



17 November 2005

Answer to Question on Notice from Senator Brandis
Senate Legal and Constitutional Committee

Mental state for existing sedition offences

1. The existing offences of seditious words and engaging in a seditious enterprise (ss 24C–D, Crimes Act 1914 (Cth)) require both a seditious intention (defined in s 24A) *and* the further ulterior or specific intention of ‘causing violence, or creating public disorder or a public disturbance’.

Mental state for existing offence of incitement

2. The law of incitement (s 11.4, *Criminal Code*) requires both that a person *intentionally* urges the commission of an offence (s 11.4(1)) *and* the further ulterior intention that the offence incited be committed (s 11.4(2)). (An ulterior intention means that it was the person’s object or purpose to induce the offence.¹)

While s 11.4(1) does not expressly mention that the urging itself must be intentional, s 5.6(1) of the *Criminal Code* provides that:

If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

Urging someone to do something is ‘conduct’ within the meaning of the *Criminal Code*. In s 5.2(1) of the *Criminal Code*:

A person has intention with respect to conduct if he or she means to engage in that conduct.

Incitement thus requires that a person both means to urge the commission of an offence, and intends that the offence incited be committed. The offence of incitement is *not* committed where a person intends to urge the commission of a crime, but does not specifically intend that that offence be committed.

Mental state for proposed sedition offences

3. The proposed new sedition offences in s 80.2(1), (2) and (3) require only that a person urges another to commit the specified conduct. Consistent with s 5.6(1) of the *Criminal Code* (above), the urging may be intentional, or even reckless (in accordance with proposed s 80.2(2), (4) and (6)).

A person is reckless with respect to a 'result' (here, the commission of the specified conduct) if the person is 'aware of a substantial risk that the result will occur' and 'having regard to the circumstances known to him or her, it is unjustifiable to take the risk' (s 5.4(2), *Criminal Code*).

However, unlike existing offences of both sedition and incitement, the Bill imposes no further requirement of an ulterior intention that the specified conduct actually be committed by the persons urged. The offences are thus wider than the scope of the existing offences of sedition and incitement.

The widening of liability

4. The widening of liability is inconsistent with the recommendations of the drafters of the Model Criminal Code, who refrained from allowing liability as the basis of recklessness, or in the absence of an ulterior intention:

Since the prohibition of incitement penalises communication, restricting freedom of expression, liability is narrowly limited to communications which are intended to promote the commission of an offence. Incitement does not extend to instances of recklessness with respect to the effects which speech or other communication might have in providing an incentive or essential information for the commission of crime.²

Yours sincerely



Appendix

Question from Senate Brandis (p 69, Hansard):

Senator BRANDIS—I do not take responsibility for the explanatory memorandum. Dr Saul, could you take a question on notice for me, please. I do not know if you were here this morning when I was asking Mr McDonald some questions about sedition. I was trying to make the point to him—which was the point that you made to us before—that I could not immediately see why at least subclauses (1), (3) and (5) of clause 80.2 could not be covered by the law in relation to incitement to violence.

Mr McDonald had an answer and it was, as I understood it, that in order for there to be a liability under the generic offence of incitement there has to be shown to be a direct relationship between the incitement and the particular thing or conduct which is being incited. Therefore, subclauses (1), (3) and (5) at least of 80.2 had a utility and an area of operation beyond the general law of incitement. I do not say that that is a good argument; I have not thought fully about it. Can I ask you on notice to review that part of the Hansard with my questions to Mr McDonald. I am told the Hansard will be available the committee's web site within 24 hours. If you are prepared to do this, could you furnish the committee with your views of that argument as to why sedition is not sufficiently covered by incitement. If, as I apprehend, you disagree with what Mr McDonald has said, can you tell us why?

¹ See Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, AIJA, March 2002, 270-275.

² *Ibid.*