

Treason: Defunct Or Dormant?

ADAM REYNOLDS*

The law relating to high treason — ‘the most heinous of all crimes’¹ — traces its origins to some of the earliest statute law in England. Despite this, it is still the subject of on-going law reform. Laws relating to treason are found in Victorian and Commonwealth statutes, but not in all other states of Australia. Successful prosecutions in Australia and the United Kingdom this century are rare, and convicted offenders have often been pardoned. So is the law of treason defunct — anachronistic in a time when Australia has not been at war for some decades? Or is it just dormant, as it was after the Middle Ages, waiting to be adapted to a new set of circumstances? In a review of the law of treason, this paper examines one such area — its possible application to twentieth century terrorist activities.

INTRODUCTION

‘treason! foul treason! Villain! traitor! slave!’

William Shakespeare, “King Richard III”, Act 5, Scene 2.

‘Treachery and treason — there’s always an excuse for it’

Dire Straits, “Private Investigations”.

What is Treason?

Treason has been variously described as ‘the most heinous of all crimes’,² an offence of ‘unparalleled gravity’,³ and ‘the gravest crime in the whole calendar of crime’.⁴

‘Treason . . . is the betrayal of a trust’,⁵ and the current law holds this to be any revolutionary activities of a warlike nature. Until recently, in Victoria treason was deemed serious enough to be distinguished from misdemeanors and felonies, and prior to 1973 it attracted the death penalty. In all Australian jurisdictions where there are treason laws, the sentence for treason is now life imprisonment.

Treason is essentially a wartime phenomenon. All case law this century in Australia and the UK resulted from activities during the Boer, First and Second World Wars. There were also legislative activities during the Korean War,⁶ and at the height of the Cold War.⁷

* BBus(Acc), BAppSc(Comp), CPA, MACS. The author is a Mature Age first year law student at Monash University.

¹ Alan Wharan, ‘Treason’ (1978) 128 *New Law Journal* 851, 851.

² *Ibid.*

³ *R v Snow* (1915) 20 CLR 315, 330.

⁴ A comment made by the Crown Prosecutor, W R Dovey, appearing in Ivan Chapman, *Tokyo Calling. The Charles Cousens’ Case* (1990), 233.

⁵ *Joyce v DPP* [1946] 1 AC 347, 368.

⁶ Editorial (John Burke and Peter Allsop), ‘Treason’ [1955] *Criminal Law Review* 269, 271.

⁷ *Communist Party Dissolution Act 1950* (Cth).

This Paper

Originally divided into petty (or 'petit') treason, and high treason, only the latter is still a crime. Related crimes against the state such as sedition, treachery, and espionage are outside the scope of this paper. Space permits only a passing mention of treason relating to royalty.

LEGAL FRAMEWORK

A Brief History

Treason is an ancient law, 'whose historic protean forms provide an interesting chapter in the development of the law'.⁸ The codification of the law of treason began with the *Treason Act 1351* (UK).⁹ Development of case law through the seventeenth and eighteenth centuries extended the basic definition of treason, and adapted the older wording to satisfy the needs of later eras. This 'constructive treason' was then confirmed and codified under the *Treason Act 1795* (UK). This developed into the *Treason Felony Act 1848* (UK), the basis of Commonwealth and Victorian law today.

Victoria — Statute Law

The legal definition of treason is contained within section 9A of the *Crimes Act 1958* (Vic). The main heads involve:

- Causing the death of, or harm to the Sovereign, or the Sovereign's consort or heir.¹⁰
- Levying war or doing any preparatory act to levy war against the Commonwealth.¹¹ Levying war involves 'the use of force in action which is far more than local riot or industrial action, with the object of forcibly accomplishing some end which should be effected, if at all, only by proper constitutional means'.¹²
- Assisting enemies at war with Australia (regardless of any official proclamation of war).¹³
- Instigating a foreigner to make an armed attack of Australia.¹⁴

The Act also requires that a treasonous act be an overt one.¹⁵ As to what constitutes an overt act, this has been left to the courts to decide based on the circumstances of each case. A person is also guilty of treason if they know that another person intends to commit a treasonable act and does not inform

⁸ *Connor v Sankey; Whitlam v Sankey* 28 FLR 267, 277 (Street CJ).

⁹ 25 Edw III c 2 st 5.

¹⁰ *Crimes Act 1958* (Vic) s 9A(1)(a) & (b).

¹¹ *Crimes Act 1958* (Vic) s 9A(1)(c).

¹² Commonwealth, *Parliamentary Debates*, House of Representatives, 8 September 1960, 1028 (Sir Garfield Barwick, Paramatta — Attorney-General).

¹³ *Crimes Act 1958* (Vic) s 9A(1)(d).

¹⁴ *Crimes Act 1958* (Vic) s 9A(1)(e).

¹⁵ *Crimes Act 1958* (Vic) s 9A(1)(f).

the police or attempt to prevent this act.¹⁶ This was formerly known as 'misprision' of treason.

Victoria — Common Law

The only cases of note were in 1855, where thirteen survivors of the Eureka Stockade rebellion were charged with treason for their participation in the uprising.¹⁷ All were acquitted by juries returning their verdicts after deliberating for periods of between 25 and 40 minutes, mostly due to the reflection of public sympathy for the rebels' cause.

Commonwealth — Statute Law

The crime of treason is laid out in section 24 of the *Crimes Act 1914* (Cth). This section is as per section 9A of the *Crimes Act 1958* (Vic), with the addition that an 'enemy' can be also declared by proclamation.¹⁸ Major changes to this section were introduced in 1960 by the Attorney-General at the time, Sir Garfield Barwick.¹⁹ Also added was section 24AA, which created the new crime of Treachery.

The law of treason again came under review in 1991.²⁰ At this time, there was general support for retention of the crime of treason.²¹ It was proposed, however, to either remove the head of treason relating to harming or killing the Sovereign, or move it to a separate section. Other minor changes were suggested, but as yet none of the recommended changes have been implemented.

Commonwealth — Common Law

The only case to be prosecuted this century in Australia was that of Charles Cousens,²² who was alleged to have broadcast propaganda on Japanese radio during World War II. As the current Commonwealth law of treason was not yet in place in 1946, the case was prosecuted under NSW law (see below). Although a prima facie case was established for Cousens' prosecution, the NSW Attorney-General decided to drop the charges.²³

Other States

Statute Law — Code States

There are no laws against treason in Western Australia, Northern Territory and Queensland. Tasmania has an adaptation of the *Treason Act 1351* (UK),

¹⁶ *Crimes Act 1958* (Vic) s 9A(2)(b).

¹⁷ Graham Fricke, 'The Eureka Trials' (1997) 71 *Australian Law Journal* 59.

¹⁸ *Crimes Act 1914* (Cth) s 24(1)(d)(ii).

¹⁹ *Crimes Act 1960* (Cth) s 24.

²⁰ Review of Commonwealth Criminal Law, *Fifth Interim Report*, (1991), 277–99.

²¹ Comment, 'Review of Commonwealth Criminal Law Continues' (1988) 26 (10) *Law Society Journal* 73.

²² *Ex Parte Cousens; Re Blackett* (1946) 47 SR (NSW) 145 ('Cousens' Case').

²³ Chapman, above n 4, 305.

retaining a section covering the 'violation' of the Queen or the wife of the eldest son and heir.²⁴ It also has an additional requirement that there be more than one witness to the crime for treason to be proven.

Statute Law — Common Law States

The ACT has no law against treason. Both South Australia²⁶ and NSW²⁷ integrate parts of the *Treason Act 1351* (UK) into their criminal law. In 1977, a law reform committee in South Australia considered that a state law of treason was unnecessary²⁸ as it was adequately covered at Commonwealth level. This has not yet changed.

Other Countries

This paper is not intended to be an exhaustive comparative analysis of treason laws around the world. However, specific features of these laws in some countries bear mentioning.

United Kingdom

In the UK, cases this century relate to the Boer War — *R v Lynch*, *De Jager v Attorney-General of Natal*;³⁰ the First World War — *R v Casement*,³¹ *R v Ahlers*;³² and the Second World War — *Joyce v DPP*³³ (*Lord Haw-Haw Case*), *R v Purdy*,³⁴ *R v Steane*.³⁵ Both the *Casement* and *Joyce* cases resulted in the death penalty, which was the penalty for treason in the UK until 1999. As with the *Cousens' Case* in Australia, the *Joyce* and *Steane* cases related to wartime radio broadcasts of propaganda.

United States

Treason is the only crime defined in the *United States Constitution*.³⁶ Since independence, there have been less than 40 treason prosecutions in the USA, with only two successful at state level.³⁷ The most notable trials included:

²⁴ *Criminal Code Act 1924* (Tas) s 56(i). This head was introduced in the time of Henry VIII to ensure the purity of the royal line. See Paul Catley, 'James Hewitt, the Princess of Wales and the Treason Acts' (1996) 146 *New Law Journal* 350, and Marion Berry, 'Violation of the Queen Consort or Wife of the Eldest Son: Twentieth Century Treason?' (1995) 19 *Criminal Law Journal* 332.

²⁵ *Criminal Code Act 1924* (Tas) s 60(1). This requirement can be traced back to 5/6 Edw VI c 11, and the Bible — Deuteronomy Chapters 17, 19.

²⁶ *Criminal Law Consolidation Act 1935* (SA) ss 6–10A.

²⁷ Crimes Act 1900 (NSW) ss 11–16A.

²⁸ Criminal Law and Penal Methods Reform Committee, *Fourth Report: The Substantive Criminal Law* (1977).

²⁹ [1903] 1 KB 444.

³⁰ [1907] AC 326.

³¹ [1917] 1 KB 98.

³² [1915] 1 KB 616, quashed on appeal.

³³ [1946] 1 AC 347.

³⁴ (1945) 10 JCL 182.

³⁵ [1947] 1 KB 997.

³⁶ Art 3, s 3.

³⁷ For example, see *United States v Rosenberg et al* (1952) 195 F (2d) 583.

- Aaron Burr — 1807 — former Vice President (acquitted)³⁸
- Robert Wilcox — 1889 — rebellion leader in Hawaii (acquitted)³⁹
- Ezra Pound — 1946 — poet (found to be mentally unsound)⁴⁰
- Iva Toguri — 1949 — ‘Tokyo Rose’ (sentenced, then pardoned)⁴¹

Civil Unrest

Fiji has similar treason provisions to Australia, with the punishment being death.⁴² However, the success of the 1987 coup meant that no charges were laid against its instigator Sitiveni Rabuka, who acknowledged at the time ‘my actions constitute a treasonable offence’.⁴³ This was similar to the successful fight for Rhodesian independence in 1965.⁴⁴

Compare this with Abdullah Öcalan, who was captured in 1999 after leading the unsuccessful PKK (Kurdish) resistance movement for 14 years against the Turkish government. He was found guilty of treason, in contravention of Turkish law,⁴⁵ and was sentenced to death.⁴⁶

Rule of Law

Treason also features in countries where the principles of the rule of law are not held in high regard, and governments use it to suppress democratic processes. Some recent examples are charges laid in Russia (Nikitin, 1998;⁴⁷ Pasko, 1999),⁴⁸ Nigeria (Abiola, 1994),⁴⁹ Peru,⁵⁰ and Malaysia (Ibrahim, 1998).⁵¹

General Defences

Of the general defences available, the defence of duress is of most interest. This has never been raised in Australia in relation to treason. However, there

³⁸ *United States v Burr* (1807), 25 F. Cas. 187 (No 14,694).

³⁹ H G Chapin, ‘Robert Wilcox and the 1889 Rebellion’, The Hawaiian Historical Society, [Internet — <http://www.hawaiianhistory.org/wilcox89.html> (Accessed 19 May 1999)].

⁴⁰ J Stephanic and R Delgado, ‘Partners and Pinstripes: The Case of Ezra Pound and Archibald MacLeish’, (1990) 63 *Society of California Law Review* 907.

⁴¹ *Iva Ikuko Toguri D’Aquino v United States* (1951) 192 F (2d) 338.

⁴² *Fijian Penal Code 1945* ss 50, 51, 53.

⁴³ Kenneth Bain, *Treason at 10: Fiji at The Crossroads* (1989), 193.

⁴⁴ B A Hepple, P O’Higgins and C C Turpin, ‘Rhodesian Crisis — Criminal Liabilities’ [1966] *Criminal Law Review* 5.

⁴⁵ *Turkish Penal Code 1965* Art 125.

⁴⁶ Amnesty International, ‘Turkey: Death Sentence After Unfair Trial — the Case of Abdullah Öcalan’, EUR 44/40/99, August 1999.

⁴⁷ ‘Russian Former Navy Captain’s Treason Trial Open to Public’, *ITN Online*, [Internet — <http://www.itn.co.uk/world/world19981020/102004w.htm> (Accessed 19 May 1999)].

⁴⁸ ‘Defense Lawyers in Pasko Treason Trial Win Week-Long Recess’, *Russia Today*, [Internet — <http://russiatoday.com/rtoday/news/99020907.html> (Accessed 19 May 1999)].

⁴⁹ Department of Foreign Affairs and Trade, ‘Nigeria — Death of Alhaja Kudirat Abiola’, [Internet — <http://orpheus.dfat.gov.au/pmb/releases/fa/fa45.html> (Accessed 19 May 1999)].

⁵⁰ Amnesty International, ‘Peru: Amnesty International Urges President Fujimori to Release “Innocent Prisoners”’, [Internet — <http://www.amnesty.org/ailib/aipub/1999/AMR/24600699.htm> (Accessed 12 July 1999)].

⁵¹ *PP v Dato’ Seri Anwar Ibrahim* [1998] 4 CLJ 387.

is precedent to both support⁵² and deny⁵³ the availability of this defence. In *Steane*,⁵⁴ the most supportive case for the defence, Gestapo officers beat Steane, tore part of his ear off, and threatened him with putting his wife and children in a concentration camp, to force him to commit treasonable acts.

TERRORISM

Terrorism in Australia

Terrorism is the use of violent means 'for the purpose of putting . . . any section of the public in fear'.⁵⁵ In Australia, it is only legislatively provided for in the Northern Territory,⁵⁶ and through adoption of international conventions.⁵⁷ Terrorism is generally regarded as a crime of political violence, and several Australian incidents are relevant here. They include the Hilton Hotel bombing (1978), Family Court attacks (1980–1984),⁵⁸ and the National Crime Authority offices bombing (1994).

Terrorism and Treason

In my opinion, there is a need for a law against terrorism; terrorist acts against the Australian Government could be prosecuted as treason ('levying war'). There is some precedent in this area, relating to an English case,⁵⁹ where several men smuggled 60 pounds of gelignite into the country and spent some days watching government buildings. They were arrested and convicted on charges of treason. In this case, Stephen J stated:

a series of violent acts and public calamities would have an effect on the temper of Her Majesty's subjects . . . and acts of that kind might amount to a sort of informal war.⁶⁰

In a more recent case in Australia, involving the Australian Communist Party, Latham CJ mentioned during his obiter:

a case of alleged treasonable conspiracy. The Court held that the accused did not intend to destroy government, but only to bomb public offices and assassinate ministers and generals and others. As they intended to take over the task of governing the country themselves, they were not guilty. I did not then, and do not now, agree with such a decision.⁶¹

⁵² *R v Purdy* (1945) 10 JCL 182, *Goddard v Osborne* 35 FLR 122, *R v Steane* [1947] 1 KB 997.

⁵³ *R v Smyth* [1963] VR 737.

⁵⁴ [1947] 1 KB 997.

⁵⁵ *Criminal Code Act 1983* (NT) s 50(b).

⁵⁶ *Criminal Code Act 1983* (NT) s 50.

⁵⁷ For example *Crimes (Hostages) Act 1989* (Cth) Sch 1, *Crimes (Torture) Act 1988* (Cth), *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth). Cf *Prevention of Terrorism (Temporary Provisions) Act 1989* (UK), enacted to provide for crimes committed as part of the Northern Ireland conflict.

⁵⁸ Charges were never laid in relation to the Family Court bombings.

⁵⁹ *R v Deasy* (1883) 15 Cox 334.

⁶⁰ *Ibid*, 342.

⁶¹ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 142 (Latham CJ).

SHOULD WE RETAIN THE LAW OF TREASON?

Difficulties in Obtaining Convictions

As seen from the cases cited here, convictions for treason are difficult to obtain — ‘one can assert with some confidence that . . . any competent advocate . . . would have little difficulty in securing an acquittal’.⁶²

The courts have agreed;

juries have often refused to convict where there was oppression in the law . . . despite overwhelming evidence of guilt. A famous example is the consistent refusal of juries over many years to convict of treason, whatever the evidence.⁶³

It could be argued, however, that since the death penalty no longer applies, juries might be more willing to pass down guilty pleas. Note also that despite the death penalty, there have been successful trials for treason that have passed through both original and appellate courts.

In the situation where instigators of civil unrest are brought to trial for treason, a successful prosecution may raise otherwise morally culpable criminals to the level of heroes for the cause.

Difficulties in Prosecution

Gaining a fair trial for treason today given the likely level of publicity would be hard. In the 1850s, jury impartiality issues caused the Eureka cases to be moved from Ballarat to Melbourne.⁶⁴ Note also the considerable worldwide publicity gained for the Öcalan case.⁶⁵

The legal issues relating to cases cited here were not without complexities; these include jurisdictional issues (*Cousens*,⁶⁶ *Casement*⁶⁷), and citizenship during times of war (*Joyce*,⁶⁸ *Ahlers*⁶⁹).

On the other hand, prosecution for treason should not be easy; the severity of the crime necessitates a narrow interpretation of the law in order to avoid a return to the inequity of ‘constructive treason’ that followed the Middle Ages.

Coverage by Other Laws

State treason laws could be repealed, as they are covered adequately at Commonwealth level. Even at Commonwealth level, aspects of modern treason are covered by other legislation⁷⁰ and the law could be deemed obsolete. However, in opposition to this argument, the 1991 Commonwealth reform proposal was to strengthen and clarify, rather than to remove treason provisions. In addition, there is a need for a law against terrorism, as discussed above.

⁶² Alan Wharam, ‘Treason and the Terrorist’ (1976) 126 *New Law Journal* 428, 429.

⁶³ *Jackson v The Queen* (1976) 134 CLR 42, 54 (Murphy J).

⁶⁴ Fricke, above n 17, 61.

⁶⁵ Amnesty International, above n 46.

⁶⁶ (1946) 47 SR (NSW) 145.

⁶⁷ [1917] 1 KB 98.

⁶⁸ [1946] 1 AC 347.

⁶⁹ [1915] 1 KB 616.

⁷⁰ For example, *Crimes (Internationally Protected Persons) Act 1976* (Cth), and to a lesser

A Wartime Phenomenon

Most of Australia's population is too young or culturally sheltered to have been exposed first-hand to a country at war. In times of peace, the attitude of society towards seemingly treasonable activities is one of tolerance. In contrast, unpatriotic activities during wars are seen as 'siding with the enemy', or 'fighting for the other side', and are lifted to the level of being criminal due to their heightened moral repugnant nature. If one views treason laws as being 'on stand-by', waiting for the unwelcome day where Australia might re-enter a war, they should not be repealed. Running contrary to this argument is the belief that laws against treason will not act as a deterrent where such emotionally charged issues as patriotism — 'life and liberty' — are involved.

Democratic Processes

There is a fine line between a government that seeks to quell civil unrest due to a threat to public order and safety, and to the stability of society, and one that attempts merely to eliminate democratic government criticism and freedom of speech:

Any Government which acts or asks Parliament to act against treason . . . has to meet the criticism that it is seeking not to protect government, but to protect the Government, and keep itself in power.⁷¹

CONCLUSION

History has shown that the difference between being charged with treason, and being a hero of the state, is whether a rebellion is successful. Successful treason convictions are difficult to obtain. In times of peace, a law of treason is really only necessary where subversive activities such as terrorism, threaten members of society, whose safety is a responsibility of the state.

If Australia becomes a Republic in the coming years, the *Crimes Act 1914* (Cth) will need to be modified. Cynical commentators will see the modifications as a test of Australia's true commitment to the concept of a Republic. If references to royalty are retained (rather than removed, or just replaced with references to the President), this could be seen as a concession to Royalists.

Although I believe that Victoria no longer needs a law against treason, Australia does need one. The codification of a law against terrorism should form part of an improved and more relevant modern Commonwealth treason law.

In conclusion, I would agree with Latham CJ who strongly felt that 'no organised State can continue to exist without a law directed against treason'.⁷²

extent, *War Crimes Act 1945* (Cth).

⁷¹ *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 142.

⁷² *Ibid*, 150; see also *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116, 132.