The offence of sedition: Its history, its current status in Australian and international law, and its constitutionality

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The law of sedition has a long history in the common law. Government attempts to discourage and punish dissent and criticism are not new. This article notes current examples where laws of Australian states continue to punish sedition. It argues that this kind of law is not compatible with Australia's implied freedom of political communication, which reflects Australia's democratic governance structure. Democracy requires full and frank discussion of political issues, including criticism of those in government. On the other hand, freedom of speech is not absolute, so government regulation of speech which urges or incites violence is legitimate.

Introduction

Freedom of speech is very topical at present on a range of fronts. There is a significant debate around freedom of speech within universities.[1] There have been concerns about attempts to shut down or censor particular speakers in Australia, including Bettina Arndt, in recent months. Some speakers have been asked to pay for security, where their speech garners sometimes violent protest. This is part of a bigger problem in the United States, with so-called 'no platforming' of speakers whose views are considered unpalatable. The High Court last year struck out anti-protester legislation on constitutional free speech grounds,[2] and at the time of writing is considered an appeal against legislation prohibiting protest within close proximity to an abortion clinic.[3] The question of acceptable limits on free speech is live.

The focus of this particular work will be on criticism of government, and the extent to which the law either protects it, punishes it, or is neutral towards it. Again, this has been topical. A recent controversy involved the Australian Broadcasting Corporation, with the former chairman of the organisation resigning after apparently seeking to have sacked a staff member who had published material critical of the government. He apparently believed that members of the government 'hated' that particular journalist, though he made it clear he was not specifically directed by anyone to have the journalist dismissed. This episode is just another example of attempts to censor, one way or another, views that government might find to be undesirable. This is not a new phenomenon. Indeed, part of the basis of this article is that governments for hundreds of years have sought to punish, deter and dissuade the expression

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1 Robert French, 'Free Speech and the Law on Campus — Do we need a Charter of Rights for Universities?' (Speech delivered at the 8th Austin Asche Oration in Law and Governance, Charles Darwin University and Australian Academy of Law, 17 September 2018).

2 *Brown v Tasmania* (2017) 261 CLR 328.

3 Transcript of Proceedings, *Clubb v Edwards* [2018] HCATrans 210 (11 October 2018).

of views critical of their governance. The question is how has the law responded in the past, and how should it respond. In a sense, the issue is considered to be timeless.

Since early times within democratic forms of government, there has been possible conflict between the need to preserve a given system of governance within society, and the right of members in that society to contribute to debate within it, including matters of governance. That debate might include criticism of existing governance structures. A potential clash exists between two great interests, preserving existing institutional structures in society, yet ensuring individuals within that society can actively contribute to its governance, by participating in debate and proposing reform. Which interest has prevailed, and which interest should prevail? How do we preserve democratic structures, while permitting the kinds of robust discussions such a system contemplates and indeed requires?

This conflict is evident in early Greek and Roman political systems. While Plato linked democratic government with the ability of citizens (some, at least) to contribute to debate, he favoured some censorship. He argued material critical of the gods should not be published, due to the harm it would cause society. When Augustus took power in ancient Rome, he punished government critics. He ordered the burning of books thought to contain such criticism. Around 12 BC Augustus began to enforce an old Twelve Tables law prohibiting defamation, and another prohibiting 'violation of majesty'. Prosecutions were brought against professors who questioned his policies. Labienus and Severus were among the targets. Later it became a crime to possess material thought treasonous or seditious. When Tiberius ascended to power, proceedings for 'literary treason' expanded. The death penalty was used against those convicted of treason, one example being poet Clutorius. He was executed after daring to write a poem mocking an heir to government power.

I will now explain how both English and American law have sought to reconcile these competing interests, before considering the Australian position. Both jurisdictions are critical. Those who wrote the *Australian Constitution* drew upon what they considered the best aspects of British and American constitutionalism. By understanding the historical development of anti-sedition laws there, we are in a stronger position to consider our nation's position, and whether our existing laws are constitutionally valid. At the time of writing, there remains various legislation in Australia that seeks to criminalise and punish the expression of views critical of government, in some form. The federal government re-legislated in this area in 2010. Evidently, it believes the issues remain live. However, it is important to understand the extent to which sedition legislation is consistent with our constitutional commitment to freedom of expression. The ultimate objective of this article is to determine whether existing sedition legislation in Australia is constitutionally valid.

Criticising rulers — English law

English law dealt with criticism of rulers, particularly monarchs, in various ways.[4] First was the *scandalum magnatum* (1275), which in modern parlance prohibited spreading 'fake news' about the monarch or senior office holders. Secondly, Parliament legislated *Treason Act 1351* (UK) (25 Edw 3 Stat 5, c 2). Treason involved three types of wrongdoing: (a) levying war against the monarch; (b) 'adhering' to the king's enemies; and (c) compassing or 'imagining' the death of the monarch. Regarding (c), initially speech in itself could not suffice. An overt act was also required. Over time, this requirement was relaxed, broadening the scope of the offence. Usually, the threat of prosecution was used to discourage undesired behaviour, though some were prosecuted. One example was Twyn, who printed a book suggesting the monarch should be accountable to their subjects. He was executed for his blatantly democratic views. Sometimes treason mixed with religion, given the monarch as head of the state church. It became treasonous to publish a papal bull, or 'reconcile the Queen's subjects to the see of Rome'. Ecclesiastical courts would pursue prosecutions for blasphemy and heresy, enforcing orthodoxy.

Despite the threatening nature of the offence, prosecutions were limited in number. The main sticking point was the requirement to prove the material was treasonous, and had been published. It could be difficult for the state to get the warrant needed to obtain evidence supporting their allegations. The *Treason Trials Act 1696* (UK) accorded suspects due process protections.

William Caxton introduced a system of printing in 1476. Initially the number of printers was small, but this grew exponentially during the following century. This concerned the government, because it increased the likelihood material critical of the government could circulate widely. As a result, the Crown began to assert control over what was printed. Initially this was in the form of benevolent copyright, under which the government would recognise ownership rights in the creator of the work. However, the system morphed into one of censorship,[5] where copyright protection was a proxy for government approval of material. During Elizabeth I's reign, the Star Chamber expressly limited the number of permitted printers, and required all material sought to be published to be first approved by the Archbishop of Canterbury or the Bishop of London.[6]

Difficulties with prosecutions for *scandalum magnatum* and treason led to development of the common law offence of seditious libel in the 1606 Star Chamber decision *De Libellis Famosis*.[7] That Chamber was an attractive forum for the state in these matters, because it lacked the due process protections applicable in the common law courts for treason trials. Its members belonged to the King's Council and served at the monarch's

4 Graham McBain, 'Abolishing the crime of sedition: Part 1' (2008) 82 *Australian Law Journal* 543; Graham McBain, 'Abolishing the crime of sedition: Part 2' (2009) 83 *Australian Law Journal* 449.

5 W R Vance, 'Freedom of Speech and of the Press' (1918) 2 *Minnesota Law Review* 239, 244.

6 Philip Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37 *Stanford Law Review* 661, 672.

7 (1606) 5 Co Rep 125a; 77 ER 250.

pleasure. The kind of judicial independence we today take for granted was not a feature of the judiciary.

In that case, the accused admitted publicly ridiculing members of the clergy. The Chamber noted the supposed perils of criticism of public figures, on the basis it would engender disrespect. It could be seen as a criticism of the monarch who appointed them. Thus, the common law offence of seditious libel should be recognised. It required proof that: (a) material was 'seditious' — inherently subjective, but broadly involved criticism of government;[8] (b) the author had seditious intent in writing it, which could be implied; and (c) the material had been published. Truth was no defence. Those publicly criticising the government were successfully prosecuted.[9] Sir Francis Bacon noted the chilling effect of the threat of punishment for seditious libel.[10] Like treason, such threat was the most significant impact of the provision, though prosecutions occurred.

The early 17th century regime of James I was unlikely to encourage dissent. He claimed to govern by divine right, and believed himself above the law.[11] Not surprisingly, during his regime prosecutions for seditious libel increased. Abolition of the Star Chamber in 1641 effected some change to this position. It had been enforcing the restrictive licensing of printers. Its demise caused a large increase in the volume of publications. The government still censored material, requiring it to be approved prior to publication. This system of 'prior restraint' finally lapsed in 1694.

The story of protection of criticism of government is connected with activity in Parliament. When members asserted customary right to freedom of speech in the 16th–17th centuries, they met with substantial resistance. Historian Maitland records it was in 1521 the Speaker of English Parliament first announced freedom of speech existed in Parliament as an ancient right.[12] Elizabeth I disagreed, seeking to curb parliamentarians' right to speak about royal succession and religious matters. James I's ascension caused relations between the Parliament and monarch to deteriorate substantially. He believed Parliament could only discuss what he wanted them to discuss. When parliamentarians went on official record espousing their right to discuss what

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8 Leonard W Levy, *Legacy of Suppression: Freedom of Speech and Press in Early American History* (Bellknap Press, 1960) 10: 'any comment about the government which could be construed to have the bad tendency of lowering it in the public's esteem or of disturbing the peace was seditious libel, subjecting the speaker or writer to criminal prosecution'.

9 *R v Chambers* (1629) 3 St Tr 373, where a businessman was successfully prosecuted for criticising government commerce regulation.

10 Reflecting on one offender's punishment, he lamented that:

> [it] was a matter of great terror among all the King's servants and subjects; in somuch as no man almost thought himself secure, and men durst scarce commune or talk one with another, but there was special diffidence everywhere, which nevertheless made the King rather more absolute than more safe. For bleeding inwards and shut vapours strangle soonest, and oppress most.

Brian Vickers (ed), *History of the Reign of King Henry VII and Selected Works* (Cambridge University Press, 1992) 115.

11 'The King ... cannot do a wrong': *Case of the Master and Fellows of Magdalen College in Cambridge* (1615) 11 Co Rep 66b, 72a; 77 ER 1235, 1243 (Lord Coke).

12 F W Maitland, *The Constitutional History of England — A Course of Lectures Delivered* (Cambridge University Press, 1908) 242; David Colclough, *Freedom of Speech in Early Stuart England* (Cambridge University Press, 2005) 137.

they wanted, he tore the relevant page out. He imprisoned parliamentarians regarded as disloyal, including Coke. After various suspensions of Parliament, regicide, and several years of a republic, the Glorious Revolution of 1688 established Parliament's dominance over the monarch. The *Bill of Rights 1689* (UK) established the right of parliamentarians to speak.

This right was not extended to the public, and prosecutions for seditious libel increased. Judges, still not wholly independent, relaxed former requirements to successfully prosecute seditious libel. For instance, in *R v Beare*[13] the accused was successfully prosecuted, though there was no evidence the accused had published the allegedly seditious poems, or intended to do so. According to the law then, he should have been acquitted. However the court, led by Holt CJ, decided these facts no longer prohibited conviction. He justified this on the 'principle of the preservation of all government, and safety of all civil society: and if it should be no crime to write libels, the government and the magistrates must be exposed to the malice and discontents of disaffected persons'.[14]

Again in the successful prosecution of Tuchin for seditious libel for criticising the government, Holt CJ explained:

> it is a very strange doctrine, to say, it is not a libel, reflecting on the government ... if men should not be called to account for possessing the people, with an ill opinion of the government, no government can subsist, for it is very necessary for every government, that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities as to the management of it. This has been always looked upon as a crime, and no government can be safe unless it is punished.[15]

While the government did not revert to 'prior restraint' of proposed speech, Queen Anne's government imposed a tax on all newspapers and advertisements. The United States Supreme Court found this measure was designed to deter criticism of government.[16]

While we laud free speech luminaries like Milton and Locke, neither criticised the offence of sedition. Both expressed strong anti-Catholicism, and would not support those expressing Catholic views. Leading legal commentator Blackstone hardly espoused a strong defence of freedom of speech:

> liberty of the press is indeed essential to the nature of a free state: but this consists in laying on previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity ... to punish ... any dangerous or offensive writing which [are] ... of a pernicious tendency is necessary [to] preserv[e] ... peace and good order.[17]

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13 (1698) 1 Ld Raym 414; 91 ER 1175.

14 Holt CJ, quoted in Hamburger, above n 6, 732.

15 *Tuchin* (1704) Holt KB 424, 424–5; 90 ER 1133, 1133–4 (Holt CJ).

16 *Grosjean v American Press Co Inc*, 297 US 223, 246 (Sutherland J) (1936).

17 William Blackstone, *Commentaries on the Laws of England — A Facsimile of the First Edition of 1765–1769* (University of Chicago Press, 1979) vol IV, 151–2.

However, during this period society's view of governance was changing. Hamburger tracks this to differences in political thought, between conservative government and Whig governments. Broadly, because conservative governments strongly sought to protect current hierarchy, dissent and criticism was dangerous, and needed to be put down. Sedition laws were vigorously applied. However, as the Whigs took power, prosecutions decreased. Hamburger writes:

> In 1710 the idea of vigorous criticism of authority was as disturbing to most Tories as it may have been congenial to a small number of radical Whigs ... committed to a vision of hierarchical society established by divine authority and therefore unimprovable, unchanging and uniform, Tory ideologues in ... 1710 perceived no alternative to the received religious and political establishment ... the slightest dissent posed a danger, and printed criticism of the government was no exception ... by 1720 many men began to realize that ministers and factions, with all their petty squabbles and scurrilous printed attacks on one another, would come and go, but the English Establishment, a Protestant parliamentary monarchy, would be secure in spite of all the liberties taken by the press ... accordingly although the Whig government continued to prosecute printers for seditious libel after 1714, it did so without expecting to bring the press to complete submission.[18]

Here a shift in political philosophy is observed, away from Hobbesian all-powerful sovereign with unquestioned power,[19] towards Lockean[20] representative government with government as agent and servant of the people. Obviously, the right to criticise the government is more compatible with Lockean view of government than Hobbesian.[21]

Other pivotal developments in the 18th century include publication of *Cato's Letters* by prominent Whigs, advocating the importance of free speech in democracy.[22] The successful prosecution of Wilkes for sedition for anti-government statements, his jailing for 2 years,[23] and successful prosecution of Thomas Paine for *Rights of Man* were contentious.[24] Palmer breached anti-sedition legislation in 1793 for daring to suggest universal

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18 Hamburger, above n 6, 748–52.

19 Thomas Hobbes, *Leviathan or the Matter, Forme, and Power of a Commonwealth Ecclesiaticall and Civil* (1651).

20 John Locke, *Two Treatises of Government* (Cambridge University Press, first published 1690, 1960 ed) 150: 'the community perpetually retains a supreme power of saving themselves from the attempts and designs of any body, even of their legislators, whenever they shall be so foolish, or so wicked, as to lay and carry on designs against the liberties and properties of the subject'.

21 James Fitzjames Stephen, *A History of the Criminal Law of England* (MacMillan, 1883) vol 2, 299–300. He adds 'that the practical enforcement of this doctrine (of sedition) was wholly inconsistent with any serious public discussion of political affairs is obvious': at vol 2, 348.

22 John Trenchard and Thomas Gordon, *Cato's Letters; or, Essays on Liberty, Civil and Religious, and Other Important Subjects* (J Walthoe, T and T Longman, 6th ed, 1755) 96–100 ('Cato's Letter No 15 Of Freedom of Speech: That the Same is Inseparable from Publick Liberty'): 'without freedom of thought there can be no such thing as wisdom, and no such thing as public liberty, without freedom of speech', 'whosoever would overthrow the liberty of the nation, must begin by subduing the freedom of speech', 'freedom of speech is the great bulwark of liberty; they prosper and die together'.

23 *R v Wilkes* (1770) 4 Burr 2577, 2561; 98 ER 327, 346.

24 *R v Paine* (1792) 22 St Tr 357; Thomas Paine, *Rights of Man: Being an Answer to Mr Burke's Attack on the French Revolution* (J S Jordan, 1791) ('*Rights of Man*').

suffrage, and was transported to Australia for 7 years for attempted 'total subversion of the constitution'.[25] In the early 19th century when paranoia about Napoleon was highest, Drakard was convicted for questioning the practice of flogging in military ranks.[26] The judge suggested the accused had sought to weaken the British army, by reducing those wishing to enlist. He denied anyone had the right to 'make the people dissatisfied with the government ... this is not to be permitted to any man, — it is unconstitutional and seditious'.[27] Yet prosecution for seditious libel had 'practically ceased' within 20 years.[28] In 1843 *Libel Act 1843* (UK) ('*Lord Campbell's Act*') made truth a defence to libel actions. By 1868, the courts lauded freedom of speech as a fundamental constitutional value.[29]

Freedom of speech, including the right to criticise government, is best seen in the common law as a negative liberty, in that it exists so far as, and to the extent that, it is not abrogated by legislation.[30] This is supported by the principle of legality; where legislation is ambiguous, it will be interpreted to not abrogate fundamental common law rights like freedom of speech.[31] The United Kingdom system of governance reflects parliamentary supremacy, where courts traditionally lack power to deem a law unconstitutional. This is tempered by the United Kingdom's accession to the *Convention for the Protection of Human Rights and Fundamental Freedoms* ('*European Convention on Human Rights*'),[32] art 10 of which protects freedom of expression.

Regulation of sedition in the United States

From early times legislatures in the United States passed anti-seditious legislation. Most notorious was the Alien and Sedition Acts of 1798 (US) prohibiting a person from 'writing, printing, uttering or publishing ... any false, scandalous and malicious writings against the government of the United States or the President with intent to defame ... or bring them into disrepute'.[33] Punishment could include a fine of $2000 and 2 years' jail. Ten were convicted under it. There was no successful *First Amendment* challenge to it. In the early 19th century, when the court had not applied the *First Amendment* to state

25 Thomas Erskine May, *The Constitutional History of England Since the Accession of George Third 1760–1860* (Crosby and Nichols, 1863) vol II, 145, 148.
26 *R v Drakard* (1811) 31 How St Tr 495, 535 (Baron Wood).
27 Ibid.
28 Stephen, *A History of the Criminal Law of England*, above n 21, 373, states that prosecutions for seditious libel had practically ceased by 1832; Zechariah Chafee, Jr, 'Freedom of Speech in War Time' (1919) 32 *Harvard Law Review* 932, 951: 'liberalism triumphed in 1832'.
29 *Wason v Walter* (1868) LR 4 QB 73, 93 (Cockburn CJ).
30 *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, 207 (Lord Steyn).
31 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 130 (Lord Steyn; Lord Browne-Wilkinson agreeing), 131 (Lord Hoffmann).
32 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*').
33 *Sedition Act 1798* (US).

laws, many states had anti-sedition legislation, using it to prosecute slavery abolitionists. They were jailed for their anti-government statements.[34]

During World War I the *Espionage Act 1917* (US) was passed, creating an offence to make false statements intending to interfere with the war effort, including inciting insurrection, mutiny or disloyalty among armed forces, or obstructing recruitment. It was amended to preclude disloyal, profane, scurrilous or abusive language about the American form of government. Approximately 1000 individuals were convicted under the Act.[35] Their 'crimes' often involved making anti-war statements. For that, they were jailed for 10 years or more.[36] It was unnecessary for the government to show the defendant's conduct had in fact impeded the war effort. For some years the court accepted the validity of legislation prohibiting the making of statements advocating violent overthrow of government. They were applied to communists and communist sympathisers.[37] Eventually, the court determined such statements per se were protected by the *First Amendment*. The state's constitutional power to proscribe such speech was limited to cases where speech was intended, and likely, to lead to imminent lawless behaviour.[38] It recognised the incompatibility of most iterations of sedition law with free speech.[39] American free speech doctrine virtually prohibits viewpoint and content discrimination:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there any circumstances which permit an exception, they do not now occur to us.[40]

Prosecutions for sedition in Australia

Sedition first entered the criminal law federally in Australia in 1920, and became prominent during[41] and after World War II, including the period of communist hysteria in the late 1940s to early 1950s. The Commonwealth attempted to outlaw the Communist Party of Australia, and then sought a change to the *Constitution* via referendum to give them power over it when Plan A foundered in the High Court.[42] There is a long association between

34 Norman Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* (University of North Carolina Press, 1986) 108–20; Levy, above n 8, 204–12.

35 Stewart Jay, 'The Creation of the *First Amendment* Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century' (2008) 34 *William Mitchell Law Review* 773.

36 *Debs v United States*, 249 US 211 (1919); *Schenck v United States*, 249 US 47 (1919); Chafee, above n 28, 965.

37 *Gitlow v New York*, 268 US 652 (1925); *Whitney v California*, 274 US 357 (1927); *Dennis v United States*, 341 US 494 (1951).

38 *Brandenburg v Ohio*, 395 US 444 (1969).

39 *Keyishian v Board of Regents*, 385 US 589, 598 (1967): 'dangers fatal to *First Amendment* freedoms inhere in the word "seditious"' (Brennan J).

40 *West Virginia State Board of Education v Barnette*, 319 US 624, 642 (1943) (Jackson J; Black, Douglas and Murphy JJ concurring).

41 *National Security Act 1939* (Cth) and *National Security (General) Regulations 1939* (Cth); Roger Douglas, 'Law, War and Liberty: The World War II Subversive Prosecutions' (2003) 27 *Melbourne University Law Review* 65.

42 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

sedition laws and anti-communism, with suggestions the laws were originally introduced federally in response to feared repercussions from the Russian Revolution of 1917.[43] Since inception,[44] anti-sedition laws have been applied in a highly politically selective manner.[45]

The two landmark sedition cases in Australia are *Burns v Ransley*[46] and *R v Sharkey*.[47] Both occurred in 1949 at the start of the Cold War, and concerned s 24 of the *Crimes Act 1914* (Cth), as it then was. Section 24D stated any person who writes, prints, utters or publishes any 'seditious words' is guilty of an indictable offence. Section 24B stated seditious words were those expressing seditious intention. Section 24A stated expression in any of the following circumstances was evidence of seditious intention: attempt to excite dissatisfaction against the sovereign, government or constitution of the United Kingdom, excite disaffection against the Australian Government, *Constitution* or either House of Parliament, or promote feelings of ill-will and hostility between classes of subject so as to endanger the peace, order and good government of the Commonwealth. A defence applied if the accused could show they had been attempting in good faith to show the sovereign had been mistaken, point out in good faith government errors, attempt by lawful means to secure alteration of the law in Australia, or point out in good faith any matters 'producing or tending to produce feelings of ill-will and hostility' among Her Majesty's subjects.

In *Burns v Ransley*, Burns was a participant at a public debate in Brisbane after World War II. He represented the Australian Communist Party. He was asked, in the event of a third world war pitting Russia against Western powers, what the attitude and approach of the Party would be. He replied the communists would oppose the war. Upon being pressed, he indicated the Communist Party would side with Russia. He was charged with sedition under s 24D.

At the time, the High Court has not discerned the *Australian Constitution* contained an implied freedom of political communication. This only occurred in 1992.[48] Thus, the Court did not consider, in terms of constitutional issues,

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43 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, Report No 104 (2006) 55 ('*Fighting Words*').

44 McBain, 'Part 2', above n 4, 479–80:

> the heart of the offence (is) punishment by the ruling class of opinions inimical to its own; using the mechanism of the courts. Sedition was a useful political weapon to protect the status quo, whether this be the supremacy of the monarch, the established church or the government in power. Of uncertain origin, impossible to define, vague in ambit, prosecutions were invariably prompted by political considerations.

45 Laurence W Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287, 303–4; see also 300: 'the decision (to prosecute Burns) was intended to secure a political advantage for the Commonwealth Government'; *Fighting Words*, above n 43, 62 [2.53]: 'sedition is a quintessentially political crime, in that this offence has been used to criminalise expression that is critical of the established order'; Michael Head, 'The Political Uses and Abuses of Sedition: The Trial of Brian Cooper' (2007) 11 *Legal History* 63, 64: 'decisions were taken to launch ... sedition prosecutions, which required the approval of the Attorney-General, for purely political purposes'.

46 (1949) 79 CLR 101.

47 (1949) 79 CLR 121.

48 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

whether the law infringed Burns' right to discuss political matters. The (statutory) majority found the words he used expressed seditious intent, encouraging disloyalty to Australia.[49] It was held unnecessary for a successful prosecution to show the accused *subjectively* intended insurrection etc; it was sufficient the words used could *objectively* be interpreted that way. It also found the law was constitutionally valid, supported by the Commonwealth's power to enact laws incidental to other heads of power. The Court stated it was normal for states to have power to prevent and punish subversive activity.[50] The comments concerned went beyond mere political discussion.[51] They interpreted disaffection to mean hostility, estranged allegiance, or disloyalty, and excite to mean inspire, infect or inflame disaffection.[52] The two dissenting justices disagreed the accused had the required objective of inciting disaffection against the government.[53] They interpreted intention subjectively.

In *R v Sharkey*,[54] a newspaper reporter interviewed Mr Sharkey, the General Secretary of the Communist Party in Australia. The reporter asked him what the position of the Communist Party would be if Australia were invaded by communists. He replied if communist forces entered Australia 'in pursuit of aggressors', Australian workers would welcome them, as workers in Europe had welcomed arrival of the Soviet Union to liberate them from Nazi rule. Mr Sharkey opined the Soviet Union would only engage in war if it were attacked, and it was unlikely their forces would invade Australia. He said communist policy was to prevent war and educate people to disfavour it. He said the Communist Party wanted to bring the working class to power, and if 'fascists' in Australia sought to use force to prevent workers gaining access to that power, the Communist Party would advise workers to 'meet force with force'. The words appeared in a newspaper, and Mr Sharkey was charged with sedition. He was convicted by jury and appealed to the High Court. When an appeal goes to the High Court against findings of fact of a jury, the Court is not to make the decision itself anew, but determine whether there could have been a reasonable basis for the jury's findings.

All members of the Court found it was open for the jury to interpret Mr Sharkey's words as more than a prediction about how Australian workers would react; that in fact it represented an urging that workers should welcome Soviet troops if they arrived. It could be read as recommending disloyalty to Australia and exciting disaffection to the country, under cover of commenting about the likelihood of an invasion.[55] Dixon J confirmed the Commonwealth had constitutional power to punish any utterance or publication which 'aroused resistance to the law or which excited insurrection against the Commonwealth, likely to cause discontent with and opposition to the enforcement of federal law or the operations of the federal government'.[56] He

49 *Burns v Ransley* (1949) 79 CLR 101, 109 (Latham CJ), 112 (Rich J).
50 Ibid 110 (Latham CJ).
51 Ibid 109 (Latham CJ), 111 (Rich J).
52 Ibid 109 (Latham CJ), 112 (Rich J).
53 Ibid 118 (Dixon J), 120 (McTiernan J).
54 (1949) 79 CLR 121.
55 Ibid 140–1 (Latham CJ), 145 (Rich J).
56 Ibid 148 (Dixon J).

agreed obedience was important for the effective working of government.[57] He would not disturb the jury's finding the words used carried seditious intent. Other members agreed Mr Sharkey's words carried seditious overtones.[58] The decisions have been criticised.[59] A later case noted a prima facie case of sedition because the accused strongly suggested violence, but the court did not equivocally find the offence required this be proven, just that it existed on the facts, so reasonable evidence of the offence having been committed existed.[60]

Current sedition offences in Australian law

Section 52 of the *Criminal Code Act 1899* (Qld) makes it an offence for a person to conspire with another to engage in a seditious enterprise, or advisedly publish seditious words or writing. The maximum penalty for a person convicted is 3 years' jail, or 7 years for a second/subsequent offence. Seditious words are those uttered with a seditious intention, and a seditious enterprise is formed to execute seditious intention. Section 44 defines seditious intention as an intention to effect any of the following purposes:

(a) bring the sovereign into hatred or contempt;
(b) excite disaffection against the sovereign or government of the United Kingdom or Queensland, against Houses of Parliament of the United Kingdom or Queensland Legislative Assembly, or administration of justice;
(c) excite individuals to agitate for change to law other than by lawful means;
(d) raise discontent or disaffection among the monarch's subjects; or
(e) promote feelings of ill-will and enmity between different classes of the monarch's subjects.

This definition was taken from Stephen's 1887 *A Digest of Criminal Law (Crimes and Punishments)*.[61] This definition gives less scope for freedom of speech than alternatives.[62] It was a feature of the State's *Criminal Code Act*

57 Ibid.
58 McTiernan, Williams and Webb JJ.
59 Laurence W Maher, 'Dissent, Disloyalty and Disaffection: Australia's Last Cold War Sedition Case' (1994) 16 *Adelaide Law Review* 1, 17: 'the High Court had, very unwisely, interpreted the sedition provisions of the Act in a way that enabled the Act to be used to punish expressions of "disloyalty". At the time the concept of loyalty was defined in terms of an enforced rigid anti-communist political orthodoxy'; Maher, 'The Use and Abuse of Sedition', above n 45, 309:

> in none of the sedition cases (during) 1948–1953 was there any evidence of an actual (that is, subjective) seditious intention of the types referred to in (then) s 24A of the *Crimes Act 1914*. Nor was there the slightest ... evidence that the words used by any ... defendant was intended to provoke violence or public disorder or that the words in fact created any immediate threat of that kind.

60 *Cooper v The Queen* (1961) 105 CLR 177, 185 (Dixon CJ, Fullagar, Kitto, Menzies and Windeyer JJ).
61 James Fitzjames Stephen, *A Digest of the Criminal Law (Crimes and Punishments)* (MacMillan, 4th ed, 1887).
62 Simon Pickering, '"A Voice in the Wilderness": Revisiting the Trial of Brian Cooper' (2016) 35 *University of Queensland Law Journal* 371, 383.

1899 at inception.[63] It is said Stephen required the conduct to include incitement to violence,[64] as laid down by cases such as *R v Collins*.[65] However, none of the purposes stated refer to a requirement that the accused commit violence or breach the peace, so if this were part of Stephen's model, it was 'lost in transplantation' to the colonies. The other states received the United Kingdom common law of sedition;[66] under these laws various important individuals and events in Australian history were associated with prosecutions.[67] A good faith defence is provided in s 45.[68] Similar provisions exist in Western Australia,[69] Tasmania,[70] and Northern Territory.[71]

The previous Commonwealth sedition provisions were removed in 2010 after a recommendation by the Australian Law Reform Commission.[72] In their place, s 80.2 of the *Criminal Code Act 1995* (Cth) was legislated. It creates an offence to intentionally urge another to overthrow *by force or violence* the *Australian Constitution*, federal or state governments, or lawful authority of the Commonwealth Government. This is punishable by maximum 7-year jail term. Section 80.1AC provides an offence of treachery, where a person actually engages in conduct involving use of force or violence, intending to overthrow the *Australian Constitution*, federal or state governments, or lawful authority of the Commonwealth Government. This is punishable by a maximum life jail term.[73]

The United Kingdom retains anti-sedition legislation in the *Incitement to Disaffection Act 1934* (UK). Section 1 creates an offence if a person maliciously endeavours to seduce a member of the defence force from their duty. A woman was prosecuted for breach of this provision, for circulating anti-war pamphlets to serving soldiers detailing where they could go if they

63 Some voiced concern over the breadth of the proposed provision and its likely impact on 'radicalism and republicanism': ibid 384.

64 McBain, 'Part 2', above n 4, 468: 'Stephen was also clear that for the modern offence to exist there must be an incitement to violence as laid down in *Collins*'.

65 (1839) 3 St Tr (NS) 1149.

66 See *Imperial Acts Application Act 1969* (NSW) s 35(1), contemplating prosecutions for seditious libel; *Crimes Act 1958* (Vic) s 316(2)(a)(i) referring to seditious enterprises, relying on common law definition of sedition.

67 They include prosecution of John Macarthur for sedition against Governor Bligh, Governor Darling's press critics, the *Ballarat Times* editor during the Eureka Stockade, and anti-conscriptionists during World War I: *Fighting Words*, above n 43, 53.

68 A defence applies where an accused points out in good faith sovereign's mistakes, points out in good faith defects in the government or constitution of the United Kingdom or Queensland with a view to reform, attempting to change the law by lawful means, and points out with a view to remedy existing points of contention and unhappiness among individuals.

69 *Criminal Code Compilation Act 1913* (WA) ss 44–52.

70 *Criminal Code Act 1924* (Tas) ss 66–7. Section 68 creates an offence of degrading, reviling or exposing to hatred or contempt people or a government of any foreign state, except fair comment. Section 62 prohibits encouraging traitorous conduct. The *Crimes Act 1900* (NSW) s 12 prohibits acts which 'compass, imagine, invent, devise or intends to deprive' the monarch or her heirs and successors from the style, honour or royal name, compel her to change her measures or counsels, or put any force or restraint on to intimidate the Parliament of the United Kingdom or New South Wales, and attempt to make these things happen by uttering or printing words.

71 *Criminal Code Act 1993* (NT) ss 44–6. The common law offence of sedition was abolished in South Australia and the Australian Capital Territory.

72 *Fighting Words*, above n 43, 84.

73 See *Crimes Act 1914* (Cth) s 24AA.

wished to desert. Her free speech defence was rejected.[74] Otherwise, sedition was and remains a common law, rather than statutory, offence.[75] Seditious intention alone is not sufficient to commit the offence; intent to incite violence is also required.

Implied freedom of political communication

In landmark decisions in 1992, the High Court implied in the *Australian Constitution* a freedom of political communication.[76] This was based on notions of representative government reflected in the *Constitution*, including ss 7 and 24 providing for direct election of members of the Senate and House of Representatives respectively. The Court has explained it is necessary in a functioning democracy there be full and robust debate about issues. Candidates for political office must be able to communicate with voters. Voters must have access to a broad range of information to make an informed decision about their vote, and discuss political issues among themselves. The implied freedom has led to various laws being invalidated, including restrictions on political advertising, prohibition of criticism of government bodies, bans on political donations, and anti-protest laws.

The High Court has observed the implied freedom is narrower in Australia than its counterpart in the United States. This is important, since the High Court clearly drew on American jurisprudence in discerning the freedom, and has continued to use American precedents in outlining its contours. Specifically, it is narrower than the *First Amendment* in being confined to communication with a 'political' flavour. This distinguishes it from protection of freedom of expression in other human rights instruments; the freedom is not similarly confined in the United States,[77] Canada,[78] Europe[79] or New Zealand.[80] It is not clear, in policy terms, why the freedom should be so confined in Australia. Further, it is a negative right, a shield protecting it from interference from statute or common law. It is not a positive right, in the sense it could found a legal action for breach, and damages.

Like the United States precedents,[81] Australian precedents have determined a difference between laws prohibiting or regulating speech based on content (content-based regulation), and laws regulating speech not based on content.[82]

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74 *Arrowsmith v United Kingdom* (1978) 3 EHRR 218.

75 *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury* [1991] 1 QB 429.

76 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

77 *United States Constitution* amend I.

78 *Canada Act 1982* (UK) c 11, sch B pt I s 2(b) ('*Canadian Charter of Rights and Freedoms*').

79 *European Convention on Human Rights* art 10(1).

80 *New Zealand Bill of Rights Act 1990* (NZ) s 14.

81 *Police Department of the City of Chicago v Mosley*, 408 US 92, 95–6 (Marshall J) (1972):

> above all else, the *First Amendment* means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content ... any restriction on expressive activity because of its content would completely undercut the profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.

82 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ), 234–5 (McHugh J); *Hogan v Hinch* (2011) 243 CLR 506, 555 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

Laws of the former kind are more difficult to justify. In contrast, where the laws are aimed at a legitimate objective unrelated to suppression of speech, and the effect on speech incidental rather than the direct purpose of the laws, they are more likely valid.

The approach to determining whether a law infringes the implied freedom has evolved. For some years, a two-stage test was applied.[83] Now a majority of the High Court has adopted a three-stage test.[84] That test considers the following questions to determine whether a law is valid:

(a) whether the law effectively burdens freedom of communication about government or political matters in terms, operation or effect;
(b) whether the purpose of the law and the means adopted to achieve it are legitimate, compatible with maintenance of the constitutionally-prescribed system of representative government; and
(c) whether the law is reasonably appropriate and adapted to achieve that legitimate objective (proportionality testing). Under proportionality testing, the court considers whether the challenged measures are suitable, necessary and adequate in their balance. They are *suitable* if rationally connected to their purpose. They are *necessary* if no obvious and compelling reasonable practical alternative exists to achieve the legitimate objective, and may be *adequate in their balance* having regard to their infringement of the fundamental freedom, compared with the legitimate objective/s sought.

The High Court has not considered the implied freedom in the context of a sedition-type offence. The closest equivalent involved laws making it an offence to bring the Industrial Relations Commission into disrepute. Several members of the Court decided such a law invalid because it infringed the implied freedom of political communication.[85] Later some members found the implied freedom engaged when an individual circulated written material accusing police officers of corruption.[86] The High Court has accepted protest directly engages the implied freedom of political communication, validating laws restricting protest that were reasonable for public safety,[87] but invalidating anti-protest laws that were vague and overbroad.[88] I will now consider whether the state anti-sedition laws (exemplified in the Queensland *Criminal Code Act 1899*) and federal anti-sedition laws are likely to be held constitutionally valid if challenged. The implied freedom applies to federal and state laws.[89]

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83 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
84 *McCloy v New South Wales* (2015) 257 CLR 178.
85 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 53 (Brennan J), 79–80 (Deane and Toohey JJ).
86 *Coleman v Power* (2004) 220 CLR 1, 30 [25]ff (Gleeson CJ), 45 [80]–[81] (McHugh J), 78 [197]ff (Gummow and Hayne JJ), 100 [261]ff (Kirby J); *contra* 113 [299] (Callinan J), 120 [318]ff (Heydon J).
87 *Levy v Victoria* (1997) 189 CLR 579.
88 *Brown v Tasmania* (2017) 261 CLR 328.
89 *Unions NSW v New South Wales* (2013) 252 CLR 530.

Constitutional validity of state anti-sedition laws

As noted, current legislation in several states criminalises sedition. This legislation defines sedition broadly, including bringing the sovereign into hatred or contempt, exciting disaffection against the sovereign of the United Kingdom or state, against parliaments in the former country or state, or the administration of justice, or raise discontent or disaffection among citizens, or promote feelings of ill-will between individuals.

The first observation is the very broad possible ambit of such an offence. Consider a person who is an avowed republican. They may espouse strident views in favour of a republican form of government, and in so doing disparage members of the monarchy. On one view, this disparagement could bring the sovereign into contempt or hatred.

In relation to exciting disaffection against the government, and raising discontent or disaffection among citizens, on one view this is what opposition members of Parliament regularly do. They often oppose government action and criticise government policy. Sometimes the opposition and criticism is for genuine policy different reasons; however, sometimes the opposition seems to be for the sake of opposition; the opposition is not seeking to make a good faith contribution to society in order to improve the situation, but constantly negative about anything a government does, to rouse public sentiment against the government. Other political lobby groups may also work to excite 'disaffection' with the government. This may be designed to change policy, or a cynical ploy to undermine the government, with a view to changing it. Individuals may also work to do this. For example, an Australian businessperson is currently running large advertisements in newspapers suggesting we should cut the current immigration intake, because our youth unemployment rate is high. The question of immigration levels is highly charged and emotive. Is this advertiser seeking to 'excite disaffection' against the government, or raise discontent among citizens? On one view, he is. He suggests Australia's youth unemployment rate is caused by high immigration levels. That would rankle with current unemployed people, their families, and others. On another view, this is a contribution to an important public policy debate that all countries, including Australia, have and should have regarding optimal immigration levels.

In relation to 'promoting feelings of ill-will', many public commentators do this. Some radio and television broadcasters take a particularly aggressive tone. It has been suggested some members of the media adopted an aggressive strategy to have Australia's previous Prime Minister removed. A radio broadcaster has recently been found to have committed defamation by falsely accusing individuals who owned a dam of causing the death of numerous flood victims. Accusing someone of causing the death of others is likely to promote feelings of ill-will between individuals.

Some might defend the validity of the state legislation by pointing to the good faith defence. Broadly, it is a defence to prosecution for sedition to show the accused raised matters in good faith relating to mistakes the monarch made, defects in governance with a view to reform, and point out with a view to correction things causing ill-will and discord among society.

This defence is not sufficient to protect legitimate speech. For instance, an

arch republican may stridently criticise the monarchy. This may not be with a view to pointing out 'mistakes', but with a view to abandoning the monarchy. Much criticism of government is not designed to point to defects in government with a view to reform; rather it is to pursue an agenda of regime change or change of policy direction. Some participants in public debate might point to issues causing ill-will and discord among the community, but not with a view to correction. The person may cynically play on public discord for their own ends, or may have personal animosity towards the government or its members. In other words, the existing good faith defence is not broad enough to protect the kinds of speech that should be permitted in a robust democracy like Australia.

In terms of the three-stage test for determining whether laws are compatible with the implied freedom, the first question is whether the law burdens freedom of communication about government or political matters in terms, operation or effect. Clearly it does — discussion about the head of state, Parliament and government is clearly about political matters. The second question is whether the purpose of the law and the means adopted to achieve it are legitimate, being compatible with the constitutionally prescribed system of representative government. The purpose of the law will have to be guessed at. It is a section contained in *Criminal Code Act 1899* since inception, and there has been no alteration to the definition of seditious intention since. The second reading speech introducing the Code to Parliament did not specifically refer to the sedition section, thus we have no specific evidence about its purpose.

Presumably, the purpose of the law was to prevent uprising and revolution against the established system of government and constitutional structure. It was believed if individuals were permitted to foment discontent about the status quo, this might cause civil unrest and discord, and destruction of the stable structures that had largely been imported from the United Kingdom for the colony's governance. A breach of the peace might result. Looking at the section through the eyes of today, one may doubt whether the purpose of the law and the means used are in fact compatible with representative government. Representative government implies individuals must be free to speak their mind about political matters, including how they are governed. If they are not happy with the current monarch, or the constitution or members of the Parliament, they should have a right to say so without fear of being prosecuted for fomenting ill-will against established order.

The definition of seditious intention is not confined to cases where the accused uses or threatens violence to attain their ends. Only one of the five examples of seditious intent refers to use of unlawful means. That example might be more justified as consistent with representative government, in that citizens are expected to comply with the law, and use lawful channels, including talking with their representative or themselves standing for office, if they wish to change the law. A law seeking to confine dissent to lawful means might have a legitimate purpose. In contrast, laws simply preventing a person exciting disaffection with the current governance or promoting ill-will among

citizens may not, because they prevent the robust public debate upon which representative government depends.[90]

At the third stage, the court considers whether the law is reasonably appropriate and adapted to a legitimate objective. It considers whether the law is *suitable* (rationally connected to its purpose), *necessary* (no alternative less invasive of human rights practically available to meet the legitimate objective), and *adequate in its balance*. If it were accepted suppression of dissent and criticism is a legitimate objective, it might be argued the law is suitable to that end. However, it is unlikely to be necessary. There are many ways to ensure maintenance of existing governance structures without criminalising dissent and criticism. Arguably, if there is a place for sedition laws in a modern democracy, they should be limited to circumstances where the relevant conduct was likely to lead to immediate breach of the peace and/or cause danger to the public.

Indeed, this is the current position in Canada,[91] the United States[92] and United Kingdom.[93] The Australian High Court relied on Canadian cases, particularly those prior to the introduction of the *Canadian Charter of Rights and Freedoms* there, when discerning the implied freedom in Australia.[94] Thus, their precedents hold special relevance for Australia here. Such a Canadian case concerned the validity of legislation proscribing seditious libel. The section defined sedition as involving publication or circulation of written material advocating use, without legal authority, of force to accomplish government change in Canada. The section stated it was not intended to limit the meaning of sedition. A defence was provided in very similar terms as the state legislation in Australia. Difficulties arose because, historically, sedition had sometimes been defined as involving mere intent to bring the sovereign or government into hatred or contempt, or invite disaffection with them, and sometimes defined to be merely promoting feelings of ill-will and hostility between individuals. In both such iterations, there was no requirement of intention to incite violence to secure government change. The issue was whether the Canadian version of the sedition law should be interpreted narrowly on its terms, confined to cases where the publisher or circulator of the material intended it to lead to government change through violence, or whether the broader view of sedition was part of Canadian law. The context was an adherent of the Jehovah's Witness religion who distributed pamphlets. They contained statements calling for calm and reason. They discussed victimisation and persecution of Witnesses, and called for a closer reading of God's word.

A majority of the Court interpreted the sedition offence in Canada as limited

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90 McBain, 'Part 2', above n 4, 480: 'the absence of the offence (of sedition) demonstrates a healthy democracy'.

91 *Boucher v The King* [1951] SCR 265.

92 *Brandenburg v Ohio*, 395 US 444 (1969); *Dennis v United States*, 341 US 494 (1951).

93 *R v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury* [1991] 1 QB 429, 453. A change occurred in *R v Collins* (1839) 3 St Tr (NS) 1149, 1176: Littledale J defined seditious writing as one suggesting 'the people should make use of physical force as their own resource to obtain justice', as opposed to mere criticism.

94 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 141 (Mason CJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 49–50 (Brennan J), 74 (Deane and Toohey JJ), 103 (McHugh J).

to when the accused intended to bring about government change *through force*. Rand J tied the changing conception of sedition with changes in how government was viewed. When government was seen as comprising superior beings exercising a divine mandate, and a Hobbesian view of human nature taken, a broad conception of sedition, and strong legal prohibition against criticism of government action, was expected. With the growth of representative government and acceptance that the people were sovereign, criticism of government action became more acceptable.[95]

Rand J said legal historian Stephen had defined seditious as involving any of the following: (a) bringing into hatred or contempt, or exciting disaffection against, the monarch or government or constitution of the United Kingdom, either House of Parliament, or administration of justice; (b) excite the monarch's subjects, other than through lawful means, to alter any law; (c) incite any person to commit a crime in disturbance of the peace; (d) raise discontent or disaffection amongst citizens; or (e) promote feelings of ill-will or hostility between different classes of subjects.[96] This is like definitions in existing state laws in Australia.

Rand J distinguished historical practice evidenced by Stephen with current realities (in 1954). He concluded no modern authority had included within the concept of sedition the mere fact a person creating discontent or disaffection among citizens, without the further element of inciting illegal conduct. He was not surprised by this because:

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality ... our compact of free society accepts and absorbs ... differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and ... in the search for the constitution and truth of things generally.[97]

Locke J said it was 'very much too late in the day' to say that it was a crime for a person to publish something calculated to alienate the affections of people by bringing the government into disrepute or ridicule.[98]

Of course, if the Australian courts were to apply these sentiments, the state laws would be invalid, at least partly. They do not require that the accused

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95 *Boucher v The King* [1951] SCR 265, 285–6.

96 Ibid 287.

97 Ibid 288 (Rand J), 330 (Locke J). Similar comments appear in Dickson J (for Spence and Estey JJ) in *Cherneskey v Armadale Publishers Ltd* [1979] 1 SCR 1067, 1096:

> free and general discussion of public matters is fundamental to a democratic society. The right of persons to make public their thoughts on the conduct of public officials ... goes back to earliest times in Greece and Rome. The Roman historian, Tacitus, spoke of the happiness of the times when one could think as he wished and could speak as he thought ... citizens, as decision makers, cannot be expected to exercise wise and informed judgment unless ... exposed to the widest variety of ideas, from diverse and antagonistic sources. Full disclosure exposes ... false doctrine.

98 *Boucher v The King* [1951] SCR 265, 331 (Locke J).

incite unlawful conduct. Rand J erred by claiming in 1954 'no modern authority' had included within the offence of sedition the uttering of words exciting disaffection without the accompanying requirement of incitement of illegal conduct. His ignorance of the law of Australian states may be forgiven. Evidently, Locke J was also unfamiliar with these laws. In any event, if punishing non-violent expressions was seen as a relic of another era by Canadian judges in 1954, their unfitness to be part of Australian statute law in 2019 is clearer.

In terms of necessity, Douglas explains the United Kingdom did not suffer from its tolerant approach to dissenters during World War II. He points out bans on speech and association usually do not prevent allegedly subversive groups from continuing their activities. He suggests sedition laws are essentially typically based on a false premise:

> Anti-subversion legislation assumes that there are ideas which, once allowed into the community, are likely to run rampant. Yet there was no evidence to suggest that the major dissident groups possessed some mysterious capacity to seduce the populace. Indeed their ongoing minority status was testimony to their ineffectiveness in this regard.[99]

In sum, if anti-sedition laws ever were needed, they are no longer 'necessary' and they are not minimally invasive of freedom of communication.

Further, the laws are unlikely to be adequate in their balance. The ability to discuss politics is essential in a democracy. In the United States and Europe, where a broader range of speech is protected, both have recognised speech about political matters/public affairs occupies the highest rung of free speech protection.[100] This goes to show how widespread is recognition within democracies of the pivotal role of free speech in their healthy preservation. Further, sedition restrictions are content-based. As indicated above, courts in Australia and United States have been wary of laws regulating speech where their application is based on content. According to Mason CJ in *Australian Capital Television*, they require compelling justification. It is difficult to meet this requirement in relation to the broadly-defined state sedition laws.

It is noteworthy that in *Coleman v Power*,[101] two justices of the High Court were only able to conclude a provision prohibiting the use of 'insulting words' was compatible with the constitutional implied freedom by reading the provision down to be confined to words likely to provoke violence.[102] There are obvious analogies with the ill-defined notion of sedition.

State anti-sedition laws are unconstitutional in their infringement of the implied freedom of political communication. The offence provisions burden freedom of political communication. They are not compatible with representative government. Even if they are, they fail proportionality testing, because they are not necessary or adequate in their balance. If they were

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99 Douglas, above n 41, 113. Further, in an internet era, the ability of any legislature to combat subversive communications is highly suspect.

100 *Snyder v Phelps*, 562 US 443, 452 (Roberts CJ) (2011): 'speech on public issues occupies the highest rung of the hierarchy of *First Amendment* values, ... entitled to special protection'; *Oberschlick v Austria [No 2]* (1997) 25 EHRR 357, [29].

101 (2004) 220 CLR 1.

102 Ibid 77–8 [193]–[196] (Gummow and Hayne JJ; Kirby J agreeing).

narrowly tailored, confined to instances where the relevant speech was likely to provoke a violent response, they are defensible. This possibility is discussed below.

Constitutional validity of Commonwealth anti-sedition laws

There is a key distinction between the offence of sedition as described at state level, and the equivalent offence at federal level, as amended in 2010. The 2010 amendments removed the offence of sedition, replacing it with a new offence in s 80.2 of urging overthrow of the government or *Constitution with violence*. This amendment brought the Australian federal law into line with what the court in Canada in the 1954 *Boucher v The King* case[103] said was required for sedition to be proven, namely that of incitement to an unlawful act, typically violent. The question is whether the amended provision is constitutionally valid, given the implied freedom of political communication.

On the three-step test, s 80.2 burdens freedom of communication about political matters. Secondly, we consider whether the purpose of the law and the means to achieve it are legitimate, compatible with representative government. The purpose of the law is to discourage and put down urging of violent insurrection. Such insurrection may well involve violence and injure others. The government has a legitimate interest in preserving public order and safety. The means to achieve it, preventing the urging of violent acts, are legitimate and compatible with representative government. Representative government implies changes to the law, and changes to government, occur through the voting process. They occur through peaceful, democratic means, not violent, undemocratic means. Prohibition of unlawful violence committed to achieve political change is consistent with representative government.

On the third stage and proportionality analysis, the court considers whether the law is suitable, necessary and adequate in its balance. The Commonwealth law is suitable, as rationally connected towards a purpose of peaceful resolution of disputes, discussion of issues, and change. It is necessary — where an individual or group obtained power, or a transfer of power away from a democratically elected government, through unlawful force, the new government is illegitimate. It is at odds with representative government. It is necessary to criminalise attempted action along these lines. The section is adequate in its balance. Preservation of a democratically elected government from violent overthrow is a pressing objective. The impact on freedom of expression involved is minimal, having regard to that pressing objective. The Commonwealth anti-sedition law is valid.

I am fortified in this conclusion upon considering *First Amendment* doctrine in this type of case. It has been pointed out the Australian implied freedom differs materially from the *First Amendment*. United States decisions are not necessarily applicable in Australia, given these differences. Having said that, many Australian cases have utilised doctrine from *First Amendment* discussion, acknowledged or not. The first implied freedom cases referred to

103 [1950] 1 DLR 657 (Supreme Court of Canada).

American authorities.[104] The Australian court's distinction between content-based and content-neutral restrictions mirrors the distinction made in the *First Amendment* jurisprudence. Gummow and Hayne JJ's use of the 'fighting words' doctrine in the Australian *Coleman v Power*[105] decision was expressly linked with *Chaplinsky v New Hampshire*.[106]

The *First Amendment* case law is vast. Broadly, at one time the Supreme Court upheld anti-sedition legislation, *Espionage Act 1917*, against *First Amendment* challenge.[107] In 1925, it validated a law on the basis the state was entitled to criminalise speech that might endanger foundations of government.[108] At the start of the Cold War, legislation prohibiting advocacy of overthrowing any government in the United States and organisations with such aims was validated.[109] Requirements for individuals to utter oaths loyal to the nation as a condition of employment, or government benefits, were upheld.[110] Legislation prohibiting advocacy or teaching of violence to seek political change was upheld.[111]

However, the Court moved away from these precedents. It struck down laws that sought to criminalise peaceful association.[112] It struck out loyalty oaths.[113] It overturned *Whitney v California*,[114] deciding legislation criminalising urging of criminal behaviour to achieve reform was invalid. There in *Brandenburg v Ohio*, the Court insisted the only circumstances in which such advocacy could be lawfully prohibited was when directed to incitement or production of imminent lawless action, and was likely to so achieve.[115] This contrasted with mere abstract speech suggesting violence. On the facts, the accused's conviction was overturned. He was a leader of the KKK. He suggested if the American President continued to 'suppress the white, Caucasian race', 'revengeance' might be needed. The Court quashed his conviction, concluding his speech was not directed or likely to cause imminent lawless behaviour.

Broadly, the European Court of Human Rights ('ECHR') has taken a similar view. It quashed convictions of individuals who were highly critical of the Turkish Government. They were prosecuted for publishing propaganda said to undermine that state,[116] and inciting hostility among groups.[117] In both the ECHR found infringement of art 10(1) of the *European Convention on*

104 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143 (Mason CJ), 231, 241 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 31 (Mason CJ), 79 (Deane and Toohey JJ), 103 (McHugh J).
105 (2004) 220 CLR 1, 75–6 [187].
106 315 US 568 (1942).
107 *Debs v United States*, 249 US 211 (1919) (jailed for 10 years for an anti-war speech found to be an attempt 'to cause and incite subordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States': at 212).
108 *Gitlow v New York*, 268 US 652 (1925).
109 *Dennis v United States*, 341 US 494 (1951).
110 *Garner v Board of Public Works of Los Angeles*, 341 US 716 (1951).
111 *Whitney v California*, 274 US 357 (1927).
112 *DeJonge v Oregon*, 299 US 353 (1937).
113 *Speiser v Randall*, 357 US 513 (1958).
114 274 US 357 (1927).
115 395 US 444 (1969).
116 *Baskaya v Turkey* (2001) 31 EHRR 10.
117 *Ceylan v Turkey* (2000) 30 EHRR 73

Human Rights, and the measures not justified, because the speech was unlikely to incite violence. Canadian Supreme Court also confine sedition to cases where the relevant speech was likely to incite violence.[118]

Thus, if an Australian court were to follow the American, Canadian and European precedent, it could strike out s 80.2 of the *Criminal Code Act 1995* (Cth) because it is not limited to cases where the urging of criminal behaviour is likely to lead to *imminent* violence, but applies to all such urgings. On the other hand, as noted the Australian High Court has found our freedom is narrower in scope than elsewhere. It is concluded the High Court would find s 80.2 constitutionally valid.[119]

Conclusion

This article has considered the history, and current regulation, of behaviour known as sedition. It has found the federal provision is likely valid, but there are real question marks over validity of state equivalents, due to the implied freedom of political communication. Perhaps some believe discussion of this topic is 'academic' given the offence may be perceived anachronistic. There are two answers. The first is the federal government evidently saw the need in recent years for an offence of this nature. The second is law is often symbolic, reflecting society's values and culture. Removal of state sedition offences, whether by parliament or court decision, would send an important message about the confidence we have in our democracy, that it is robust enough to sustain heated debate and strident criticism, and the general public mature enough to have ongoing debates of this nature, without fear our institutions of governance are vulnerable. It would reinforce our nation's commitment to free speech, at a time when it appears to be under threat.

118 *Boucher v The King* [1951] SCR 265.

119 The same conclusion appears in *Fighting Words*, above n 43, 144; cf Pickering, above n 62, 391: 'it is difficult to imagine sedition laws could pass as constitutional in a prosecution today since the High Court's recognition of the implied freedom of political communication, as they so plainly inhibit political speech'.