

'REVIEW OF COMMONWEALTH CRIMINAL LAW
FIFTH INTERIM REPORT, JUNE 1991'
(GIBBS COMMITTEE REPORT).

CHAPTER 32

SEDITION

Historical

32.1 While there was no offence at common law of sedition, it was a common law misdemeanour to publish, orally or in writing, any words with a seditious intention: Smith and Hogan Criminal Law⁽¹⁾.

32.2 The matter is dealt with in the Crimes Act by sections 24A (defining seditious intentions), 24B (defining seditious enterprise), 24C (creating offences in relation to seditious enterprises), 24D (creating offences in relation to seditious words), 24E (dealing with punishment of these offences) and 24F (stating what acts done in good faith are not unlawful). These provisions in large part follow the provisions of the Queensland Criminal Code.

32.3 These sections read:

"24A. An intention to effect any of the following purposes, that is to say:

- (a) to bring the Sovereign into hatred or contempt;
- (b) ...
- (c) ...
- (d) to excite disaffection against the Government or Constitution of the Commonwealth or against either House of the Parliament of the Commonwealth;
- (e) ...
- (f) to excite Her Majesty's subjects to attempt to procure the alteration, otherwise than by lawful means, of any matter in the Commonwealth established by law of the Commonwealth; or
- (g) to promote feelings of ill-will and hostility between different classes of Her Majesty's subjects so as to endanger the peace, order or good government of the Commonwealth,

is a seditious intention.

(a)

24B. (1) A seditious enterprise is an enterprise undertaken in order to carry out a seditious intention.

(2) Seditious words are words expressive of a seditious intention.

(b)

24C. Any person who -

(a) engages in or agrees or undertakes to engage in, a seditious enterprise;

(c)

(b) conspires with any person to carry out a seditious enterprise;

(c) counsels, advises or attempts to procure the carrying out of a seditious enterprise,

(d)

with the intention of causing violence or creating public disorder or a public disturbance, shall be guilty of an indictable offence.

Penalty: Imprisonment for 3 years.

(e)

24D. (1) Any person who, with the intention of causing violence or creating public disorder or a public disturbance, writes, prints, utters or publishes any seditious words shall be guilty of an indictable offence.

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Penalty: Imprisonment for 3 years.

(a)

(2) A person cannot be convicted of any of the offences defined in section 24C or this section upon the uncorroborated testimony of one witness.

(b)

24E. (1) An offence under section 24C or 24D shall be punishable either on indictment or summarily, but shall not be prosecuted summarily without the consent of the Attorney-General.

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(2) If any person who is prosecuted summarily in respect of an offence against section 24C or 24D, elects, immediately after pleading, to be tried upon indictment, the court or magistrate shall not proceed to summarily convict that person but may commit him for trial.

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(3) The penalty for an offence against section 24C or 24D shall, where the offence is prosecuted summarily, be imprisonment for a period not exceeding 12 months.

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24F. (1) Nothing in the preceding provisions of this Part makes it unlawful for a person -

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restricted by

- (a) to endeavour in good faith to show that the Sovereign, the Governor-General, the Governor of a State, the Administrator of a Territory, or the advisers of any of them, or the persons responsible for the government of another country, has or have been, or is or are, mistaken in any of his or their counsels, policies or actions;
- (b) to point out in good faith errors or defects in the government, the constitution, the legislation or the administration of justice of or in the Commonwealth, a State, a Territory or another country, with a view to the reformation of those errors or defects;
- (c) to excite in good faith another person to attempt to procure by lawful means the alteration of any matter established by law in the Commonwealth, a State, a Territory or another country;
- (d) to point out in good faith, in order to bring about their removal, any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different classes of persons; or
- (e) to do anything in good faith in connexion with an industrial dispute or an industrial matter.

(2) For the purpose of sub-section (1), an act or thing done -

- (a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth;
- (b) with intent to assist an enemy -
 - (i) at war with the Commonwealth; and
 - (ii) specified by proclamation made for the purpose of paragraph 24(1)(d) to be an enemy at war with the Commonwealth;
- (c) with intent to assist a proclaimed enemy, as defined by sub-section 24AA(4), of a proclaimed country as so defined;
- (d) with intent to assist persons specified in paragraphs 24AA(2)(a) and (b); or
- (e) with the intention of causing violence or creating public disorder or a public disturbance,

is not an act or thing done in good faith".

32.4 The original width of these provisions was significantly restricted by amendments made in 1986. The relevant offence

provisions now require "intention of causing violence or creating public disorder or a public disturbance".

32.5 In The King v. Sharkey⁽²⁾, the High Court upheld the validity of sections 24A, 24B and 24D as they then stood, but Dixon J. (as he then was) dissented as to the validity of paragraph 24A(1)(g).

United Kingdom

32.6 In Working Paper No. 72, the U.K. Law Commission discussed sedition. It concluded that there was no need for the offence of sedition in a criminal code on the basis that, before a person could be convicted of publishing seditious words or a seditious libel or seditious conspiracy, he must be shown to have intended to incite to violence or to public disorder or disturbance, with the intention thereby of disturbing constitutional authority. Thus, it would have to be shown, the Commission argued, that the defendant incited or conspired to commit either offences against the person or offences against property or urged others to riot or to assemble unlawfully; the defendant would be thus guilty of either incitement or conspiracy to commit the appropriate offence. The Commission thought it better in principle to rely on ordinary statutory and common law offences than to have to resort to an offence which had the implication that the conduct in question was "political"⁽³⁾. However, these recommendations of the Commission have not been implemented.

32.7 In the draft Code set out in Law Com No. 177, the Commission did not provide for sedition as such but, in sections 205 to 210, provision is made for acts intended or likely to stir up racial hate.

Canada

32.8 The Canadian draft Code makes no provision for sedition as such but, in sub-section 21(1), would make it an offence to publicly stir up hatred against an identifiable group.

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New Zealand

32.9 The New Zealand draft Bill does not provide for sedition.

The Discussion Paper

32.10 In its Discussion Paper, the Review Committee indicated that, contrary to the views expressed in the U.K. Working Paper No. 72, it was disposed to think that a separate offence of sedition needed to be retained. However, it was disposed to doubt that this need extend beyond inciting to violence for the purpose of disturbing or overthrowing constitutional authority. It observed that, in actual practice, the offence might rarely be prosecuted, but the seriousness of its possible consequences was such that the Review Committee's provisional view was that an offence in this limited form should be retained. In any event, as section 24A is expressed in an archaic form, it was thought that the relevant provisions should be rewritten in more simple terms.

32.11 Submissions on these issues were accordingly invited.

Views in submissions

32.12 Most submissions addressing this issue favoured the course foreshadowed in the Discussion Paper. Attorney-General's Department, while agreeing with the deletion of the reference in sub-section 24AA(2) to seditious purposes other than steps towards violent overthrow of the Constitution or Government or the constructive levying of war, said that the Law Commission might well be right in arguing that there was no need for a separate offence of inciting to violence for the purpose of disturbing (as opposed to overthrowing) constitutional authority and in any case, such an offence would seem too vague.

The Review Committee's conclusions

32.13 The present approach of sections 24A to 24F is unsatisfactory in that the definition of "seditious intention" is expressed in archaic terms and is misleadingly wide. Certainly, the effect of section 24A is very significantly restricted by the requirements in sections 24C to 24D that there be an intention to cause violence or create a public disorder or disturbance and the further qualifications in section 24F. Nevertheless, these provisions need to be rewritten to accord with a modern democratic society.

32.14 Many of the elements of section 24A can be eliminated on the grounds of archaism or excessive width. However, other matters must be considered for inclusion.

32.15 Clearly, it should be an offence to incite the overthrow or supplanting by force or violence of the Constitution or the established Government of the Commonwealth or the lawful authority of that Government in respect of the whole or part of its territory. Indeed, the offence should, in the opinion of the Review Committee, extend to the associated matter of inciting to the use of force or violence with a view to interfering with the lawful processes for Parliamentary elections, the essence of a democratic society.

32.16 A narrower version of paragraph 24A(g) must also be considered for inclusion. This would be inciting particular groups in the community, whether distinguished by nationality, race or religion, against other such groups or members thereof.

32.17 As previously mentioned, paragraph 24A(g) was held valid by the High Court in The King v. Sharkey⁽²⁾, although the dissenting judgment of Dixon J. must be taken into account. However, in so far as this provision would refer to incitement to violence on national, racial or religious grounds, constitutional support for such a provision could be found in the external affairs power of the Constitution (section 51(xxix)) and Article 20 of the International Covenant on Civil and Political Rights. This Article requires any advocacy

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of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence to be prohibited by law. Parenthetically, it may be noted that, in the case of International Covenant on the Elimination of All Forms of Racial Discrimination, Australia entered a reservation to Article 4 of this Covenant which, while more restricted in subject matter (it is limited to racial discrimination), dealt with matters additional to incitement to violence.

32.18 In the result, the Review Committee recommends that it be made an offence to incite by any form of communication:

- (a) the overthrow or supplanting by force or violence of the Constitution or the established Government of the Commonwealth or the lawful authority of that Government in respect of the whole or part of its territory;
- (b) the interference by force or violence with the lawful processes for Parliamentary elections; or
- (c) the use of force or violence by groups within the community, whether distinguished by nationality, race or religion, against other such groups or members thereof.

Penalty: 7 years' imprisonment.

32.19 The more specific nature of the proposed offence calls for a maximum penalty of seven years' imprisonment.

NOTES

- (1) 6th ed., at 833
- (2) (1949) 79 C.L.R. 121
- (3) paragraphs 77 and 78

Matters to which court to have regard when passing sentence etc.

7. Section 16A of the principal Act is amended:

- (a) by inserting "relevant" before "matters" (first occurring);
- (b) by omitting paragraph (2)(j) and substituting the following paragraph:
 - "(j) the deterrent effect that any sentence or order under consideration may have on:
 - (i) the person; and
 - (ii) potential offenders;"

Restriction on imposing sentences

8. Section 17A of the Principal Act is amended by omitting from subsection (2) "a federal offence" and substituting "an offence against section 69F, 69H, 69J, 69L, 69M, 69N, 69Q or 72 or an offence against a prescribed provision of another Act".

9. Section 19AG of the Principal Act is repealed and the following section is substituted:

Non-applicability of State or Territory remission or reduction laws to be taken into account

"19AG. In calculating a non-parole period or pre-release period in respect of any federal sentence, the court fixing that period:

- (a) must take into account the fact that any non-parole period or pre-release period in respect of the sentence will not be subject to remission or reduction otherwise than under subsection 19AA (4); and
- (b) must adjust that period accordingly, but must make no further adjustment because of any adjustment of the sentence under section 16G."

10. Sections 24, 24AA, 24AB, 24AC, 24A, 24B, 24C, 24D, 24E, 24F, 25, 26, 27 and 28 of the Principal Act are repealed and the following sections are substituted:

Treason

"24. (1) A person must not:

- (a) assist by any means a foreign country:
 - (i) against which Australia has declared war; or
 - (ii) that is declared by proclamation to be a country with which Australia is at war; or
- (b) assist or encourage a foreign country or a foreign force to make an armed invasion of or attack on the Commonwealth or an external Territory; or
- (c) do an act with intent to overthrow, or to supplant by force or violence:
 - (i) the Constitution; or
 - (ii) the government of the Commonwealth; or

(iii) the lawful authority of the government of the Commonwealth in respect of the whole or part of its territory.

Penalty: Imprisonment for life.

"(2) Subsection (1) applies to:

- (a) acts done anywhere by a person who is:
 - (i) an Australian citizen; or
 - (ii) a member of the Australian Public Service or of the Defence Force; and
- (b) acts done in Australia or in an external Territory by any other person who is voluntarily in Australia or that external Territory.

"(3) A person who, knowing that another person intends to commit an offence against subsection (1), does not as soon as practicable after becoming aware of that intention:

- (a) report the matter to a constable; or
- (b) use other reasonable means to prevent the commission of the offence;

is guilty of an offence.

Penalty: Imprisonment for 14 years.

"(4) Section 7C applies to the offence created by subsection (1) as if subsection 7C (1) were omitted and the following subsection were substituted:

'(1) Where a person, with intent to commit an offence against subsection 24 (1), does an act that is preparatory to the commission of that offence, the person is taken to have committed that offence and is punishable accordingly.'

Offences against the Sovereign

"25. (1) A person must not kill or injure the Sovereign, the Sovereign's consort or the heir to the throne.

Penalty: Imprisonment for life.

"(2) A person must not have in his or her possession an explosive, weapon or other thing near the Sovereign, the Sovereign's consort or the heir to the throne with the intention of injuring or alarming that person.

Penalty for an offence against this subsection: Imprisonment for 7 years.

Sabotage

"26. A person must not destroy, damage or impair a thing:

- (a) that is used or intended to be used by the Defence Force; or
- (b) that is used or intended to be used in, or in connection with, the manufacture, development or testing of weapons of war or apparatus of war intended for use, or capable of use, by the Defence Force;

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with the intention of impairing or interfering with:

- (c) the safety or defence of the Commonwealth; or
- (d) the functioning or operation of the Defence Force; or
- (e) the effective use by the Defence Force of the thing; or
- (f) that manufacture, development or testing.

Penalty: Imprisonment for 15 years.

Assisting a State against which the Defence Force is engaged in armed conflict

"27. (1) If:

- (a) a part of the Defence Force is engaged in armed hostilities against a foreign country or a foreign armed force; and
- (b) that country or force is declared by proclamation to be one to which this section applies;

a person must not assist by any means that foreign country or that foreign force.

Penalty: Imprisonment for 14 years.

"(2) Subsection (1) applies to:

- (a) acts done anywhere by a person who is:
 - (i) an Australian citizen; or
 - (ii) a member of the Australian Public Service or of the Defence Force; or
 - (iii) a member or special member of the Australian Federal Police; and
- (b) acts done in Australia or in an external Territory by any other person who is voluntarily in Australia or that external Territory.

"(3) An expression in good faith of dissent from the decision to commit the Defence Force to hostilities is not to be regarded as assisting the foreign country or foreign armed force.

"(4) A proclamation under subsection (1), unless it is sooner revoked or renewed, ceases to have effect at the end of the period of 12 months after it was made.

Inciting treason, interference with elections or racial violence

"28. (1) A person must not, by any means:

- (a) incite another person to overthrow, or supplant by force or violence:
 - (i) the Constitution; or
 - (ii) the government of the Commonwealth; or
 - (iii) the lawful authority of the government of the Commonwealth in respect of the whole or part of its territory; or
- (b) incite another person to interfere by force or violence with Parliamentary elections; or
- (c) incite the use of force or violence by one group within the Australian community, whether distinguished by nationality, race or religion, against another group within the Australian community.

Penalty: Imprisonment for 7 years.

"(2) An expression in good faith of dissent from a decision of a government is not to be regarded as an incitement referred to in subsection (1).

"(3) Paragraph (1)(c) is intended to implement in part Australia's obligations under Article 20 of the International Covenant on Civil and Political rights.

Unlawful drilling and training in use of arms or explosives

"29. (1) The Governor-General may, by proclamation, prohibit:

- (a) the training of persons or a class of persons in the use, as part of an armed force or armed group, of arms or explosives; or
- (b) the drilling of persons in military exercises; or
- (c) the meeting or assembly of persons or a class of persons for the purpose of:
 - (i) training in the use, as part of an armed force or armed group, of arms or explosives; or
 - (ii) drilling in military exercises.

"(2) A proclamation may be limited to:

- (a) the training of persons for a purpose specified in the proclamation; or
- (b) the drilling of persons in military exercises of a kind, or for a purpose, specified in the proclamation.

"(3) A person must not:

- (a) train or drill another person contrary to such a proclamation; or
- (b) be trained or drilled contrary to such a proclamation; or
- (c) be present at a meeting or assembly prohibited by such a proclamation.

Penalty: Imprisonment for 5 years.

Interfering with political liberty

"29A. (1) A person must not, by violence or by threats or intimidation of any kind, hinder or interfere with the free exercise or performance by another person of a political right or duty under or in relation to the Constitution or a law of the Commonwealth.

Penalty: Imprisonment for 3 years.

"(2) Subsection (1) applies to political rights and duties of a member of the Parliament, but:

- (a) that subsection does not limit the power of the Parliament to deal with contempt of the Parliament; and
- (b) a person is not liable to be convicted of both an offence against subsection (1) and of contempt of the Parliament in respect of the same conduct.

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Using threats etc. to demand things

"29B. (1) A person who threatens violence, injury or damage to any person or to the health or safety of the Australian community or the environment with the intention of:

- (a) inducing the Commonwealth, the Parliament or a public authority under the Commonwealth to do or to refrain from doing an act; or
- (b) inducing the Governor-General, a Minister, a judicial office holder, a Commonwealth officer or an officer of a public authority under the Commonwealth to do or to refrain from doing an act in the course of his or her duties;

is guilty of an offence.

Penalty: Imprisonment for 14 years.

"(2) The maximum penalty for an offence against subsection (1) is:

- (a) subject to paragraph (b), imprisonment for 14 years; or
- (b) if carrying out the threats would have caused:
 - (i) loss of life or serious personal injury; or
 - (ii) substantial damage to the health or safety of the Australian community or the environment; or
 - (iii) substantial economic loss to the Commonwealth, a State, a Territory, a public authority under the Commonwealth, an authority of a State or a Territory or a commercial or industrial activity;

Penalty: Imprisonment for life.

"(3) In this section, 'judicial office holder' has the same meaning as in Part III.

Note: The definition of 'judicial office holder' in the section 31 recommended by the Committee is to be changed to include a reference to registrars of courts who have judicial functions.

Possessing or using firearms etc.

"29C. A person must not:

- (a) have in his or her possession or under his or her control any arms, explosives, weapons or ammunition with the intention of causing death or injury to, or threatening, another person in the commission of an offence against a law of the Commonwealth; or
- (b) use, in the commission of an offence against a law of the Commonwealth, any arms, explosives, weapons or ammunition to attack or cause death or injury to, or threaten, another person.

Penalty: Imprisonment for 10 years."

Repeal of Part IIA

11. Part IIA of the Principal Act is repealed.