‘A VOICE IN THE WILDNERNESS’: REVISITING THE TRIAL OF BRIAN COOPER

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‘One must lie low, no matter how much it went against the grain, and try to understand that this great organization remained, so to speak, in a state of delicate balance, and that if someone took it upon himself to alter the dispositions of things around him, he ran the risk of losing his footing and falling to destruction, while the organization would simply right itself by some compensating reaction in another part of its machinery – since everything interlocked – and remain unchanged, unless, indeed, which was very probable, it became still more rigid, more vigilant, severer, and more ruthless.’

- Franz Kafka, *The Trial*

I INTRODUCTION

In 1960, on the personal instruction of Prime Minister Robert Menzies, a young officer in the Australian Administration in New Guinea (then an Australian Territory) was prosecuted for sedition, an offence criminalising criticism of the established government. His name was Brian Leonard Cooper.

Over three days in 1960, Cooper sat under the shade of a tree with a number of New Guinean men during his lunch hours and discussed his recent travels through Southeast Asia while on leave. At some point, the conversation veered towards the governance of these countries and then towards the prospect of self-government for New Guinea. Responding to a question, Cooper outlined three methods by which the Territory could achieve independence, including one violent method he denounced. Translated from Pidgin into English, the indictment against Cooper stitched together the most sensational recollections relating to this method over three days from various witnesses, who conferred before giving their statements. He was ultimately charged with saying:

> You must have a new Government of your own. Often I’ve heard that some countries refer to Australia as an Imperial country and I’ve been very ashamed about this. Now the Menzies Government, I hate it very much all the time. He hasn’t done any good for Australia, and the Cleland Government is the same, it is very worthless. Now I don’t want a long delay. You must set a date and you must sing out for all the men and speak to them so that they will all hear. I don’t want a long delay. Set a Saturday, that’s a good day. All right then, I can send talk to some people so that they can come and help you. Me, I’m not afraid. All right if they want to do something to me later on I can go in the high part at the back of Amele and put headquarters there. Now some men can come and help me. You have heard that in Africa in the Congo, that they have got a new Government of their own, and they all stay contented. Now I want you people to get it within six months. It’ll be no good to leave this talk for very long because the District Office will hear of it and prevent us. Set a meeting and tell all the men so that they’ll hear, tell the Police who

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> speak you same language to hear this now. Don't worry about the Native Affairs Field Staff. Consider only the Police Officer. First a group can go and take hold of the Police Officer and tie him to a post with a rope so that he'll remain there. Some groups can go and break into the stores, into the place where the rifles are and get them all; some groups can go the big stores and break into them and take things such as beer, rum and food and they can all eat and drink. Expel all the white people and tell them they have to go back to their own place. Now all the men must go and occuply [sic] the places of employment so that they can't come back. They must remain in their houses, board a ship and then they can go back. Now at the airstrip a group can go and cut some trees and throw them on to the airstrip, burn some aircraft and put them on the airstrip so that the Australian and American soldiers can't come down. Your own army can get rid of all the Europeans so that they go back to their own place, Australia. If the Australians want to do something, if they want to come and fight with you, all the Russians and Chinese can help you. The Australians will be frightened if the Russians and the Chinese make threats. I can get a message to the Russians and they will come and help you.[1]

In a climate of acute Executive insecurity, the sensational and widely publicised prosecution of Cooper was a relief for a government under fire, and assisted the passage of wholesale changes to the *Crimes Act*, ongoing involvement in the Territory on the eve of war in Vietnam and demonstrated the continued need to defend Australia from the 'red threat'. The prosecution also promoted the interests of two New Guinean men, Stahl Solum and Somu Sigob, who went on to positions of prestige beyond the imagination of most native New Guineans at the time and were instrumental in securing the prosecution.

When Cooper's appeal came before the Dixon High Court, the last trial for sedition in Australia, it was dismissed as 'simple and straightforward';[2] however, it need not have been. Despite substantial historical baggage associated with the law of sedition, deep uncertainty surrounding fundamental doctrinal questions, and Sir Owen Dixon's careful judgements in previous sedition cases, the Court's decision in Cooper's case was cursory at best. Rather than taking the opportunity to engage in careful analysis of the law on sedition and clamp the lid on the deeply problematic law of sedition outside a wartime environment, the Dixon Court left the law in a dangerous state which unduly favours the prosecution and remains vulnerable to abuse.

Part II describes the political climate and contemporary historical context to help understand the significance of the offence, and put the political decision to prosecute in perspective. Part III focuses on Cooper's employment in the Territory and how he was closely watched by ASIO for his political opinions. Part IV examines the offence in detail, how it was reported, and how the decision to prosecute was virtually abandoned until the intervention of the Prime Minister and Attorney-General. Part V pivots from a purely historical analysis of the case to an analysis of sedition law in Australia, highlighting the ways in which the offence has historically been deeply problematic and uncertain in terms of principle and bare operation. Part VI focuses on the legal resolution of *Cooper's* case in the Supreme Court of Papua and New Guinea and the High Court of Australia on appeal, arguing that the High Court failed to engage meaningfully with the issues of principle which have dogged the offence historically, and interpreted the offence in a way which leaves it open to future abuse by the Executive.

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1 Transcript of Proceedings, *Cooper v The Queen* (Supreme Court of the Territory of Papua and New Guinea, Mann CJ, 27 January 1961) 2-3.

2 *Cooper v The Queen* (1961) 105 CLR 177, 183.

II THE POLITICAL CLIMATE

A *Trouble At Home*

In the months leading up to Cooper's prosecution, the Menzies government was being heavily criticised. The public response to a decision on the advice of the Australian Security and Intelligence Organisation (ASIO) to deny an entry visa to the distinguished anthropologist, Max Gluckman, to conduct research on Papua and New Guinea was especially critically received.[3] In Parliament, Arthur Calwell, Leader of the Opposition, supposed the permit was denied because Gluckman was 'soft' on the future of the white race in South Africa,[4] despite not being a communist. In the criticism of ASIO's perceived paranoia which followed, the *Age* wrote that on the few occasions ASIO had 'been exposed to the public gaze and put to the test of independent judgement, there have been disturbing signs of inefficiencies and irregularity'.[5] In November 1960, around the time the decision was made to prosecute Cooper, the Treasurer Harold Holt handed down the 'Holt Jolt', a range of budget measures that sent unemployment soaring.[6]

A series of bizarre political outbursts and a dogged anti-communist stance put the Attorney-General, Sir Garfield Barwick, front and centre of a cross-section of public criticism. In August 1959, Barwick sacked Jim Staples, a barrister with the department, without explanation on learning he had previously been a member of the Communist Party between 1947 and 1956.[7] He justified it later, saying 'we are not in the least ashamed of the fact that the Commonwealth did not allow a man who had long been a communist, and who was said to have been thrown out, to continue with us. Being expelled is a fancy way that these gentlemen have of dissociating themselves, for the time being, from the party so that they may do more valuable work under cover.'[8] More importantly, however, was Barwick's introduction of a suite of amendments to the *Crimes Act*[9] which sought to redefine four great offences against the State: treason, sabotage, the new crime of 'treachery', and 'known character' provisions which permitted courts to construe criminal intent in some offences on the basis of the accused's reputation.[10] The amendments were criticised as a paranoid attack on legitimate trade-union activities;[11] criticism Barwick characterised as a communist plot.[12] The amendments were introduced immediately after debate on the Gluckman affair on September 8th [13] and shortly after they were introduced, Barwick left the country to represent Australia at the United Nations, losing control of the debate for

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3 David Marr, *Barwick: The Classic Biography of a Man of Power* (Allen & Unwin, 2nd ed, 1992) 154-155; Anthony Yeates, '"A foolish young man, who can perhaps, be straightened out in his thinking": The Brian Cooper Sedition Case' (2007) 129 *Australian Historical Studies* 71, 81.

4 Marr, above n 3, 154-155.

5 *The Age* (Melbourne), 14 September 1960.

6 Michael Head, 'The Political Uses and Abuses of Sedition: the Trial of Brian Cooper' (2007) 11 *Legal History* 63, 68.

7 Marr, above n 3, 154.

8 Ibid 154, quoting Commonwealth, *Parliamentary Debates,* House of Representatives, 8 September 1960, 1045 (Garfield Barwick).

9 *Crimes Act 1914* (Cth)

10 Marr, above n 3, 158.

11 W R Stent, 'An Individual vs. the State' (1980) 79 *Overland* 60, 61.

12 Marr, above n 3, 159, citing Commonwealth, *Parliamentary Debates,* House of Representatives, 8 September 1960, 1033 (Garfield Barwick).

13 Stent, above n 11, 61.

the five weeks he was away.[14] The same day Cooper committed his offence, the *Age* wrote that Barwick's timing in introducing 'a controversial bill dealing with security measures is evidence that the otherwise capable Attorney-General still has a lot to learn about politics'.[15] A version of the amendments eventually passed on 13th December, but exacted a political cost: the damage to his prestige as a legislator quelled previous suggestions that Barwick could be a possible successor to Menzies.[16]

B *Holding on to Papua and New Guinea*

Throughout this period, despite a 'glorious late flowering of imperial sentiment in Australia'[17] and 'unprecedented expansion of Administration expenditure'[18] under Prime Minister Menzies and the Minister for Territories Paul Hasluck, Australia's de facto colonial position in Papua and New Guinea was under pressure from anti-imperial, pro-independence movements. In May 1960, Gough Whitlam brought an end to longstanding bipartisan support for the status quo, declaring that Australia contributed only one tenth towards Papua New Guinea as it did domestically, per capita, and that it should be spending the same.[19] At the UN General Assembly, the Australian delegation was pressured to pull out of the Territory, and set target dates for its self-determination.[20]

C *War on the Asian Frontier*

However, these pressures to withdraw from the Territory did not outweigh the pressures to remain throughout the Cold War, which underlay the *Cooper* prosecution. Although Marr notes that throughout this period it seemed that at any moment Australia might be at war,[21] the true position is that Australian forces had been engaged in the Malayan Emergency to combat the communist insurgency since April 1950 and although the Malayan Emergency was officially declared over in July 1960, marking the longest continuing military commitment in Australia's history, the hunt for remaining guerrilla forces remained ongoing throughout the period of the prosecution.[22] Towards the end of the Emergency, it became clear that further conflict in the region was imminent and posed a substantial threat to regional stability. This push for communist containment in the region drew Australia into conflict with both Vietnam in 1962[23] and Indonesia during Konfrontasi in 1963.[24]

In the same way the feared Japanese invasion of Australia had been repelled along the Kokoda trail and Papua and New Guinea entered ANZAC legend,[25] New Guinea was viewed as a protective buffer between Australia and possible enemies to

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14 Marr, above n 3, 159.
15 *The Age* (Melbourne), 14 September 1960, 2.
16 Marr, above n 3, 164-5.
17 Ibid 169.
18 R S Parker, 'The Growth of Territory Administration' in E K Fisk (ed), *New Guinea on the Threshold* (Australian National University Press, 1966) 187, 193.
19 Yeates, above n 3, 86, citing *South Pacific Post,* 31 May 1960.
20 John Ryan, *The Hot Land: Focus on New Guinea* (MacMillan, 1971) 25.
21 Marr, above n 3, 169.
22 Peter Dennis and Jeffrey Grey, *Emergency and Confrontation: Australian Military Operations in Malaya and Borneo 1950-1966* (Allen & Unwin, 1996) 22, 150.
23 Paul Ham, *Vietnam: The Australian War* (Harper Collins, 2007) 48-9.
24 Dennis, above n 20, 171.
25 Peter Stanley, *Invading Australia: Japan and the Battle for Australia, 1942* (Penguin Australia, 2008) 191-2.

the north and west.[26] Unsurprisingly, Minister Hasluck was prepared to limit political development in the Territory in the interests of defence, to the chagrin of the United Nations Trusteeship Council.[27]

III ENTER LEFT: A FOOLISH YOUNG MAN

A *Cooper in the Territory*

Throughout the time these tensions were mounting on the Menzies government, Brian Cooper was forging his career in the Administration of the Territory. A neighbour of many years described Cooper as 'teetotal, moderate, hard-working, intelligent and trustworthy in everything'.[28] Within the Administration he earned a reputation as a quiet young man, who was very much an outsider as he had no interest in sport,[29] preferred the company of New Guineans,[30] and fellow recruits thought he was aloof and more intelligent than they were.[31] This social tension brought him into conflict with both his superior Ian Wiseman in Madang, the site of his offence, whom he found 'bossy, lazy, and at the same time rather brainless',[32] and his fellow recruit, Peter Wright.[33] For his part, Wiseman thought Cooper 'anti-monarchy, anti-social and anti-everything',[34] and both men were important in Cooper's prosecution.

In addition to his temperament, Cooper was marked out as different for the political opinions he held. He readily admitted that he was attracted to socialism,[35] while his fellow recruits liked to provoke him in argument to 'get him going'.[36] Cooper later reflected that it was 'through provoking arguments and being misinterpreted in my views, that I have been reported to the authorities'.[37] Cooper also felt it was only European conservatism holding back the Territory and that it was ready to govern itself.[38] This was not necessarily an isolated view, but unlike others Cooper believed New Guinea was capable of independence immediately. In a letter home, he wrote, somewhat prophetically, '[w]hat are we waiting for? The inland people are not ready, but the coastal and near coastal people are. A voice in the wilderness at the moment. Will it remain so? Probably, almost certainly'.[39]

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26 Marr, above n 3, 169.
27 Ryan, above n 19, 25.
28 Yeates, above n 3, 73.
29 Minute to Senior Field Officer ASIO, Victorian Office, 2 April 1958, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.
30 W R Stent, 'A Brief Biographical Account of Brian Leonard Cooper: An Early Advocate of Self-Government for Papua New Guinea' (Discussion Paper No 1/78, School of Economics, La Trobe University, Bundoora, February 1978) 6-8.
31 RD, Attorney General's Department D Branch, Port Moresby to Headquarters ASIO, 12 May 1958, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.
32 Stent, above n 30, 10.
33 Ibid 5-6, 8.
34 Regional Director to Headquarters, ASIO, 26 September 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.
35 Memorandum for Headquarters ASIO (B1(e)), 29 July 1958, 5, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.
36 RD ASIO to Headquarters ASIO, 20 March 1958, C/1/48, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.
37 Memorandum for Headquarters ASIO (B1(e)), 29 July 1958, 5, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.
38 Stent, above n 30, 12; Transcript of Proceedings, *Cooper v The Queen* (Supreme Court of the Territory of Papua and New Guinea, Mann CJ, 27 January 1961) 429-30.
39 Stent, above n 30, 11.

Throughout his employment in the Territory, Cooper was viewed with deep suspicion for his political opinions, and was under constant surveillance by ASIO. Even before taking up the position, Cooper was assessed as being 'impressed by communist propaganda',[40] and not long after arriving, the Regional Director of ASIO received a report that Cooper had allegedly visited the room of an associate saying he wanted to listen to Moscow or Radio Peking.[41] To guarantee he would not be 'foolish enough to indoctrinate native people with communist propaganda',[42] his activities were 'kept under constant review'.[43] Despite security assessments that declared 'Cooper is a Communist sympathiser' and 'unsuitable for employment in ~~any Australian Public Service~~ a sensitive area, such as New Guinea,'[44] these assessments were disregarded by the Department of Territories,[45] most likely because of the shortage of capable candidates in the Territory,[46] and Cooper received regular postings.

During a short posting in Wewak, Cooper was interviewed by the Regional Director of ASIO at the instruction of the Director-General[47] to determine whether he was a communist,[48] his attitude towards Australia's administration in Papua New Guinea,[49] and to neutralise his 'considerable exploitable value to a hostile intelligence service'.[50] The interview was mostly unremarkable. At the end of the interview, Cooper was given a pointed warning that 'if any person is foolish enough to give people the impression that he perhaps supports Communism, then that person is in for some strong criticism'[51] and he 'should be very careful not to say anything stupid to the natives in this area'.[52] Despite expressing apprehension to his family following the interview that he might not be permitted to remain in the Territory,[53] the official assessment was favourable to Cooper, if condescending. The Director General of ASIO, Charles Spry, found that Cooper's statements were merely 'a manifestation of a feeling of inferiority rather than the fruit of deep thought or conviction',[54] and the ASIO Regional Director issued follow-up assessments that Cooper had 'not engaged in any political activity since being interviewed by me in July 1958'. In February, Spry declared no objection to Cooper's position.[55] Thereafter, ASIO's interest in Cooper

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40 G T Daniels to Officer in Charge, CIB Special Branch, Russell Street, Melbourne, 21 January 1958, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

41 Yeates, above n 3, 73.

42 Ibid 73.

43 Director-General to Regional Director, ACT, 26 February 1958, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

44 Minute Paper: Brian Leonard Cooper, 6 May 1958, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

45 Yeates, above n 3, 75.

46 Ibid 74.

47 Director-General to Regional Director, Territory of Papua & New Guinea, 4 July 1958, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

48 Regional Director to Headquarters, ASIO, 20 March 1958, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

49 Yeates, above n 3, 76.

50 Vetting Interviews: Brian Leonard Cooper, 25 June 1958, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

51 Memorandum for Headquarters ASIO (B1(e)), 29 July 1958, 8, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

52 Ibid.

53 Stent, above n 30, 9.

54 Director-General to Regional Director, ACT, 21 August 1958, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

55 Director General ASIO to RD, Australian Capital Territory, 20 February 1959, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

appears to have waned, and on 9 June 1959, after more than a year in the Territory, Cooper was transferred to Madang, the site of his ultimate offence.

B *A Holiday*

On 12 May 1960, Cooper left Papua New Guinea on leave, spending a month in Indonesia before going on to Singapore, Malaya, Thailand, South Vietnam, the Philippines, Japan, and Hong Kong, before returning to Madang on 10 September 1960.[56]

During Cooper's absence, his superior Ian Wiseman made contact with the District Officer of Madang, and told him that during a recent visit by the Minister for Territories, and Leader of the Opposition, Arthur Calwell, two native men had informed Wiseman that Cooper had previously 'expressed pro-communist ideas' to them.[57] Wiseman considered the matter one that 'could grow into a considerable problem', and recommended Cooper be 'interviewed and advised of his responsibilities to implement the policy of the Government and directed on the particular aspects which are against policy and cannot be condoned.'[58]

Despite these reports, the ASIO investigation revealed that 'the only remark Cooper made was to the effect that he believed in the Russian and Chinese system of development' and though the matter was 'too inconclusive' to overturn his favourable security status granted in March, Wiseman 'promised to keep the District Commissioner informed regarding any future left-wing remarks Cooper may make',[59] which he duly did.

IV REPORTING AND PROSECUTION

A *The Offence and the Offended*

When Cooper returned to work in Madang, he discussed his travels with several local New Guinean men over his lunch hour on Tuesday, Wednesday and Thursday. It is these talks which constituted Cooper's offence.

Each discussion was attended by Stahl Salum, one of the native men who prompted the ASIO investigation against Cooper during his absence for expressing his 'pro-communist' ideas. Stahl benefitted handily from maintaining the political status quo as the son of a government-appointed leader, and heir to the largest New Guinean-owned plantation in the Territory under a specially devised will, contrary to the local custom of inheritance.[60] He was so much in favour of the Australian Administration that he wrote a letter to Arthur Calwell, copied to the District Commissioner at Madang, saying New Guinea was not ready for self-government,[61] and impressed Wiseman with his 'unbiased assessment and appreciation of the benefits to this Territory and its people of the Australian government of this territory'.[62] His contribution to the prosecution was essential, and on the first day of the proceedings

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56 Stent, above n 30, 13-14.

57 I W Wiseman to The District Officer, Madang, 26 September 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

58 Ibid.

59 Regional Director to Headquarters, ASIO, 14 September 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

60 Stent, above n 30, 17; Yeates, above n 3, 77.

61 Stent, above n 30, 17.

62 I W Wiseman to The District Officer, Madang, 26 September 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

against Cooper, Stahl was appointed the first indigenous member of the Copra Marketing board by the Minister for Territories, Paul Hasluck,[63] who tried to downplay these interests when later questioned in Parliament.[64]

The first two discussions seem to have aroused little attention. The discussions on the Thursday, however, were reported to local police by Somu Sigob, a visiting friend of Stahl's and sitting President of the neighbouring local government council. Like Stahl, Somu was invested in the political status quo, with an eye to being elected to the Legislative Council which Hasluck and Calwell had propounded during their visit to New Guinea. He was subsequently elected to represent three districts, including Madang,[65] and was critical to the prosecution case.

After having lunch together on the Thursday, Somu and Stahl went to hear Cooper speak. According to Somu, Stahl called out that 'All boys must come and sit down with the European and hear what he has to say', and said to Cooper 'I am very worried about New Guinea, we have been in the dark for so long, it has been a long time since the white man came here, what can we do to better ourselves?'[66] It was this question which prompted Cooper's impugned response including the single violent method, which Somu said 'would be very easy for me to do'[67] in his own district. Knowing Stahl's vocal and enthusiastic support for the Administration, and his apparent suspicion of Cooper's political opinions, it is hard to avoid the impression Stahl was setting Cooper up.[68] This was certainly Cooper's suspicion,[69] and at trial, Cooper drew attention to Stahl's interests,[70] and his inexplicable inability under cross-examination to remember anything from three days of discussion except the words of the indictment.[71]

That afternoon after Cooper spoke, Somu reported the discussion to the local police sergeant.[72] He told the sergeant he heard something which made him 'very much afraid, it is the kind of talk which would offend me just as if someone had excreted in my house and left me to clean it up'.[73] Before he could finish, Stahl arrived at the station and told the sergeant 'I am going crazy, I am all the time worried about we people of New Guinea'.[74] Like Stahl's, Somu's claims to offence seem suspicious given his own offer to Cooper to spearhead a violent movement in his district. That evening, Stahl met with three other native witnesses where they discussed what Cooper had been telling them[75] and the following day, on which he gave his official statement, Somu visited Stahl's house once again.[76]

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63 Stent, above n 30, 17.

64 Commonwealth, *Parliamentary Debates,* House of Representatives, 9 May 1961, 1683 (Paul Hasluck).

65 Somu Sigob, 'The Story of My Life' in Ulli Beier (ed) *Voices of Independence: New Black Writing from Papua New Guinea* (University of Queensland Press, 1980) 15, 20.

66 Statement of Somu, 16 September 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia; Transcript of Proceedings, *Cooper v The Queen* (Supreme Court of the Territory of Papua and New Guinea, Mann CJ, 27 January 1961) 388.

67 Statement of Somu, 16 September 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

68 Yeates, above n 3, 78-79.

69 Brian Cooper, 'Birth Pangs of a Nation' (1961) 20 *Overland* 31, 35.

70 Transcript of Proceedings, *Cooper v The Queen* (High Court of Australia, No. 4 of 1961, Dixon CJ, Fullagar, Kitto, Menzies, Windeyer JJ, 10 March 1961) 33-4.

71 Ibid 38.

72 Statement of Somu, 16 September 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

73 Ibid.

74 Ibid.

75 Stent, above n 30, 29.

76 Statement of Stahl, 22 September 1960, BLC, Vol. 1, A6119 3196, NAA.

In subsequent investigations and at trial, nothing seems to have been made of the confluence of interests, the goading of Cooper and the witness conferral surrounding the event, despite the obvious doubt they cast on the account of what had happened and the prosecution's reliance on these statements.

B *Local Administrative Response: Relief and Inaction*

On Friday September 16th, the first two statements of Somu and the local sergeant were immediately forwarded to the District Office, Madang, with an undertaking not to conduct any further questioning until a reply was received. Wiseman was instructed not to send Cooper out on patrol, not to leave him on his own at Association Headquarters,[77] and to give him work at the Co-operatives office, where he remained for a week and a half before being transferred to Port Moresby to do various odd jobs.[78] The Regional Director, recognising the 'wide-reaching' political implications of the enquiry, noted that sedition charges were not preferred, and would not be pursued 'unless there is very sound reason for anticipating a conviction',[79] forwarding the statements to the Minister for Territories to 'consider the case from political aspects'[80] while the advice of the Attorney-General was sought.[81]

The Minister for Territories, Paul Hasluck, seemed content to deal with the matter discretely, asking the Administrator whether Cooper 'was the type of person who could be quietly spoken to and persuaded to leave the Territory'.[82] Such a talk, however, proved unnecessary as Cooper tendered his resignation, effective October 23rd.[83] Although the tedium of office life in Port Moresby bored him, he was also aware his personal mail was being intercepted,[84] and that his lack of a new posting was related to his lunch discussions,[85] and probably realised his ongoing employment in the Administration was compromised. The Minister accepted his resignation, and made no attempt to prevent Cooper from leaving the Territory.[86]

Although the decision to prosecute awaited the return of the Attorney-General, Sir Garfield Barwick, from the United Nations General Assembly in New York,[87] where Marr claims he was totally humiliated by the Indian Prime Minister Jawaharlal Nehru,[88] by the end of October it was 'presumed that no criminal proceedings against Cooper for sedition are contemplated'[89] and in light of his accepted resignation it was 'apparent that the official view of this case [was] one of relief that Cooper [had] resigned and left the Territory'.[90]

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77 Jack Page to District Office, Madang, 16 September, 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

78 Stent, above n 30, 15.

79 Regional Director to Headquarters, ASIO, 20 September, 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

80 Ibid.

81 Ibid.

82 Ibid.

83 Ibid.

84 Stent, above n 30, 15.

85 Transcript of Proceedings, *Cooper v The Queen* (High Court of Australia, No. 4 of 1961, Dixon CJ, Fullagar, Kitto, Menzies, Windeyer JJ, 10 March 1961) 97.

86 Regional Director to Headquarters, ASIO, 31 October, 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

87 Ibid.

88 Marr, above n 3, 168-169.

89 Regional Director to Headquarters, ASIO, 31 October, 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

90 Ibid.

C *Barwick Returns*

On Barwick's return, Cooper's prosecution was 'considered by the Attorney-General and discussed with the Prime Minister and the Minister for Territories' who decided to issue proceedings against Cooper 'immediately'.[91]

On November 28, the Administrator informed the Regional Director of ASIO that 'the action in this case had been taken on the directions of the Prime Minister after the investigation by Mr K Edmunds, Attorney-General's Department and Mr J Davis, Commonwealth Investigation Service'. [92] This investigation had concluded that 'a strong case of sedition lies against Cooper' and the native witnesses were 'reliable and [had] enlarged on the evidence which they previously gave'. [93] No comment of conferral or conflicting interests appears to have been made, and in any event Cooper was arrested on 30 November 1960 at Bradford Knitting Mills in Sydney, where he had taken up work after leaving the Territory.[94] He was charged under section 52 of the Queensland *Criminal Code* for sedition and extradited to New Guinea for trial,[95] setting in train the last known prosecution for sedition in Australia which went before Mann CJ in New Guinea, and then to the High Court on appeal.

V LEGAL HISTORY, CODIFICATION AND HIGH COURT PRECEDENT

The entire chapter of the Queensland *Criminal Code*[96] relating to sedition under which Cooper was prosecuted was modelled on the common law, drafted and introduced before Federation, and had remained totally unchanged when Cooper's prosecution was brought in 1960.[97] It is therefore difficult to divorce the statutory offence from its common law and statutory origins, and an understanding of the law demands some attention to the historical and socio-political tensions its development produced.

A *Legal History*

The common law sedition offences evolved from treason and emerged at a time when innovations like the printing press promoted popular political awareness and challenged the political establishment,[98] and contemporary authors have noted the way it was repeatedly deployed to stifle dissent or persecute unpopular minorities.[99] The

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91 Kenneth Bailey, Solicitor-General to His Honour the Administrator, 25 November, 1960, BLC, Sedition – New Guinea, A432 1961/2004, National Archives Australia.

92 Regional Director to Headquarters, ASIO, 28 November, 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

93 Ibid.

94 Stent, above n 30, 16; Scorpion to Austerity, 30 November 1960, Brian Leonard Cooper, Vol. 1, A6119 3196, National Archives Australia.

95 *The Sun* (New South Wales), 1 December 1960.

96 *Criminal Code Act 1899* (Qld).

97 The only amendment to ss 44, 46, or 52 at the time of writing was the removal of the words 'with hard labour' from the sentences under s 52: *Corrective Services (Consequential Amendments) Act 1988* (Qld), s 5, Sch II.

98 See generally: Philip Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37 *Stanford Law Review* 661; Roger B Manning, 'The Origins of the Doctrine of Sedition' (1980) 12(2) *Albion: A Quarterly Journal Concerned with British Studies* 99.

99 Simon Bronitt and James Stellios, 'Sedition, Security and Human Rights: "Unbalanced" Law Reform in the War on Terror' (2006) 30 *Melbourne University Law Revue* 923, 925-6; Laurence W Maher, 'The Use and Abuse of Sedition' (1992) 14 *Sydney Law Review* 287, 295; Roger

offences necessarily depend on the prevailing view of the relation between ruler and subject,[100] and are unavoidably pure political offences, existing between two poles of opinion on the relationship between state and subject.[101] At one end, the state is superior to the subject, and it follows that open censure of the state constitutes an unacceptable challenge to rightful authority. At the other, the state is a mere agent of the subject, who has a right to criticise his agent, and it follows that there may be offences such as incitement to violence, but no offence of sedition.

In formulating and interpreting the sedition offences relevant to Cooper's trial, Sir Samuel Griffith (in drafting the relevant section of the Queensland *Criminal Code*)[102] and Sir Owen Dixon (when delivering his judgements in *Burns*[103] and *Sharkey*)[104] relied on the history of the offence propounded by Sir Fitzjames Stephen. Stephen's account, outlined briefly below, demonstrates the competition over the two polar positions through interpretations of the offence, and the changing burden on prosecutors.

'Seditious libel' originates in the 1606 *De Libellis Famosis*[105] decision of the Star Chamber which created a wide offence of sedition that enabled prosecutions against people who used words that could urge insurrection against those in authority, or who censured public men for their conduct, or criticised the institutions of the country.[106] Almost one hundred years later, the privileged legal position of the State remained preserved by the judiciary,[107] reflected by the judgement in *Tutchin*, that '… it is very necessary for all governments that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to produce animosities as to the management of it; this has always been looked upon as a crime, and no government can be safe without it.'[108] The judgment introduced the 'bad tendency' test, which assumed criticism of government tended to undermine government, and proof of publication alone was the only proof required of the prosecution.[109] Despite this low bar for the prosecution, Stephen notes that because the law remained vague and 'round, full-mouthed abuse of people who gave offence to the government was thought natural and proper', the common practice of the prosecution was to accuse the defendant of being 'extremely wicked' and having 'every sort of bad intention'[110] in case such intention were perceived as a requirement, an uncertainty which persists in the law.

To overrule judicial comment that intention was irrelevant to the offence,[111] the *Libel Act*[112] was passed to empower juries to decide 'the whole matter put in issue' by the indictment, and to prevent them being directed by judges to find the defendant

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Douglas, 'The Ambiguity of Sedition: The Trials of William Fardon Burns' (2004) 9 *Australian Journal of Legal History* 227, 248.

100 Fred Siebert, *Freedom of the Press in England 1476-1776: The Rise and Decline of Government Controls* (University of Illinois Press, 1952), 270.

101 Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Burt Franklin, first published 1883, 1964 ed) vol 2, 298.

102 Letter from Sir Samuel Griffith to Thomas Joseph Byrnes (Queensland Attorney-General) 29 October 1897, IV.

103 *Burns v Ransley* (1949) 79 CLR 101.

104 *R v Sharkey* (1949) 79 CLR 121.

105 (1606) 77 ER 250; Sir Geoffrey Palmer, 'Political Speech and Sedition' (2008-9) 11/12 *Yearbook of New Zealand Jurisprudence* 36, 37; Manning, above n 98, 115.

106 For earlier development and evolution of the sedition offences, see: Manning, above n 98.

107 Hamburger, above n 98, 756.

108 Ibid 318 (citing *Tutchin* (1704) 14 State Trials 1095, 1128).

109 Manning, above n 98, 121; Stephen, above n 101, 348, 353.

110 Ibid 353-4.

111 Ibid 345; Hamburger, above n 98, 738.

112 *1792,* 32 Geo 3 c 60.

'guilty merely on the proof of the publication'.[113] The practical effect of the Act was to expand the definition to require some bad or illegal intention by the offender, in addition to the bare intention to publish,[114] without describing such an intention, thereby increasing the prosecution's burden while circumventing the need to develop a principled, top-down approach to sedition in favour of allowing juries to apply the prevailing popular attitude.

In 1819, a statutory definition of the offence somewhat revived the 'bad tendency' test by shifting the basis of liability from the accused's intention toward whether the words or writing were 'tending to' produce some enumerated outcomes on which the current definition is modelled.[115] Following this legislation, *R v Burns*,[116] referring to Stephen, resisted this shift and held the accused must publish with a 'seditious intention'; one to 'bring into hatred or contempt' the sovereign, reflecting a number of subsequent authorities which suggested only intention of a 'direct incitement to disorder and violence'[117] constitutes a seditious statement.

At the time the law was codified in Queensland, the existing common and statute law was thus unclear, confusing and left significant questions of principle unresolved, setting aside deeper questions touching the appropriate relationship between the individual and the state. Chief among these were what the respective roles of tendency and intention were in the offence, and whether the intention required was limited to bare speaking or writing of the impugned words or included some larger category of intention, like the specific intention to incite violence.

B *Codification*

At the close of the 19th century a number of self-governing British colonies, including Queensland,[118] adopted voluntary codifications of their criminal law which rationalised the increasingly complex mix of applicable English criminal law and colonial legislation.[119] These codifications had a quasi-constitutional dimension and importance to the development of the modern state,[120] and in some respects Sir Samuel Griffith's efforts in Queensland were an extension of his constitutional efforts and political perspective.[121]

In 1896, Griffith prepared a Digest of the Statutory Criminal Law embodying 'all the existing Criminal statute Law which it is within the competence of the Legislature of Queensland to repeal or amend',[122] which formed the basis for the final Queensland *Criminal Code*.[123] His Digest drew freely upon Stephen's codification efforts in Britain,[124] which provided by far Griffith's main point of reference,[125] though he

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113 Stephen, above n 101, 344-345.
114 Ibid 359.
115 *An act for the more effectual prevention and punishment of blasphemous and seditious libels 1819,* 60 Geo 3 and 1 Geo 4, c 8.
116 (1886) 16 Cox 355, 360.
117 Stephen, above n 101, 375, citing *R v Collins*, 9 C and P 450; David Feldman and Peter Birks, *English Public Law* (Oxford University Press, 2004) 1333; *R v Aldred* (1909) 22 Cox CC 1.
118 For instance, Canada in 1892, New Zealand in 1893, and Queensland in 1899.
119 Barry Wright, 'Criminal Law Codification and Imperial Projects: The Self-Governing Jurisdiction Codes of the 1890s' (2008) 12 *Legal History* 19, 26, 28.
120 Wright, above n 119, 65.
121 Wright, above n 119, 41.
122 Sir Samuel Walker Griffith, *A Digest of the Statutory Criminal Law in Force In Queensland on the First Day of January, 1896*, 1 June 1896.
123 *Criminal Code Act 1899* (Qld).
124 Letter from Sir Samuel Griffith to Thomas Joseph Byrnes (Queensland Attorney-General) 29 October 1897, IV.

departed from it where he thought appropriate.[126] Political offences were an unusually prominent feature of Griffith's code, regulating both the subject's public expression and the rulers' parliamentary conventions,[127] and Friedland has noted that Stephen's code which Griffith took as a model allowed far less scope for criticising the government than other available models in the field of sedition.[128]

Griffith describes the law relating to 'Seditious Words or Libels' at clause 25 of his Digest, within the chapter dedicated to offences 'Against Public Order'. It was introduced into the Queensland Legislative Assembly for debate on 20 September 1899, and remained unchanged at the time of Cooper's prosecution. The sections relevant to Cooper were drafted as follows:

> *52 Sedition*
> (1) Any person who—
> (b) advisedly publishes any seditious words or writing;
> is guilty of a misdemeanour, and is liable to imprisonment for 3 years with hard labour.
>
> *46 Definition of seditious enterprises etc.*
> (2) Seditious words are words expressive of a seditious intention.
>
> *44 Definition of seditious intention*
> An intention to effect any of the following purposes, that is to say—
> (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 of Queensland as by law established, or against either House of Parliament of the United Kingdom or of Queensland, or against the administration of justice;
> (c) to excite Her Majesty's subjects to attempt to procure the alteration of any matter in the State as by law established otherwise than by lawful means;
> (d) to raise discontent or disaffection amongst Her Majesty's subjects;
> is a seditious intention, unless it is justified by the provisions of section 45.
>
> *45 Innocent intentions*
> It is lawful for any person—
> (a) to endeavour in good faith to show that the Sovereign has been mistaken in any of Her counsels; or
> (b) to point out in good faith errors or defects in the government or Constitution of the United Kingdom or of Queensland as by law established, or in legislation, or in the administration of justice, with a view to the reformation of such errors or defects; or
> (c) to excite in good faith Her Majesty's subjects to attempt to procure by lawful means the alteration of any matter in the State as by law established; or

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125 Wright, above n 119, 42; Barry Wright, 'Self-Governing Codifications of English Criminal Law and Empire: The Queensland and Canadian Examples' (2007) 26(1) *University of Queensland Law Journal* 39, 59.

126 Wright, above n 125, 59; Wright, above n 119, 42.

127 Wright, above n 125, 57.

128 In Robert S Wright's Jamaican code, for instance, sedition is limited to 'a purpose to excite any of Her Majesty's subjects to the obtaining *by force or other unlawful means* of an alteration in the laws or in the form of government' (emphasis added): Martin L Friedland, 'Codification Efforts in the Commonwealth: Earlier Efforts' (1990) 2(1) *Criminal Law Forum* 145, 153.

> (d) to point out in good faith in order to their removal any matters which are producing or have a tendency to produce feelings of ill will and enmity between different classes of Her Majesty's subjects.

These sections fell for debate just before 8.30pm on 3 October 1899 during a detailed and exhausting session, which prompted the Home Secretary to tersely remind members present 'there were 708 clauses in the Code' to debate.[129] In debate over section 44, James Stewart, member for Rockhampton North, remarked 'subjects who were perfectly loyal to the country might find themselves in difficulties' and that members 'ought to have a clear definition of what all this meant.'[130] Joseph Lesina, the member for Clermont, entered his protest, stating it 'was deliberately framed against radicalism and republicanism', was unnecessary, and he 'did not think that what was called sedition, in the popular acceptation of the term, was such a great crime as it was once considered to be, and yet under that musty, antiquated law the person writing it was liable to seven years imprisonment'.[131] However, all sections passed without amendment and on 28 November 1899, the *Queensland Criminal Code Act 1899* received assent from its own drafter, Sir Samuel Griffith, as acting Governor.[132] At the time of writing, it remains an offence to seditiously intend to excite disaffection against the Sovereign, Government, Constitution or either House of Parliament of the United Kingdom.[133]

C *Burns, Sharkey and Dixon's Dissents*

In 1949, the High Court decided two sedition cases brought against members of the Communist Party of Australia which constitute important authority on the law of sedition, albeit for a different but similarly drafted federal statutory offence: *Burns v Ransley*[134] and *R v Sharkey*.[135] Both cases were decided in favour of the Crown,[136] on the basis of majority findings that expressing hypothetical positions of the Communist Party in the event of wars involving Australia constitute seditious intentions. Incidentally, Dixon CJ was the only member of the Court hearing Cooper's case who had also sat on the *Burns* and *Sharkey* cases. In both cases, he delivered powerful dissents which have been described as 'wholly persuasive'.[137]

Under his leadership as Chief Justice, one may have expected the *Cooper* judgment to reflect the principles and approach he had followed in those dissenting judgments, which were marked by two themes. The first was the application of the common law history of sedition to the questions of interpretation raised in those trials, in contrast to the approach of Latham CJ who abruptly declared, without citing authority, that where the offence was statutory it was 'not necessary … to consider the common law as to sedition'.[138] In particular, Dixon drew on the work of Stephen,[139]

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129 Queensland, *Parliamentary Debates,* Legislative Assembly, 3 October 1899, 226 (Home Secretary).
130 Ibid 227 (James Stewart).
131 Ibid 228 (Joseph Lesina).
132 Geraldine Mackenzie, 'An Enduring Influence: Sir Samuel Griffith and His Contribution to Criminal Justice in Queensland' (2002) 2(1) *Queensland University of Technology Law and Justice Journal* 53, 60, citing Roger Joyce, *Samuel Walker Griffith* (University of Queensland Press, 1984) 219.
133 *Criminal Code Act 1899* (Qld) s 44.
134 (1949) 79 CLR 101.
135 (1949) 79 CLR 121.
136 For a more detailed discussion of these cases, see Maher, above n 99.
137 Zelman Cowen, *Sir John Latham & Other Papers* (Oxford University Press, 1965) 48.
138 *Burns v Ransley* (1949) 79 CLR 101, 108.

and declared it would be a 'mistake to give the words of the provisions a meaning going beyond the sense in which by that date they would be understood when used with reference to the common law misdemeanour of seditious words or libel'.[140] This holistic mode of analysis, emphasising the role of the common law and statutory context, is one Dixon had expounded (albeit in the context of constitutional interpretation) in an address to the Law Council of Australia several years earlier when he noted 'principles of the common law with respect to the interpretation and operation of a statute … account in great measure for the form and method of modern legislation'.[141] He concluded by urging 'the necessity of taking our jurisprudence as a whole and applying it as an entirety to any legal complex even if a greater intellectual pleasure be experienced in the abstract examination of a question in isolation.'[142] The second apparent theme was his engagement with the issue of intention posed by sedition, and the demanding standard he attempted to set for the prosecution in *Burns*[143] to prove a seditious intention. He stated that 'expressive of an intention' meant the words must convey 'in fact an intention on the part of the speaker to excite or produce such an *actual* state of feeling',[144] by 'words and observations *calculated* to arouse such feelings' (emphasis added).[145] He further stated the words used 'must be understood in the light of the circumstances in which they were uttered'[146] and, even if a seditious construction might be placed upon the words used, that alone is not sufficient 'unless on the occasion when they were used they really conveyed an intention on the part of the speaker to effect an actual seditious purpose'.[147]

VI COOPER'S CASE

A *Opportunity and Outcome*

When Cooper's case came before the High Court, the Dixon Court had the opportunity to clarify a vague and 'troublesome area of the criminal law',[148] and to limit its scope as a tool of political stagecraft as Dixon had evidently attempted to achieve in *Burns*. Given Dixon's Chief Justiceship and his careful, holistic approach to interpretation, the case appeared well placed for the Court to address the issues of principle that plagued sedition law.

Instead, the High Court unanimously dismissed the case as 'simple and straightforward',[149] in a brief and crude analysis which ignored the principles and history underpinning sedition and was subtly more favourable to the prosecution than Mann CJ in the court below. By comparison to *Burns*, the judgment conspicuously lacks any treatment whatsoever of the history of the offence, the role of the common law in its interpretation, or the relevance of codification. By refusing to engage meaningfully with the history or principle latent in the offence, the Dixon Court squandered the opportunity to clarify the appropriate boundaries of a pure political

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139 *R v Sharkey* (1949) 79 CLR 121, 150; *Burns v Ransley* (1949) 79 CLR 101, 115.
140 *Burns v Ransley* (1949) 79 CLR 101, 115.
141 Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' in Woinarski (ed), *Jesting Pilate* (Law Book Company, 1965) 203, 205.
142 Ibid 213.
143 (1949) 79 CLR 101.
144 Ibid 115.
145 Ibid 118.
146 Ibid 117.
147 Ibid 116.
148 Cowen, above n 137, 48.
149 *Cooper v The Queen* (1961) 105 CLR 177, 183.

offence and remains open to criticism it 'leaned towards the state and showed … too little regard for quite fundamental liberties'.[150] In its cursory analysis, the Court preserved a number of recurring historical, doctrinal uncertainties which favour the prosecution and left the law of sedition in an 'unsatisfactory state which makes it vulnerable to abuse'[151] by the Executive, where closer analysis would have clarified the criminal elements of sedition in a more meaningful and intellectually satisfying way, and possibly produced a different outcome for Cooper.

B *The Factual Finding of Intention*

At trial, Cooper largely accepted he had spoken the substance of the words of the indictment,[152] but claimed they were taken out of context and the violent means he outlined was only one of at least three ways New Guinea could achieve independence, and one he expressly denounced. At first instance, Mann CJ's key finding of fact was that Cooper's 'intention was to start a movement which would be likely to extend along the Northern coast of New Guinea, and which would cause the utmost embarrassment to the Administration at a time when international attention was critically focused on the situation of primitive people in this and other areas'.[153] What is remarkable about Mann CJ's conclusion is how it is at once specific and yet vague and speculative, attempting to incorporate the prestige of the Australian Administration and international opinion into a judicial determination of guilt. However, the High Court did not disturb this finding. This is all the more odd as s 23 of the *Code* states that '[u]nless the intention to cause a particular result is expressly declared to be an element of the offence … the result intended to be caused by an act or omission is immaterial'.[154]

What Mann CJ meant by 'a movement' remains totally opaque. On the one hand, he did not 'believe that the accused really expected to see an immediate armed uprising of natives in the Madang area nor … that the accused supposed for a moment that such an uprising would serve any useful purpose'.[155] On the other, however, his Honour concluded Cooper 'intended to produce a situation in which the Administration would suddenly find itself confronted by an actual or imminent uprising by natives over a wide area of difficult country'.[156] The only explanation for these apparently contradictory statements rests on the slim distinction between causing 'an immediate armed uprising' and an 'actual or imminent uprising'. Furthermore, the assessment was at odds with the opinion of some of Cooper's significant detractors, Ian Wiseman and the Administrator, who saw Cooper's conduct as neither 'subversive'[157] nor spoken 'in a vicious frame of mind'.[158]

C *Alternative Findings Available and Delicate Issues of Fact*

Given Cooper's political views, and awareness he was under surveillance, it is tempting to say he sought to create a 'movement' by deliberately martyring himself by

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150 Cowen, above n 137, 47.
151 Michael Head, 'Sedition – Is the Star Chamber Dead?' (1979) 3 *Criminal Law Journal* 107.
152 Transcript of Proceedings, *Cooper v The Queen* (Supreme Court of the Territory of Papua and New Guinea, Mann CJ, 27 January 1961) 390-1.
153 *The Queen v Cooper* [1961] PGSC 14 (1 February 1961) 4-5.
154 *Criminal Code Act 1899* (Qld) s 23.
155 *The Queen v Cooper* [1961] PGSC 14 (1 February 1961) 4.
156 Ibid 5.
157 Statement of Ian William Wiseman, Vol. 1, A6119 3196, National Archives Australia.
158 Regional Director to Headquarters, ASIO, 24 October, 1960, Vol. 1, A6119 3196, National Archives Australia.

seeking arrest, however, this seems extremely unlikely. Although Cooper's trial attracted substantial interest both in the New Guinea courthouse, which was filled beyond capacity,[159] and the Australian press,[160] there is no indication Cooper was playing to his audience. Cooper's evidence at trial was restrained and direct, and 'he spoke clearly, without hesitation and very quickly'.[161] More tellingly, Cooper 'showed no emotion as the sentence was passed', and when asked if there was anything he would like to say, 'he stood in the dock and in a loud voice said "no"',[162] hardly the stuff of deliberate martyrdom.

At trial, Cooper said he wanted to encourage his audience 'so that they would not think self-government was something many years away – or impossibly hard to obtain'.[163] In light of his activities in Madang, this statement seems a sincere and plausible description of the conversations. In January 1960, for instance, Cooper arranged a meeting at the Madang Native Club and presented a slide show of Africa and Fiji. Writing of the evening, Cooper said he 'was unable to make the talk interesting by telling them about the struggles for independence taking place in Africa and about all the potential friends they have in the world', but was heartened to think he 'must have succeeded in arousing some interest in the outside world'.[164] Whether he was unable to do this due to some instruction, or as a result of strategic self-censorship, he does not say, but his prior experience with ASIO makes it likely Cooper was aware he was at the boundary of what was permissible and self-censored accordingly. Similarly, he thought a discussion of his experiences while traveling through Southeast Asia 'might wake them up'.[165]

In a sense, Cooper probably was trying to 'start a movement', but most likely as part of an attempt to foster genuine domestic political discussion and progress towards self-government, while operating within the limits of political acceptability. What this discussion over intention demonstrates, however, is how deeply problematic the role of fact can be in sedition cases, and how the relevant basis of criminal liability cannot 'be clearly defined and readily inferred from the facts',[166] an issue Stephen outlined decades earlier.

D *Cooper's Intention and Tendency*

On the key issue in the case, the High Court abruptly and unanimously declared that all the Crown had to prove was that the words of the indictment, or the substance of those words, had been spoken publicly, and those words were 'on their face expressive of a seditious intention within the meaning of the Code.'[167]

By declaring the words were clearly expressive of a seditious intention, the Court begs the question of why, and fails to unpack this troublesome but critical concept. On the one hand, the Court may have been indicating the words, on their face value alone, have a tendency to effect an enumerated 'purpose', each framed as a consequence listed in section 44. If so, this would exclude the role of several contextual elements in

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159 *South Pacific Post*, 3 February 1961, 24 January 1961.
160 See: *The Sun* (New South Wales) 30 November 1960, 1, 4, 6 December 1960; *Sydney Morning Herald* (New South Wales) 1-3, 6 December 1960; *South Pacific Post,* 2, 6 December 1960.
161 *The Age* (Melbourne), 28 January 1961.
162 Ibid 2 February 1961.
163 Transcript of Proceedings, *Cooper v The Queen* (Supreme Court of the Territory of Papua and New Guinea, Mann CJ, 27 January 1961) 389.
164 Stent, above n 30, 12.
165 Ibid 14.
166 Stephen, above n 101, 359.
167 *Cooper v The Queen* (1961) 105 CLR 177, 183.

assessing the tendency of the words which were accepted as appropriate factors at common law, including the state of public feeling, the place, the mode of publication, and the audience addressed.[168] Furthermore, to divorce the words from their context and suggest they alone have a dangerous tendency is plainly ridiculous because if so it would be a risk to public order to repeat them in court and to the media.[169] On the other hand, the Court may have meant that, in addition to the need to prove merely that the words were spoken 'advisedly' or deliberately, proof of some higher, unspoken category of intention was required, but that the words spoken were capable of proving that intention. This element of the reasoning would also make the unanimous judgment even harsher to the accused than the 'statist'[170] judgment of Latham CJ in *Sharkey*, that 'intention … is not by any means necessarily to be judged upon the face value of words used'.[171] Furthermore, it would make the reasoning circular, using a limited form of intention to speak words, and then using those words to prove a separate, higher category of intention.

On either approach, the High Court's judgment limits or eliminates the need to prove any type of specific subjective intention of the type Dixon J appeared to reach for in *Burns*,[172] fails to delineate the roles of tendency and intention, and fails to engage with identical doctrinal issues with dogged the offence historically.

E *Role of Evidence*

The vast majority of the judgment in *Cooper* concerned the admissibility of evidence, and is often cited in support of the proposition that similar fact evidence should be excluded unless 'the fact of repetition tends to make it more probable that some necessary element of the offence charged was present on the occasion actually in question'.[173] The evidentiary discussion at first appears unconnected to the principles or history of the law of sedition. However, this discussion both reflects and obscures the uncertainty at the heart of the offence, and repeats historical practices connected with sedition.

Surprisingly, the Court settled the evidentiary issue by upholding the conviction on the basis that Mann CJ used inadmissible evidence 'not against the accused, but in his favour',[174] and framed the 'fundamental question'[175] in the case as whether or not Cooper had 'spoken publicly' words equivalent in substance to the indictment.[176] Framing the question in this way substantially narrowed the range of relevant evidence for both the prosecution and defence while excluding the circumstances and context of Cooper's words and making Cooper's admission fatal to his case. More importantly, by declaring that proof of publication alone was sufficient for the prosecution to make its case, the Court interpreted the modern statutory formulation in similar fashion to that at the end of the eighteenth century which unambiguously favoured the prosecution.

The evidential uncertainty throughout Cooper's prosecution also mirrors sedition prosecutions as they existed at the end of the eighteenth century. As then, uncertainty persisted over whether the prosecution was required to prove some bad intention of the

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168 J C Smith, *Criminal Law* (Butterworths, 9th ed, 1999) 740.
169 L W Maher, '"Modernising" the Crime of Sedition?' (2006) 90 *Labour History* 201, 203.
170 Cowen, above n 137, 54.
171 *R v Sharkey* (1949) 79 CLR 121, 141-2.
172 *Burns v Ransley* (1949) 79 CLR 101.
173 *Hopkins Plaster Industries Pty Ltd v USG Interiors Australia Pty Ltd* [2002] VSC 293, [11]; *HW Thompson Building Pty Ltd v Allen Property Services Pty Ltd* (1983) 48 ALR 667, 675.
174 *Cooper v The Queen* (1961) 105 CLR 177, 185.
175 Ibid 185.
176 Ibid 183.

accused and so, erring on the side of caution, Cooper's prosecutors gave 'round, full-mouthed abuse'[177] in lieu of a clear statement of principle indicating the role of the accused's intention, noting that '[i]f some such other evidence is not admissible it might still furnish valuable material for cross examination' of Cooper,[178] while pursuing questions intended to portray him as a communist and an atheist.[179] The fact this evidence was led, and admitted, suggests the prosecutor and Mann CJ had a different, and wider, conception of the offence to be proved than what the High Court formulated, and prompted Dixon CJ to ask counsel whether evidence of Cooper's communist sympathies was led to demonstrate the probability of his having spoken the words, or his intention.[180] By slimming the requirements of the offence, the High Court considerably expanded the scope of criminal liability for sedition under section 52 of the Code and analogous sedition offences.

F *'Advisedly' publish*

When sedition was codified in Queensland, it required the accused to speak or write 'advisedly', a point that did not escape the attention of Acting Secretary for Law, CJ Lynch, when preparing Cooper's prosecution.[181] The decision to use the term 'advisedly' was the product of a deliberate decision by the drafter, Sir Samuel Griffith, to express 'the element of deliberation' and avoid use of the term 'maliciously', which he thought had acquired a technical, unnecessary and misleading meaning,[182] borrowing the phrase from a statute relating to the offence of 'inciting to mutiny'.

Griffith's use of 'advisedly' appears more technical, unnecessary and misleading than the terms it replaced, and why he avoided using the word 'deliberately' to express the 'element of deliberation' is baffling. Moreover, the offence of 'inciting to mutiny'[183] from which he borrowed the term requires the accused to act 'maliciously and advisedly', indicating that Griffith conflated two distinct elements in drafting the Queensland sedition offence. Indeed, Griffith was also resurrecting British statutory language from 1661 for the 'safety and preservation of his majesty's person and government, against treasonable and seditious practices and attempts',[184] which required the accused write or speak 'maliciously and advisedly'.

The High Court described the word as being used 'somewhat curiously'[185] and Dixon CJ, armed with dictionary definitions, raised the issue and invited both parties to make submissions as to the word's meaning within the Code.[186] Counsel for Cooper appeared unprepared for the question, and was satisfied to note that the term was also used in sections 54, 55 and 56 of the Code before closing argument, without making

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177 Stephen, above n 101, 353-4.
178 C J Lynch, Acting Secretary for Law, to the Solicitor General, 5 January 1961, BLC, Sedition – New Guinea, A432 1961/2004, National Archives Australia.
179 Yeates, above n 3, 84.
180 Transcript of Proceedings, *Cooper v The Queen* (High Court of Australia, No. 4 of 1961, Dixon CJ, Fullagar, Kitto, Menzies, Windeyer JJ, 10 March 1961) 13A, 14.
181 C J Lynch, Acting Secretary for Law, to the Solicitor General, 5 January 1961, BLC, Sedition – New Guinea, A432 1961/2004, National Archives Australia.
182 Letter from Sir Samuel Griffith to Thomas Joseph Byrnes (Queensland Attorney-General) 29 October 1897, VIII, citing 37 Geo 3, c 70.
183 *Incitement to Mutiny Act 1797* 37 Geo 3, c 70, s 1.
184 *The Sedition Act 1661,* 13 Car 2 c 1.
185 *Cooper v The Queen* (1961) 105 CLR 177, 183.
186 Transcript of Proceedings, *Cooper v The Queen* (High Court of Australia, No. 4 of 1961, Dixon CJ, Fullagar, Kitto, Menzies, Windeyer JJ, 10 March 1961) 137-8, 144.

any submission as to its meaning.[187] Counsel for the Crown was evidently better prepared for the question, and referred the Court to a number of sources from which that meaning might be derived.[188] Ultimately, the High Court concluded roughly in accordance with Griffith's understanding that it means 'no more than that the publication must be made deliberately in the sense that there is an intention to publish'.[189]

The clumsy drafting of such a problematic offence is deeply unsatisfying. For one, if 'advisedly' means only to speak or write deliberately, this interpretation adds little to the offence, as people are generally presumed to speak or write deliberately. Secondly, the High Court appears to have interpreted the term in a way that is subtly more favourable to the prosecution than Mann CJ understood the term when he concluded that 'what [Cooper] said he said advisedly I have no doubt whatsoever, for he is a man of considerable expertness and knew what he was talking about'.[190] If Mann CJ had understood the term to mean, as the High Court did, simply that Cooper spoke his words deliberately, there would be no need to refer to his expertise. Doing so suggests that Mann CJ understood the term to include some type of conscious, even trained, insight with a special appreciation of the possible consequences of his words. Finally, assuming the words 'maliciously' and 'advisedly' had separate meanings as it appears they did, then irrespective of the meaning of 'malicious' at the time of drafting or in 1960[191] by omitting this previously distinct element the legislation requires fewer elements to be proved by the prosecution, reducing its burden of proof. Arguably, this makes it easier for the Crown to succeed in a sedition prosecution under the modern Queensland *Criminal Code* than under British legislation from 1661 which emerged from the ashes of the English Civil War and the restoration of the monarchy, a totally counter-intuitive and regressive possibility.

VII CLOSING REMARKS

After his failed appeal, Cooper returned to the Territory unescorted, on an airfare he bought himself, to complete the balance of his prison sentence,[192] and was two and a half thousand pounds in debt on account of his legal expenses.[193] An assessment of the political situation by the District Commissioner after the appeal confirmed 'there are no grounds for believing that Cooper, in his seditious talks among the natives of the Madang district, made any impression, lasting or otherwise',[194] and a group of 'native leaders' in Madang 'expressed an inability and unreadiness to even suggest a possible date for Territorial self-government' to the Leader of the Opposition, Arthur Calwell

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187 Ibid 137-8.

188 Ibid 144. Namely: Reginald Francis Carter, *Criminal Law of Queensland* (Butterworths, edition not stated); *Criminal Code Act 1899* (Qld) s 23; and *Heath v Burder* (1982) 15 Moore's Privy Council Cases 1, 2 (erroneously printed in the transcript as *Heath v Burr*), which stated the term meant 'the act complained of is the deliberate act of the accused and not a casual expression dropped inadvertently'.

189 *Cooper v The Queen* (1961) 105 CLR 177, 183.

190 *The Queen v Cooper* [1961] PGSC 14 (1 February 1961) 4.

191 For a collection of authority as to the meaning of the term 'malicious' available at the time of Cooper's trial, see John B Saunders, *Words and Phrases Legally Defined* (Butterworths, 2nd ed, 1970) vol 3, 198.

192 *South Pacific Post*, 18 April 1961.

193 Stent, above n 30, 59-60.

194 H L Williams, District Commissioner, to The Director, Department of Native Affairs, 25 July 1961, Brian Leonard Cooper, Vol. 2, A6119 3197, National Archives Australia.

during a visit.[195] While those who brought Cooper's prosecution prospered,[196] Cooper struggled. Following his release from prison, Cooper's fiancée of nine months terminated their engagement, and he became increasingly remote from other people and a diagnosed schizophrenic. In 1965, ten years before New Guinea achieved independence, Cooper shot himself. He was 28.[197]

Like Cooper, there are no grounds for believing that the High Court made any impression, lasting or otherwise, on a clearer understanding of the law of sedition. 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, especially on the High Court's formulation in *Cooper*. Nevertheless, sedition remains an attractive and flexible tool to silence political opposition during periods of Executive insecurity and public discontent.

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195 Ibid.

196 In New Guinea, Somu represented three districts on the Legislative Council, including Madang, and accompanied two Australian delegations to the United Nations: Somu Sigob, 'The Story of My Life' in Ulli Beier (ed) *Voices of Independence: New Black Writing from Papua New* Guinea (University of Queensland Press, 1980) 15, 20; while Stahl owned and ran a lucrative plantation: United Nations Visiting Mission to the Trust Territories of Nauru and New Guinea, *The People Speaking: New Guinea, Nauru* (Canberra, Commonwealth Government Printer, 1965), 16. In Australia, Barwick became the Chief Justice in 1964, Menzies retired in 1966 as Australia's longest-serving Prime Minister, and Hasluck was appointed Governor-General in 1969: Head, above n 6, 74.

197 Stent, above n 30, 59-60.