

## Treason

- 4.1 The *Security Legislation Amendment (Terrorism) Act 2002* (the Act), inserted new Chapter 5, 'The Security of the Commonwealth', into the *Criminal Code*. The Act modernised the offence of treason, and introduced the:
- definition of a terrorist act;
  - definition of terrorist organisation;
  - terrorism offences and offences related to terrorist organisation offences; and
  - an administrative power to proscribe a 'terrorist organisation'.
- 4.2 This chapter deals with the offence of treason.

## Treason

- 4.3 The Act moved the offence of treason from the *Crimes Act 1914* into the *Criminal Code*, replaced the death penalty with life imprisonment; and removed gender specific references to the sovereign.
- 4.4 Under section 80.1 a person commits treason if he or she:
- causes the death or harm, resulting in death, imprisons or restrains the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or Prime Minister;
  - levies war, or does an act preparatory to levying war against the Commonwealth;

- intentionally assists, by any means whatsoever, an enemy, at war with the Commonwealth;
- intentionally assists, by 'any means whatever', another country or organisation that is 'engaged in armed hostilities' against the Australian Defence Force (ADF);
- instigates a person who is not an Australian citizen to make an armed invasion of the Commonwealth or a Territory of the Commonwealth; or
- forms an intention to do any of the above acts and manifests that intention by an overt act.

4.5 The Sheller Committee rejected the proposition that the offence of treason is not appropriate in a modern democratic society.<sup>1</sup> The ALRC has also considered aspects of the treason offences as part of its inquiry in sedition law, which has provided additional matters for consideration by the Committee.<sup>2</sup>

### **Assisting a country or organisation to engage in armed hostilities against the Australian Defence Forces**

4.6 Section 80.1 replicated the existing offences from the *Crimes Act* and added a new offence of against the Australian Defence Forces (paragraph 80.1(1)(f)). In a submission to the Sheller Committee, the AFP argued that:

...the new offence takes into consideration the increasing changes in global and political circumstances in relation to terrorism. The enhanced treason offence is required to ensure that Australians in armed conflict with a terrorist organisation, such as Al-Qa'ida, can be dealt with under Australian law, where life imprisonment is the penalty. The extended jurisdiction of the offence means that an Australian committing treason as a member of a terrorist organisation against the Commonwealth of Australia, whether within or outside of Australia can be captured under the legislation.<sup>3</sup>

4.7 The underlying rationale for the new offence was the view that the *Crimes (Foreign Incursions and Recruitment) Act 1978* was insufficient to

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1 Sheller Report, 2006, p.42.

2 ALRC, *Fight Words A Review of Sedition Laws in Australia*, Report 104, July 2006. <http://www.alrc.gov.au/inquiries/title/alrc104/index.html>

3 AFP, *SLR Submission 12*, p.5.

deal with alleged activities of Australians in support of, for example, Al-Qa'ida post 11 September 2001 in Afghanistan.<sup>4</sup> The *Crimes (Foreign Incursions and Recruitment Act 1978)*:

makes it an offence for Australians to become involved in armed hostilities overseas, but exempts those who are serving with the armed forces (of the other country).<sup>5</sup>

## Assisting the enemy

- 4.8 The offences under paragraph 80.1(e)-(f) apply where a person intentionally 'assists' an enemy at war with Australia, or a country or organisation in armed hostilities with the ADF. During the 2002 Senate inquiry, a number of witnesses raised concerns that in its original form, the definition of 'assist' was broad enough to encompass the provision of humanitarian relief. That problem was rectified by subsequent amendment which inserted sections 80.1 (1A) and (1B) to provide an express exemption where assistance constitutes humanitarian relief.<sup>6</sup>
- 4.9 However, the question of the meaning of 'assists', which is not defined in the *Criminal Code*, has remained a live issue. The ALRC has recommended that the term be amended to 'materially assists' to avoid uncertainty about the scope of its application.<sup>7</sup> The intention is to clarify that 'assist' relates to conduct such as funding, provision of troops or armament, intelligence or other strategic support.

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4 The *Crimes (Foreign Incursions and Recruitment) Act 1978* makes it an offence to recruit people, or to train and organise in Australia, for armed incursions or operations on foreign soil. It is an offence to 'engage in hostile activity in a foreign state' or to 'enter a foreign state with intent to [do so]'. It is also an offence to do preparatory things for the same purposes. And it is an offence to 'give money or goods to, or perform services for, any other person or any body or association of persons for the purpose of supporting or promoting [these activities]'. 'Hostile activities' include any acts done for the purpose of overthrowing a government by force or violence, engaging in armed hostilities in a foreign state, placing a foreign public in fear and causing damage to foreign public property. The offences exclude activities undertaken in the service of a foreign power's armed forces; Hancock N., *Terrorism and the Law in Australia: Legislation, Commentary and Constraints*, 19 March, 2002 p.17.

5 Patrick Emerton, *Submission 9*, p.4; s. 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978*.

6 The defendant bears an evidential burden in relation to the matter.

7 ALRC, *Review of Seditious Laws*, Discussion Paper 71, May 2006, 158 -165; and for discussion see ALRC, *Fighting Words, A Review of Seditious Laws in Australia*, Report 104, July, 2006, p.226-227 and p.p. 232-234.

- 4.10 ALRC have also argued that a closer connection between the conduct and the capacity of the country, organisation or state to 'engage in war' or 'engage in armed hostilities' should be drawn to remove any residual ambiguity. It follows that the 'by any means whatever' should be deleted from both subsections to ensure internal consistency in the drafting. Additionally, ALRC proposed that an explanatory note be added to the provision to clarify the intended meaning of 'materially' to 'make clear that mere rhetoric or expression of dissent are not sufficient.'<sup>8</sup>
- 4.11 In our view, given the seriousness and penalties attached to the offence it is crucial that the law achieves the highest degree of certainty. The removal of ambiguity and greater precision are important legal policy principles and the Committee sees considerable merit in ALRC recommendations.

## Jurisdiction

- 4.12 A more contentious issue concerns the application of extended geographical jurisdiction category D, to the crime of treason. Under section 15.4 of the *Criminal Code*, extended geographical jurisdiction (category D) means that the offence applies:
- whether or not the conduct constituting the alleged offence occurs in Australia; and
  - whether or not a result of the conduct constituting the alleged offence occurs in Australia.<sup>9</sup>
- 4.13 There is no citizenship or residency qualification. That is, the offence can be committed by anyone acting any where in the world.
- 4.14 Historically, the crime of treason was based on the principle of allegiance to the Crown. On the basis of its comparative research, ALRC argues that the principle of allegiance has retained its importance in the law of treason.<sup>10</sup> For example, in the US, misprision of treason applies only to those 'owing allegiance to the United States'<sup>11</sup> and the concept of allegiance is part of the offence of

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8 ALRC, *Fighting Words A Review of Sedition Laws in Australia*, Report 104, July, 2006, p. 232.

9 Extended geographical jurisdiction also applies to the ancillary offences of attempt, complicity and common purpose, innocent purpose, incitement and conspiracy; see Part 2.4 Extension of Criminal Responsibility sections 11.1 – 11.6 of the *Criminal Code*.

10 See for example, *Historical Concept of Treason: English and American* (1960), 35 *Indiana Law Journal*, p. 70 as cited ALRC, Discussion Paper 71, May, 2006, p.169.

11 18 USC 2382.

treason in the UK under the *Treason Act of 1351 (Imp)*<sup>12</sup>, which remains in force in the UK.<sup>13</sup>

- 4.15 By way of background, the Gibbs Committee argued the case for the extension of treason to apply to Australia's defence force in the following terms:

31.49 On the other hand, it can be argued with considerable force, that if Australia sends part of its defence force overseas to oppose any armed force, it owes it to the defence force members to prohibit other Australians from doing any act to assist the other force.

31.50 A provision on the broad lines of the Canadian or New Zealand formulation; that is, making it an offence for an Australian citizen or a person voluntarily resident in Australia, to help a State or any armed force against which any part of the Australian Defence Force is engaged in armed hostilities would express this principle....

Given a situation short of war, the proposed offence must, it is thought be distinguished from treason. Further, the right of a citizen to express his or her dissent must be recognised. However, there could be situations where, at least to the man or woman in the street, it would not be clear that hostilities involving Australian Defence Force members had commenced. Therefore, the operation of the provision must be dependent on a proclamation as to the existence of such hostilities.<sup>14</sup>

- 4.16 As the ALRC has noted, treason offences in the repealed *Crimes Act* had no citizenship qualification

...although the Gibbs Committee observed that the treason offences 'must obviously be construed so as not to apply to an enemy alien in time of war outside Australia' and recommended that the offence of treason should be stated to apply to:

(i) an Australian citizen or a member of the Public Service of Defence Forces anywhere; and

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12 25 Edw III c 2.

13 ALRC, *Review of Sedition Laws*, Discussion Paper 71, May 2006, p.169.

14 Sir Harry Gibbs, *Review of Commonwealth Criminal Law*, Fifth Interim Report, June, 1991 as cited in the Sheller Report, p.154.

(ii) any person (including enemy aliens) voluntarily in Australia.’<sup>15</sup>

- 4.17 Under existing paragraph 80.1(1)(e), during wartime (whether or not it is declared) any person (either a national or a non national) inside or outside Australia who ‘assists’ an enemy of the Commonwealth is liable for prosecution in Australia for treason. The effect of paragraph 80.1(1) (f), is to extend the crime of treason to assisting a country or an organisation in situations of ‘armed hostilities’.
- 4.18 In 2002, during the SLCLC inquiry into the Bill, it was argued that the effect of paragraph (f) is to ‘render guilty of treason any person involved in the Afghanistan civil war that fought against an Australian soldier’.<sup>16</sup> The matter was raised again during the ALRC inquiry in the law of sedition and has been the subject of further discussion during this review.<sup>17</sup>
- 4.19 It is legitimate for Australia to defend itself by criminalising conduct that might generally be described as ‘assisting the enemy’, covered by paragraphs (e) and (f). Indeed, there are comparable provisions in Canadian and New Zealand law, and the new provisions recognise that the ADF are deployed in a range of scenarios. Nevertheless, two substantive issues arise under the current formulation.
- 4.20 First paragraphs (e) and (f) apply to people who have no allegiance and do not benefit from the protection of the Australian state. In this sense, the provisions depart from the traditional underpinning of the concept of treason, which is a breach of ones obligation to the Crown and loyalty to Australia. This would suggest that either the offence is misconceived or that the label ‘treason’ is simply inappropriate to those persons.
- 4.21 Secondly, the case has been argued that as presently drafted paragraphs 80.1(e) and (f) would apply to enemies and anyone who assists the enemy. To the extent that the provisions overlap with the law of armed conflict, there is a potential to put at risk the principle of combatant immunity and Australia’s obligations under the Geneva

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15 ALRC, *Review of Sedition Laws*, Discussion Paper 71, May 2006, p.170.

16 The Hon Justice Dowd, International Commission of Jurists, at LCLC Hansard, 8 April 2002, p.p. 2-3 as cited in LCLC Report, May 2002, p.30. In *Hamden v Rumsfeld, Secretary of Defense*, et al, USSC No.05-188, 29 June 2006 the Supreme Court confirmed that the laws of war applied to hostilities in Afghanistan.

17 ALRC, *Review of Sedition Laws*, Discussion Paper 71, May 2006, p.167-68; see also B Saul, *Submission SED 52*, 14 April 2006;

Conventions to treat captured enemy as prisoners war.<sup>18</sup> If paragraphs (e) and (f) are restricted to apply only to those owing allegiance to Australia and those who have voluntarily placed themselves under the protection of Australia, the potential conflict with the law of armed conflict falls away.

- 4.22 The ALRC propose other provisions of the *Criminal Code*, including terrorism, might be more appropriate where the conduct is committed by a person who does not owe allegiance or is not voluntarily under Australia's protection. Similarly, those provisions dealing with causing death or harm to the Sovereign, Governor-General or Prime Minister could be dealt with by the normal criminal law, that is, simply not placed under the label 'treason'.

### Knowledge of the hostilities

- 4.23 The Sheller Committee recommended that the paragraph 80.1(1)(f) be amended to require that the person have knowledge of the existence of armed hostilities.<sup>19</sup> The requirement for 'knowledge' is intended to give clarity and certainty to the offence, and provide the same standard of protection obtained by a proclamation of war under paragraph (e). The Committee agrees with this proposition.

### Retrospectivity

- 4.24 The ALRC has also accepted that the offence of assisting an enemy at war with the Commonwealth is open to being interpreted as having retrospective application. Although it is a requirement of paragraph 80.1(1)(e) that the existence of a state of war be specified by Proclamation, there is no express requirement that the Proclamation must have been made before the offending conduct took place.<sup>20</sup> The ALRC has recommended that the Proclamation under 80.1(1)(e)(ii) be expressed clearly so that must have been made before the relevant conduct is engaged in.

### Attorney-General consent for prosecution

- 4.25 All the offences set out in Division 80 (treason and sedition) require the written consent of the Attorney-General before prosecution can

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18 Violations of the law of armed conflict may be prosecuted as a war crimes provided for in Chapter 8 of the *Criminal Code*.

19 Sheller Report, p.157.

20 ALRC, *Fighting Words A Review of Sedition Laws in Australia*, Report 104, July, 2006, p. 234.

commence. A person can be arrested, charged and remanded in custody or placed on bail but no further proceedings may be taken until the Attorney-General's consent. This issue was also raised during the 2002 Senate inquiry, but remains in place. Although the matter was not touched on by the Sheller Committee, the ALRC recommends that section 80.5 be repealed.<sup>21</sup>

4.26 The ALRC reasoned that terrorism offences do not require the Attorney-General's consent and that the CDPP is independent, and must take account of a range of factors when exercising the discretion whether or not to prosecute. The factors that must not influence CDPP prosecution decisions include:

(a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved...

(c) possible political advantage or disadvantage to the Government or any political group or party...<sup>22</sup>

4.27 On this basis, the ALRC has recommended that the requirement for the Attorney-General's consent be removed. The Committee does not agree with this conclusion. The requirement for the Attorney-General's consent is a safeguard, it may be exercised to prevent prosecution but not to initiate one and does not, in our view, represent an impermissible intrusion in the independence of the CDPP.

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21 Section 16.1 of the *Criminal Code* still applies, requiring the Attorney-General's consent where conduct occurs wholly outside Australia and the person charged is not an Australian citizen.

22 CDPP, *Prosecution Policy of the Commonwealth*, as cited in ALRC, *Review of Sedition Laws*, Discussion Paper 71, May 2006, p.175.

**Recommendation 6**

The Committee recommends that:

- the offence of treason be restructured so that conduct constituting treason apply only to persons who owe allegiance to Australia or who have voluntarily placed themselves under Australian's protection;
- the conduct of others, which falls within the scope of paragraphs 80.1(1) (a)(b)(c), should be dealt with separately;
- the offence of assisting the enemy under paragraph 80.1 (e) and (f) be clarified to cover 'material assistance';
- paragraph 80.1 (f) be amended to require knowledge of the existence of armed hostilities.

