the subject.

14 In late April 1949 the Western Australia Police obtained search warrants on the basis that the CPA was engaged in a seditious enterprise contrary to s52 of the *Criminal Code* (WA). The warrants were executed on 1 May 1949, but no prosecution was launched. Letter, Good to Mills, 25 October 1949. AA (WA) PP 352/1, Attorney-General's Department, Deputy Crown Solicitor Correspondence Files 1944-1969, Item WA 5837.

15 *War Precautions Act Repeal Act* 1920.

one of the legislative by-products of the Report of the Royal Commission on Australia's Security and Intelligence Agencies.<sup>16</sup>

Next, ss12-14 of the 1986 Act amended the *Crimes Act* 1914 so as to redefine the *mens rea* of the offences in a way that reproduced the corresponding element of the common law offence as it had emerged a century before.<sup>17</sup> The prosecution must now also prove that the seditious conduct of the accused was carried out "with the intention of causing violence or creating public disorder or a public disturbance".<sup>18</sup>

Finally, s24F provides, in substance, that it is not unlawful for a person, acting in good faith, to endeavour to show that the government is mistaken in its actions or policies, to attempt to bring about a change of government by lawful means, or to do anything in good faith in connexion with an industrial dispute.

### 3. *The Case for Abolition*

There are two broad categories of arguments which support abolition of all sedition offences. The first concerns questions of principle and related questions of necessity, and the other is historical.

#### A. *Protection of Public Order: Principle and Necessity*

It is submitted that the law should permit the widest possible scope for the expression of ideas and opinions. In the absence of a constitutional guarantee of freedom of expression, legislatures should not create new prohibitions on free speech unless an unequivocally clear and convincing case is made out that a prohibition is essential to protect some vital public interest and that there is no other means available to protect that interest.

In the past, defenders of the law of sedition have claimed that it is necessary and right as a matter of principle to retain the sedition offences in order to protect the state against subversion and threats to lawfully constituted authority. Underlying this argument is an assumption that subversive or

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16 Commonwealth, Royal Commission on Australia's Security and Intelligence Agencies, Report on the Australian Security Intelligence Organization (1984) (Parl Pap 1985/232) paras 4.81-4.101.

17 *R v Burns* (1886) 16 Cox CC 355; *R v Aldred* (1909) 22 Cox CC 1. See the detailed discussion in *R v Boucher* (1951) 2 DLR 369 and *R v Lemon* [1979] AC 617. The amendments of the *Crimes Act* 1914 (Cth) in 1920, enacted in an atmosphere of hysteria produced by the Bolshevik Revolution, had, in making the requirement of seditious intention objective rather than subjective, taken the law back in the direction of its repressive Star Chamber origins. In the same year the House of Representatives, in a blatantly partisan exercise, expelled one of its Opposition members, Hugh Mahon, for an allegedly seditious extra-parliamentary utterance which, in part, referred to "this bloody and accursed [British] Empire". Commonwealth, *Parliamentary Debates* (House of Representatives) 11 November 1920 6382-6480.

18 In *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* above n10, the Divisional Court indicated at 453 that to make out the common law offence of seditious libel, "Proof of an intention to promote feelings of ill will and hostility between different classes of subjects does not alone establish a seditious intention. Not only must there be proof of an incitement to violence in this connection, but it must be violence or resistance or defiance for the purpose of disturbing a constituted authority."

revolutionary speech brings on revolution. It is the mere *tendency*, however remote, of the advocacy of subversive or revolutionary ideas to disrupt or damage the orderly processes of the state, or to prompt insurrection, that has been central to the definition of the common law and statutory offences of sedition in Australia.

This self-protection argument has a disarmingly attractive appeal about it. Why should the state not be entitled to put a stop to incipient insurrection? Why should the state have to wait until violence and insurrection breaks out before responding to seditious speech? These are questions which need to be asked. However, in seeking answers to them it is important to acknowledge just how rubbery is a test based on *tendency*. The cases applying the tendency approach have not been based on any close analysis of the nature and magnitude of the actual threat supposedly presented by the voicing of dissident opinions. It is clear that a legal regime which punishes expressions of opinion merely for their tendency to lead to public disorder carries with it the potential for severe restriction on freedom of expression. For a society such as Australia which places a high value on free speech there should be a more convincing justification for the imposition of criminal penalties than the mere tendency of speech to result in violence and public disorder. In Australia, unlike the United States, courts have not been required to interpret and apply the law of sedition in the context of a constitutional guarantee of free speech. It is scarcely surprising therefore that Australian courts have interpreted and applied the law of sedition in a way that has not closely examined the range of justifications for severely limiting the scope of sedition that have been considered in the twentieth century US cases.

Sedition has its origins in the law of treason and the repressive approach of the common law to all criticism of government no matter how innocuous. This derives from what Stephen called the deferential view of government according to which the ruler is the superior of the subject and that, as a matter of principle, it is wrong to censure the ruler openly.<sup>19</sup> By the end of the eighteenth century seditious libel had become established as a distinct species of criminal libel and consisted of any written censure on public officials for their conduct as such or upon the laws or institutions of Great Britain. Stephen, writing in 1883, remarked:

That the practical enforcement of this doctrine was wholly inconsistent with any serious public discussion of political affairs is obvious, and so long as it was recognised as the law of the land all such discussion existed only on sufferance.<sup>20</sup>

By the end of the nineteenth century starkly contradictory democratic influences were at work. The ruler was now to be regarded as the servant and agent of the subject. Ever so slowly, the law changed to allow more criticism of government.<sup>21</sup>

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19 Stephen, J F, *A History of the Criminal Law of England* (1883), vol II at 299.

20 *Id* at 348.

21 *R v Burns* (1886) 16 Cox CC 355. Paterson, J, *The Liberty of the Press, Speech and Public Worship* (1880), Ch V; Wickwar, W C, *The Struggle for the Freedom of the Press 1819-1832* (1928); Stephen's definition of the common law offence and his own code inspired the enactment of statutory sedition offences throughout the then British Empire. See eg *Wallace-Johnson v R* [1940] AC 231; *Joshua v R* [1955] AC 121; Sastri, S D G, *The Law of Sedition in India* (1964).

Save for seditious libels of the sovereign, the preservation of the existing apparatus of law and order had become the primary theoretical justification for the common law offence of sedition. This resulted in a decline in sedition prosecutions in the United Kingdom. One commentator, surveying the period 1770-1820, has recently observed that by the mid-1880s "political protest was . . . regulated for the threat to public order caused by the manner of expressing ideas rather than for the ideas themselves".<sup>22</sup> Frequently, allegedly seditious speech was directly associated with public protest activities and the police and security authorities used the law of unlawful assembly rather than the law of sedition to contain radical protest movements.<sup>23</sup>

However, despite the transformation of the law of sedition in the nineteenth century, there is one *category of ideas*, namely, ideas about violent revolution, the advocacy of which remains forbidden by the law of sedition. In the twentieth century the main targets of sedition investigations and prosecutions have been the followers of Marx and Lenin. More numerous and more vocal in earlier decades, they were convinced that the Bolshevik Revolution had unleashed forces which made worldwide socialist revolution inevitable. It was simply a matter of time.<sup>24</sup> The CPA was an avowedly revolutionary organisation although it operated openly through the existing political and industrial apparatus. In 1926 amendments to the *Crimes Act 1914* had declared as unlawful (1) associations which advocated or encouraged the overthrow of the Constitution of the Commonwealth by revolution or sabotage, the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilised country or of organised government, the destruction or injury of property of the Commonwealth or of property used in interstate or overseas trade or commerce and (2) any body of persons which advocated or encouraged the doing of any act having or purporting to have as an object the carrying out of a seditious intention as then defined in s24A of the *Crimes Act 1914*.

In *R v Hush; ex parte Devanny*<sup>25</sup> the High Court rebuffed an attempt by the Lyons Government to deal a death blow to the CPA using the 1926 amendments to the *Crimes Act 1914*.<sup>26</sup> The judgment of Evatt J emphasises the ambiguity of a prohibition couched in terms of "advocate and encourage":

"When the time comes." It is, it would seem from the writings in evidence, the element of time which must be closely examined in determining whether at the present, or in the near, or very far distant, future there is to be any employment of violence and force on the part of the classes for which the

22 Lobban, M, "From Seditious Libel to Unlawful Assembly: Peterloo and the Changing Face of Political Crime c1770-1820" (1990) 10 *Oxf JLS* 307.

23 Williams, D G T, "Freedom of Assembly and Freedom of Speech: Changes and Reform in England" (1975) 1 *UNSWLJ* 97.

24 Evans, R, *The Red Flag Riots: A Study in Intolerance* (1988). For details of the history of the (now disbanded) CPA, see Davidson, A, *The Communist Party of Australia: A Short History* (1969); Gollan, R, *Revolutionaries and Reformists: Communism and the Australian Labour Movement 1920-1955* (1975). For a period in the late 1940s and early 1950s the party was known as the Australian Communist Party. For the sake of convenience, the abbreviation CPA is used throughout this article.

25 (1932) 48 CLR 487.

26 United Australia Party, *The Record of the Lyons Government January 1932 to January 1933* (1933) section 8 — Suppressing Communism.

Communist Party claims to speak. "The inevitability of gradualness" as a Socialist and Labor doctrine, the Communists reject. But they believe and advocate that a Socialist State must inevitably emerge from the very nature of capitalist economy. But when? So far as the evidence placed before us goes, there is no answer to this question. So that one possible argument, which may be open to the Communist Party in explaining their references to physical force, is that force and the threat of force are far distant from the present or the near future. The history of the attempts and failures of Communism to gain control of other political movements of the working classes may tend, upon close analysis, to show that, to turn the phrase, Communism illustrates the gradualness, the extreme gradualness, of inevitability.<sup>27</sup>

It follows from Evatt J's analysis that the critical factors in assessing whether advocacy or encouragement of revolution merits the imposition of a penalty will be the timing of the call for revolution and the degree of probability that the state will actually be endangered by such a call. As will be argued later in this article, the same can just as easily be said of a prohibition which rests not on the verbs "advocate" or "encourage", but instead on the equally problematical verb "incite".

In the United States, as in Australia, the success of the Bolshevik Revolution prompted deep fears about communism. This led to thousands of prosecutions for violation of the *Espionage Acts* of 1917 and 1918 and to other repressive official behaviour.<sup>28</sup> Underlying these early official responses was the attitude that any advocacy of communist ideas and opinions was, inherently, an extremely dangerous incitement to overthrow the existing social order.

In his famous opinion in *Masses Publishing Co v Patten*<sup>29</sup> then District Court Judge Learned Hand referred to the strict judicial approach under which incitement may occur because of something inherent in the particular words used regardless of the speaker's intention and without any further conduct by the speaker:

Words are not only the keys of persuasion, but the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of that public opinion which is the final source of government in a democratic state.<sup>30</sup>

However, especially in the context of offences against public order, the concept of incitement is highly ambiguous. This was the point made by Holmes J and Brandeis J in their joint dissent in *Gitlow v New York*<sup>31</sup> in which Gitlow had been charged with infringing a criminal anarchy statute in that he advocated the duty, necessity and propriety of the forcible overthrow of government:

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27 Id at 517-18.

28 Heale, M J, *American Anti-Communism: Combatting the Enemy Within, 1830-1970* (1990); Murray, R, *Red Scare: A Study in National Hysteria 1919-1920* (1955); Chafee, above n1; Boasberg, J E, "Seditious Libel v Incitement to Mutiny: Britain Teaches Hand and Holmes a Lesson" (1990) 10 *Oxf JLS* 106.

29 244 F 535 (1917) reversed 246 F 24 (1917).

30 244 F 535 at 540.

31 268 US 652 (1925).

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 proletarian 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.<sup>32</sup>

In the next 50 years the Supreme Court of the United States was presented with a procession of cases in which the nature and extent of the First Amendment's protection of free speech was closely examined in circumstances where dissident individuals or groups, often the followers of Marx and Lenin, were alleged to pose an unacceptable threat to the continuation of the existing order. In the 1920s and 1930s the Supreme Court eschewed the "words as triggers of action" approach which Hand J had adverted to in the *Masses* case, and instead developed the "clear and present danger test".<sup>33</sup>

In 1951, during the anti-communist witch hunts to which Senator Joseph McCarthy's name became attached,<sup>34</sup> a majority of the Supreme Court in *Dennis v US*,<sup>35</sup> stepped back from the clear and present danger test in upholding the convictions of the leaders of the Communist Party of the United States for conspiracy to advocate and teach violent revolution.<sup>36</sup> But by the end of the 1970s, with McCarthyism in retreat, the Supreme Court had embraced an even more liberal approach than that ostensibly embodied in the original clear and present danger test. In *Brandenburg v Ohio*<sup>37</sup> the Supreme Court reformulated the test by holding that the First Amendment does "not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action".<sup>38</sup>

In the United Kingdom there appear to have been relatively fewer sedition prosecutions this century than in Australia. In the small number of reported decisions, culminating in *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury*,<sup>39</sup> the judges have significantly narrowed the scope of the common law sedition offences.<sup>40</sup>

32 Id at 673.

33 See, eg, *Schenck v US*, 249 US 47 (1919); *Abrams v US*, 250 US 616 (1919); *Whitney v California*, 274 US 315 (1927); *Fiske v Kansas*, 274 US 380 (1927); *De Jonge v Oregon*, 299 US 357 (1937); *Herndon v Lowry*, 301 US 242 (1937).

34 Belknap, M R, *Cold War Political Justice: The Smith Act, The Communist Party, and American Civil Liberties* (1977); Navasky, V S, *Naming Names* (1980); Kutler, S I, *The American Inquisition: Justice and Injustice in the Cold War* (1982); Fried, R M, *Nightmare in Red: The McCarthy Era in Perspective* (1990).

35 341 US 494 (1951).

36 Emerson, T I, *The System of Freedom of Expression* (1970) 112-121.

37 395 US 444 (1969).

38 Id at 447. See also *Hess v Indiana* 414 US 105 (1973); *NAACP v Claiborne Hardware Inc*, 458 US 886 (1982).

39 [1991] 1 QB 429.

40 Barendt, E, *Freedom of Speech* (1985) at 152-53; Robertson, G and Nicol, A G L, *Media Law* (2nd ed, 1990) at 343-46.



It is this writer's primary contention that, in the context of the preservation of public order, a broad tendency-based sedition offence is not justifiable because such an offence does not operate to protect any legitimate social interest but rather operates only to stifle the free expression of ideas and opinions. But, if there is to be such an offence in Australia, it ought to be strictly confined and the much more liberal approach of US courts as exemplified in *Brandenburg v Ohio* should be accepted. In essence, at which Evatt J was hinting in *R v Hush; ex parte Devanny*.

However, it needs to be understood that in cases where subversive or revolutionary speech will only be criminal if the speech is accompanied by other conduct which, in terms of *Brandenburg v Ohio*, satisfies the direct incitement and danger requirements, the satisfaction of such a rigorous test will, by reason of the additional conduct, invariably also involve the commission of other specific public order offences as well as general criminal law offences against person and property. It is in this sense that, aside from any question of principle, even a very limited sedition-like offence becomes unnecessary. Largely because of the absence of a constitutional guarantee such as that embodied in the US First Amendment, courts in Australia and the United Kingdom have not needed to draw the necessary distinction between speech and conduct which is so important in First Amendment cases in the US.<sup>41</sup> To see how the failure to make such a distinction has contributed to the use of the law of sedition as an instrument to suppress innocuous but highly unpopular speech in Australia it is necessary to look closely at the enforcement history of sedition.

### ***B. Lessons of History: Oppression and Injustice***

It is not necessary to go back to the grim Star Chamber origins of sedition or even the appalling eighteenth or nineteenth century sedition cases.<sup>42</sup> There is a sufficiently telling lesson in the Australian sedition trials in the period 1948-1953. It is, however, necessary to pursue the inquiry beyond the law reports and to examine the available archival evidence. An examination of Australian sedition investigations and prosecutions in the early Cold War period reveals just how simplistic and deceptive is the conventional public order justification for sedition. Archival and other evidence amply demonstrates that sedition is invariably used in an oppressive manner. In twentieth century Australia the history of the law of sedition is a history of repeated injustice meted out to left wing radicals.

One of the most striking illustrations of this is to be found in the events surrounding the conviction of Gilbert Burns. Burns, a member of the Queensland State Committee of the CPA, participated in a public debate in

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41 For example, to give real meaning to the idea of freedom of expression, a protest march properly should be characterised as "expressive conduct" rather than as speech. In *Forbutt v Blake* (1980) 51 FLR 465 the police who sought to stop the protesters were not inspired by an understanding of the speech/conduct dichotomy. That is not to say that the speech/conduct dichotomy is without faults. See eg Cox, A, *Freedom of Expression* (1981), 59-62; Tribe, L, *Constitutional Choices* (1985), 198-203.

42 An examination of the *State Trials* series will yield numerous instances of the use of sedition as a brutal instrument of repression.

Brisbane on 15 September 1948 on the topic "That Communism is not Compatible with Personal Freedom". By this stage of the early Cold War period in Australia the freedom of the CPA and its adherents to pursue their radical political objectives had become a major divisive political issue. The CPA had failed in its electoral endeavours but enjoyed considerable power in the trade union movement. There were powerful forces at work seeking the outlawing of the CPA. It was a principal tenet of the anti-communist cause that the CPA was a subversive instrument of a hostile foreign power, the USSR.<sup>43</sup>

On 12 October 1948 Burns was convicted in the Court of Petty Sessions at Brisbane of uttering seditious words at the debate and was sentenced to six months imprisonment.<sup>44</sup> He appealed, by way of case stated, directly to a four-judge bench of the High Court of Australia which divided equally. Dixon J and McTiernan J each would have allowed the appeal, but the unlucky Burns had the misfortune to have his appeal disposed of by a court presided over by Sir John Latham. Latham, the sponsor of the 1926 amendments to the *Crimes Act*, had pursued a political career in which he had given vent to his visceral anti-communism.<sup>45</sup> It was the Chief Justice's virtual casting vote which, pursuant to s23(2)(b) of the *Judiciary Act* 1903-1948, was the decisive factor in the conviction being sustained.

The claim that the prosecution of Gilbert Burns involved a serious injustice rests on evidence relating to (i) the organisation of the debate, (ii) the interest of the then Commonwealth Investigation Service (CIS) in, and its reaction to, the debate, (iii) the circumstances surrounding the decision of the Acting Attorney-General to give the necessary consent for the prosecution of Burns, (iv) the blatantly discriminatory nature of that prosecution, and (v) the extraneous political and diplomatic uses to which the prosecution was put.

(i) The debate was promoted by the Queensland People's Party ("QPP") which soon after emerged as the Queensland Branch of the Liberal Party. Contemporary newspaper, archival and other evidence indicates that the QPP, with assistance from other anti-communist organisations including the Returned Soldiers Sailors and Airmen's Imperial League of Australia ("RSL") and the Queensland League of Rights organised the debate in order to trap the CPA and prompt criminal charges against it.<sup>46</sup> The QPP openly acknowledged that it had set up the debate to demonstrate that the CPA was a treasonable conspiracy. The careful planning included the formulation of specific questions to be put to the CPA participants and the stationing of a shorthand writer in the hall in which the debate took place.<sup>47</sup> At the time it

43 See generally Curthoys, A and Merritt, J, (eds), *Australia's First Cold War 1945-1953, Communism and Culture* vol 1 (1984), *Better Dead than Red* vol 2 (1986); Bolton, G, *The Oxford History of Australia, Vol 5 1942-1988: The Middle Road* (1990) at 68-78.

44 AA (Queensland) BT 77, Attorney-General's Department, Deputy Crown Solicitor's Office Correspondence Files 1943-1944, Item 17289.

45 Cowen, Z, *Sir John Latham and Other Papers* (1965); Lloyd, C J, "Not Peace But a Sword! — The High Court Under J G Latham" (1987) 11 *Adel LR* 175.

46 AA (Queensland) BT 77, Item 17289; *Daily Telegraph*, 18 September 1948; Interview, J D Killen, 16 September 1988.

47 Letter, Wake to Lloyd, 17 September 1948; Proof of Evidence, Bruce McDonald Wight, undated. AA (ACT), CRS A432, Item 1948/1065. During 1949 the CPA and its sympathisers were repeatedly denied access to municipal venues to stage their political

was a common practice of anti-communist agitators to attend CPA rallies and meetings and to ask questions of CPA speakers designed to demonstrate their disloyalty.<sup>48</sup>

The QPP strategy succeeded brilliantly. During a question period in the debate a QPP and RSL functionary, Bruce Wight, went after Burns relentlessly in an attempt to show that his (and therefore all Australian communists') first, if not only, loyalty was to the Soviet Union. Wight cornered Burns in the following exchange:

WIGHT: We realise the world could become embroiled in a third world war in the immediate future between Soviet Russia and the western powers. In the event of such a war what would be the attitude and actions of the Communist Party in Australia?

BURNS: If Australia was involved in such a war, it would be between Soviet Russia and Imperialism of America and Britain on the other hand. It would be a counter-revolutionary war.

WIGHT (*interjecting*): That isn't an answer to my question! I want a direct answer!

BURNS: All right, we would oppose that war. We would fight on the side of the Soviet Union. That's a direct answer!<sup>49</sup>

Wight got to his feet and, pointing at the hapless Burns, said with obvious satisfaction "That's all I want to know". Burns had fallen into the QPP trap by answering one question too many. Wight and his cohorts in the audience had been ready with their further questions, but in view of the replies received it was decided not to pursue the matter.<sup>50</sup> One of the QPP participants in the debate told the audience that Burns' statement was seditious and "if we had a federal government worthy of the name a man who uttered it would be treated as a traitor".<sup>51</sup>

The conservative political forces, including some within the ALP, were outraged by what Burns had said. According to one newspaper editorial at the time, Burns had "let [the CPA's] cat out of the bag".<sup>52</sup> Here was proof positive that the CPA was an apparatus of treason which was adhering to Australia's enemy in the worsening Cold War, the Soviet Union.

(ii) In the highly charged political environment of late 1948, by which time the "communist menace" had emerged as a major political issue, it would have been unusual had the CIS not been present at the debate. The CPA was being subjected to continued close surveillance.<sup>53</sup> This was the chief task of

meetings. In Melbourne an unsuccessful attempt was made by an official of the Australia-Soviet Union House to obtain injunctive relief to compel the City of Melbourne to allow the use of the Town Hall: *Skerry v City of Melbourne* (unreported, Supreme Court of Victoria, 22 February 1949), *The Argus*, 23 February 1949. City of Melbourne Archives, Files 1949/809, 1949/857, 1949/1025, 1949/1107, 1949/2220.

48 For one especially bizarre example of this stratagem involving that indomitable anti-communist brotherhood, the League of Rights, see AA (ACT) CRS A432, Item 1949/1316.

49 AA, (Queensland) BT77, Item 17289.

50 Letter, Wake to Lloyd, AA (Queensland) CRS A432, Item 1948/1065.

51 *Ibid.*

52 *Brisbane Telegraph* 17 September 1948.

53 See generally Cain, F, *The Origins of Political Surveillance in Australia* (1983).

the CIS. Yet at this time the CIS was itself being subjected to increasing criticism within defence and diplomatic circles in Melbourne and Canberra for its alleged inability to deal effectively with the communist menace, and there was strong pressure on the Chifley Government to establish a specialist internal security agency modelled directly on MI5.<sup>54</sup> It was not surprising therefore that the audience attending the debate in Brisbane included two members of the CIS, Norman Ransley, who later swore out the sedition charge against Burns, and George Edward Sleeth. Also present were two plain clothes members of the Queensland Police engaged in undercover anti-subversive activities.

But, when giving evidence in chief at the summary prosecution of Burns, Ransley said that at the time he attended the debate he was not on duty. In cross-examination he said he attended the meeting at Sleeth's invitation and that he did not think Sleeth had instructions to go to the debate.<sup>55</sup> Ransley's evidence appeared to suggest that he was at the debate as a matter of idle curiosity and the cross-examination of him was far from vigorous. Sleeth was ill at the time of the hearing and was not called to give evidence. Strangely, the defence made no complaint about this. Ransley's evidence at the hearing reveals nothing about his superiors' interest in the debate. It requires a prodigious leap of imagination to accept that Sleeth was also present at the debate out of no more than idle curiosity. There is, however, clear archival evidence that the CIS's interest exceeded any idle curiosity displayed by Ransley. Prior to the hearing, the Deputy Commonwealth Crown Solicitor in Brisbane, A G Bennett, had written to the Commonwealth Crown Solicitor, H F E Whitlam, advising that both Ransley and Sleeth (and the two State policemen) had "attended the meeting for the purposes of reporting same to their respective organizations".<sup>56</sup> If Ransley's ambiguous evidence is disregarded, his conduct following the debate clearly corroborates Bennett's quite different characterisation of the CIS interest in the debate.

Immediately after the debate concluded, Ransley, Sleeth and their two Queensland Police colleagues assembled to discuss their observations and to prepare notes. Such was the diligence of the off-duty Ransley. The following

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54 The pressure was being exerted at the highest levels by the United Kingdom and United States Governments, and by the Australian Department of Defence and Australian service intelligence directorates. See, eg, Transcript of Evidence (In Camera), Brig F O Chilton, 1 November 1954, AA (ACT), CRS A6213, Royal Commission on Espionage — Correspondence Files, Alpha-Numeric Series, Item RCE/Z/7. At the time the Burns case burst into public prominence in September 1948 a small team of MI5 officials were in Australia on a top secret mission advising the Chifley Government on ways of improving security arrangements. News of a review of security leaked (or, what is more likely, was leaked) from within the defence establishment: see eg *The Herald*, 30 September 1948. This, in turn, led Prime Minister Chifley to write to the managing editors of all Australian metropolitan newspapers seeking their cooperation in refraining from publishing any matter with regard to security measures other than that which was supplied through government publicity channels. Letter, Chifley to Norton et al, 6 October 1948, AA (ACT), CRS A5954, Sir Frederick Shedden Papers, Box 850/2. The Chifley Government had been resisting the pressure for an antipodean MI5 throughout most of 1948, but eventually gave in to it and on 2 March 1949 the Prime Minister announced the establishment of the Australian Security Intelligence Organisation. See Cain, *ibid*.

55 Transcript, 12-13. AA (Queensland) BT77, Item 17289.

56 Letter, Bennett to Whitlam, 29 September 1948, *ibid*.

day Ransley and Sleeth reported orally to the CIS Deputy Director in Brisbane. On 17 September 1948 they delivered a detailed report to their superior.<sup>57</sup>

In fact, the Government's security advisers were anxious to see the Burns case used as a part of a more concerted effort to deal with the danger posed by the CPA. The Government's chief civilian security adviser, Colonel E Longfield Lloyd of the CIS, advised Professor K H Bailey, who was both the Secretary of the Attorney-General's Department and Solicitor-General of the Commonwealth, that

The report from Brisbane is of the greatest significance and brings publicly to the surface the Communist objective of complete adherence to a foreign country even in any war in which the British Commonwealth might be involved. *Action is entirely advisable; and the significance of the matter is such that it involves the total organization of the Communist Party in Australia.*<sup>58</sup>

In a situation where the defence and diplomatic establishment regarded the CIS as a collection of amateurs and "flatfeet"<sup>59</sup> in the life and death struggle against communism, there was every reason for Lloyd to proffer this inflated assessment of what had transpired at the debate in order to demonstrate that the CIS was treating the menace of communism seriously.<sup>60</sup> The CIS had a source of information within the Queensland District Committee of the CPA and this enabled the government to obtain information about discussions on how the CPA wanted the defence of Burns conducted. At an early stage of the surveillance the intelligence suggested that the defence of Burns would be vigorous, but at the hearing counsel for Burns made only a rather lame attempt to call into question the role of the QPP in the genesis of the prosecution and the seemingly fortuitous presence of the CIS officers at the debate. Not surprisingly, in the investigation of the case, the CIS received unstinting assistance from Wight and his QPP colleagues.<sup>61</sup>

(iii) Despite the fact that the QPP had set out to trap Burns and the CPA, there was an important safeguard against the abuse or reckless use of the sedition offences in the requirement in s24AC of the *Crimes Act* 1914, that proceedings alleging sedition could not be instituted except by, or with the consent of, the Attorney-General.

In September 1948, the Commonwealth Attorney-General, H V Evatt, was away from Australia at the beginning of his term of office as President of the United Nations General Assembly.<sup>62</sup> The Acting Attorney-General in the Chifley Government, was Senator Nicholas E McKenna of Tasmania.

57 Report, Ransley and Sleeth to Wake, 17 September 1948, id.

58 Letter, Lloyd to Bailey, 20 September 1948. AA (ACT), M1503, Attorney-General's Department, K H Bailey Papers, Item 15, (emphasis added).

59 The uncomplimentary "flatfeet" label was applied by the United States Naval Attache in Melbourne, Commander Stephen Jurika, Jr, USN. Joint Weeka Despatch C-13, Military Attache to Chief of Staff, 15 July 1949. National Archives and Records Administration ("NARA"), Washington, DC. RG 59, Records of the Department of State.

60 The CPA was quick to distance itself from Burns. It informed its members that its policy was not reflected in the statement attributed to Burns. Circular letter, District Committee to Branch Secretaries, 17 September 1948. AA (Queensland) BT 77, Item 17289.

61 AA (Queensland) BT 77, Item 17289.

62 (1948) 19 *Current Notes on International Affairs* 621.

McKenna was advised by A G Bennett, Bailey, A L Bennett, KC, a (if not the) leader of the Brisbane Bar, K C Waugh, an Assistant Crown Solicitor, Whitlam and another of his senior officers, H E Renfree, that Burns had not committed any offence against s24D of the *Crimes Act* 1914.<sup>63</sup>

McKenna discussed the case with Bailey and Whitlam and examined the officers' and A L Bennett's memoranda of advice. He rejected their unanimous advice. Without recording his reasons for the decision, McKenna gave the following instruction to Whitlam:

I think a prosecution under Section 24D should be launched immediately. Unless you see any strong reason against that course there should be a summary prosecution. The accused may of course elect to be tried on indictment.<sup>64</sup>

Why did McKenna consent to the prosecution contrary to all his legal advice? It is possible, of course, that the explanation is that McKenna, who was an able lawyer, regarded his own legal opinion on Burns as superior to that of his advisers. However, the more likely explanation is that he finally exercised his power under s24AC for reasons that had nothing to do with the law and were based instead solely on political expediency. The decision was intended to secure a political advantage for the Commonwealth Government. By making an example of Burns the Chifley Government was able to send a clear message to the Opposition, to the public, and to the CPA that communist "extremism" would not be tolerated.

A decision not to consent to the prosecution of Burns would have intensified the political pressure being exerted on the government. There is no doubt that the government was very concerned about the furore created by what Burns had said especially because of the outrage welling up within the right wing of the government party. The ALP government in Queensland made it clear to Prime Minister Chifley that it wanted Burns charged.<sup>65</sup> Despite the conservative parties' shrill claim that the ALP was soft on communism, there was, in fact, deep animosity between the ALP and the CPA at the time and the ALP had repudiated any suggestion that there could be common cause between it and the CPA.<sup>66</sup> McKenna, who professed strong anti-communist convictions and was associated with the right wing of his party and sympathetic anti-communist forces outside it,<sup>67</sup> discussed the case with Chifley before making his decision.<sup>68</sup>

An Attorney-General concerned to ensure that his authority to initiate prosecutions was exercised in a principled and fair way should have been

63 AA (Queensland) BT 77, Item 17289.

64 McKenna, Handwritten Instruction on Memorandum, Waugh to Bailey, 22 September 1948. AA (ACT) CRS A432, Item 1948/1065.

65 Letter, Gair to Chifley, 23 September 1948. AA (ACT), CRS A461/1, Prime Minister's Department, Correspondence Files, Multiple Number Series (Third System) 1934-1950, Item K327/1/4.

66 In September 1948 the Federal Conference of the ALP reiterated its repudiation of the CPA. See Burgmann, M, "Dress Rehearsal for the Cold War" in Curthoys, A and Merritt, J, above n42, vol 1.

67 See, eg, Henderson, G, *Mr Santamaria and the Bishops* (1980) at 74-75.

68 AA (Queensland) BT 77, Item 17289. Commonwealth, *Parliamentary Debates* (House of Representatives) 16 September 1948, 512, 22 September 1948, 688, 711, 798, 885, (Senate), 23 September 1948 at 760-761.

alerted to the entrapment involved in the Burns case and should have focused on the hypothetical and innocuous nature of what Burns had said. At least on the latter element all the government's senior legal advisers spoke with a single voice. Burns was entitled to the Attorney-General's protection. Instead, he was victimised by the acting first law officer.

The day after McKenna decided to consent to the prosecution of Burns, Renfree and Whitlam made telephone calls to A G Bennett and informed him of McKenna's instruction. Bennett recorded those telephone discussions in the following terms:

Renfree informs me Mr Whitlam phoned Wednesday afternoon and instructed him obtain counsel's opinion re Burns matter. Renfree obtained opinion Arnold Bennett, KC who confirmed my opinion and advised against prosecution. This communicated Canberra Wednesday afternoon. Mr Whitlam phoned me 10.30 a.m. with instructions to prosecute Burns under Section 24D. I was to lay as many charges as possible to make the case as "big" as possible. He said he realised the legal position but circumstances were such that case "must" go on. Desired prosecution be instituted as soon as possible.<sup>69</sup>

This candid acknowledgment of the political purpose of the prosecution makes it easy to appreciate why McKenna did not favour the Parliament with a detailed explanation of why he consented to the prosecution.

McKenna followed a similar path in two later cases involving the CPA. Laurence Louis ("Lance") Sharkey, the General Secretary of the CPA, met a similar fate. In March 1949 a journalist from the Sydney *Daily Telegraph* asked Sharkey to comment on a statement attributed to the French Communist Party leader, Maurice Thorez, in which Thorez had claimed that, in the event of Soviet troops entering France in pursuit of an aggressor, the French working class would side with the Soviet forces. Sharkey had been asked what the attitude of Australian Communists to the Thorez statement was and after several telephone conversations with the journalist had provided for publication a statement in which he said that, in the highly unlikely event of Soviet forces entering Australia in pursuit of an aggressor, "Australian workers would welcome Soviet Forces pursuing aggressors as the workers

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69 Handwritten memorandum (undated), AA (Queensland) BT77, Item 17289 (italic emphasis supplied, underlined in original). There is no reason to suspect that the decision to prosecute Burns was, in reality, Whitlam's. All the indicators point to McKenna. According to his son, Whitlam was a true public servant in the traditional Westminster sense and would have loyally carried out his Minister's instructions. The son also suggested that McKenna was much more decisive in this type of situation than H V Evatt. Telephone Interview, E G Whitlam, 8 February 1988. There is evidence which suggests that Evatt may have been concerned about the decision to prosecute Burns and some reason to believe that he would not have consented to any of these prosecutions. In mid-1949, at the time of the hearing of Burns's High Court appeal, Renfree requested a report on the genesis of the Burns prosecution. It is difficult to believe that Renfree sought this report for his own benefit since he had been directly involved in the process which led to Burns being prosecuted. Whatever the reason(s) for seeking this report may have been, it is notable that the detailed report prepared by A G Bennett contained no mention of Whitlam's pungent reference to the political nature of the decision to prosecute Burns or his instruction to Bennett "to lay as many charges as possible" and "to make the case as 'big' as possible". Letter, Bennett to Renfree, 16 June 1949, *Ibid*.

welcomed them throughout Europe when the Red troops liberated the people from the power of the Nazis".

Sharkey's remarks appeared the following day on the front page of the *Sydney Daily Telegraph* under the highly suggestive abbreviated headline "Reds Welcome" and were reported widely in newspapers and on radio throughout Australia. Again, uproar and indignation ensued. Again, the government tried to salvage its political position in the face of damaging criticism that it was "soft" on communism. Again, Evatt was absent from Australia because of his position as President of the UN General Assembly and as Minister for External Affairs and, again, it was Acting Attorney-General McKenna who gave the necessary consent for the prosecution.<sup>70</sup> By this time McKenna at least had the unexpected conviction of Burns on which to rely on in order to give some semblance of legal respectability to his consent to Sharkey's prosecution. There were some similarities between the two cases. Like Burns, Sharkey had been pressed to provide a response to a hypothetical question. But Sharkey's case was to some extent different. In its use of the term "welcome" it was less charged than Burns' "fight". Sharkey's remark was not made on a public occasion. It was the editor of *Daily Telegraph* and other media who chose to publicise Sharkey's statement. However, these were not differences which were likely to cause McKenna to treat Sharkey differently. Politically, Sharkey, as leader of the CPA, was a much more desirable target than Burns.

In the five months since Burns was convicted anti-communist and Cold War hysteria had intensified. To his lasting credit, Chifley resolutely resisted all attempts, including those emanating from within his own party, to bully him into proscribing the CPA. He continued his government's ad hoc approach to dealing with the "threat", such as it was, posed by the CPA, an approach which began with the enactment of the *Approved Defence Projects Protection Act* 1947.<sup>71</sup> With Evatt away, Chifley was no less at ease relying on McKenna to provide advice as the first law officer. There is nothing at all in the way the government acted in response to the furore created by publication of Sharkey's views to support the conclusion that on this latter occasion McKenna changed his approach and altogether put out of his mind the political considerations which generated his decision to prosecute Burns.

Sharkey was convicted and sentenced to the maximum penalty of three years at hard labour, later reduced on appeal to the New South Wales Court of Criminal Appeal to 18 months.<sup>72</sup> Unlike Burns, Sharkey had elected to be tried before a jury. In sentencing him, Dwyer J made it plain that he thought Sharkey was a traitor and that a severer sentence would have been appropriate.<sup>73</sup> Again, the High Court upheld the conviction. On this occasion only Dixon J dissented indicating that he regarded the specification of seditious intention in s24A(g) as beyond the legislative competence of the

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70 AA (ACT) CRS A432, Item 1949/308.

71 Evatt, H V, *Hands Off Australia's Defences* (1947). AA (ACT) CRS A432, Item 1947/678, Item 1947/967. Morton, P, *Fire Across the Desert: Woomera and the Anglo-Australian Joint Project 1946-1980* (1989) at 120-121.

72 *Sharkey v R* (Unreported, Court of Criminal Appeal, 24 February 1950). AA (ACT) CRS A432, Item 1949/308.

73 Sentencing Remarks, 17 October 1949. *Ibid.*



Commonwealth Parliament. But, even so, Dixon would have sent Sharkey back for a new trial.<sup>74</sup>

Also in March 1949, Kevin Martin Healy, the State President of the CPA in Western Australia, in response to a local press invitation, issued a press statement agreeing with Sharkey's expression of opinion. McKenna was nothing if not consistent when it came to applying the heat to the CPA and readily consented to the prosecution of Healy.<sup>75</sup> Healy's trial on 1 November 1949 had been delayed throughout 1949 pending the outcome of the High Court appeals in the Burns and Sharkey cases. Partly because he was unable to secure adequate legal representation in Perth and partly because the CPA was rocked by Sharkey's conviction and sentence, Healy decided to defend himself.<sup>76</sup> Chief Justice Sir John Dwyer (no relation of the judge who a fortnight before had sentenced Sharkey in Sydney) allowed Healy to conduct his defence from the bar table rather than from the dock, and otherwise gave Healy a free hand in making an unsworn statement to sway the jury by pointing to the essentially political nature of the prosecution. The jury returned from its deliberations and indicated that it had a doubt about the prosecution's case. Healy was acquitted.

(iv) In each of these three cases the Chifley Government adopted a strong public stance that it was doing no more than enforcing the criminal law against individual offenders rather than attacking the CPA. At Sharkey's committal hearing his counsel suggested that Sharkey was being victimised. This prompted the following declaration from leading counsel for the prosecution:

Let me say here and now that the Crown has no desire or intention to depart from the well known principles of British justice handed down through the centuries which justice is available to all men under the Crown and to all classes of men and that attitude will be maintained in this prosecution which is a prosecution against an individual and not against any class of individual.<sup>77</sup>

In his opening the prosecutor let slip that what Sharkey had said revealed certain aims of the CPA, but again hastened to assure the court that the prosecution was not directed against the CPA.<sup>78</sup> These statements by the prosecution were all false, and hypocritical in the extreme.

The intensity of Australian political debate in the early Cold War period was such that, had the Commonwealth and State authorities enforced the law of sedition consistently, the courts would not have been equipped to cope with the avalanche of sedition prosecutions that would have ensued. The public political discourse of the time was saturated with "sedition" of the kind that Burns, Sharkey and Healy were made to answer for. A cursory reading of daily newspapers in the years 1947-1949 or the literature produced by all political parties reveals countless examples of inflammatory speech and expressive conduct which clearly fell within the harsh sedition provisions of

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74 (1949) 79 CLR 121 at 156.

75 AA (WA) PP 352/1, Item WA 4164.

76 Interview, K M Healy, 29 November 1987; K M Healy Papers, copies in writer's possession.

77 Depositions at 5. AA, (ACT) CRS A432, Item 1949/308.

78 Id at 12.

the *Crimes Act* 1914.<sup>79</sup> Yet, in an environment in which inflammatory political speech was commonplace, no sedition prosecutions were brought against any of the CPA's equally determined and ruthless opponents on the far right of the political spectrum. If the government had been genuinely concerned to protect public order, it would not have singled the CPA out for punitive treatment the way it did.

Soon after McKenna consented to the Sharkey prosecution he received a letter from CPA President Richard Dixon complaining about a front page editorial entitled "Why Waste Police on Muscovies" in the *Eastern Suburbs Advertiser* in Sydney. The editorial ended on a stirring note:

These big-mouth Reds can run all right! Oh, yes! But why waste good police manpower on such non-descripts? We know a lot of citizens who would slit every Commo's throat on sight. And these citizens wouldn't bother offering the Commo's blood to the Blood Bank on the grounds that the content of most Commo bodies are all yellow — fit only for transfusion to the dingoes outback.<sup>80</sup>

Dixon reminded McKenna that Sharkey was accused of promoting feelings of ill will and hostility among different classes of His Majesty's subjects, a reference to the definition of seditious intention in s24A(g) of the *Crimes Act* 1914. Dixon suggested that, in the interests of consistent law enforcement, McKenna should apply the same law against the newspaper. The Attorney-General's Department prepared a reply for McKenna informing Dixon that the editorial did not incite the commission of any offence against any law of the Commonwealth and that no action would be taken. This was quite unconvincing and ignored the terms of s24A(g). If the *Eastern Suburbs Advertiser* editor's remarks about the treatment that should be visited upon communists did not involve incitement to the commission of any offence, then there was far less of a case against Burns, Sharkey and Healy for their hypothetical outpourings. McKenna, whose performance as Acting Attorney-General in all these cases was deplorable, was persuaded by an adviser not to reply at all because "Dixon is sure to publish [and] criticise any reply you may send him".<sup>81</sup>

(v) In fact, as Lloyd's candid assessment of the Burns case to Bailey clearly indicated,<sup>82</sup> the government's reactions in these three cases were part of the overall political struggle of the time which, for example, saw the Chifley Government crush the CPA-inspired coal strike in June-August

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79 Apart from the vitriolic slanging which characterised public discourse, there was both clandestine and open conduct aimed at silencing the CPA as a political force. For brief details of the organised semi-official clandestine activities see Moore, A, *The Secret Army and the Premier* (1989), Epilogue; Hetherington, J, *Blamey: Controversial Soldier* (1973) at 389-92. Throughout Australia in 1949, CPA public meetings were regularly disrupted or broken up by excited anti-communist agitators. Shortly after Sharkey's statement was published a large crowd estimated at 1500 attacked CPA speakers at a public meeting in Bourke, New South Wales. Driven from their platform by the vigilantes, the unpopular speakers had to seek sanctuary inside the Bourke Police Station, *The Argus* 10 March 1949. This writer has been unable to locate any record of a prosecution of an individual involved in the disruptive anti-communist activities of this period.

80 *Eastern Suburbs Advertiser*, 31 March 1949.

81 AA (ACT), CRS A432, Item 1949/379.

82 Above n57.

1949<sup>83</sup> and take a variety of other measures in 1948-49 to strengthen Australia's internal security apparatus in the face of increasing anxiety about communist disruption of Australia's industry and defence preparedness.

In 1948 and 1949 substantial pressure was exerted on the Australian Government by the Governments of both the United Kingdom and the United States of America "to get tough with" the CPA.<sup>84</sup> In Washington in mid-1949 on a one-man mission to improve the severely strained relationship between Australia, the United States and the United Kingdom, Sir Frederick Shedden, the powerful Secretary of the Australian Department of Defence, made as much as he could of the prosecutions of Burns, Sharkey and Healy as one important indication of the Chifley Government's anti-communist resolve.<sup>85</sup> This flatly contradicted the repeated claims which the prosecuting counsel had made that there was nothing systematic about the cases and that they were merely directed at individuals. It is a measure of the anti-communist hysteria generated at the time and its impact on the workings of the highest levels of government that Shedden felt it necessary to acknowledge concern that some high officials in the US Government believed not merely that the Australian Government was "soft" on communism, but also that members of the Chifley Ministry were, in fact, Communists. The US Ambassador and Charge d'Affaires in Canberra could scarcely believe their ears when Shedden volunteered this observation in a meeting with them in Canberra on 20 October 1949 following his return from Washington and London.<sup>86</sup>

The Chifley Government was defeated at the polls on 10 December 1949 following an election campaign in which the Opposition led by R G Menzies persistently and cleverly exploited the prevailing anti-communist hysteria. The message of the successful Burns and Sharkey prosecutions was not lost on the new Government. Menzies, of course, was more intent on honouring one of his main policy speech promises by securing passage of the Communist Party Dissolution Bill.<sup>87</sup> However, every weapon that could be used against the CPA was wheeled out by the new government. What is not so well known or remembered is that the Menzies Government used the law

83 *National Emergency (Coal Strike) Act 1949*; AA (ACT) CRS A432, Item 1949/654; *R v Taylor*; *Ex parte Federated Ironworkers' Association of Australia* (1949) 79 CLR 333. Starghardt, A W, (ed), *Things Worth Fighting For: Speeches by Joseph Benedict Chifley* (1953 edn), 66-70; Sheridan, T, *Division of Labour: Industrial Relations in the Chifley Years 1945-1949* (1989) ch 12. The ALP Government in New South Wales secured the passage of the *Emergency Powers Act 1949*.

84 See generally Cain, F, "Missiles and Mistrust: US Intelligence Responses to British and Australian Missile Research" (1988) 3 *Intelligence and National Security* 5; Cain, F, "An Aspect of Post-War Australian Relations with the United Kingdom and the United States: Missiles, Spies and Disharmony" (1989) 23 *Aust Historical Studies* 186; Cain, F, "ASIO and the Australian Labour Movement — An Historical Perspective" *Labour History* No 59 (May 1989), 1.

85 Letter, Shedden to Secretary of the Army Gray, 18 July 1949 and attached Notes on Section 3 of United States Army Circular No. 100 (From the Aspect of Comparable Legislation in Australia). AA (ACT), CRS A5954, Box 1795. The Notes which Shedden supplied to Gray referred to the sedition prosecutions in 1948/1949 and mistakenly claimed that Kevin Healy had been recently *convicted* of sedition.

86 NARA RG 59, Despatch No 115, Jarman to Acheson, 21 October 1949, 847.20/10-2149.

87 Cain, F & Farrell, F, "Menzies' War on the Communist Party of Australia, 1949-1951" in Curthoys, A and Merritt, J, above n42 (vol 1) at 109.

of sedition with the same vigour and lack of principle as had McKenna on behalf of the Chifley Government.

The invasion of South Korea by North Korean forces on 25 June 1950 and the ensuing UN Security Council-sanctioned operation to which Australia committed military forces led to the next Cold War case. Another CPA functionary, William Fardon Burns, found himself in trouble for expressing opposition to Australia's involvement in the Korean War in the words "Not a man, not a ship, not a plane and not a gun for the aggressive imperialised war in Korea" for which he was convicted on a charge of uttering seditious words and sentenced to six months imprisonment.<sup>88</sup>

In 1950 and 1951 the resources of the Attorney-General's Department were regularly resorted to for advice on whether individual CPA outbursts were seditious. A significant amount of taxpayers' money was spent spying on CPA functionaries and people on the far left and in obtaining high level legal advice in an attempt to stem the tide of disagreeable CPA propaganda. This kept the CIS and ASIO and their eager civilian supporters active in snooping about CPA haunts. In one case an intrepid sleuth spotted a piece of allegedly seditious doggerel displayed in the window of the International Bookshop in Melbourne. This was duly reported to the highest levels and the Attorney-General's Department was asked whether a prosecution could be brought.<sup>89</sup> In another episode in Brisbane in 1950 Commonwealth security officers monitored the vocal appeals of street vendors of a CPA newspaper and sought the Attorney-General's Department's opinion on these allegedly seditious outpourings.<sup>90</sup> There were at this time several similar cases brought to the attention of the Attorney-General's Department particularly by the CIS, but it appears that, largely due to the advice of K H Bailey and related uncertainty caused by a pending appeal brought by W F Burns, prosecutions were not instituted.<sup>91</sup> However, the fact that the Government decided not to launch more sedition prosecutions should not obscure the fact that the Government's message was otherwise announced loudly and clearly — express "extreme" left wing political opinions and risk being sent to prison.

The high point of the abuse of the law of sedition in Australia occurred in 1953. By then, following the narrow defeat of the anti-communist referendum proposal in September 1951,<sup>92</sup> the Menzies Government had given up on its policy of outlawing the CPA. However, it was pursuing the CPA, which it continued to regard as a subversive organisation, with undiminished vigour.

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88 AA (ACT), CRS A432, Item 1963/362.

89 AA (ACT), CRS A432, Item 1950/1553.

90 AA (ACT), CRS A432, Item 1950/1411.

91 See, eg, AA (ACT) CRS A432, Item 1950/1321, Item 1950/1441, Item 1950/1553, Item 1950/1621, 1950/1830, 1950/1857, Item 1951/283, Item 1951/1224, Item 1951/1232, Item 1953/2483.

92 Webb, L C, *Communism and Democracy in Australia: A Survey of the 1951 Referendum* (1954); Kirby, M D, "H V Evatt, The Anti-Communist Referendum and Liberty in Australia", (1991) 7 *ABR* 93; Winterton, G, "The Significance of the Communist Party Case", Paper presented at the Evatt Foundation Conference on The Communist Party Dissolution Act and Referendum 1951: Lessons for Constitutional Reform, The University of Sydney, 31 August 1951.

Herbert Bovyll Chandler and Adam Ogston were highly placed CPA officials. Chandler was registered as the publisher of the *Communist Review*, the organ of theory and practice of the CPA. He had been spied upon by Commonwealth and State security agencies for many years.<sup>93</sup> James Bone was the printer of the *Communist Review*.

In its issue dated June 1953 the *Communist Review* featured an article entitled "The 'Democratic' Monarchy". The author of the article was identified only by the initials "RC". The article, which was prompted by the coronation that month of Queen Elizabeth the Second, unflatteringly chronicled various changes in European royalty in the nineteenth century. In particular, it traced the ancestry of Prince Philip of Greece and Denmark upon whom had been bestowed the title Duke of Edinburgh prior to his marriage to the then Princess Elizabeth in 1947. The article referred to members of the English Royal Household and described the Royal circle as made up of people "whose background, origins, birth and connections are big business and profits, reactionary politics, opposition to social change and anti-working class."

The author denounced the monarchy as an enemy of the working class:

There is not and cannot be anything in common between the ordinary people and the monarchy which, as a social institution, is a close preserve of the ruling class and as a political institution a bulwark of conservatism against social change. The monarchy is a useful weapon to protect the system, to stifle class consciousness, foster working class collaboration and paralyse working class action for social change. That too is the aim of the Coronation.

The article by "RC" was regarded as a particularly heinous seditious libel by the Menzies Government. ASIO Director-General, Colonel C C F Spry, promptly sought advice from the Acting Solicitor-General, J Q Ewens. Ewens was convinced that the article was seditious and that those responsible for it should be prosecuted.<sup>94</sup> J W Shand, QC and H J H Henschman of the New South Wales Bar were consulted and advised that the article as a whole was seditious. W F Burns was registered as proprietor and publisher of the *Communist Review* under the *Newspapers Act 1898* (NSW). In relation to Burns, Shand and Henschman observed that:

from the evidence adduced the last time he was prosecuted [ie in 1950] it clearly appeared that he was not actively engaged in the publication of the paper and to proceed against him may detract from the seriousness of these offences.<sup>95</sup>

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- 93 For sanitised versions of part of the intelligence generated by the long surveillance of Chandler see AA (ACT) CRS A6119/2, Australian Security Intelligence Organisation, Personal Files, Alpha-Numeric Series, Items 71-75. Ogston came close to being charged with sedition in September 1950 following publication of propaganda material like that which led to the prosecution of W F Burns earlier that year. AA (ACT) CRS A432, Item 1950/1621.
- 94 Memorandum, Ewens, July 1953; Memorandum, Spry to Whitrod, 8 July 1953, AA (ACT) CRS A432, Item 1953/734.
- 95 Joint Memorandum of Advice, Shand and Henschman to Crown Solicitor, 23 July 1953. Ibid (emphasis added).

So confident was Ewens that a conviction would be secured that he advised his political masters that he thought it was unlikely that a sentence of more than twelve months imprisonment would be imposed.<sup>96</sup>

On any view, the article by "RC" was innocuous. By the standards of CPA propaganda it was remarkably muted. No doubt it had the potential to upset some readers, notably Colonel Spry and his officers and the fiercely Anglophile Prime Minister Menzies, but otherwise the highly esoteric *Communist Review* was far from being a journal that was in a position to prompt civil unrest.

These three cases were fought far more vigorously than those of Sharkey and Gilbert Burns. The defence counsel, L Badham, QC, F W Paterson and G T A Sullivan, rightly heaped scorn and derision on the Informant's case.<sup>97</sup> After a hearing lasting six days, all charges were dismissed with costs. This may have disappointed Menzies, but the expenditure of taxpayers' money on the investigation of the case yielded other benefits in the overall scheme of the government's program to keep the CPA in check.

The allegation that a sedition offence under s24D of the *Crimes Act* had been committed enabled the Commonwealth to obtain search warrants in order to conduct highly organised raids on CPA offices and the offices and homes of CPA officials throughout the Sydney metropolitan area. CPA offices had been raided on several occasions since mid-1949 (although not in the context of the Burns, Sharkey or Healy prosecutions) and on each occasion ASIO and the CIS came away with large quantities of CPA records. The publication of the *Communist Review* article gave the Commonwealth a further opportunity to obtain search warrants to launch a fishing expedition which was not confined to locating evidence relating to the offences said to have been committed by the printing and publishing of the offending article. One of the express purposes was to obtain information generally about CPA membership. Another was to obtain evidence pertaining to a pending industrial dispute.<sup>98</sup>

ASIO was convinced that elements within the highest echelons of the CPA were implicated in Soviet espionage in Australia. At the time of publication of the *Communist Review* article, ASIO was still pursuing espionage investigations that had their origins in 1948 and which had prompted the establishment of ASIO.<sup>99</sup> By mid-1953 ASIO was also intensely interested in the activities of the Third Secretary at the Soviet Embassy in Canberra,

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96 Memorandum, Ewens to Spicer, 24 July 1953. Spicer agreed with Ewens and authorised a summary prosecution. Memorandum, Ewens to Bennett, 27 July 1953. *Ibid.*

97 There was apprehension on the part of the Commonwealth's legal advisers that the defendants might endeavour to probe ASIO's involvement in the case. Prime Minister Menzies signed a certificate claiming crown privilege so as to prevent the defendants seeking to compel answers "to any questions relating to the activities, duties, functions, operations, instructions or organization of the Australian Security Intelligence Organization", the objection being that disclosure of such matters would be injurious to the public interest. Memorandum, Bell to Ewens, 8 August 1953; Menzies, Certificate, August 1953, *ibid.* The prosecution did not have occasion to seek to rely on the certificate.

98 Notes on Alleged Seditious Article in "Communist Review" July 1953. *Ibid.*

99 See Maher, L W, "Sounds Dreadful: Broadcasting Regulation, Communism and the Early Cold War in Australia" (1991) 18 *MULR* 368 at 390-91.

Vladimir Petrov, whose name was soon to pass into Australian history. The ASIO appetite for intelligence concerning the CPA was insatiable and since the CPA was regarded as a criminal conspiracy which threatened national security there were no effective limits on ASIO's power to harass the CPA.<sup>100</sup>

The archival records of the 1953 sedition case and the archival records and the *Report of the [Petrov] Royal Commission on Espionage* indicate that ASIO and the CIS hit the investigative jackpot when ASIO-related information and excerpts from the secret personal diary of External Affairs Minister R G Casey dating from October and November 1952 were located in the raid at Chandler's home on 17 July 1953 following publication of the *Communist Review* article.<sup>101</sup> Chandler denied all knowledge of the ASIO-related information and the Casey diary extracts. The Royal Commission did not accept Chandler's denials, but still produced an equivocal finding on this aspect of its inquiry and no charges were brought against Chandler. Even so, the whole episode helped reinforce the government's claim that the CPA was, in essence, an active part of the worldwide Soviet espionage and subversion network.<sup>102</sup>

What needs to be emphasised is that in none of the sedition cases in the period 1948-53 was there any evidence of an actual (that is, subjective) seditious intention of the types referred to in s24A of the *Crimes Act* 1914. Nor was there the slightest shred of evidence that the words used by any of the defendants were intended to provoke violence or public disorder or that the words in fact created any immediate threat of that kind. Of course, they provoked heated public debate — one of the characteristics of an open society and the best antidote to supposedly poisonous anti-social ideas as supporters of the clear and present danger rule in the US had been saying for three decades. However, in each case the law of sedition was used to punish individual left-wing non-conformists for precipitating those debates. In each case the real target was the CPA and it suited the political convenience of the Chifley and Menzies Governments to exploit the opportunities that these cases presented in their respective campaigns against the CPA.

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- 100 At the time ASIO was operating pursuant to a very elastic charter which described its task as "the defence of the Commonwealth and its Territories from external and internal dangers arising from attempts at espionage and sabotage, or from actions of persons and organizations, whether directed from within or without the country, which may be judged to be subversive of the security of Australia". Charter of the Australian Security Intelligence Organisation, 6 July 1950, para 5, reproduced in Commonwealth, *Fourth Report of the Royal Commission on Intelligence and Security* (1977) vol 1 (Parl Pap 1977/248), App 4-B. See generally, Hanks, P, "National Security — A Political Concept" (1988) 14 *Mon LR* 114.
- 101 Report, L E Watson, 17 July 1953, Memorandum, E O Redford and J Gilmour to G R Richards, 30 July 1954, Statement, E O Redford, 1 December 1954, Statement, L E Watson, 3 December 1954. AA (ACT) CRS A6119/XR1, Item 77.
- 102 Commonwealth, *Report of the Royal Commission on Espionage* (1955) (Parl Pap 1955/113), paras 846-851; For an account of the events surrounding the raid on Chandler's home which accepts the ASIO perspective uncritically see Manne, R, *The Petrov Affair: Politics and Espionage* (1987) at 198-201. ASIO considered that Chandler was the chief security officer (a role which included acting as the chief conduit for the passage of information to the USSR) of the CPA. Letter, Spry to Menzies, 31 July 1953, AA (ACT) CRS A6119/XR1, Item 19.

Today, only the most incorrigible supporter of the anti-Communist cause would be likely to deny that by being prosecuted Gilbert Burns, Sharkey, Healy, W F Burns, Chandler, Ogston and Bone were unjustly treated, or to deny that those among them who served prison sentences were the victims of even greater injustice. Such was the grip that anti-communism exercised on the public imagination that at the time there were very few outside the CPA, and especially few in the legal profession, who were prepared to attack the bipartisan use of sedition to punish dissident speech for political advantage. One of the few voices raised in opposition was that of the then Australian Council for Civil Liberties. In a pamphlet distributed in 1950 the Council drew attention to the manifestly inconsistent results produced in the three 1948-49 cases. It described the miscarriage of justice in the following terms:

If Sharkey was guilty, as the trial judge clearly indicated he believed, and the jury found, surely Healy was guilty in a greater degree, inasmuch as he volunteered his wholehearted approval of what Sharkey had said; and if Healy was innocent, as the jury in his case found after a very brief summing up by the trial judge, then surely Sharkey was wrongly convicted. Again, if Sharkey was appropriately punished by three years' imprisonment for telling a reporter that in an event which he considered unlikely "Australian workers would *welcome* Soviet forces", then the punishment imposed upon Burns was inadequate, for he said, "... we would *fight* on the side of Soviet Russia".<sup>103</sup>

The injustice perpetrated in the cases in 1948-1953 was reinforced by the widespread reporting of the allegedly seditious statements. The statutory code of sedition was harsh in two ways. First, as regards the *actus reus*, the code was not limited to proscribing conduct that posed an actual or imminent danger to public order. Secondly, unlike the common law offence, the *mens rea* element could be satisfied by a showing of an objective seditious intention. In Sharkey's case, the essence of the offence was his carefully prepared statement to the *Daily Telegraph* journalist. If the objective bad tendency of Sharkey's statement to bring about, at some unspecified future date, one or more of the outcomes referred to in s24A was deserving of punishment, then what responsibility should attach to the decision of the *Daily Telegraph* to publish the full text of Sharkey's statement on the front page and the decision of other media organisations around Australia to give it and the statements of Burns and Healy similar prominence? It could be no answer by those media organisations to assert that they lacked an actual seditious intention. They must be presumed to have published the material honestly believing that they were not thereby inciting violence or disorder. However, there was never any suggestion that the media organisations responsible for publishing Sharkey's statement or those of Gilbert Burns, or Kevin Healy or W F Burns should be prosecuted for seditious libel. It would be tempting to laugh off the absurdity of a law enforcement process which generated the widespread publication of the allegedly unlawful seditious material were it not for the fact that it sent CPA dissidents to prison.

In the Chandler, Ogston and Bone cases in 1953 a similar situation arose when, without any real fear of prosecution, *The Sydney Morning Herald*

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103 The Australian Council of Civil Liberties, *A Public Remonstrance* (1950) at 11-12. Watson, D, *Brian Fitzpatrick: A Radical Life* (1979) ch 9 (emphasis in original).



published the full text of the *Communist Review* article following the initiation of the prosecution. This was too much even for some of the Chifley Government's most vehement anti-communists. One of these, A A Calwell, complained bitterly to the Commonwealth Attorney-General, J A Spicer, about the absurdity and injustice involved in the prosecution of Chandler, Bone and Ogston, but Spicer brushed the criticism aside and blandly replied that the newspaper was free to publish an accurate report of the case including the full text of the offending article which was set out in the details of the charge.<sup>104</sup>

At the time even the most temperate criticism of the government was regarded as suspicious. On 15 September 1953 the *Melbourne Herald* reported that the federal cabinet had asked the Attorney-General to submit proposals for strengthening the laws against sedition, sabotage and threats to national security. This prompted one reader of the article to write to Attorney-General Spicer arguing against such proposals and the existing provisions of the *Crimes Act*. This innocuous expression of opinion resulted in the letter being sent to ASIO Director-General Spry for attention.<sup>105</sup>

#### 4. Reform Proposals

Apart from the fortuitous consideration of the law of sedition by the Royal Commission on Australia's Security and Intelligence Agencies, there was little reason to expect much attention to be paid to sedition after Australia had emerged from the anti-communist hysteria which was so much a part of the politics of the first three decades of the Cold War.<sup>106</sup> However, over the last 15 years some attention has been focused on the law of sedition in the context of separate inquiries into proposed codification of the entire criminal law in the United Kingdom, Canada, New Zealand and Australia. In 1977 the Law Commission in England expressed the provisional view that there was no need for an offence of sedition.<sup>107</sup>

The latest suggestion is that contained in the *Fifth Interim Report* of the Committee of Review of Commonwealth Criminal Law ("the Review Committee") which was tabled in the Commonwealth Parliament on 21 June 1991.<sup>108</sup> The Review Committee had earlier expressed a provisional opinion<sup>109</sup> that a limited offence of sedition needed to be retained and that, as ss24A-24F of the *Crimes Act* 1914 are expressed in archaic form, the relevant provisions should be rewritten in more simple terms despite the amendments

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- 104 Letter, Calwell to Spicer, 8 August 1953, Letter, Spicer to Calwell, 9 September 1953. AA (ACT) CRS A432, Item 1953/2506. Following the dismissal of the charges *The Sydney Morning Herald* in its issue dated 19 September 1953 described the prosecution as "stupid" and a threat to freedom of expression in Australia.
- 105 Letter, K Turnbull to Spicer, 15 September 1953. AA (ACT) CRS A432, Item 1953/2540.
- 106 See Curthoys, A, and Merritt, J, above n42.
- 107 United Kingdom, The Law Commission, Working Paper No 72, *Codification of the Criminal Law, Treason, Sedition and Allied Offences* at para 78. See Leigh, L H, "Law Reform and the Law of Treason and Sedition" [1977] *Public Law* 128.
- 108 Commonwealth, *Parliamentary Debates* (House of Representatives) 21 June 1991, 5221. Goode, M, "Codification of the Australian Criminal Law" (1992) 16 *Crim LJ* 5.
- 109 Review of Commonwealth Criminal Law, Discussion Paper No 8, *Offences Relating to the Security and Defence of the Commonwealth*, February 1988 at 14-17.

effected in 1986. In its *Fifth Interim Report* the Committee made the following recommendation in line with its earlier provisional view:

*Clearly, it should be an offence to incite the overthrow or supplanting by force or violence of the Constitution or the established Government of the Commonwealth or the lawful authority of that Government in respect of the whole or part of its territory. Indeed, the offence should, in the opinion of the Review Committee, extend to the associated matter of inciting to the use of force or violence with a view to interfering with the lawful processes for Parliamentary elections, the essence of a democratic society.*<sup>110</sup>

The Review Committee has therefore recommended the repeal of ss24-28 of the *Crimes Act 1914* and the creation of the following new offence:

Inciting treason, interference with elections or racial violence

28 (1) A person must not, by any means:

- (a) incite another person to overthrow, or supplant by force or violence:
  - (i) the Constitution; or
  - (ii) the government of the Commonwealth; or
  - (iii) the lawful authority of the government of the Commonwealth in respect of the whole or part of its territory; or
- (b) incite another person to interfere by force or violence with Parliamentary elections; or
- (c) incite the use of force or violence by one group within the Australian community, whether distinguished by nationality, race or religion, against another group within the Australian community.

Penalty: Imprisonment for seven years.

- (2) An expression in good faith of dissent from a decision of a government is not to be regarded as an incitement referred to in subsection (1).<sup>111</sup>

There is almost complete agreement in the common law jurisdictions that sedition should be made obsolete. The recommendation in the Review Committee's *Fifth Interim Report* stands out on its own. Curiously, neither the Review Committee's Discussion Paper No 8 nor its *Fifth Interim Report* has much to say about the desirability of retaining the law of sedition in some form. There is no consideration of the history of sedition prosecutions. Nor is there any identification or discussion of issues affecting freedom of expression or arguments in favour of abolition of the sedition offences. In this respect the Review Committee's approach to what is an issue affecting fundamental questions of liberty is profoundly disappointing and inadequate.

The Review Committee was altogether too restrained in referring to the archaic form of the existing legislation. The language of ss24A-24F is incurably obscure. The real boundaries of the offence are impossible to determine with any degree of certainty. Although the 1986 Act went part of the way towards relieving the harshness of the High Court's decisions in *Burns v Ransley* and *R v Sharkey*, the requirement that the prosecution prove that the accused's conduct was accompanied by an "intention of causing

110 *Fifth Interim Report* at para 32.15 (emphasis supplied).

111 Appendix, Draft Bill.

violence or creating public disorder or a public disturbance" is wholly unsatisfactory and the *Crimes Act* offences still inhibit freedom of expression to a much greater degree than the surviving common law offence.

Whether it is sufficient that there be an intention to cause violence at some unspecified future time or whether there must be proof of intention to cause immediate violence is unclear. As regards the vague concepts of "public disorder" and "public disturbance", the 1986 Act merely adds yet another layer of linguistic obscurity. Apart from anything else, because of unpredictable changes in community attitudes about specific political issues, the statutory language will inevitably fluctuate in meaning across time. This is a totally unsatisfactory situation. Fifty years later, Chafee's criticism in that regard remains true. The definition of sedition "is so loose that guilt or innocence must obviously depend on public sentiment at the time of the trial".<sup>112</sup> This will not be a source of concern when public opinion is supportive of vigorous free speech. But recent history demonstrates that public opinion can be manipulated to generate irrational fear of minority groups and attitudes. An accused person may or may not be better off electing for jury trial. In Sharkey's case the conviction is probably explained in terms of the trial judge's scarcely concealed bias against Sharkey, the prosecution's exploitation of Cold War hysteria, and the way in which the defence was conducted.<sup>113</sup> In Healy's case the jury was insulated from these particular prejudicial influences and were, in effect, urged by Healy to throw the case out as involving an abuse of process.

The Review Committee's support for paragraphs (a) and (b) of the proposed sub 28(1) rests on the basis that it is axiomatic that incitement to revolutionary violence or lesser disturbances should be a serious criminal offence.<sup>114</sup> It may well be open to accept the Review Committee's conclusion if it is first accepted that revolutionary or subversive speech inevitably carries with it the likelihood of imminent revolutionary or subversive action. But this is manifestly not the case. The Review Committee Discussion Paper and Report ignore all this.

Apart from (or perhaps because of) the failure of the Review Committee to consider the free speech issues implicated in the law of sedition, the fundamental difficulty with the Review Committee's proposal is that the central word in the proposed s28, the verb "incite", is not defined. The flaw in the proposed offence is the use of a verb "describing an indirect and diffuse causal relationship between an expressive act and some danger or 'evil'

112 Chafee, above n1 at 506.

113 Soon after Sharkey was charged a Sydney newspaper published a story about criminals serving on juries in New South Wales: *Sunday Herald* 27 March 1949. This led to expressions of concern in the state parliament that communists were serving on juries and might be unwilling to convict other communists and to a police investigation at the request of the Chief Secretary of New South Wales and the tabling in the New South Wales Parliament of a curious document entitled *Police Report on Alleged Criminals and Communists Serving on Juries*, New South Wales, *Parliamentary Debates*, 29 March 1949, 1669-1670, 1673, 1691-1695.

114 See text at n111. Proposed para(c) has been recommended by the Review Committee to give effect to Australia's obligations under the International Covenant on Civil and Political Rights and the International Covenant on the Elimination of all Forms of Racial Discrimination. *Fifth Interim Report*, para 32.17.

against which the state may constitutionally protect itself, without any evidence of immediacy or probability beyond the words used themselves".<sup>115</sup> So, if I "advocate" violent revolution in the abstract do I thereby "incite" violent revolution contrary to the proposed offence? Does such abstract advocacy necessarily endanger the foundations of existing government? More specifically, for example, does an Australian bookseller who in 1992 offers for sale or sells the works of Marx and Lenin thereby "incite" violent revolution? Common sense dictates that the answer to each of these questions, of course, must be in the negative. The prefatory words in proposed s28, "by any means", add nothing in the quest for the meaning of "incite". The unanswered question is: How wide or narrow a meaning is to be given to the term "incite"? If it is applied to a wide range of conduct including so-called expressive conduct, or if it rests on mere tendency, then the abolition of the present legislative scheme will have achieved nothing.

It does seem, however, to be implicit in proposed s28(2) that the mere expression of an abstract opinion can constitute incitement if the expression of opinion has the necessary link with the types of forcible or violent conduct specified in paragraphs (a) to (c) of proposed s28(1).

In a South African case an inciter was defined as

one who reaches and seeks to influence the mind of another to the commission of a crime. The machinations on criminal ingenuity being legion, the approach to the other's mind may take various forms, such as suggestion, proposal, request, exhortation, gesture, argument, persuasion, inducement, goading or the arousal of cupidity.<sup>116</sup>

The history of sedition and allied public order and national security offences in the Anglo-Australian tradition reveals a strong legislative and judicial preference for sweeping up into the incitement category forms of political behaviour that do not present a demonstrated actual threat to the survival of existing political institutions. In *R v Arrowsmith*<sup>117</sup> the defendant was convicted on a charge of endeavouring to seduce a member of the British armed forces from his duty or allegiance contrary to s1 of the *Incitement to Disaffection Act* 1934. Arrowsmith had distributed literature at an army centre in England advocating that soldiers should leave the army or desert rather than serve in Northern Ireland. The Court of Appeal dismissed an appeal against conviction. The attack on the conviction did not involve any direct consideration of the extent to which the 1934 Act allowed information and opinions to be conveyed to members of the armed forces. The Court of Appeal had no doubt about the severity of Arrowsmith's criminal conduct:

This leaflet is the clearest incitement to mutiny and to desertion. As such, it is a most mischievous document. It is not only mischievous, but it is wicked. This court is not concerned in any way with the political background against

115 Bloustein, E J, "The First Amendment 'Bad Tendency' of Speech Doctrine" (1991) 43 *Rutgers LR* 507 at 511.

116 *Nkosiwana* 1966 (4) SA 655 at 658 quoted in Smith, J C, and Hogan, B, *Criminal Law* (6th ed) at 252. Incitement is but one of the inchoate criminal offences which presents serious analytical problems. See also *R v Andrews* [1973] QB 422 at 425-426; *Invicta Plastics Ltd v Clare* [1976] RTR 251; *R v Pearce* (1980) 72 Cr App R 295; *R v Fitzmaurice* [1983] QB 1083; *R v Sirat* (1985) 83 Cr App R 41; *R v Rowley* [1991] 1 WLR 1020.

117 [1975] QB 678.

which this leaflet was distributed. What it is concerned with is the *likely effects* on young soldiers aged 18, 19 or 20, some of whom may be immature emotionally and of limited political understanding.<sup>118</sup>

There is nothing in the report of the case which indicates that there was any evidence about the "likely effects" of Arrowsmith's conduct.<sup>119</sup> The decision of the Court of Appeal in *Arrowsmith* reflects the repressive origins of the law of sedition and has been rightly criticised as unjustifiably restricting freedom of expression.<sup>120</sup>

In some circumstances, especially in the context of public protest, speech may be an integral part of a pattern of activity which, overall, is alleged to amount to incitement to the commission of some offence. In *R v Langer*,<sup>121</sup> the accused was acquitted on a charge of inciting an assault at a May Day rally in Melbourne attended by several thousand people. It was alleged that Langer, using a public address system microphone, referred to the presence of plainclothes members of the Victoria Police in the crowd and spoke the following words:

And at that time (a similar demonstration two days before) it was resolved by a number of people that it ought to become a standard practice that when Bob Larkins comes along to show what a big man he is, what big tough guys the Special Branch are, they should always be driven off, and that the same practice ought to be adopted for the next guy who gets put in to replace him, because the only way that you can fight the copper bastards was the same way as we fought the Nazis, and that is by punching the shit out of them.<sup>122</sup>

Langer denied using these words. If the prosecution had satisfied the jury that Langer had uttered the words attributed to him, it is submitted that, on the evidence disclosed in the report of the case, it does not follow that there was an incitement although the judge's charge to the jury and the Court of Criminal Appeal decision clearly suggest that the incitement would have been made out.

- 118 *Id* at 684. The European Commission on Human Rights, in a majority decision, later found that the prosecution and conviction of Arrowsmith did not violate the European Convention on Human Rights. Arrowsmith's case demonstrates how, especially in the field of public order offences, individuals can be punished for having "bad" intentions. Arrowsmith's conduct involved the expression of strong opposition to British involvement in Northern Ireland. If her advice had been heeded by service personnel, then questions would have arisen about the responsibility of those personnel for their own conduct in voluntarily heeding Arrowsmith's advice. See Barendt, E, "Note" (1981) 1 *Oxf JLS* 279. See also *Sullivan v Hamel-Green* [1970] VR 156 where the distribution of a pamphlet opposing conscription prompted a charge, pursuant to s7A(b) of the *Crimes Act 1914* (Cth), of publishing writing inciting the commission of offences against the *National Service Act 1951* as amended. See Reaburn, N, "Incite, Urge and Encourage: Section 7A and the National Service Act" (1970) 3 *U Tas LR* 285.
- 119 In another case arising out of the publication of Salman Rushdie's novel, *The Satanic Verses*, a question arose as to the scope of s4 of the *Public Order Act 1986* (UK) which creates offences in respect of conduct likely to provoke the immediate use of unlawful violence: *R v Horseferry Road Metropolitan Stipendiary Magistrate; ex parte Siadatan* [1991] 1 QB 260. See generally, United Kingdom, The Law Commission, *Report on Offences Related to Public Order (No 123)* (1983).
- 120 Barendt, E, above n119.
- 121 [1972] VR 973.
- 122 *Id* at 974.

If there is to be a public order incitement offence, the scope of the offence should be very narrowly confined so that incitement operates to catch only those forms of behaviour which, in Chafee's words, "come dangerously close to success".<sup>123</sup>

The conceptual and practical challenge facing the Review Committee in the area of public order offences was to devise a regime of Commonwealth criminal liability which is appropriate to a free and open society. Such a society should tolerate a diversity of opinion including what might be called extremist speech.<sup>124</sup> Of course, the term "extremist speech" is itself loaded since whether or not something is to be regarded as extremist depends very much on one's world view and political prejudices. We live in a society which does not punish people for having ideas and one which should not punish them for expressing ideas. Contrary to the Review Committee's view, there is no *a priori* reason why we should penalise "subversive" or "revolutionary" speech. We have surely reached a stage of civic maturity in Australia where the open expression of revolutionary or subversive opinion can be tolerated. The acid test of a society's commitment to freedom of speech is its willingness to tolerate extremely unpopular expressions of opinion. As I F Stone observed, *apropos* the McCarthy era excesses in the United States in the 1950s,

There must be renewed recognition that societies are kept stable and healthy by reform, not by thought police; this means that there must be free play for so-called "subversive" ideas — every idea "subverts" the old to make way for the new. To shut off "subversion" is to shut off peaceful progress and to invite revolution and war.<sup>125</sup>

A generalised prohibition on incitement is likely to catch all forms of advocacy of radical or revolutionary change. The proposed provision, resting as it does on the patent ambiguity of the central term "incite", would, if enacted, leave us in no better position than that examined in *R v Hush; ex parte Devanny*. Australia has surely progressed since those hysterical times. It is to be hoped, therefore, that the Commonwealth Government unequivocally rejects this particular proposal of the Review Committee and instead introduces legislation limited to the repeal of all sedition offences.

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123 Chafee, above n1 at 46.

124 For a detailed discussion see Bollinger, L C, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986).

125 Stone, I F, *The Haunted Fifties 1953-1963* (1989 edn) at 68.