

## Political Cartoonists and the Law

### Elizabeth Handsley and Robert Phiddian

Political cartoonists feel various forces for ‘censorship’ on and in their work. Often these are informal pressures that are based on moral or commercial interests, or the amorphous notion of ‘good taste’.<sup>1</sup> This chapter seeks to focus on the formal legal pressures on cartoonists. We suspect that cartoonists fear (and are led to fear by cautious editorial staff) more legal sanction than is likely to be the case, and that ‘legalling’ of cartoons before publication is often a cover for other sensitivities. But we first need to look at the state of the law.

The legal ramifications of cartooning occur after the fact when someone complains, because political cartoons are highly unlikely to be caught by the Office of Film and Literature Classification’s pre-publication vetting system. Films and computer games must be classified prior to distribution, but the only ‘literature’ that needs to be submitted for such vetting is that which:

having regard to the Code and the classification guidelines to the extent that they relate to publications, contains depictions or descriptions that:

- a. are likely to cause the publication to be [refused classification]; or
- b. are likely to cause offence to a reasonable adult to the extent that the publication should not be sold or displayed as an unrestricted publication; or
- c. are unsuitable for a minor to see or read.<sup>2</sup>

As the Code and the Guidelines relate primarily to sex, drugs, crime, cruelty, violence, and revolting or abhorrent phenomena, it would be very unusual for the publisher of a political cartoon to be required to submit it in advance. Although it is not inconceivable that political satire could be considered ‘submittable’ if it touches on one of these subjects<sup>3</sup>, this chapter focuses on two areas of law that are of far greater practical significance to cartoonists.

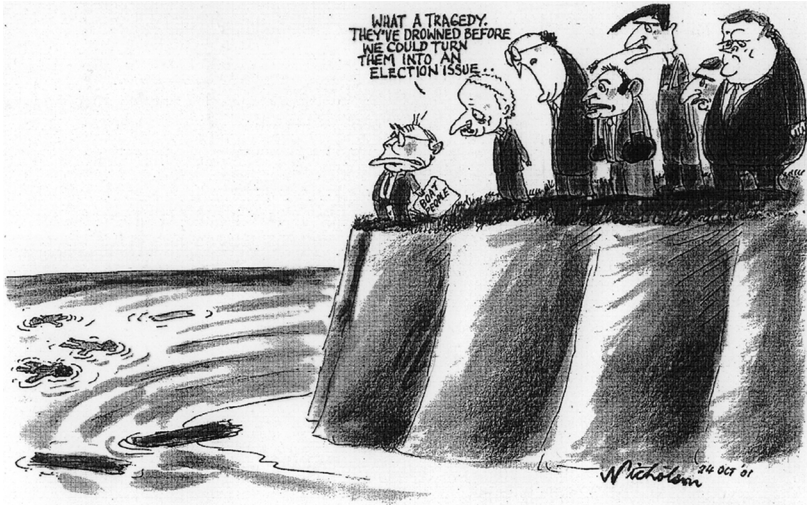
Racial vilification laws passed in some states might be seen as having some relevance, but they have specific exemptions for artistic activity<sup>4</sup>, and do not appear to have any impact on cartoonists’ practice, so we will not discuss them further here. Similarly, there is very little prospect that dormant blasphemy laws will be revived in Australia, despite occasional calls from some quarters, either for Christianity or for other faiths. We do not have space here to survey obscenity laws, but point out that cartoons do not form a special case separate from illustrations, photographs, or other publications when it comes to obscenity.<sup>5</sup>

The main body of law that impinges on cartoonists’ practice is defamation, which will be the focus of the first half of this chapter. The second half will discuss the possible implications for cartoonists of the revision of the sedition laws undertaken in the *Anti-Terrorism Bill (No. 2) 2005* (Cth), passed just before the Christmas recess in that year.

## Defamation

Strictly speaking, cartoonists and other satirists enjoy no more legal protection under the laws of libel and defamation than do any other sorts of writers, but it is clear that they get away with a lot more. The text-book summary of defamation describes it as the publication of material which ‘tends to injure the personal, professional, trade or business reputation of an individual or a company, to expose them to ridicule or to cause people to avoid them’.<sup>6</sup> It is hard to imagine that cartoonists cause many people to be avoided, but injuring reputations and holding people up to ridicule are their core activities. As the business of satire is to attack the character and impugn the motives of public figures, you would have thought that this would make satirists notable benefactors of defamation lawyers.

Let us start with a consideration of some cartoons that to a lay reader might seem defamatory. The first cartoon by Peter Nicholson, from the Tampa Election of 2001, attacks all the senior politicians of the moment for cruel opportunism:



'What a tragedy', Peter Nicholson, *Australian*, 24 October 2001

For a fleeting moment, the readers will think that those on the cliff are mourning the loss of life in the SIEV X disaster, but then we read the caption and see that they are only mourning a lost opportunity for politicking. This is a very stern, albeit bi-partisan, attack on the reputations of Howard, Ruddock, Reith, Abbott, Anderson, Crean and Beazley, and is arguably unfair to the point of malice.

Ron Tandberg's accusation of bribery in the promises that abounded during the 2004 campaign is a similarly blunt attack on John Howard's reputation for honesty (see 'Anyone still undecided?', overleaf).

There are at least two reasons why John Howard and the other politicians attacked here would not dare sue the cartoonists, especially during an election campaign. Handsley and Davis are not surprised that there are so few defamation cases on satire for, as they explain:



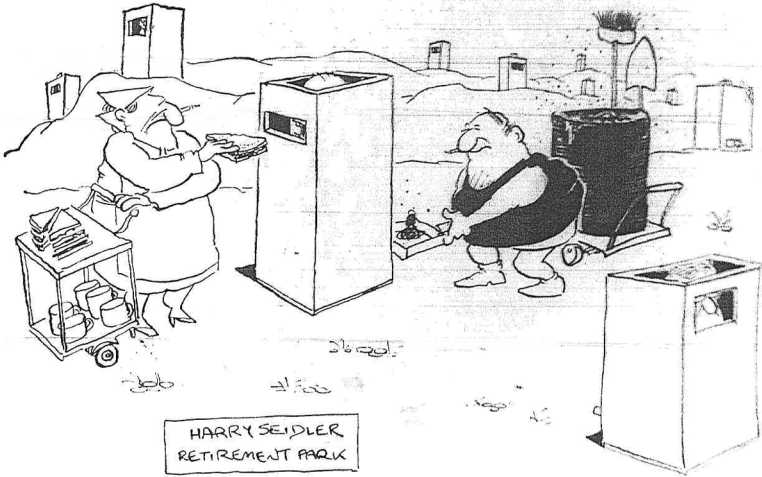
‘Anyone still undecided?’, Ron Tandberg, *Age*, 28 September 2004

Most people when they are lampooned prefer not to give the satirist a further platform and further publicity by bringing proceedings ... In addition, most observers would instantly recognise satirical commentary as inherently in the nature of comment, and therefore easy to defend under defamation law.<sup>7</sup>

This quotation identifies both the cultural defence satirists enjoy from lawsuits—few like simultaneously to make fools of themselves and give their detractors publicity—and the legal protection of fair comment. This common law defence is discussed in more detail below, but in 1980 it defeated the only case we know of in which a politician sued for a cartoon: a Canadian court decided that it was fair comment to depict a politician picking the wings off flies.<sup>8</sup> This case is very much the exception that proves the rule that politicians in the English-speaking world tend to stay out of court when seeking to muzzle the effect of satire on their reputations.

It is notable that the one libel suit concerning a cartoon in Australian law was made not by a politician, but by an architect, the late Harry Seidler. In the *National Times* of 15 August 1982, Patrick Cook had drawn ten ugly boxes, some human figures and a night cart over the caption ‘Harry Seidler Retirement Park’.

His defamation suit was unsuccessful both before a jury and on appeal.<sup>9</sup> The conclusion we draw from this episode is that Seidler as an architect was less hardened to the rough and tumble of public debate than serving politicians tend to be, and in this sense he may have further damaged his own reputation by being over-sensitive to criticism.



'Harry Seidler Retirement Park',  
Patrick Cook, *National Times*, 15 August 1982

We can find no cases of active politicians suing cartoonists for defamation in Australia. There are a handful of stories like Alan Moir's, recounted in his chapter of this book, where politicians have sent letters threatening legal action, but even these are very rare; none has been taken to court. That there is so little case law on defamatory cartoons leads us to the conclusion that cartoonists enjoy something very close to a *de facto* immunity from suit. Moreover, if cases were brought, a strong defence of fair comment would be led by the cartoonists' lawyers, with a high chance of success, even for very bluntly abusive works.

This cartoonists' immunity may be as much a culturally accepted licence as a strictly legal protection—for example, no one seems inclined to run a defamation case focused on the element of the law where cartoons seem most vulnerable, exposing people to ridicule. Most aggrieved people obviously recognise that suing a cartoonist will not do anything to restore lost reputation (the aim which theoretically underlies the law of defamation), and will very probably damage their reputation further, both by refocusing attention on the original allegation and by proclaiming them to the world as people who cannot take a joke.

### Fair comment and honest opinion

As already mentioned, the key defence for cartoonists under defamation law has been the common law defence of fair comment. Examples of other defences are justification (truth), absolute privilege (for example, parliamentary speeches) and qualified privilege (for example, communication about governmental or political matters, under the *Lange* doctrine). New uniform defamation legislation is in place or proposed in all states and territories, and it supplements fair comment with a defence referred to as 'honest opinion'. We will first discuss the common law defence, and then describe how the statutory defence closes off some gaps it left open, putting cartoonists in an even more firmly protected position.<sup>10</sup>

The fact that fair comment is a defence means that if the defendant can prove all its elements, he or she is not liable. In practice it means that a person referred to in a defamatory communication by a person who can prove all the elements of fair comment will not generally sue in the first place. The exception might be where the person referred to believes that he or she can prove the publication was motivated by malice, or a desire to do harm to the plaintiff. The defendant does not need to prove absence of malice, but rather the plaintiff must prove not only its presence, but that it was the prime motivation for the defendant's actions. This will invariably be impossible to prove in the case of a political cartoon.

At common law, the availability of fair comment depends on a cartoonist's ability to prove the following:

- that the statement being made is in the nature of comment, that is, opinion rather than fact;
- that the opinion expressed is genuinely held (but see below);
- that the subject-matter of the statement is a matter of public interest;
- that the statement is based on true facts; and
- that the true facts are stated or indicated in the communication (see below).

The Cook/Seidler cartoon above illustrates how the defence works in practice: (1) the cartoon is a statement on the aesthetic qualities of Seidler's architecture, which is inherently a matter of opinion; (2) we can assume the opinion was genuinely held, at least by Patrick Cook; (3) the work of a hugely successful and influential architect is clearly a matter of public interest. That much is clear, in spite of the argument advanced by Mr Seidler's counsel, that because all the buildings he had designed were privately owned, they were not matters of public interest! We shall return to the relationship with the truth.

The importance of fair comment as a defence for cartoonists and their publishers lies in the fact that it focuses on comment as distinct from fact. It is possible that all cartoons might be considered by the courts not as assertions of fact about their targets but 'as comment and nothing else'.<sup>11</sup> However, there were a couple of things in the common law defence of fair comment about which we were not quite certain: first, legally, we have never been sure in Australia whether the opinion has to be genuinely held by the defendant, even if that person is only the publisher (for example, the newspaper editor), or whether it is enough that it could genuinely be held by the person who originally expressed it (for example, the cartoonist). As this has never been tested in Australia, all we had was conflicting overseas authority.<sup>12</sup>

The uniform defamation legislation has now cleared all this up. (It might be worth noting, as an aside, that the New South Wales Act under which the *Seidler* case was fought had also sorted it out<sup>13</sup>, but that did not stop Seidler's counsel from attempting to claim aggravated damages based on an argument that Fairfax did not share Cook's view of Mr Seidler's architecture. Hunt J described that claim as 'heretical in the extreme'.<sup>14</sup>) But it clearly leaves a slight loophole open for politicians and others, especially if it is true that cartoonists have real freedom to depart from the editorial line. One would expect that many newspapers, then, would not be able to prove they 'genuinely' held the opinions being expressed by their cartoonists. This must have represented a niggling concern at the backs of the minds of newspapers and their lawyers. But it did not affect cartoonists themselves, except to the extent it might make their employers a little more cautious about what they printed.

The second reservation one might have about the applicability of fair comment to cartoons is that they do not usually state or indicate



the background facts. Usually they assume the reader knows what facts are being referred to. So, for example, the Warren Brown cartoon from 26 October 2001 (see below) relies on us knowing that there is an election due on 10 November. Readers simply cannot get the message unless they know the factual substratum. In fact, in this case, as in the vast majority of cases, readers scarcely get any message at all unless they know it.

To return to Patrick Cook's cartoon about Harry Seidler: to 'get' its message, readers needed to have an awareness about public debates on architecture. They would need a fairly detailed knowledge of who had designed what around Sydney, as few readers of the *National Times*, we suspect, would (especially those who lived elsewhere). This might explain why the Cook cartoon got the publishers into so much more trouble than the many hundreds of thousands of cartoons published since. Perhaps there is an argument that the cartoon was just gratuitous and nasty—as most cartoons are not. Unfortunately for Mr Seidler, however, the jury in his case against Fairfax thought that the cartoon was based on 'proper material' (being the phrase used in the NSW *Defamation Act* then in force). The material in question was a number of buildings Mr Seidler had designed, including his own house.

The *Seidler* case turned mostly on the application of the 'proper material' requirement under the NSW Act. In a sense it is surprising that the limits of the 'stated facts' requirement were never tested in those parts of Australia that relied only on the common law until 2005. Perhaps those limits are usually addressed by the fact that the cartoon appears on an op-ed page where the facts are laid out, at least to some extent.

Both of these issues have been ironed out by the introduction of the defence of honest opinion in the new uniform defamation legislation. The *South Australian Defamation Act 2005*, for example, provides separate defences for those who are sued:

- For their own statements of opinion<sup>15</sup>;
- For a statement of opinion by an employee or agent<sup>16</sup>; and
- For a statement of opinion by another person.<sup>17</sup>

Only in the first case is it necessary to show that the defendant honestly held the opinion. In the case of an employee or agent, it is



necessary to show that ‘the defendant believed that the opinion was honestly held by the employee or agent at the time the matter was published’. In the case of another person (for example, the writer of a letter to the editor) the defendant need only show it had no reason to believe the opinion was not honestly held.

Clearly the second category defence closes off the small loophole noted earlier in relation to newspapers and cartoonists. It might lead to the faintly absurd spectacle of editors calling the cartoonist in each day to say: ‘Now, you really do hold this opinion, don’t you?’ However, the absence of any requirement of ‘reasonable grounds’ for the belief would mean that in the vast majority of situations, editors can rely on their general knowledge of the cartoonist’s character and political stance (not to mention the inherent unlikelihood that a cartoonist would ever want to express an opinion he or she did *not* honestly hold!).

As to the second reservation, that of the need to state the facts relied on, the new defence requires that the statement be ‘based on proper material’, which is defined in much the same way as under the common law, that is, true or privileged.<sup>18</sup> There is no requirement that that material be stated or included in the statement. Therefore the defendant need only be able to prove its ‘propriety’ in the event that a suit is brought. People who are depicted in cartoons would usually have a pretty good idea which facts can be proved—and once again, in cartoons, the underlying facts are generally notorious. What all this means is that the existence of an honest opinion defence provides cartoonists with a great deal of protection and, frankly, freedom to defame others.

### **Satire and literalism: the fault lines**

The only risk for cartoonists under defamation law is that their material will be interpreted in a literal way, ignoring the irony and exaggeration that are the stock in trade of satirists. Such an interpretation can derail the application of the fair comment defence by requiring the cartoonist to defend a meaning which he or she did not intend. However, a comparison of two cases, one involving a satirical song and one involving a cartoon, shows that even this risk is very slight in the case of cartoons.

In 1997, Pauline Hanson sought and received an interlocutory injunction to stop the ABC’s youth radio network, JJJ, from playing

the satirical song '(I'm a) Back Door Man' by Simon Hunt, AKA Pauline Pantsdown. The song consisted of words and phrases sampled from Hanson's speeches and interviews, rearranged to make outrageous statements such as 'I'm very proud that I'm not straight' and 'I'm a very caring potato'. In their analysis of the litigation, Handsley and Davis showed how ill-equipped a black-letter, literal-minded approach to law was to cope with satirical communication, for the Queensland Court of Appeal treated the words as if they were literal assertions about the politician Pauline Hanson, likely to be taken literally by a reasonable listener. It is hard to understand how their Honours so misconstrued the context of the song. The ABC did not even get to the point of arguing fair comment (or its equivalent under the Queensland Defamation Code) for the precise reason that the literalist approach overlooked the comment, or opinion, element of the song and took it as strictly factual.

However, such subtleties are less likely to be a problem for cartoons, where the context of caricature is explicit. This prediction is borne out by the result in the *Seidler* case. Unlike de Jersey CJ and the other members of the Queensland Court of Appeal who found in favour of Hanson against the ABC, the judges in *Seidler* appeared capable of understanding satire.

Cook's cartoon did not relate to any contemporary debate in the paper or elsewhere about the value of Seidler's work; he certainly was not engaged to design a retirement home. According to David Marr's account of the trial in the *National Times*, 'Seidler saw the cartoon as an unwarranted attack on his life's work ... [He] took it that Cook was being quite literal, that he had *actually* built a house with no roof, no door, able to fit only one inhabitant who had to be fed sandwiches through a slot'.<sup>19</sup> This attitude was translated into the following argument by Seidler's counsel:

Since there was no evidence that the plaintiff had ever designed a structure answering the description of a retirement park the factual basis for comment identified by the cartoonist contained a misstatement. As a result the comment was not based upon proper material and the defence of comment was not available.<sup>20</sup>

This passage demonstrates that Seidler, through his counsel, fell into precisely the same error as the Queensland Court of Appeal did in the *Hanson* case: reading satire literally. Glass JA had this to say:

An ordinary reader would understand that cartoons are often not to be taken literally and would *gain a suggestion of a fictitious project* from the term ‘retirement park’ or so the jury could reasonably find. According to an illustration mentioned during argument the ordinary reader contemplating a well known Saturday cartoon would not necessarily understand it to allege as a fact that the Prime Minister and Treasurer discuss the economy sitting in the branches of a tree. The jury must have found that the cartoon made its comment on the plaintiff’s architecture by *representing in allegorical form [sic] the kind of retirement village which would be designed by an architect who lacked aesthetic sensibilities.*<sup>21</sup>

We applaud the New South Wales Court of Appeal for its more sophisticated reading of the material. On the other hand, we might take the difference in the two courts’ approaches to the satire as an indication that, once again, the visual nature of cartoons might lessen the risk of category error: it is that much more difficult to miss the satirical nature of a cartoon.

### **A chilling effect?**

We have shown that it is very rare for cartoons to be the subject of defamation actions, and that even when they are, they have a stout defence in their favour. And yet, the law does cast a shadow over the practice of cartoonists and their editors. The *fear* of litigation is much more pervasive than the reality of effective immunity from suit. As Dean Alston, cartoonist with the *West Australian*, observes:

If I’m dancing on the borderline of slander, cartoons which could be a worry are vetted by the company lawyer. If it’s deemed too dangerous legally, we’ll pull the cartoon. Most of it is self-imposed censorship. You know what is going to be acceptable, and what is going to be over the top and absolutely affronting to people.

If a cartoon is thought by the editor to be unsuitable, he will say, ‘Look I think that is going a bit too far’. And that’s fine with me. But if it comes to the point where I think the cartoon really should be run, I stand up and say I want it run. And they’re pretty good and fair about it.<sup>22</sup>

It is quite impossible to quantify the effect of legal caution on cartooning comment, but there is enough anecdotal evidence to suggest that it is real. Many cartoonists talk of having work checked and sometimes rejected by the company lawyers. It would be a fascinating research project to study some rejected cartoons, but

these are, of their nature, difficult to track down. Until someone is foolish enough to run a test case through the courts, our opinion that cartoonists and their editors should not be anxious on this point can be no more than an educated guess. It is a guess that is further informed by the existence of an implied freedom of political communication under the Constitution. Even if fair comment failed, the '*Lange*' defence of qualified privilege for discussion of political and government affairs<sup>23</sup>, or some version of it, might protect a cartoonist who might not have had his or her facts quite right.

Interestingly, 'legalling' of cartoons can cut both ways, as a positive opinion can protect them from having a cartoon the editor fears or dislikes 'pulled'. Alan Moir, of the *Sydney Morning Herald*, explains that his contract follows the 1927 precedent of the renowned David Low, whereby publication of cartoons is guaranteed as long as they are legal: 'Sometimes the cartoon which appears beside the editorial is in contradiction to the editorial; sometimes by coincidence, it is the same. But there is never any problem. They have never attempted to stop or even remark on a cartoon in 14 years'.<sup>24</sup> This seems to be the position experienced by many cartoonists, and yet the fear (as distinct from the reality) of legal reprisal still shadows cartoonists.

## Sedition

In November 2005, the Federal Government used its new majority in both houses of parliament to rush through a revision of the sedition laws (first instituted in Australia in 1914 and last used in 1949) in the context of a wide-ranging anti-terrorism law. It became a sort of shorthand in the media for the possible implications of this new law that political cartoonists might be jailed for seditious work, cartoonists acting as a synecdoche for free speech. This transcript from the ABC's flagship current affairs program, *The 7.30 Report*, gives a sense of the reaction:

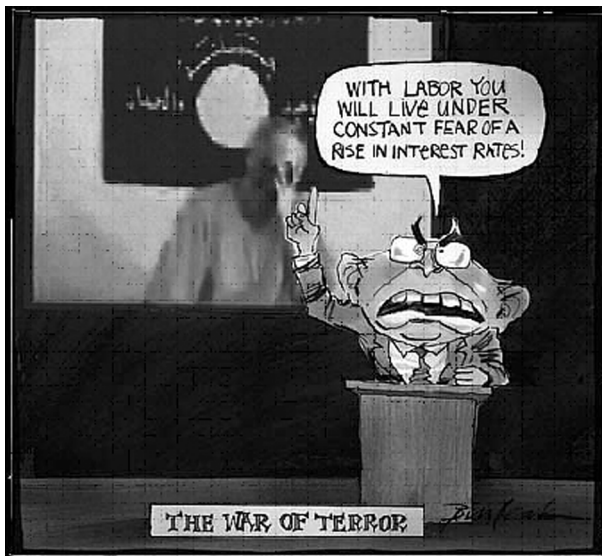
KERRY O'BRIEN: And now to sedition laws ... critics say sedition is an archaic concept and that the criminal code already provides protection against such behaviour. Among those voices of dissent, some of Australia's best known cartoonists and satirists who claim they too could now face the threat of jail. Geoff Hutchison reports.

LAURENCE MAHER, BARRISTER: Seditious speech is an old criminal offence going back 500 years, which was designed to prevent speech and conduct which was thought to be a precursor to treason. So that, for example, if one were foolish enough to suggest that the king was a fool then you faced conviction and on conviction the penalty of death would be applied.

BILL LEAK, CARTOONIST, *THE AUSTRALIAN*: Seditious speech is a, sort of, basic component of satire. If your cartoon or your satire can't be considered as seditious then you're probably not doing a very good job.<sup>25</sup>

There is a sense in which the dictionary definition of sedition supports Leak's point. For example, the *Australian Concise Oxford Dictionary* offers, as definition 2, 'agitation against the authority of the state'<sup>26</sup>, which is pretty close to Leak's perceived job description. The following cartoon of his from the 2004 election campaign provides an example of this kind of communication, stating bluntly that John Howard is waging a war of terror against the voters in the interests of political advantage.

The interesting thing is that this cartoon generated considerable criticism, not for its potentially seditious depiction of the Prime



'The war of terror',  
Bill Leak, *Australian*, 25 September 2004

Minister, but for the dubious taste of involving the image of Ken Bigley, the British hostage murdered in Iraq, in a domestic political cartoon.

The following two cartoons by Warren Brown from the election campaign of 2001, when the issue was the troop deployment to Afghanistan in the wake of the September 11 attack, provide an interesting contrast between a patriotic response to going to war and sedition by the Leak definition.

A week after the first cartoon, Brown had moved from warmly patriotic support of the diggers to the sarcastic implication that the soldiers were being sent to Afghanistan to win the government votes at the election scheduled for November 10.

In earlier times of war (especially the First and Second World Wars), such an image would have been censored, but in 2001 all it generated was some hostile comment in the letters pages.

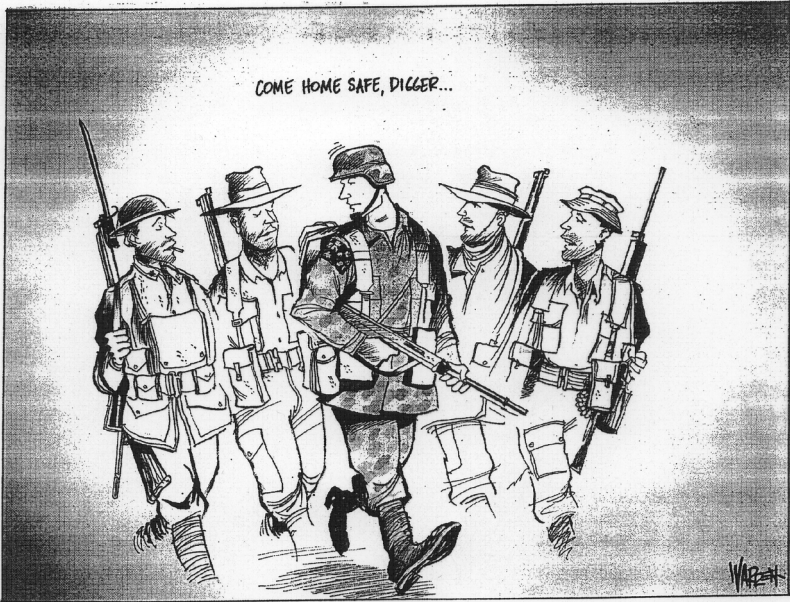
Would these hostile cartoons have been in trouble under the revived sedition laws of 2005? The more we study the controversy, the less we think that it had any substantive legal (as opposed to political) content. But first we should work through the events and the law in more detail.

The Opposition picked up on the issue of cartoonists, with leader Kim Beazley seeking simultaneously to be a fearless protector of free speech and staunch pursuer of the war on terror:

‘I’m all for jailing terrorists but I don’t think we ought to jail cartoonists. The sedition laws are about protecting politicians. The detention laws are about protecting Australians,’ Mr Beazley said. ‘I’m all for protecting Australians, I’m not for protecting politicians, and we’re talking about politicians’ reputations, not their lives. I do not know why the Government insists that we should lower ourselves to the standard of North Korea, Syria and Cuba.’<sup>27</sup>

The Coalition government was quick to dispute that there was any significant threat to cartoonists or free speech, and this does have some credence considering the sedition offences outlined in the Act conform more to the other, more precise sense of definition 1, ‘conduct or speech inciting to rebellion or a breach of public order’.<sup>28</sup> Both the Attorney-General, Phillip Ruddock, and John Howard hit the airwaves vigorously insisting that there was nothing to worry about:





'Come home safe, Digger', Warren Brown, *Daily Telegraph*, 18 October 2001



'November 10', Warren Brown, *Daily Telegraph*, 26 October 2001



‘Journalists, cartoonists, actors and all other sundry critics of the Government have nothing to fear from these new proposals,’ the Prime Minister said. ‘People can still attack me and Mr Beazley and lampoon us, as I am sure they will, without any fear of being put in the slammer.’<sup>29</sup>

Awareness of the debate extended beyond Australia, as this report from a part of the world that has been on the receiving end of Australian advice about freedom of speech and independence of public institutions, suggests:

Howard insisted the new laws were not intended to hamper freedom of speech. ‘These laws will not stop journalists attacking the government, they will not stop cartoonists lampooning the prime minister [sic] and the leader of the opposition,’ Howard told public radio. ‘They will not prevent free and open debate because in substance they are no different from the sedition laws that have existed in the past.’<sup>30</sup>

Nationally, there was widespread disquiet about the laws’ implications, and about the apparent urgency with which they were being pursued. There was a hurried Senate ‘Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005’, which received 294 submissions in its brief life.<sup>31</sup> Even the Coalition members of the Senate Committee were unimpressed by the implications of the Bill for free speech, and recommended delay. Instead, the Attorney-General made some hurried amendments to address the more glaring concerns and insisted that the Bill be passed before Christmas, which it duly was. The law was, however, referred to the Australian Law Reform Commission (ALRC) for inquiry and report on:

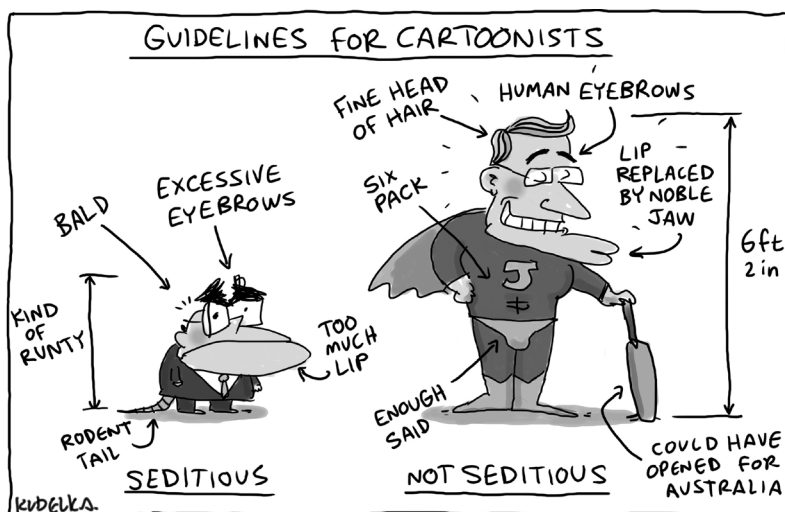
- a. whether the amendments ... effectively address the problem of urging the use of force or violence;
- b. whether ‘sedition’ is the appropriate term to identify this conduct;
- c. whether [the amended law] is effective to address the problem of organisations that advocate or encourage the use of force of violence to achieve political objectives; and
- d. any related matter.

The terms of reference were dated 1 March 2006, with the report due no later than 30 May. Once again, then, we see evidence of indecent haste about this matter on the government's part—though in this case the ALRC was able to slow the train down somewhat. It produced a substantial Issues Paper by the end of March and a Discussion Paper followed on 29 May, with submissions due by 3 July. The final report was published on 13 September.

Considering the controversy that has surrounded the introduction of the amendments, it is worth stepping back to assess the likely implications of the new legislation, specifically for the cartoonists who were often at the centre of the debate. What we have to say will have some bearing on other satirical practice in the arts, literature and media, but may play out rather differently in detail.

### Application of the 2005 law to cartoons

The *Anti-Terrorism Act (No 2.) 2005* (Cth) repeals the old seditious provisions in the *Crimes Act 1914* and substitutes certain provisions of the *Criminal Code*. In this section we will look at the content of those new provisions and consider their application to Kudelka's 'Guidelines for cartoonists'.



'Guidelines for cartoonists', Jon Kudelka, *Australian*, 17 November 2005

It is hard to imagine a more scathing cartoon than this, and it is also reasonable to suppose it would easily meet Leak's definition of 'seditious'. But is it in breach of this provision that the *Anti-Terrorism Act 2005* (Cth) inserted into the *Criminal Code*?

### 80.2 *Urging the overthrow of the Constitution or Government*

1. A person commits an offence if the person urges another person to overthrow by force or violence:
  - a. the Constitution; or
  - b. the Government of the Commonwealth, a State or a Territory; or
  - c. the lawful authority of the Government of the Commonwealth.

Clearly not. The cartoon may be quite vicious and personal against John Howard, and it might even be seen as undermining his authority, but it does not urge violence and it is therefore clearly not seditious. It is not seditious to cast aspersions on the head of government's appearance, his height, or even the size of his genitals. Nor is it seditious to accuse him of vanity or childish cricket dreams. Therefore Kudelka would have been at no risk of the maximum penalty of seven years imprisonment under section 80.2(1).

There are similar provisions relating to 'Urging interference in Parliamentary elections'<sup>32</sup>, 'Urging violence within the community'<sup>33</sup>, 'Urging a person to assist the enemy'<sup>34</sup> and 'Urging a person to assist those engaged in armed hostilities'.<sup>35</sup> Kudelka's cartoon would be some way off breaching any of these provisions either.

Furthermore, all offences in section 80.2<sup>36</sup> have the following defence:

### 80.3 *Defence for acts done in good faith*

1. Sections 80.1 and 80.2 do not apply to a person who:
  - a. tries in good faith to show that any of the following persons are mistaken in any of his or her counsels, policies or actions:
    - i. the Sovereign;

- ii. the Governor-General;
  - iii. the Governor of a State;
  - iv. the Administrator of a Territory;
  - v. an adviser of any of the above;
  - vi. a person responsible for the government of another country; or
- b. points out in good faith errors or defects in the following, with a view to reforming those errors or defects:
- i. the Government of the Commonwealth, a State or a Territory;
  - ii. the Constitution;
  - iii. legislation of the Commonwealth, a State, a Territory or another country;
  - iv. the administration of justice of or in the Commonwealth, a State, a Territory or another country; or
- c. urges in good faith another person to attempt to lawfully procure a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country; or
- d. points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; or
- e. does anything in good faith in connection with an industrial dispute or an industrial matter; or
- f. publishes in good faith a report or commentary about a matter of public interest.

Kudelka's cartoon would undoubtedly have benefited from paragraph (f) and also possibly paragraph (b), depending on how sophisticated a reading were accorded to the image.

Warren Brown's 'November 10' cartoon might be seen as cutting closer to the bone, typifying the sort of cartoon spawned by Australia's involvement in the Iraq war. It questions the wisdom of our involvement in the war, and impugns the government's motives for allowing us to become involved. But once again it does so without urging the violent overthrow of the government, or urging anybody to assist the enemy. Even if it did urge assistance of the enemy, surely it would benefit from the application of the defence of good faith, at the very least paragraph (f) in that the cartoonist has only 'publishe[d] in good faith a report or commentary about a matter of public interest'.<sup>37</sup> The 'matter' in question would be the political decision-making of the Commonwealth government. What could be of greater public interest?

There is also the possibility that the cartoon itself could be seen as assisting the enemy, not just urging others to do so. Such a view would be based on the idea that lowering the morale of Australian troops is a benefit to the enemy. In that event it would be treason, not sedition.<sup>38</sup> One requirement that the prosecution would have to meet in such a case would be to show that the cartoonist had intent to assist the enemy, which would usually be hard to do.

While these laws might be of real concern to political activists, it is very unlikely that the kind of political cartoons to which we are accustomed in Australia, at least in the mainstream media, would fall foul of these laws, and even more unlikely that they would not be able to benefit from the defence.

Therefore it is clear that the new laws are based on the alternative and narrower definition of 'sedition', not on Leak's broader and more colloquial one. However, precisely because of the colloquial nature of Leak's definition, it would make sense to remove the word from these laws and to use instead a formulation that captures the nature of the laws. This is precisely what the ALRC recommended in its September 2006 report: the replacement of 'sedition' with the phrase 'Urging political or inter-group force or violence'.<sup>39</sup> In the ALRC's words:

It would be unfortunate ... if continued use of the term 'sedition' were to cast a shadow over the new pattern of offences. The term 'sedition' is too closely associated in the public mind with its origins and history as a crime rooted in criticising—or 'exciting

disaffection' against—the established authority. Consequently ... the ALRC recommends that the term 'sedition' no longer be used in federal criminal law.

It might also be worth noting that the ALRC has proposed that the definition of treason be re-framed to make it clear that only *material* assistance to the enemy is an offence.<sup>40</sup> Such a change would have the precise purpose of indicating 'that mere rhetoric or expressions of dissent do not amount to "assistance" for these purposes'.<sup>41</sup> The result would be that Brown's cartoon would not even be arguably treason.

There are two other things that support the conclusion that these cartoons would not have been held seditious if published after the new laws were passed: first, the provisions that these laws are replacing used the word 'excite' where these use 'urge'.<sup>42</sup> While neither term is defined, 'excite' can be read as requiring more of an objective assessment of the *likely effect* of the communication—so you might be prosecuted for 'exciting' others to overthrow the government even though it was not your subjective intent that others do so. It is possible to imagine a cartoon that is simply so inflammatory that it could be seen as carrying a likelihood that people would get so angry they would be driven to overthrow the government by violent means. 'Urge' carries a more deliberate connotation: you cannot 'urge' someone to overthrow the government without there being some kind of specific reference to overthrowing the government in the communication—or at least to an act that would have the effect of overthrowing the government.

Ironically, the first major cartoon-related controversy that blew up after introduction of the new laws related to some apparently blasphemous images of the prophet Mohammed, originally published by a conservative Danish newspaper. These might be seen as just the kind of inflammatory cartoons hypothesised in the previous paragraph. The application to them of the new provisions provides a good illustration of what a narrow concept 'urge' is.

The provision that comes closest to addressing this situation is sub-section (5) of section 80.2:

*Urging violence within the community*

A person commits an offence if:

- a. the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and
- b. the use of the force or violence would threaten the peace, order and good government of the Commonwealth.<sup>43</sup>

If the provision still used the word ‘excite’, you might see retaliatory violence as having been ‘excited’ by the publication of inflammatory cartoons. But do the cartoons ‘urge’ violence by Muslims? For one thing, the cartoons are not even aimed at Muslims, so how can they be seen as ‘urging’ any particular behaviour on the part of Muslims? Moreover, to say the cartoon ‘urges’ violence suggests the cartoonist sees such violence as good and right and justified. Those who want to bait Muslims certainly do not see it that way. The publication of the cartoons clearly does not ‘urge’ violence, even if the publisher should realise that is a likely result.

It is interesting to note that the old *Crimes Act* provision referred to an intention to promote ‘feelings of ill will or hostility between classes of her Majesty’s subjects’ as a seditious intention.<sup>44</sup> So under the old laws, publication of the cartoons might have been unlawful. This would suggest that the new laws have, if anything, opened up the field for freer expression than was allowed under the previous laws.

This view is further supported by the second consideration, which looks at the ‘recklessness’ provisions. Section 80.2(1), for example, is followed immediately by this provision:

2. Recklessness applies to the element of the offence under subsection (1) that it is:
  - a. the Constitution; or
  - b. the Government of the Commonwealth, a State or a Territory; or
  - c. the lawful authority of the Government of the Commonwealth

that the first-mentioned person urges the other person to overthrow.<sup>45</sup>



In other words, if you urge behaviour which would have the effect of overthrowing the Constitution (etc.) but you don't realise that because you don't know what the Constitution (etc.) is, and you don't particularly care that it would have that effect, you can still be held liable for the offence. The proscriptions on urging interference in elections and urging violence within the community both have a similar 'recklessness' provision.

These provisions do not make any reference to the defendant's perception as to whether people, on receiving his or her communication, are likely to take steps to overthrow the government. The provisions could have said that the offence extends to situations where someone is reckless *as to what people do* in response to what he or she does or says. But they do not. This appears to mean the offence is committed only by people who intentionally try to get others to commit violent acts that would have the effect of overthrowing the government. It is very unlikely that this will ever be true of a cartoonist in Australia.

The foregoing logic might be seen as a little too subtle and legalistic for us to feel confident that cartoonists (and others) will know precisely what they are allowed to do. Therefore there would be no harm in removing any doubt by including a provision that to be convicted of an offence under section 80.2 'the person must intend that the urged force or violence will occur' in accordance with the ALRC's recommendation.<sup>46</sup>

Once again, this is not to say that the *Anti-Terrorism Act* is not open to question in a liberal democracy that values political freedom. We might arrive at a point where a violent overthrow of the government would be the only means of protecting fundamental justice and liberties. If we did, this law would prevent people from encouraging others to take the necessary action. However, we are not there yet, and, in any event, probably every country on earth has some kind of law under which the state can prosecute those who might see themselves as freedom fighters. Indeed, the ALRC has put the view that 'governments have a perfect right, and in many cases a duty, to legislate to protect the institutions of democracy ... from attack by force or violence'.<sup>47</sup> From this perspective we might tell our hypothetical freedom fighters that if democracy has broken down to a point where violence is the only solution, the prospect of a sedition trial in the event they lose the struggle is probably the least of their worries.

On any view, the point remains that the sedition laws are very unlikely to touch political cartoons as we know them. The alarm among cartoonists that the new laws were part of a plan to muzzle their sort of licensed dissent seems to be groundless, and the underlying politics of spending so much political capital on something bound to create anxiety and change little remain opaque to us. The likeliest explanation we can come up with is also the ‘dumbest’. In the wake of the London bombings, the government may just have been determined to give the various security organisations everything they asked for. As Natalie O’Brien and Patrick Walters reported:

From that moment [i.e. the London bombing of 12 July 2005], Australian Federal Police Commissioner Mick Keelty was ‘knocking on an open door’ with his requests for greater police powers to fight terrorism, according to senior government sources.<sup>48</sup>

After all, who would want to be the prime minister or attorney general who had refused the reforms that would have prevented a terrorist attack within Australia? The sedition laws came as part of a package of anti-terror legislation, and the other parts make significant changes. The most economical explanation is that a government determined to present as ‘tough on terror’ felt that, politically, it could not afford to back down on any part of the package, even a controversial one with little or no legal impact. More sinister theories about an overly authoritarian government engaging in hidden attacks on freedom of speech<sup>49</sup> are worth considering but need further investigation and evidence to be convincing. In any event, such theories, if ultimately found to be justified, have a significance reaching far beyond the terms of any particular piece of legislation. Indeed, one might see the legislation as a symptom, rather than as a problem in its own right.

With a couple of exceptions, then, it appears that the government was correct in its assertions that the *Anti-Terrorism Act* hardly changes anything in sedition law. One small but possibly significant change is actually in defendants’ favour; that is, the introduction of para (f) in the good faith defence. There are also some quaint instances of such things as changing ‘one of her Majesty’s subjects’ to ‘a person’. The main change is to bring the laws in from the *Crimes Act* to the *Criminal Code*. This is not legally

significant, but rather part of a project that has been going on for years, to ‘migrate’ all substantive offences from the Act to the Code, leaving the Act to deal only with procedural matters.

The greatest danger of these laws is that their passage might lead people, including cartoonists, to be more self-censoring in their public statements because of a perception of risk of legal reprisal. If that is so, we hope that this article can play a part in restoring their confidence.

There are two more general arguments against the 2005 laws, which we discuss briefly here even though they do not have any special application to political cartoons.

It has been suggested that the passage of a new law breathes new life into the offence of sedition, and is bound to make the authorities more likely to use it.<sup>50</sup> The ALRC appears to be agnostic on this point, but did hint that it saw such concerns as ‘justifiable’.<sup>51</sup> We do not necessarily agree. The reason sedition laws have hardly been applied for so long is because there has been hardly anyone breaching them. They are, after all, very specific laws addressing a very limited range of conduct. We see no immediate danger of the laws suddenly being flashed around the place, unless there is some kind of surge in (for example) communications urging violent overthrow of the government. In this connection it is worth noting that the ALRC’s proposed remedy to reinvigoration is *not a return* to the old laws!

It has also been argued that any sedition law at all is unnecessary, as the same effect can be achieved with the general incitement provisions of the criminal law.<sup>52</sup> Everything that section 80.2 says one cannot ‘urge’ someone else to do is a crime—so, in principle, it should already be a crime to incite someone else to do it. However, the ‘incitement’ provision of the *Criminal Code* requires that the accused intend that the specific offence ‘incited’ be committed.<sup>53</sup> The offences under section 80 do not require anything so specific; in the words of the ALRC, they do not necessarily ‘cover conduct that amounts to a more generalised call to action’.<sup>54</sup> So the question becomes whether there is any justification for singling out particular types of physical offences (terrorism, treason and so on) for harsher treatment of those who advocate them. The ALRC suggested that there is a justification, because these laws aim to address a special

kind of harm: ‘the creation of an environment in which the likelihood of force or violence being used for the proscribed purposes is increased’.<sup>55</sup>

The difference between incitement and sedition is reflected in the penalty structures for the two types of offence. For at least some of those offences of which sedition is an incitement, the penalty is life imprisonment.<sup>56</sup> Therefore the penalty for incitement would be imprisonment for ten years.<sup>57</sup> Yet, under the sedition provisions, the penalty is only seven years. This is only fitting, considering the broader and more general nature of the communications caught by sedition.

Is it possible that an abusive government could apply these laws to imprison cartoonists? Of course it is. It is in the nature of an abusive government to do as it pleases and misapply any laws on the books to imprison whom it pleases (or whoever displeases it). By the time we got to the point of cartoonists being imprisoned under these laws, however, we would surely have many other things to worry about.

Meanwhile, the term ‘sedition’ continues to be used in senses which the law does not support. An extreme, if trivial, example appears in Susan Mitchell’s January 2007 feature in the *Australian*: ‘I hate the summer. For an Australian to make such a denouncement borders on sedition.’<sup>58</sup>

It has also been suggested that sedition laws be used against the sport psychologist who helped swimmer Ian Thorpe decide to retire.<sup>59</sup> Closer to having meaning for present purposes is the declaration by comedian Charles Firth:

You see I support the sedition laws ... In fact, I don’t think they go far enough. I’ve come back to this country after living in New York, and people are openly criticising the Government and that isn’t on. In the US at least there’s an acknowledgement that you don’t really push Bush. He’s the boss. But here, there’s no respect. Especially for John Howard.<sup>60</sup>

Hence the ALRC’s careful explanation that the laws do not prohibit criticism of the government, or expression of disrespect for the Prime Minister, appears to have fallen on deaf ears.

A related issue is the tendency of commentators to report the ALRC’s recommendations as extending to removal of the sedition laws, rather than simply of the word ‘sedition’ itself.<sup>61</sup> Even a pair of

eminent academic lawyers appears to have implied—mistakenly—that the removal of the word would be a ‘substantial’ change.<sup>62</sup> Others, while understanding that the ALRC’s recommendation was merely about the word ‘sedition’, appear to have focused their protests on the government’s refusal to remove the word, rather than on the actual content of the law.<sup>63</sup> Moreover, the sedition laws have been blamed for the ‘banning’ of two pro-Jihad books that were, in fact, refused classification under the *Classification (Publications, Films and Computer Games) Act 1995*.<sup>64</sup>

All of this suggests that Australians have some way to go in understanding the nature and effect of these laws. We worry that a community that is so fixated on a set of laws that has little impact on its civil liberties risks failing to pay attention to things that pose a real threat. Therefore we can only endorse the ALRC’s recommendation that:

Peak arts and media organisations should provide educational programs and material to their members to promote a better understanding of:

- a. the scope of federal, state and territory laws that prohibit the urging of political or inter-group force or violence; and
- b. any potential impact of these laws on the activities of their members.<sup>65</sup>

## Conclusions

In this chapter we have argued that cartooning as it is presently practised in Australian newspapers is very unlikely to fall foul of defamation or sedition laws.

For defamation, it is very difficult to see how cartoons will be mistaken as anything other than comment. Therefore they have a ready defence under the law, unless they are very specifically malicious. It is not clear that other satirical forms (prose, video, photographs) would enjoy the same level of protection, as they run an intrinsically higher risk of being interpreted literally as statements of fact rather than as comment.

For sedition, it would be an extremely unusual cartoon that urged the violent overthrow of the state, and it would even then be

necessary to establish that, in the context of the reception of cartoons, the cartoon was interpreted as really meaning it. The sedition laws have little probable impact on cartoonists. Again, we cannot be as confident of this for other satirists.

In spite of all of this, there remains the problem of the ‘chilling effect’, or self-censorship, beyond what is actually required out of uncertainty as to the possible legal consequences of speaking one’s mind. This effect is a notoriously difficult thing to measure because it is hard to determine what people might have said if they had felt safer from the law. An interesting future project would be to gather stories from cartoonists of when cartoons were pulled on ‘legal’ grounds, to assess whether these are realistic legal concerns, over-cautiousness, or a disguise for other sensitivities such as the commercial interests of the publisher or perhaps good taste.

In the meantime, if there has been a ‘chilling effect’ on the exercise of cartoonists’ free expression from a fear of legal sanction, we hope this chapter can ease their minds. As long as all participants inform themselves accurately on the contours and operation of the laws of defamation and sedition, those laws are very unlikely to be constraints on the power of cartoonists to shine brightly, even during these dark times.